Department of Justice

STATEMENT OF

GARY G. GRINDLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

HEARING ENTITLED

"ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS"

PRESENTED

JUNE 25, 2009

Good morning Mr. Chairman, Ranking Member, and members of the Committee. Thank you for your invitation to address the Committee concerning the Department of Justice's use of corporate Deferred Prosecution and Non-Prosecution agreements. It is an honor to appear before you today.

Introduction

I am privileged to be serving the Department of Justice (the Department) as the Deputy Assistant Attorney General for the Criminal Division. In that capacity, I supervise, among other things, the Criminal Division's enforcement of the Nation's anti-fraud laws. Although I am new to this position, I am not new to the Department, as I previously served the Department during the Clinton Administration as Counselor to the Attorney General, Principal Associate Deputy Attorney General, and Deputy Assistant Attorney General in the Civil Division. Most recently, I served as a partner at a law firm in Washington, D.C.

Based on my experience as a government attorney and a private practitioner, I have had the opportunity to observe the Department's impressive efforts over the last several years to combat corporate fraud. As you know, in the wake of several major corporate scandals in 2001 and 2002, the Corporate Fraud Task Force was established and led by the Department. Since the Task Force's inception in 2002, United States Attorneys' Offices and the Department components have obtained approximately 1,300 corporate fraud convictions. This includes convictions of more than 200 corporate chief executives or presidents, more than 120 vice presidents, and more than 50 chief financial officers. Though this track record is impressive, the Department's commitment to vigorously identifying and pursuing wrongdoing in our corporate boardrooms has only grown stronger in recent months. Our prosecutors and agents are

determined to ensure that wrong-doers are punished and that victims are made whole – efforts which we believe are critical to restoring investor confidence in the markets and ensuring that our corporate citizens play fair.

The Department's extensive experience prosecuting massive corporate fraud has taught that in order for corporate and financial fraud enforcement efforts to be effective, Federal prosecutors must be permitted sufficient discretion to fashion appropriate agreements with business organizations to resolve criminal investigations, based upon all the facts and surrounding circumstances of a particular case and in light of the often unique features of certain businesses and areas of criminal law. The Department, through the United States Attorneys' Offices, the Criminal Division, Tax Division, and other components, has and will continue to bring criminal charges against business organizations where the criminal conduct is egregious, pervasive and systemic, or when a business organization is incapable or refuses to discipline culpable individuals or reform its culture and practices to prevent recidivism. At the same time, however, the Department recognizes that criminally charging and convicting a company or corporation runs the risk of triggering significant negative consequences for innocent third parties 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 public as a whole. Furthermore, in certain circumstances, the collateral consequences of such prosecutions -- such as the exclusion from government contracting pursuant to debarment rules -- may be unjustified where a corporation has fully cooperated with the government's investigation, appropriately disciplined culpable individuals, implemented comprehensive compliance reforms and other remedial measures, and made restitution to all the victims.

The impact of a corporate criminal conviction on individuals, entities, and the Nation's economic stability are all real issues that are borne in mind by the Department and must be carefully evaluated and weighed in every corporate prosecution. Accordingly, Federal prosecutors carefully consider the consequences of a criminal conviction in determining whether to charge a business organization, and may use a variety of tools other than indictment and prosecution to bring justice to innocent victims and the public. Deferred Prosecution Agreements (DPAs), Non-Prosecution Agreements (NPAs), and Independent Compliance Monitors are among the most powerful and effective of these tools. Today, I want to address how the Department uses these invaluable tools in combating corporate and financial fraud.

Deferred Prosecution Agreements and Non-Prosecution Agreements

The Department has spoken clearly about the principles that must be considered when evaluating the appropriate resolution of a corporate criminal probe. These corporation-specific principles have been followed by the Department since 1999 and were recently updated in August 2008 and formalized in the U.S. Attorney's Manual at Section 9-28.000 *et seq.*[1] *See* Exhibit 1. All Federal prosecutors are required to follow these principles in determining whether a DPA or NPA is appropriately used in a particular case, a complex decision which requires a careful analysis of a variety of factors. These agreements are subject to multiple levels of review in the Department and, in most instances, are made available to the public to ensure transparency.

