Department of Justice

STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

CONCERNING

"DEFERRED PROSECUTION: SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES"

PRESENTED

MARCH 11, 2008

Madam Chairwoman, Ranking Member Cannon, and other distinguished Members of the Subcommittee.

Thank you for this opportunity to discuss the important work of the Department of Justice in preventing, deterring, and punishing corporate crime in recent years. We want to discuss in particular our use of corporate deferred prosecution agreements and non-prosecution agreements, as well as independent monitors who assist in implementing and ensuring compliance with those agreements.[1]

Introduction

The government's renewed emphasis on corporate crime began, of course, with the corporate fraud crisis which emerged in 2001 and 2002 and significantly undermined confidence in our capital markets and our economy as a whole. The failure of major corporations such as Enron and WorldCom stripped employees and seniors of their retirement savings, wiped out the equity of ordinary investors, and left growing numbers of employees jobless. The President responded forcefully in July 2002, by creating the Corporate Fraud Task Force (CFTF) and directing it to coordinate and deploy a multi-agency response to the crisis. Our efforts in this area were bolstered by the reforms that Congress directed through passage of the Sarbanes-Oxley Act of 2002.

As a result of this renewed focus, the investigation and prosecution of corporations and their officers and employees has been an important priority of the Department in recent years. During the first five years of the CFTF, we obtained more

[1] The Department typically uses the terms "corporate" and "corporation" in this context to refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. This testimony is limited to discussion of criminal matters handled by the Department of Justice, not other types of matters handled by the Department or by other prosecutorial or regulatory agencies.

than 1,200 convictions of entities and individuals in corporate crime cases, including convictions of more than 200 corporate chief executives or presidents. We have also recovered hundreds of millions of dollars in fines and penalties and in restitution to investors and other victims of corporate crimes.

Criminal charges against corporate entities are sometimes appropriate, particularly when the criminal conduct is egregious or pervasive or we conclude that the corporation is incapable of reforming its culture and practices to prevent recidivism. At the same time, however, we recognize that criminal conviction of a corporation – indeed, in many cases, even the indictment of a corporation – can have significant negative collateral consequences for individuals who played no role in the criminal conduct, were unaware of it, or were unable to prevent it, including employees, pensioners, shareholders, creditors, customers, and the general public.

The consideration of these collateral consequences for innocent third parties is often an important factor in determining how the Department will address criminal conduct by a corporation. As set forth in the Department's Principles of Federal Prosecution of Business Organizations, the latest version of which is often referred to as the "McNulty Memo," federal prosecutors properly consider the collateral consequences of a criminal conviction in determining whether to charge the corporation, and may use a variety of tools other than indictment and prosecution to achieve the goal of justice for victims and the public. These tools include deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).

Deferred Prosecution Agreements and Non-Prosecution Agreements

In a **deferred prosecution agreement** or **non-prosecution agreement,** a corporation against which the Government has sufficient evidence to file criminal charges essentially undertakes a period of probation, subject to specific conditions, by agreement with the government instead of as a result of a criminal conviction that would have substantial collateral consequences. A deferred prosecution agreement differs from a non-prosecution agreement in that a DPA typically includes a formal charging document – an indictment or a complaint – and the agreement is normally filed with the court, while in the NPA context, there is typically no charging document and the agreement is normally maintained by the parties rather than filed with a court.[2]

The obligations imposed upon the corporation in a DPA or NPA generally include: (1) the payment of restitution to victims and/or financial penalties to the government; (2) cooperation by the corporation with ongoing government investigation of potentially culpable individuals and/or other corporations; and (3) the implementation of an ethics and compliance program, including internal controls, that will effectively prevent, detect, and respond to any future misconduct. In exchange, the government agrees to defer prosecution of the corporation for a defined period of time, usually from one to five years. If the corporation satisfies the obligations imposed by the agreement within that time period, then the government will not proceed with a prosecution. If the corporation materially fails to comply with the agreement, then the government has the

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts, and commentators. The Department is seeking to define the two terms more clearly as we go forward – with the essential difference being whether the agreement is filed with a court – to more effectively identify and share best practices and to better track the use of such agreements.

discretion to go forward with a prosecution and, in most cases, to use the admissions of the corporation to prove the case.

DPAs and NPAs occupy an important middle ground in the resolution of corporate crime cases that may have distinct advantages over simply declining prosecution, which may allow a corporate criminal to escape without consequences, or charging and convicting a corporation and producing – but often only after significant delay and diversion of resources – a result that may have calamitous consequences for innocent third parties. These agreements typically require the payment of restitution to victims and/or financial penalties to the Treasury, long before such payments could be obtained, in most cases, through formal charging, protracted litigation, and inevitable appeals. The agreements promote the public interest in ferreting out crime by encouraging corporate cooperation in obtaining the evidence necessary to prosecute individuals and other corporations who have engaged in misconduct. Perhaps most importantly, by requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates. Thus, these agreements can help restore the integrity and preserve the financial viability of a corporation that had descended into corruption and criminal conduct. And this is all done while preserving the government's ability to prosecute recalcitrant corporations if the agreement is materially breached.

