Legal Limbo

Seeking Clarity in How and When the Department of Justice Declines to Prosecute

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By George J. Terwilliger, III, and Matthew S. Miner[1]

I. Introduction

This paper addresses the need for change and improvement in the process by which the Department of Justice ("DOJ" or "the Department") notifies subjects of its investigations that matters have been closed with no prosecution and in how the Department documents publicly the generic reasons behind these decisions. We respectfully submit that the recommended changes in policy and procedure will benefit both the Department and the business community in seeking to conform business operations to the requirements of the law. After all, a recent survey showed that nearly two-thirds of North American businesses had either abandoned or modified overseas deals due to legal risks and uncertainty associated with the Foreign Corrupt Practices Act ("FCPA") or other anti-corruption considerations.[2] While the cases DOJ elects to prosecute are well known, better understanding of the parameters of its decisions to forego prosecution can add significantly to the body of guidance available to the business community. In addition, fundamental fairness dictates that decisions not to prosecute be communicated to affected parties as soon as possible.

The Need for Reform and Increased Declination Guidance

In recent years, the Department has focused its efforts, especially in the fraud and anti-corruption arenas, on larger and more complex investigations. These investigations often involve parallel investigations by civil authorities and/or internal investigations by outside counsel. Numerous individuals inside and outside a corporate entity can become involved in the process and internally such investigations often are disruptive and costly. Cases often begin with a rather public bang, but many that result in no action end in silence. When there is no clearly marked conclusion to a government enforcement investigation, an already drawn out process can have the effect of being nearly endless. It needs not be so and can be changed at no cost to federal authorities' legitimate law enforcement needs. Indeed, a little bit of daylight on the declination process could help light corporations' way to improved compliance with legal requirements and enforcement expectations within their operations.

At present, there is no DOJ policy requiring the target or subject of the investigation be notified once a declination decision, that is, the decision not to prosecute, has been made. Notice of declination of criminal charges is permissive under certain circumstances, and the decision of whether to issue a notice of declination is left entirely to the discretion of each of the 93 United States Attorneys or the Criminal or other Division section overseeing a particular investigation.[3] Accordingly, targets and subjects of criminal investigation may be left "under investigation" for months or years on end and left to make important business and personal decisions while facing the specter of an unknown outcome. This situation, with very few exceptions, seems decidedly unnecessary. Moreover, where the Department has already determined or could determine that no criminal action is warranted, it seems a matter of fundamental fairness to so notify the effected company or individual.

The current declination process has contributed to a lack of understanding and an absence of guidance regarding

what criteria actually influence and inform those decisions. Recently, DOJ has taken steps in some cases, including one in which the authors were defense counsel, to change this practice and issue a declination letter after reviewing the facts of a matter and concluding that it did not merit prosecution.[4] This is a welcome and laudable development, but even more can and should be done to secure benefits that will further both government enforcement objectives and corporate compliance.

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If a trend toward increased declination notice continues and expands to include a wider array of enforcement matters, it would present DOJ with the opportunity to provide greater guidance and clarity on what it considers in making prosecution and declination decisions, including on the specific factors that inform and influence such decisions. This would be especially welcome, since as a practical matter, most white collar cases are resolved through negotiation and there is little opportunity for putative defendants to test the elements of the government's contentions in an adversary proceeding before a neutral authority. This, in turn, makes it more difficult than necessary for corporations and their legal advisers to tailor their legal compliance efforts to standards and expectations of enforcement officials.

More clarity is needed regarding the Department's declination practices to inform and improve compliance practices, provide repose to individuals found to be outside of prosecution interest, and curb the cost of the types of lengthy internal investigations that are prompted by the Department's inquiries. As then-Attorney General Robert H. Jackson famously remarked in 1940, the broad discretion wielded by federal prosecutors to investigate individuals—and, by extension, corporations—vests a tremendous power in prosecutors' ability to make or destroy reputations.[5]

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In many of today's white collar criminal investigations, whether conducted as to corporations or individuals, the decision to investigate will bring to bear "all the force of the government itself,"[6] in a way that can also mightily affect investors and other stakeholders. Criminal investigations, whether conducted internally by a corporation's outside counsel, or by government enforcement agencies, or some combination thereof, present significant costs in the form of both legal fees as well as collateral costs, such as a chilling effect on investment and innovation, distracted management, and harm to the reputations of the individuals and businesses under investigation. [7]

