HOW PROSECUTORS APPLY THE "FEDERAL PROSECUTIONS OF CORPORATIONS" CHARGING POLICY IN THE ERA OF DEFERRED PROSECUTIONS, AND WHAT THAT MEANS FOR THE PURPOSES OF THE FEDERAL CRIMINAL SANCTION

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I. Introduction

The conference coordinators tasked me with summarizing "how we got here"—that is, to present a brief historical account of the development of current federal corporate law enforcement policy. But to prevent this essay from devolving into a mere recitation of what happened and when, I amended that mission to pursue two further queries: what Department of Justice ("DOJ") policy tells us about the purposes underlying corporate criminal liability; and whether the DOJ's application of its policy is likely to effectively serve those purposes.

At the outset, I should clarify that these latter questions will *not* be answered primarily by reference to the voluminous scholarly literature on the question of the goals—and efficacy—of corporate criminal sanctioning. Instead, I focus on what the *DOJ* perceives to be the purposes of punishment when evaluating whether those purposes are indeed served by federal organizational law enforcement policy as it has developed to date. The reason it makes sense to focus on what prosecutors believe is fairly simple. The standard of liability created over a century of common law adjudication, combined with forces that make it exceedingly difficult for (at least public) corporations to do anything but beg for mercy when the government comes calling, mean that prosecutors, and prosecutors alone, determine what purposes might be served by corporate criminal liability. To support this thesis, I will start with a brief description of the standard of liability and outline a variety of additional forces that make organizational culpability a foregone conclusion in most cases. I believe that my conclusions in this respect reflect popular wisdom in the defense bar, at least.

Turning then to the merits, both of my missions first require an inquiry into the guidelines, entitled "Federal Prosecutions of Corporations" (the "Charging Policy"), that the DOJ issued, and has periodically revamped, to guide prosecutors' discretion.[1] The Charging Policy identifies nine factors that are relevant to three

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1. U.S. Dep't of Justice, United States Attorneys' Manual § 9-28.000 (2008) [hereinafter USAM], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

purposes of corporate criminal sanction identified in the Policy: punishment (retribution), deterrence, and rehabilitation. Tracing the changes in the content of the Charging Policy demonstrates that the application of one of the nine factors—corporate cooperation with the government—generated great controversy and, in response to popular and congressional objections, was reformulated over time. Ultimately, however, the DOJ's view of the purposes of corporate punishment, and the other eight factors relevant to achieve that punishment, has largely been static.

What *has* changed—dramatically—are the *results* of prosecutorial application of the Charging Policy. The most notable development in federal organizational enforcement has been the significant decline in straight-out criminal convictions, and the DOJ's turn toward what are called "Non-Prosecution Agreements" ("NPAs") and "Deferred Prosecution Agreements" ("DPAs") to address high-profile corporate wrongdoing without extracting a criminal conviction from the company. Both NPAs and DPAs—referred to collectively within as deferred prosecution agreements (DPs)—are, quite simply, contracts between the government and the targeted company through which the company agrees to admit wrongdoing and take identified steps to remedy the harm it caused and put in place systems to prevent further wrongs. If the company satisfies the terms of the agreement, criminal charges that have already been filed against it in court will be dismissed (for DPAs) or no formal charges will be filed (for NPAs).[2] After providing data on the marked upswing in the DOJ's use of DPs in lieu of criminal convictions, I will summarize the provisions normally included in such instruments and discuss some of the concerns raised by the DOJ's use of DPs. Finally, I will focus on what prosecutors have de facto determined are the considerations they find most compelling in deciding whether to pursue a DP or to sanction a corporation criminally, and query whether these factors further the goals of corporate criminal punishment.

My bottom line is that DPs are not demonstrably better, and indeed may be less effective, than criminal convictions in serving the legitimate goals of criminal investigations—punishing, deterring, and rehabilitating companies that have committed criminal wrongs. To summarize, three reports issued by the Government Accountability Office ("GAO")[3]—which are the best available evidence to date of what is happening on the ground—suggest that prosecutors are looking primarily

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2. For the official definitions of NPAs and DPAs, see Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep't of Justice 1 n.2 (March 7, 2008) [hereinafter Morford Memo], http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

3. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009) [hereinafter GAO DEC. 2009 REPORT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS (2009) [hereinafter GAO NOV. 2009 REPORT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2009) [hereinafter GAO JUNE 2009 REPORT].

at three Charging Policy factors in deciding between DPs and prosecution: (1) the corporation's attempts to remedy its wrongdoing, both in terms of compensating victims and in terms of revising corporate policies to prevent recurrences; (2) the extent of cooperation the organization is willing to lend the government, particularly in identifying culpable employees; and (3) the collateral consequences that a criminal conviction may impose on blameless third parties.