For these reasons, since at least 1993, DPAs and NPAs have been used in a variety of cases involving a variety of crimes, including security and commodities fraud, Foreign Corrupt Practices Act violations, health care fraud, and money laundering and

tax offenses. It is worth noting, however, that while the use of DPAs and NPAs to resolve criminal cases against corporations has expanded since the corporate fraud crisis early in this decade, it is still a relatively limited practice.

Monitors

Some, but by no means all, corporate deferred prosecution and non-prosecution agreements also include the use of an independent **monitor**. Monitors are provided for in fewer than half of the agreements we have identified. A monitor is an individual or entity – independent from the corporation and the government – selected to oversee the implementation of and compliance with the provisions of the negotiated agreement. The monitor is retained by the corporation, which pays for the monitor along with other costs of implementing the DPA or NPA. Monitors retained under corporate DPAs or NPAs are not government employees or agents, and they do not contract with or get paid by the government. Monitor fees are generally negotiated between the corporation and the monitor.

A monitor may be particularly useful where the agreement requires the corporation to design or substantially re-design and effectively implement a broad ethics and compliance program and additional internal controls. In other cases, however, a monitor may not be needed, for varied reasons; an example might be where the corporation has ceased operations in the area where the criminal conduct occurred, or where the corporation has re-designed and effectively implemented appropriate compliance measures and internal controls before entering into the agreement with the government.

The appointment of a corporate monitor can have distinct advantages for the government and the public in appropriate cases. Monitors allow the government to verify, through the work of an independent observer, whether a corporation is fulfilling the obligations to which it has agreed. A monitor also may provide specialized expertise to oversee and ensure compliance with complex or technical aspects of a corporate agreement, in areas where prosecutors may lack such skills. Indeed, it is important to assure that monitors possess the expertise needed to effectively oversee a corporation's steps towards accountability. Due to the variety of situations in which it may be helpful to use a monitor, the qualifications of an appropriate monitor cannot be determined with specificity in advance.

Monitors have been selected in a variety of ways. Sometimes the monitor was selected by the corporation or by the government. Sometimes, one party selected the monitor with the other party having a right to veto. Sometimes the monitor emerged from joint discussions. And on occasion, where agreements were filed in court, the court selected or approved the monitor.

The New Principles for Use of Corporate Monitors

Based on our experience during the first five years of the President's Corporate Fraud Task Force, we recognize that the Department has now reached a point where we have developed, through many cases handled by federal prosecutors around the country as well as at Main Justice, a sufficient experience base with deferred prosecution agreements, non-prosecution agreements, and monitors to begin to craft useful policy guidance that would improve consistency and transparency and share best practices. As you know, yesterday the Deputy Attorney General issued to federal prosecutors a set of

nine principles on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations. The first of these principles sets forth a detailed policy on how monitors should be selected, which is focused on ensuring the selection of a respected, highly qualified monitor who is suitable for the assignment and free from actual or perceived conflicts of interest.

Conclusion

We will continue to review and analyze the best practices of federal prosecutors who handle corporate criminal cases, as we consider issuing additional guidance. In doing so, we bear in mind that, while public attention may focus on high-profile, Fortune 500-type corporate fraud cases, our colleagues around the country and at Main Justice have also used DPAs, NPAs, and independent monitors creatively and successfully in other, less prominent but equally meaningful corporate crime contexts. It is important that we avoid imposing an inflexible policy that fits one type of case – which may be the unusual case -- but constrains the ability of prosecutors to resolve other types of cases in the best interests of the public and victims.

We believe that federal prosecutors across the country, along with our colleagues in many regulatory and investigative agencies, have done tremendous work – hard work that requires dedication, determination, and creativity – to respond appropriately and effectively to the corporate fraud crisis. Our response has included expanded, albeit still relatively limited, use of deferred prosecution agreements, non-prosecution agreements, and monitors to resolve corporate criminal conduct in a manner that best serves the public's interests in corporate rehabilitation and reform, prompt payment of penalties and restitution for victims, and prosecution of culpable individuals, while limiting the loss of

jobs and investments that can result from a corporation's collapse after criminal indictment or conviction. As we go forward, we recognize that we will face new and varied forms of corporate crime. The Justice Department will continue its efforts to draw upon its experience and best practices to develop policies in this area that provide more consistency and transparency, while retaining the flexibility needed to address these new challenges in the best interest of our client, the citizens of the United States. Thank you.