STATEMENT OF

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BEFORE THE

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

CONCERNING

"TRANSPARENCY AND INTEGRITY IN CORPORATE MONITORING"

PRESENTED

NOVEMBER 19, 2009

Mr. Chairman and members of the Subcommittee, I am pleased to offer my views on transparency and integrity in the selection of corporate monitors. The issue is of great importance to prosecutors, defense counsel, and corporations alike. It is also an issue with which I am closely familiar. During my tenure last year as Associate Deputy Attorney General at the Department of Justice, it was my privilege to play a role in formulating the Department's Principles Concerning the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (the "Corporate Monitor Principles"). Those Principles were designed, in part, to address the very issues of transparency and integrity that are now under consideration by this Subcommittee.

Introduction

The meaning and use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) have been the subject of much study, and indeed the subject of at least two hearings before this Subcommittee. For purposes of today's hearing, and to establish the appropriate context for a discussion of corporate monitor selection, two features of DPAs and NPAs bear emphasis. The first is the critical role they play in resolving corporate criminal cases. DPAs and NPAs occupy an important middle ground between declining prosecution, on the one hand, and charging and convicting a corporation, on the other. The options at either extreme involve serious drawbacks. Declination means that corporate criminal conduct goes unpunished, an obviously undesirable result, while charging and convicting a corporation may have ruinous consequences for shareholders, employees, pensioners, and the general public. DPAs and NPAs offer an alternative approach that takes into account both corporate malfeasance and the rights of innocent third parties.

A second feature of nearly all DPAs and NPAs is particularly relevant here: the obligation these agreements impose on corporations to implement effective compliance programs, or to enhance compliance programs already in existence. By imposing this requirement, DPAs and NPAs encourage companies to identify and eliminate unlawful behavior, prevent similar behavior from recurring, and generally restore a culture of compliance. Often companies can accomplish these goals on their own, without the assistance of outside counsel or consultants, and without the need for verification by third parties. Sometimes they cannot. When circumstances do call for outside assistance, DPAs and NPAs may call for corporate monitors.

Generally speaking, corporate monitors oversee and verify the implementation of compliance programs. Monitors represent neither the company nor the government, but rather are independent of both. They are retained and paid by the corporation, not the government, and their fees are negotiated with the corporation, not the government. As noted in the Corporate Monitor Principles, a monitor may be appropriate where a company "does not have an effective internal compliance program, or where it needs to establish necessary internal controls." Corporate Monitor Principles, § I. Corporate monitors may also be especially useful in cases involving complex or esoteric industries, where prosecutors are ill-equipped to perform a key task assigned to monitors: to "assess and monitor a corporation's compliance with the terms of the [DPA or NPA] specifically designed to address and reduce the risk of recurrence of the corporation's misconduct...." *Id.*

Monitor Selection

The Corporate Monitor Principles offer guidance on these and other issues relating to the use of corporate monitors, including the submission of reports by the monitor and the duration of

monitor engagements. But the first issue addressed by the Principles is one of paramount importance, and it goes directly to the matter before this Subcommittee today: namely, the integrity and transparency of the process by which monitors are selected.

Principle 1 is designed to ensure integrity in monitor selection. It requires that monitors be selected "based on the merits." To emphasize the point, Principle 1 demands a selection process that, "at a minimum," is designed to "(1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle." *Id.*

Having thus set out its purpose, Principle 1 lays out five requirements to ensure the integrity of the monitor selection process: (1) government lawyers involved in the selection process must comply with all existing conflict-of-interest guidelines; (2) the government must create a standing or *ad hoc* committee to review monitor candidates, meaning that individual United States Attorneys or Assistant Attorneys General – the politically appointed heads of their respective offices – cannot approve or veto monitors unilaterally; (3) the Office of the Deputy Attorney General must approve the monitor; (4) the government should not accept a monitor if he or she has an interest in, or relationship with, the corporation at issue; and (5) the corporation should agree not to employ or become affiliated with the monitor for at least one year after the monitorship expires. *Id.*

These requirements have teeth, particularly with respect to concerns over favoritism or perceived cronyism by a prosecutor's office. Requiring the selection of monitors by committee diminishes the influence of any one United States Attorney or Assistant Attorney General over the selection process. Even more significant, requiring the approval – not merely consultation,

but approval – of the Office of the Deputy Attorney General provides an extraordinary check and balance against the selection of monitors for inappropriate reasons. What is more, the Comment to Principle 1 directs that monitors be selected, where practicable, from a pool of at least three qualified monitor candidates. That directive reduces even further the possibility that monitors will be cherry-picked by government officials seeking to reward friends or former colleagues.

