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"Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements"

Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

United States House of Representatives

June 25, 2009

Statement of Chuck Rosenberg

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Corporate Monitors

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

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

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

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

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

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

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

Conclusion

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

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

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