TESTIMONY OF

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HEARING ON
"DEFERRED PROSECUTION:
SHOULD CORPORATE SETTLEMENT AGREEMENTS
BE WITHOUT GUIDELINES?"

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HOUSE COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman and Members of the Committee,

My name is Timothy L. Dickinson. I am a partner in the law firm of Paul, Hastings, Janofsky & Walker; I also serve as an adjunct professor at the University of Michigan Law School, and hold a number of Bar Association and other positions. In addition, I serve as the Independent Consultant for Monsanto Company and Delta and Pine Land Company. I have been in private practice for over 25 years and have counseled companies on issues relating to the Foreign Corrupt Practices Act, including DPAs, for my entire career. I also assisted in developing the World Bank's Voluntary Disclosure Program and worked with Bank staff to advise a VDP participant on improving its compliance program.

It is a great pleasure to be here today and I should state at the outset that I am here in my personal capacity only and not as a representative of any company, client, law firm, law school, etc.

In the interest of time, I will limit my remarks to three areas; first, when is a monitor an appropriate component of a deferred prosecution agreement; second, in such circumstances, how should the monitor be appointed; and third, how should the scope of the monitor's work be determined.

To date, no guidelines have been issued outlining the appropriate circumstances for appointment of a monitor as part of a DPA. This is troubling because of the potential inconsistency and lack of predictability if, in similar circumstances, certain prosecutors insist upon a monitor and others do not. To remedy this concern, I would favor guidance from the Department of Justice that would establish clear criteria for prosecutors to follow when considering the inclusion of a monitor in the terms of a DPA.

I would favor the imposition of a monitor under fairly narrow circumstances, such as when a company has elected not to establish any compliance program or when there has been a fundamental breakdown in a company's internal controls or compliance program that the company

has not adequately addressed itself. Such a standard would leave some flexibility to prosecutors but would provide companies the option to take aggressive remedial actions themselves in lieu of the intrusion of a corporate monitor. A monitor may not be deemed necessary if a company undertakes aggressive and comprehensive remedial actions.

With respect to the appointment process, there are also no specific statutory or other guidelines. To date, the appointment process appears to be a mix of prosecutor appointments, recommendations or approvals, but without any particular guidance by Congress, the relevant government agency or otherwise.

While I recognize that some flexibility in the appointment process may be beneficial to the government's objectives, the lack of a defined methodology for appointment does not, in my view, serve the ultimate government objective of ensuring ongoing compliance with the law.

I would propose that the appointment process follow a relatively simple formula. First, the company involved in the deferred prosecution would propose to the government its preferred candidate. Such candidate would be required to be clearly qualified in the substantive area of law at issue. As I'm sure you are aware, monitors have been utilized in a number of types of cases, including securities fraud, tax issues, export violations and, my field, the Foreign Corrupt Practices Act. It is my view that anyone who a company would propose as its monitor should have the requisite demonstrated expertise such that the government and the public can be assured that the monitor's duties will be carried out in an effective manner.

Upon receipt of the company's proposed candidate, I would recommend that the government be given a veto over such appointment should the government believe that the person proposed does not possess the requisite skills or independent integrity to ensure a successful execution of his or her duties.

This process would be continued as many times as necessary until both the company to be monitored and the government agree on a candidate. This formula is similar to the process which resulted in my monitorship.

The value of this process, I believe, would be substantial. It would allow the "monitee" to consider the experience and expertise of various candidates and the company might take more ownership in the changes to its practices required by the monitor. The government's ability to exercise a veto would ensure that the monitor possesses the requisite skills and integrity to properly execute his or her duties without any criticism as to the appointment process.

Finally, the methodology for establishing the scope of the monitor's work is another topic that might be considered. In order, once again, to ensure a successful monitorship (and I am mindful that some critics may say that my use of that term is by definition impossible to achieve), all parties involved, including the government, should agree at the early stages of any monitorship as to the scope, timing and budget of the monitor's activities. Of course, adjustments may be appropriate depending on what transpires during the monitor's term. This would eliminate some of the uncertainty as to the costs of the monitor which need to be factored into a company's analysis for entering into the agreement and would reduce potential abuses by monitors who may seek a blank check for performing their duties.

Thus, I would welcome guidelines to be issued by the Justice Department that would set out in a transparent manner when a monitor would be deemed necessary as well as the methodology to be followed in the appointment process and in defining the scope of work. I would be happy to elaborate on my comments or respond to any questions. Thank you.