Opening Statement by
Chairman John Conyers, Jr. before the
House Judiciary Subcommittee on Commercial and Administrative Law hearing
on
Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements
2141 Rayburn House Office Building
June 25, 2009, 11 A.M.

Our nation is in the midst of one of the worst economic crises since the Great Depression. As we have bailed out some of the biggest financial institutions and corporations, it's come to light that many of these recipients of taxpayer dollars engaged in fraud or otherwise irresponsible activities. Given these circumstances, I applaud this subcommittee's examination of corporate pre-trial agreements, a tool at the Justice Department's disposal to deter and prevent corporate crime. Corporate pre-trial agreements are commonly labeled either deferred or non-prosecution agreements. The two kinds of agreements are functionally the same except in one respect. In the typical deferred prosecution agreement, a criminal charge is filed, and the corporation acknowledges and accepts responsibility for the criminal wrongdoing set forth in the charging instrument. In the typical non-prosecution agreement, no charging document is filed, and the investigation remains pending until the corporation fulfills the terms of the agreement.

Both pre-trial agreements provide for the prosecution to be deferred for a period of time, usually from one to two years, provided that the corporation fulfills its obligations under the agreement and does not engage in further misconduct. In addition, these agreements usually require the payment of a fine, implementation of stringent corporate governance and compliance measures, cooperation with the government's ongoing investigation, waivers of speedy trial rights and statute of limitations defenses, and consent to external oversight by an independent monitor approved by the government. After media reports detailing questionable Bush Justice Department appointments of independent monitors surfaced in January 2008, the Judiciary Committee began an investigation into the Department's use of deferred and non-prosecution agreements. We soon learned that the lack of guidelines in this area led to vast discrepancies across jurisdictions in the terms of agreements and in monitor selection. In response to our concerns, the Department issued some guidelines on monitor selection in March 2008 and mandated the collection and tracking of deferred and non-prosecution agreements. Although there has been some progress with respect to greater transparency, uniformity, and accountability in deferred and non-prosecution agreements, more needs to be done. There remain at least three issues that I believe we should address.

First; should corporate deferred and non-prosecution agreements be eliminated from the options within a prosecutor's discretion? In the wake of the 2002 criminal conviction and subsequent collapse of Arthur Andersen LLP, deferred and non-prosecution agreements

became a popular tool of President Bush's Justice Department. Although the Supreme Court eventually reversed Arthur Anderson's conviction, the firm, during the interim, ultimately dissolved and 28,000 people lost their jobs. To avoid these types of unintended collateral consequences, the Justice Department sought a middle ground between seeking corporate convictions and declining to prosecute corporations accused of wrongdoing. As a result, the number of deferred and non-prosecution agreements rapidly increased and peaked in 2007 with 40 such agreements. This rate vastly exceeds the 140 of such agreements entered into since 1993

In response to such expansive use of these agreements, Mary Jo White, the former U.S. Attorney for the Southern District of New York who orchestrated one of the first deferred prosecution agreements in 1994, recently expressed concern about prosecutors' increased reliance on this law enforcement tool. She recommends that they be phased out completely because she believes prosecutors are ignoring the option to decline prosecution. Others question whether these agreements serve the interests of justice. Through the criminal prosecution of a corporation— as opposed to just the accused employees—a prosecutor may seek to deter and prevent similar behavior throughout an entire industry.

I hope today's witnesses will be able to assure me that these agreements do not must result in just "a slap on the wrist," but instead lead to meaningful deterrence and the prevention of corporate crime. The goal of these agreements should be to cause corporations to actually reform their behavior.

Second; if these agreements remain an option for corporate prosecutions, are the guidelines issued last year by the Department sufficient for providing accountability, transparency, and uniformity in the process? As you may recall, Craig S. Morford, then-acting deputy attorney general, issued guidance in March 2008 on the selection and use of monitors in deferred and non-prosecution agreements with corporations on the eve of this subcommittee's hearing last year. By no means comprehensive, the guidance concerned monitor-related provisions that focused on: (1) the selection of monitors; (2) the scope of a monitor's duty; and (3) the duration of the agreement. Notably, these guidelines did not address whether a deferred prosecution agreement or a non-prosecution agreement should be used or how these agreements should be structured.

Additionally, the March 2008 guidance failed to rein in the tremendous leverage that the government and the monitor have over a corporation entering into an agreement. Corporations facing criminal prosecution have an unfair choice. They can either risk a conviction and a possible corporate death sentence after trial or be coerced into accepting the terms and fees the monitor and prosecutor believe are appropriate.

Third, has the abuse or the appearance of abuse in the system been completely eliminated? For example, I find New Jersey U.S. Attorney Christopher Christie's appointment of former Attorney General John Ashcroft to be a corporate monitor in the Zimmer Holdings case to be

particularly troubling. That appointment was made with no public notice, no bidding, and with no input from a neutral judge or the company subject to the monitoring.

Reportedly, Mr. Ashcroft received $52 million for 18 months of work as a result of this appointment. And, even more astoundingly, these fees were essentially non-negotiable. Especially in light of the fact that Mr. Ashcroft supervised Mr. Christie while he was attorney general, this arrangement presents the appearance of cronyism.

I am also concerned with a provision in the agreement deferring prosecution in the Bristol-Myers Squibb case where U.S. Attorney Christie required Bristol-Myers Squibb to endow a chair in business ethics at his *alma mater*, Seton Hall. This extraordinary restitution had nothing to do with the underlying criminal conduct. Furthermore, I am troubled by the fact that lucrative monitor contracts are not generally available to all interested attorneys. Last May, *The New York Times* reported that at least 30 of the 41 monitors appointed in deferred prosecution agreements since 1994 were former government officials and 23 were former prosecutors.

In light of these concerns, I am pleased that the Subcommittee on Commercial and Administrative Law is revisiting the Justice Department's use of corporate deferred and non-prosecution agreements. When the Committee last considered this issue in March 2008, former Attorney General John Ashcroft's testimony unfortunately left us with more questions than answers.

I hope that today's testimony will be more informative as we collectively consider the best path forward for deferred and non-prosecution agreements. I welcome Representatives Pallone and Pascrell to the Judiciary Committee and thank them for their leadership on this issue.