DPAs and NPAs in corporate cases provide the Department with a powerful alternative to outright prosecution or declination, and have been used effectively by the Department for many

[1] U.S. Attorney's Manual 9-28.000, Principles of Federal Prosecution of Business Organizations.

years. DPAs typically involve the filing of a formal charging document, such as a Criminal Information of complaint, by the Government. The Criminal Information and the DPA are then submitted to the appropriate court. As a part of the DPA, the government typically files a statement of facts that describes the basis of the criminal charges. Thus, although there are criminal charges pending against the business organization, the government agrees to defer the prosecution of those charges for a period of time. During the deferral period, the business organization is typically required to pay a fine and take remedial and compliance actions. Ultimately, if the business organization fails to abide by the conditions outlined in the DPA, the Department has the right to proceed on the criminal charges that were previously filed but deferred, file additional charges, and use the statement of facts that were filed with the court as an admission against the business organization. In this way, a DPA is a powerful mechanism for the Department to ensure that corporations make restitution and take affirmative remedial actions.

The Department has also entered into NPAs with business organizations. The principal distinction between DPAs and NPAs is that the latter agreements are not accompanied by the filing of formal charges. In cases involving NPAs, the Government has reviewed the facts of the case, considered the appropriate course of action, and decided not to file criminal charges; instead, it has opted to reach a resolution short of criminal prosecution.

Importantly, whether the Government has entered into a DPA or NPA with a business organization, the corporation is subject to specific conditions that serve justice, help to ensure victims are compensated, exact fines, and seek to prevent future illegal conduct. Pursuant to a DPA or an NPA, the corporation essentially undertakes a period of probation, by agreement with the Department, rather than be subjected to a criminal conviction, with the attendant collateral

consequences. The obligations imposed upon a business organization 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 business organization with ongoing Government investigations of potentially culpable individuals and/or other business organizations; and
3. the implementation of a remedial ethics and compliance program, including internal controls that will effectively prevent, deter, detect, and respond to possible future misconduct.

This type of alternative disposition is beneficial for a variety of reasons. First, as noted above, DPAs and NPAs often require the payment of restitution to victims and/or financial penalties. Because a DPA or NPA is the result of a negotiated disposition, the payments to the victims can be accomplished more quickly and efficiently as the restitution can be obtained without the delays resulting from the formal charging of a company, the protracted litigation, post-conviction restitution hearings and administration, and, then, inevitable appeals.

Second, DPAs and NPAs promote the public interest in ferreting out crime more quickly by requiring corporate cooperation. DPAs and NPAs require companies to cooperate with the government in obtaining evidence necessary to prosecute individuals and other corporations who have engaged in misconduct, including culpable individual corporate executives and employees. Notably, prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals, and corporate cooperation has proved to be invaluable in a variety of corporate and financial fraud cases against individual defendants.

Third, many DPAs and NPAs benefit the public by requiring the corporation to initiate comprehensive ethics and compliance programs. The agreements help ensure that going

forward, the business organization roots out illegal and unethical conduct, appropriately disciplines culpable employees, prevents recidivism, and adheres to business practices that meet or exceed applicable legal and regulatory mandates. There is a dual benefit to this approach: it helps to prevent future illegal conduct and helps to restore the integrity and preserve the financial viability of a corporation that had been mired in corruption or fraud.

Fourth, DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct. A vast majority of the DPAs and many NPAs are made available to the public by the Department or by the corporation. DPAs are typically filed with a court and are available to the public through the local clerk's office (or may be available electronically as most courts now post pleadings online). Further, copies of DPAs and NPAs are frequently made available by the Department online or are otherwise available upon request. Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry. Furthermore, the agreements contain information about the type of remedial efforts the Department and, in certain circumstances our regulatory partners, will require the company to take. [2] This is beneficial in helping companies to determine what may be considered "best practices" in their industry.

Finally, DPAs and NPAs allow us to achieve these benefits without necessarily subjecting companies to the collateral consequences of prosecution and conviction. These collateral consequences can include the debarment of a company which can result in the potential dissolution of a company, loss of jobs, elimination of beneficial products from the market, and

[2] The Department and a regulatory agency (for example, the U.S. Securities and Exchange Commission or the Commodities Futures Trading Commission) will conduct a parallel investigation and frequently the Government will resolve the civil and criminal cases simultaneously. In many instances, the regulatory agency and the Department will entered into agreements that are similar in nature, require similar compliance reforms, and may call for the use of the same monitor. In those cases, the regulatory agencies are instrumental in helping to identify the types of reforms that are appropriate in the particular matter and what is appropriate within a given industry.

loss of confidence in the company leading to large shareholder losses. These are just a few of the potentially substantial economic consequences. Undoubtedly, corporations that commit improper conduct should be subject to severe and appropriate punishment, but the use of a DPA or a NPA can serve to rehabilitee a company and promote ethical conduct rather than subjecting the company to potential closure.