To be sure, Principle 1 leaves room for flexibility in the selection process. It notes explicitly that "there is no one method of selection that should necessarily be used in every instance." *Id.* Indeed, as noted in the Principle, "the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable," while in other cases "the facts may require the Government to play a greater role in selecting the monitor." *Id.* But the overarching goal remains constant: "Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, *and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence*." *Id.* (emphasis added).

Post-Employment Bar

Some have suggested that a "cooling-off" period be imposed on former prosecutors after they leave government service and before they become eligible to serve as corporate monitors. That restriction may indeed be sensible. Such a period would reduce the appearance of favoritism in the selection of monitors, and thereby complement the precautions set forth in the Corporate Monitor Principles. Likewise, it may make sense to limit the ability of former prosecutors to serve as monitors with respect to matters in which they were involved while employed by the government. A limitation of this sort would, among other things, mitigate the

perception that government lawyers might choose to work on a given case with the intent of angling for a monitoring engagement after their government service expires.

Even assuming that such restrictions are appropriate, however, the question remains: Who should impose them, and when? Legislation has among its many virtues the force of law, the imprimatur of Congressional authority, and a permanence unlike any or most guidance issued by the Executive Branch. But it also poses a risk where the practices in question are still evolving, and where a sufficient body of experience has not yet developed on which to fashion immutable policy. In such matters, care must be taken to avoid imposing an inflexible set of rules that may fit one type of case, but that restrict the ability of prosecutors and corporations alike to handle other cases with maximum effectiveness.

Consider, for example, the question of whether former prosecutors should be barred from serving as monitors on matters in which they were involved while in government service. It is beyond dispute that lawyers may not appear before the Department of Justice or other agency *on behalf of another person* with regard to matters in which they were involved as prosecutors. That restriction, set forth in 18 U.S.C. § 207(a)(1), targets an obvious conflict of interest, and, not coincidentally, implicates long-established canons of professional conduct. But corporate monitors represent neither the corporation, nor the government, nor any other person; rather, as set forth in the Corporate Monitor Principles, they are "independent from both the corporation and the Government." Corporate Monitor Principles, § IIIA2. Neither Section 207 nor various state rules of professional conduct specifically address the propriety of former government personnel serving as corporate monitors.

As noted, there are sound arguments in favor of restricting the ability of former government lawyers to become monitors in the same cases they handled as prosecutors. It is not

inconceivable, however, that an unusual case (perhaps one involving an esoteric industry) would warrant the involvement of a former prosecutor with experience in the same matter. Both the corporation and its shareholders, the government, and the general public would arguably benefit from having a monitor with knowledge of the matter at hand, and from the efficiencies that such a monitor would bring to the engagement. Alternatively, even if the monitor herself did not work on the same matter previously, she might wish to partner with a former prosecutor who did, for the purpose of accelerating her learning curve and availing herself of her partner's expertise.

Conclusion

It is an open question whether any such benefits outweigh the problems created by engaging former prosecutors as monitors on the same matters they handled while in government service. But the question does not appear to have arisen in any monitor engagements to date, and certainly not between the issuance of the Corporate Monitor Principles and my departure from the Department in January 2009. Neither, to my knowledge, have problems emerged, after the Principles were issued, from the selection of recent government attorneys as monitors. Over time, as more cases involving monitors develop, it may be that Principle 1 will require adjustment to ensure that its purposes are satisfied. At that point the Department – in the exercise of its law enforcement authority, and with its ability to fine-tune any changes to existing policy – would be well suited to make any necessary modifications. At present, however, the Department's effort to formulate guidance designed to ensure integrity and transparency in the selection process appears to have worked.

Thank you.