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

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

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

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

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

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

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

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

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

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

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

The process of negotiating and executing this DPA was not shrouded in mystery as some claim. In fact, I authored (along with former Assistant United States Attorney Robert Hanna, the lead prosecutor in the BMS matters) an extensive law review article detailing every aspect of the BMS agreement, the rationale for DPAs in general, the monitor selection process and the reform measures put in place to assure that such conduct would recur at BMS. This article also reviewed a brief history of the use of DPAs by the Department of Justice. I would like to incorporate into my testimony, by reference, the entire law review article. It is entitled "A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.", 43 American Criminal Law Review 1043 (Summer 2006).

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

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

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

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

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

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

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

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

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

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

Other notable achievements include:

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

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

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

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

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

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

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