Furthermore, it should be noted that the DPAs achieve many of the goals that a guilty plea can achieve and, aside from the form of the agreement, the outcome may have little practical effect. In a criminal case against an individual, a guilty plea versus an alternative disposition can mean the difference between a jail sentence and no incarceration. Obviously, corporations cannot be sentenced to jail so the distinction in the outcome of a corporate case is truly tied to the potential collateral consequences that can result from a guilty plea as opposed to a DPA or NPA. And, as describe above, the use of a DPA can achieve the same, if not better, results for the victims of a corporations' crime.

Importantly, all of this is achieved while preserving the Department's ability to prosecute the business organization, using a set of facts to which the organization has already admitted, if the agreement is materially breached. For these reasons, since 1992, the Department has used DPAs and NPAs in a variety of corporate cases involving a range of financial crimes, including securities 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 business organizations has expanded in recent years, it is still a relatively limited practice. Indeed, the use of DPAs and NPAs to resolve corporate cases is minimal compared to the overall prosecutions the Department has pursued against business organizations. Between

2004 and 2008, the Department indicted over 1,480 business entities. In comparison, since 1992, the Department has entered into a total of approximately 150 DPAs and NPAs. Furthermore, the Department's use of DPAs and NPAs does not mean that the Department has stopped bringing criminal charges against individuals who have committed fraud. To the contrary, we continue to vigorously prosecute corporate officers who have caused their companies to suffer harm.

Independent Compliance Monitors

In appropriate cases, DPAs and NPAs also may require the retention of an independent compliance monitor. A compliance monitor is an individual or entity – independent from the business organization and the Government – selected to oversee the implementation of and compliance with the provisions of the negotiated agreement. The compliance monitor is retained by the business organization, which pays for the monitor and for the other costs of implementing the DPA or NPA.

Understanding that the use of independent monitors is a complex undertaking, the Department issued guidelines regarding the selection and use of monitors.[3] These guidelines identify a series of principles to be followed in using monitors in connection with DPAs and NPAs – including the selection of a monitor; ensuring the independence of a monitor; monitoring compliance with the underlying agreement; the communications and recommendations of a monitor; reporting of previously undisclosed or new misconduct; and the duration of a monitorship. The guidelines were drafted after careful consideration of existing agreements, relevant case law, and academic literature on the subject, and were formulated with full input from career employees of the Criminal Division and the Attorney General's Advisory Committee

[3] *See* Memorandum from Craig S. Morford, then-Acting Deputy Attorney General, U.S. Dep't of Justice, to Heads of Dep't Components, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations" (March 7, 2008). Attached as Exhibit 2.

of U.S. Attorneys. The guidelines are designed to ensure that qualified monitors are selected, that the process is free from any potential conflicts of interests, and that the monitors are used appropriately to address and reduce the risk of a corporation's future misconduct.

Compliance monitors can be an invaluable tool in fighting corporate corruption and helping to rehabilitate a company. First, the use of a compliance monitor helps to ensure that, going forward, a company institutes meaningful changes. Because of limited resources, probation officers may simply be unable to ensure ongoing, comprehensive oversight of compliance measures by a company. By contrast, a monitor, who has a singular focus on monitoring compliance, can ensure that companies make the changes required to alter a corrupt corporate culture.

Second, a compliance monitor can ensure that a company institutes the best possible compliance program. Initially, a monitor can provide a company an independent and candid evaluation of a corporate compliance program by evaluating the program from inside the company. With this access, the monitor can typically provide specialized expertise and advice to help improve and implement a broad ethics and compliance program and relevant internal controls designed to meet the needs of the specific company.

Third, a monitor can verify whether a business organization is fulfilling the obligations to which it has agreed. Although the Department certainly works to ensure this is done, the presence of an independent monitor within a corporation provides necessary insight and oversight that the Department may not be otherwise able to accomplish on its own.

The Department receives the benefit of the monitor's access and oversight through written reports. In nearly all monitorships, the monitor is required to submit reports to the Department regarding the company's compliance with the agreement, any potential breaches of

the agreements, and the company's remedial efforts. In addition to the reports, in most cases, the Department maintains an open dialogue with the monitor and will meet with the monitor frequently to receive updates. These written and oral reports frequently contain information about ongoing criminal investigations and/or contain confidential proprietary information. For these reasons, the reports are designated as confidential. The confidentiality of these reports ensures that law enforcement investigations are protected and that the corporation feels free to provide the monitor access to its operations without fear that the process could be exploited by the corporation's competitors to acquire confidential or proprietary business information.

Notably, compliance monitors retained under 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 business organization and the monitor. The Government is not – and should not be – a party to these arrangements. Each case is unique and the requirements of the monitor will differ from case to case, depending upon the nature and scope of the wrongdoing by the business organization, the scope of the monitor's duties in the underlying agreement, the type of expertise needed, the associated expenses such as travel and additional consultants, the prevailing compensation levels for subject-matter expertise and geographic scope, and many other factors. Regardless of the compensation arrangement between the company and the monitor, the key is that this system places the cost of compliance squarely on the defendant company rather than on the taxpayer.