These costs are felt not only by the corporation's investors, but also by senior management and employees suspected of malfeasance who may face their own unique personal toll in the face of a criminal investigation. In many cases, these individuals turn out to be innocent actors standing at the fringes of the suspected misconduct who, while never ultimately prosecuted, also never have the bell unrung as to whether they were truly cleared or why DOJ declined to pursue charges. Individuals who are never indicted or charged still incur the often paralyzing costs and burden of investigation and it can be difficult to determine when the investigation has come to an end. According to DOJ statistics, in 2009 it took a median of 453 days for United States Attorney's Offices to reach a declination decision.[8] By contrast, the same DOJ data shows that it takes less than a month for U.S. Attorneys to reach a decision to file charges.[9]

Repose is an element of fundamental fairness and, thus, DOJ's current policy and practice, which does not require notice of declination to those who are no longer targets or subjects of an investigation, implicates basic considerations of justice. After all, if the investigation is over—what is the cost of such notice to the government? By contrast, the chilling effect of pending investigations on the ability of corporations to move ahead is palpable. It can have a material effect on a company's financial reporting, ability to secure credit, undertake innovative capital initiatives, retain and recruit talent and on a host of other everyday elements necessary to business success. In the face of years-long investigations of expanding scope, individuals cannot change jobs, corporations cannot clarify matters in securities disclosures and must bear the wrath of the market, and insurers cannot adjust for risk without having a clear sense of the outcome of an investigation.

To reduce these wasteful effects and bring greater clarity and fairness to the process, this paper proposes a two-pronged reform of the Department's declination policy:

- First, this paper proposes that notice of declinations be issued presumptively, rather than permissively following a declination decision. This practice could be subject to clearly-stated and narrowly defined exceptions that are necessary to protect the Department's interests in ongoing investigations.

- Second, we propose that the Department publish an annual report summarizing the circumstances or key factors underlying major declination decisions. Such a report should be drafted with the goal of providing maximum guidance as to the factors underlying the Department's declination determinations by case category, while also protecting the identities of those who had been investigated. Such a reform could be presented in a categorical fashion so that companies facing investigations are provided a better understanding of the types of conduct leading to a declination decision.

With so many matters in the white collar arena resolved directly with DOJ without formal charge or adjudication, understanding of enforcement parameters will be enhanced through greater insight into what the Department does *and does not* pursue. More insight into the bases for DOJ declination decisions would be an invaluable tool to help guide corporate compliance. With such guidance, companies will be better able to expend compliance resources efficiently and effectively, while still remaining active market participants, especially when information regarding DOJ's declination decision-making is added to the already available reporting of charging decisions and other affirmative enforcement resolutions. The availability of this additional information will serve to reinforce the types of behavior the Department seeks to encourage from the business community. Thus, if guidance over time makes clear that the Department consistently declines to pursue criminal charges where management promptly investigates, reports and corrects non-compliant conduct, the overall objectives of the DOJ enforcement program will be enhanced through encouragement of more corporate self-policing, voluntary reporting and strong remedial actions where warranted. After all, the government has as strong an interest in preventing unlawful corporate conduct—and, by extension, promoting compliant behavior—on the front end as it does in investigating and prosecuting unlawful conduct after the fact. Put more plainly, improved guidance serves the goal of allowing the Department of Justice to better communicate its expectations of lawful conduct to the individuals and business community it regulates.

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II. A Presumptive Notice Rule

Section Highlights

Lengthy investigations have a significant effect on the reputations and well-being of businesses and individuals, as well as on their willingness and opportunity to pursue new opportunities. This impact is made worse where there is lingering uncertainty as to whether an investigation remains active or has been concluded.

DOJ statistics demonstrate that federal prosecutors take, on average, well over a year to reach a declination decision, and even then notice to the former target of the investigation is not required.

By adopting a policy of presumptively notifying businesses and individuals at the earliest opportunity when a determination has been made not to pursue criminal charges, DOJ would:

- Enable businesses and individuals to restore their reputations and move on from the cloud of investigation;
- Allow businesses to settle expectations, obtain credit, and seek investment opportunities and other new ventures; and
- Provide repose to those who will not be prosecuted.