My own belief is that retribution has purchase in cases of corporate wrongdoing: there are cases in which organizations—and their tainted and corrupt policies, practices, and culture—deserve and even demand the stigma of criminal punishment. Yet none of the factors in the Charging Policy that are designed to identify a truly "bad" corporation—such as the nature and seriousness of the harm, the pervasiveness of wrongdoing within the company, and the corporation's history of misconduct—are on top of prosecutors' list of concerns according to the GAO. And the three factors that *do* predominate and steer prosecutors away from prosecutions and toward DPs do not further any of the other (non-retribution) purposes of criminal punishment in ways that are demonstrably better than would be the case if the corporations involved were to receive their criminal "just desserts."

The first factor—remediation and reformation—serves DOJ's consistent emphasis on what I call "galvanizing deterrence." This type of deterrence encompasses elements of rehabilitation and thus is aimed not just at scaring a corporation straight but also at getting rid of personnel and reforming practices and procedures that make the corporate culture ripe for recidivism. The criminal sanction is designed—as, presumably, are DPs—to help a company fix its policies and procedures, and alter its corporate culture, in such a way as to preclude future wrongdoing. After examining what evidence exists, I conclude that the galvanizing deterrence goal may well be better served by criminal convictions—and the ensuing sentence of probation under the supervision of a court and court-appointed experts—than DPs.

The second factor—cooperation—does not correlate in any strong way to the purposes of punishment applicable in corporate crime cases. Its value appears to be purely instrumental: to more effectively enable the DOJ to prosecute culpable individuals. But corporations faced with criminal indictment have long offered up such cooperation, and there is no reason to think that it is more fulsome if a DP is on offer.

Finally, the third factor—avoiding the collateral consequences of a conviction, such as debarment or de-licensing, that may burden employees, shareholders, and consumers—strikes me as completely understandable and yet utterly wrong. The DOJ does not include this factor as relevant to charging or to the purposes of punishment in individual cases, where "flow-through" harm to other people and entities is also present. Some may argue that the greater potential flow-through harm likely to be present in corporate cases justifies consideration of this factor on equitable grounds, even if it is not, strictly speaking, relevant to an assessment of

corporate just desserts, deterrence, or retribution. The apparently heavy weight accorded this factor is unwarranted, however, given that drastic collateral consequences (such as failure of the company) are relatively rare, and serious collateral consequences (such as debarment and de-licensing) may also flow from DPs.

More importantly, an outsized focus on collateral consequences compromises the interests served by debarment and other "collateral" penalties while at the same time gutting the fair administration of the criminal sanction in cases of organizational wrongdoing. There are good reasons why companies that defraud the government so seriously as to be criminally sanctionable are debarred and de-licensed: the public has an interest in foreclosing further fraud until the companies prove that they can work honestly in the public interest. Yet prosecutors appear to be, in a sense, working with the guilty parties in undermining this valid regulatory interest. And, in so doing, the government gives an unprincipled windfall to those corporations that are too big to fail or that offer products or services too important for consumers to do without. When collateral consequences determine results, criminal sanctioning is a game of chance. Only those companies unlucky enough, for example, to be able to avoid or survive debarment or de-licensing, or that do not command an important enough market share in a given industry, may find themselves targeted criminally.

I understand that prosecutors are acting, in their view, equitably and even compassionately in taking into account these collateral consequences. No federal prosecutor wants to be responsible for putting thousands of innocent employees out of work if a company fails due to his or her indictment. Prosecutors also don't want to be responsible, for example, for the debarment from Medicare or Medicaid of companies that offer life-saving drugs or medical devices. But the point is that the prosecutors are *not* responsible: the rules governing the application of these collateral consequences are the problem. In short, if collateral consequences create real concerns, they should be addressed on their own terms by permitting regulators additional discretion in their administration or otherwise altering the rules. They should not be permitted to persuade the DOJ to abandon its interest in visiting just desserts on truly criminal organizations and to allow whatever corporate indictments are made to be a matter of market roulette.