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COMMITTEE ON WAYS AND MEANS
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DEMOCRATIC CAUCUS
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Statement of Principles on Deferred Prosecution Agreements

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Prepared by the Office of Congressman Bill Pascrell, Jr.

Background

The practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion...in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." The Department of Justice offered its most recent guidance on corporate prosecutions on Dec. 12, 2006, through a memorandum by Deputy Attorney General Paul J. McNulty ("McNulty Memo"), which lays out nine factors that prosecutors should evaluate when considering a corporation for a deferred prosecution agreement.

However, while the benefits of deferred prosecution agreements are clear and the Department of Justice has spelled out certain guidelines on when to consider such agreements, it has never issued any known documentation on the actual practice of enforcing deferred prosecution agreements. One concern raised about this practice is that prosecutors hold immense power over corporations through these agreements, which almost always include a requirement for a federal monitor that will oversee the corporation's efforts to abide by the terms of the deferred prosecution agreement. These federal monitors, who work on behalf of the prosecution, can wield significant control over a corporation through these agreements as evidenced by the deferred prosecution agreement that the government entered into in June 2005 with the Bristol-Myers Squibb Company. In that case, the company removed their CEO and general counsel on the recommendation of the federal monitor who allegedly based its recommendation on the discovery of potential anti-trust violations despite the fact that those potential violations were entirely unrelated to the actual securities fraud allegations that led to the deferred prosecution agreement with Bristol-Myers Squibb. More recently deferred prosecution agreements were brought into question by reports of the $311 million settlement made by U.S. Attorney Christopher Christie with leading manufacturers of knee and hip replacements. Included in this particular deferred prosecution agreement was the hiring of federal monitors including former Attorney General John Ashcroft who served as Mr. Christie's superior at the Department of Justice. It has been reported that through the course of this agreement that Mr. Ashcroft's firm is poised to collect a staggering fee of more than $52 million in 18 months, which could give the impression of impropriety and political favoritism. Furthermore, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary.

Analysis

The following constitutes the principles that would need to be considered and evaluated in order to provide the necessary oversight and transparency of deferred prosecution agreements.

Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.