The Current Declination Environment

Prosecutors necessarily have broad discretion to initiate criminal investigations by summoning a grand jury and presenting a specific target for investigation. A necessary corollary to this power is the discretion to decline prosecutions which are determined to be unworthy of government enforcement action.[10] In 2011, the latest year for which data is available, 15.3% of the 163,908 cases received for prosecution by U.S. Attorneys' Offices

resulted in declinations, a significant number of which involved white collar crime matters.[11]

Under DOJ policy, criminal charges should be pursued where the person's conduct "constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."[12] Prosecutions may be declined, however, because (1) "[n]o substantial Federal interest would be served by prosecution;" (2) the defendant "is subject to effective prosecution in another jurisdiction;" or (3) "[t]here exists an adequate non-criminal alternative to prosecution."[13]

Reasons for declinations vary, and often involve narrow factual or legal determinations, but past DOJ reporting of these decisions has included only very general descriptions of the Department's bases for declination. For example, the annual statistical report issued by the Executive Office for United States Attorneys for fiscal year 2011 lists only the most basic categories in a statistical table to explain the basis for its 25,102 declinations that year. No further information is provided as to why particular cases qualified for declination within those categories, which bear broad, non-descriptive titles like, "Other Disciplinary Alternatives," "Lack of Criminal Intent," and "Suspect Cooperating or Restitution Being Made." Only the most general guidance can be taken from these descriptions. Similarly, the Department reported that its declinations occurring in federal fiscal year 2004 were almost evenly distributed between four principal reasons:

- A finding that no crime occurred, i.e. the government found no criminal intent or no violation of a federal statute (23.1%);
- Case-specific reasons such as an expired statutory period or weak evidence (25.1%);
- Referral of the case or prosecution on other charges or by other authorities (21%); or
- A combination of other factors, such as there being a minimal federal interest,

lack of federal resources, or agency request (24.5%).[14]

This type of information is far too general to be of use in guiding conduct or helping businesses and individuals better understand the Department's enforcement expectations.

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More recently, in August 2011, the Department advised Congress of eight generic types of circumstances that had been present in certain FCPA cases where prosecution was declined in relation to corporate conduct.[15] Half of the circumstances cited by the Department related to cooperation offered by the corporation after wrongdoing was discovered, including voluntary self-disclosures, voluntary cooperation by management in interviews, and the sharing of relevant compliance and control information with the Department.[16] Two of the circumstances related to the nature of the improper payments at issue – both in terms of the limited scale of employee involvement (i.e., "[a] single employee, and no other employee, was involved") and the relative size of the improper payments at issue (i.e., "minimal funds compared to the overall business revenue"). Of the remaining two circumstances cited, one dealt with the "extensive" pre-acquisition due diligence conducted by a parent corporation over "potentially liable subsidiaries" and the other involved a civil resolution reached with the Securities and Exchange Commission ("SEC") and certain other "additional reasons" that were not disclosed. No numbers or percentages were attached to the cited reasons. Accordingly, it is difficult to gauge whether these circumstances were

considered in individual cases only or if they can be viewed as more akin to criteria for FCPA declination decisions. While this additional information is helpful, it simply falls short of that which could be provided without doing any harm to DOJ's enforcement interests.

Regardless of the reason for a declination decision, whether in the FCPA context or otherwise, U.S. Attorney's offices require a significant amount of time to decide not to pursue charges. In 2009, it took a median of 453 days after receipt of a matter for a U.S. Attorney's office to decide not to pursue criminal charges; in federal fiscal year 2004, it took an average of nineteen months to reach a declination decision.[17] By contrast, it took a median of only twenty-four days for a U.S. Attorney's office to reach a charging decision in 2009 and only four months to file charges in 2004.[18] An internal audit conducted by the DOJ Office of Inspector General ("OIG") in 2008 found that up to 35% of the criminal matters referred for prosecution between 2003 and 2007 were still pending, awaiting a charging or declination decision. Over 25% of these had been referred in 2003 and 2004, meaning a decision to decline or prosecute was outstanding for more than three years.[19]

"Once a declination decision has been made however, there is no guarantee that the target of the investigation will be informed they have been cleared."