Our experience teaches us that the use of monitors has been and should continue to be a tool that is used in appropriate corporate cases. Because no two monitor agreements will be alike given the varying facts and circumstances of each case, however, the use of monitors will be approached with care and an appreciation for the complexity of a given case.

H.R. 1947, the "Accountability in Deferred Prosecution Act of 2009"

The Department understands the Committee's interest in the use of DPAs and NPAs. We oppose H.R. 1947, entitled the "Accountability in Deferred Prosecution Act of 2009," for several reasons. The legislation constitutes an intrusion upon the powers of the Executive Branch, specifically, it encroaches on the judgment and discretion of Federal prosecutors, a core prerogative of the Executive Branch. The bill would regulate DPAs and NPAs in a uniform fashion, although we believe it is improvident to proscribe rigid rules relating to the resolution of complex corporate criminal cases, which vary greatly and rightly depend on the exercise of judgment by the Federal prosecutors. Further, in the current climate of the economic crisis, the bill would impede the Government's enforcement efforts against corporate and financial frauds by limiting our discretion in appropriately prosecuting cases. We also believe H.R. 1947 is unnecessary in light of the Department's pre-existing written guidance governing the principles that apply to prosecutive decisions regarding Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs).[4]

In addition, the Department has concerns about specific provisions of the legislation. Importantly, by requiring judicial review of NPAs, this bill would impose limitations on prosecutorial discretion concerning whether, when, and under what circumstances to conduct a criminal prosecution.

[4] For example, the U.S. Attorney's Manual already requires the review of the factors listed in Section 4 of the H.R. 1947 bill – *e.g.*, the monetary resolutions in an agreement (Section 4(b)(2)), the joint involvement of regulatory agencies (Section 4(b)(6)), what constitutes cooperation (Section 4(b)(8)), and when to use an NPA (Section 4(b)(9)). These concepts are fully incorporated into the existing Principles of Federal Prosecution of Business Organizations, and, therefore, the provision is unnecessary.

Section 5(d), imposes a national fee schedule for monitors. As discussed above, the monitor's fees are typically based upon a contractual relationship between the monitor and the underlying business organization. To unnecessarily impose constraints and limitations on a monitor's fees may interfere with the legitimate contract discussions between the two parties. Furthermore, because each case is unique and the requirements of the monitor will differ from case to case, a pre-determined "fee schedule" would not be feasible to accommodate the numerous variations of monitorships.

Section 6(b), prohibits prosecutors involved in the prosecution of the relevant case from a role in the selection of the monitor. Attorneys prosecuting a particular case frequently have the most extensive knowledge of the underlying criminal conduct committed, a keen awareness of the problems facing the business organization, an understanding of compliance or other deficiencies that may have played a contributing role, and a deep appreciation for the negotiations with defense counsel. Furthermore, prosecutors also have an understanding of the qualifications and credentials required for an effective monitor to address the needs of the business organization. To exclude the prosecutor from such a process would be imprudent and would significantly curtail the inclusion of valuable information in the monitor selection process. The Department believes that the knowledge, experience, expertise, and understanding of a prosecutor are not only invaluable to the monitor selection process, but they are essential. Such input should be an integral part of the process.

The Department has additional concerns about the legislation and welcomes the opportunity to work with the Committee to address the myriad of issues that the proposed legislation raises.

Conclusion

In these difficult economic times, the Department is committed to using all of the tools at its disposal – including DPAs and NPAs – to root out corporate fraud, ensure the vitality and integrity of the marketplace, and make victims whole. DPAs and NPAs have been used effectively in a wide variety of cases – tax schemes, international bribery conspiracies, financial fraud cases, and Medicare fraud matters – to name just a few. Our experience in these cases has shown us that these agreements must be tailored to the specific needs of a particular case and provide sufficient flexibility to achieve real results – corporate rehabilitation and reform, prompt payment of penalties and restitution to victims, and prosecution of culpable individuals – all while limiting the loss of jobs and investments that can result from a company's collapse after criminal indictment or conviction. It is important that we avoid imposing an inflexible policy that restricts the ability of prosecutors to balance all relevant concerns and resolve criminal matters in the best interests of the public and victims.

As the Department continues to root out corporate fraud, we recognize that we will face evolving threats. The Department is committed to drawing upon its substantial experience in handling corporate crime 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 the United States and its citizens.

I would be pleased to answer any questions that the Committee might have. Thank you.