In a number of cases, a declination decision may be reached only after an individual or entity has been notified they are a target or subject of a grand jury investigation.[20] Once a declination decision has been made however, there is no guarantee that the target of the investigation will be informed they have been cleared.

For example, an investigation into potentially improper payments by ERHC Energy Inc. ("ERHC") was launched in May 2006 when a search warrant was issued in connection to possible FCPA violations. According to ERHC's 2010 SEC filing, all

of the documents seized pursuant to that warrant were returned to the company in January 2010.[21] As of September 2010, ERHC stated it had no reason to believe the investigation was still ongoing, but had received no "formal communication" from either the Department or the SEC that the investigation was concluded by the time ERHC filed its 2010 10-K, more than a year after the documents had been returned.[22]

Under DOJ policy, discretion as to whether to issue notice to a target of a grand jury investigation of a declination of criminal charges generally lies with the prosecution unit or entity handling the matter.[23] The language of the policy implies that notification may be issued at the request of a party, not on the government's own initiative, as it allows a U.S. Attorney to "decline to issue . . . notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons."[24] The policy notes that notice of "discontinuation of target status *may* be appropriate" where two specific criteria are met:

- The target previously has been notified by the government that he or she was a target of the investigation; and
- The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.[25]

However, the policy also recognizes that "other circumstances" may also call for the issuance of notice, notably where an investigation becomes public, including through media attention, due to "government action."[26]

The Effects of Criminal Investigations on Corporations

Without a clear statement from the Department notifying a person or entity that they are no longer a target or subject of an investigation, subjects facing criminal investigations are unable to develop expectations for future conduct and may be left to

defend the investigation, or at least the fact of it, indefinitely without any sense of repose. Even the mere fact of a pending investigation carries negative consequences for a company, but combined with leaks or other disclosures, unresolved suspicions, speculations, or allegations can have devastating consequences prior to resolution.

Pending investigations often carry heavy financial burdens. For example, in the early stages of the DOJ investigation into ERHC (which was ultimately never charged or indicted), the small company[27] reported spending more than $2.3 million in legal fees during a twelve-month period.[28] Additionally, according to recent SEC filings, Avon Products spent $93.3 million in 2011 on an internal investigation of possible violations of the FCPA, in addition to $95 million spent in 2010 and $59 million in 2009.[29] In the Avon case, no charges have been filed to date and the matter has not yet been resolved.

Avon is not alone in expending hundreds of millions in legal fees during lengthy investigations. A recent report issued by the inspector general of the Federal Housing Finance Administration estimated that legal fees paid on behalf of Fannie Mae and Freddie Mac executives resulting from lawsuits and government investigations in the wake of the mortgage crisis totaled $97 million to date.[30] In reaching its record-setting resolution of FCPA violations with DOJ and the SEC, Siemens A.G. reportedly incurred more than $1 billion in costs for an internal global inquiry.[31]

Holding DOJ more accountable for notice of, and the reasons for, declinations can only help to contain and control costs by bringing investigations that yield no enforcement action to a timely conclusion. Simply being notified of target status alone implicates a number of collateral costs. The prospect, however actually remote it might be in a given case, of facing criminal indictment can have a tangible impact on a corporation's reputation, and in turn, its ability to pursue new business initiatives.[32] Credit rating agency Fitch

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Ratings has noted that, even where no criminal indictment is ultimately expected, an investigation involves a number of items of concern which would negatively impact a corporation's credit rating during the pendency of the investigation.[33]

First, the time from discovery of criminal malfeasance until a plea agreement or other resolution may take years, weakening a company's credit profile in the interim. For example, in 2007, Alcoa was rated "A-" according to Fitch, but in 2010 only had a rating of "BBB-" following the revelation of bribery allegations in 2008.[34] Similarly, Standards & Poor downgraded Avon's rating from "BBB+" to "BBB" in 2012 in part due to Avon's ongoing FCPA investigation.[35]

Second, the cost of the investigations (noted above) and ongoing compliance issues may be sizable and represent a significant drain on resources, potential liability affecting the company's balance sheet and, in some cases, even impact a company's liquidity.[36]

Finally, even where criminal indictment is avoided, civil liability may attach as a result of an investigation. Equitable penalties such as disgorgement may be problematic in industries such as telecommunications, defense, and construction, which have multiyear contracts that are tied to annual profits. Where disgorgement of profits associated with these contracts requires financing, it could have an impact on a corporation's medium- to long-term credit rating.[37]

Reputational harm, which may generally affect the ability of a corporation to find business partners or clients,[38] may present other difficulties in addition to adverse credit ratings. As Michael Elston, the then-chief of staff to the Deputy Attorney General, noted in a 2007 speech to the Georgetown University Law Center, "[a]s long as the company is in the news with a cloud hanging over its head, the investigation and notoriety depresses the stock price, creates a huge distraction for management of the corporation . . . and at least temporarily and in some cases permanently, it decreases the value of the corporation."[39]

These consequences combine to create a chilling effect on corporations' willingness to pursue entrepreneurial endeavors during the pendency of the investigation.[40] In one notable FCPA investigation, a high-profile merger between defense contractors Titan Corporation ("Titan") and Lockheed Martin Corporation ("Lockheed"), worth an estimated $1.83 billion, disintegrated when Lockheed withdrew from the merger in 2004 due to the pendency of an investigation into potentially improper payments made by Titan units in Saudi Arabia, Benin, and East Asia.[41]

The impact of investigations is exacerbated by the tremendous pressure corporations face to cooperate completely with investigations in order to avoid criminal indictment, which for many corporations would be akin to a death-sentence.[42] Companies police themselves to a greater degree than ever and voluntary disclosure of corporate wrongdoing is strongly encouraged by federal enforcement

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authorities' sentencing policies.[43] As a result, more corporate criminal investigations are initiated earlier than would be otherwise the case, they last longer as government investigations and/or consideration of the results of voluntary disclosure may follow and concomitant costs become greater.[44]

The recent Gibson Guitars case demonstrates some of the costs faced by companies confronted with criminal investigations that may go on for years without resolution. In November 2009, Gibson's Nashville factory was raided by federal agents on suspicion of Lacey Act violations for the illegal importation of exotic lumber from Madagascar.[45] No developments in the case occurred until August 2011, when Gibson was again raided and had more than $1 million in Indian wood seized from its inventory.[46] According to Gibson's CEO, Henry Juszkiewicz, the 2011 raid alone cost Gibson between $2 million and $3 million in lost inventory and productivity.[47] Gibson agreed to a deferred prosecution agreement and fine of $300,000 to resolve the case in August 2012.[48]

"Which Office Do I Go to Get My Reputation Back?"[49]

The toll faced by individuals confronting criminal investigations can be even more exacting than that faced by corporations. As one court has recognized, the pending period between the initiation of an investigation and indictment can be physically and psychologically exhausting, the constant threat and uncertainty of indictment hanging like a sword of Damocles.[50]

In the white collar context, individuals may also be confronted with insurmountable pressure to accept unfavorable plea agreements simply as a result of becoming the target of a grand jury or government investigation, raising the cost to individuals of the investigation itself.[51] Due to the complexity of the factual and legal questions involved in most white collar investigations, these cases become prohibitively expensive to defend, often reaching seven figures in legal fees and costs.[52] The long duration of such investigations further adds to the effect of this economic pressure.

DOJ policies and the federal sentencing guidelines have incentivized corporate cooperation in criminal investigations in such a way that can present employees involved in wrongdoing with a Hobson's choice: either submit to government or internal investigation interview despite the risks to the employee's own legal interests, or lose their job.[53]

Developments in the law of white collar criminal enforcement such as the collective knowledge doctrine and vicarious criminal liability significantly broaden the criminal exposure a corporation faces based upon individual employee action. Moreover, the experience of Arthur Andersen post-Enron has reinforced the perception that an indictment can be the equivalent of a death sentence for a corporation.[54] These considerations place significant pressure on corporations to utilize all avenues of leniency available to them in policies such as the U.S. Attorneys' Manual's *Principles of Federal Prosecution of Business Organizations*[55] and the federal sentencing guidelines,[56] by cooperating fully with government investigations, encouraging similar cooperation from all employees, including those implicated in potential wrongdoing, and voluntarily disclosing any improper conduct learned through internal investigations.[57]

Strengthening Repose Through Reform

Placed in this difficult position, it seems only fair that individuals and corporations that have faced criminal investigations be afforded repose at the earliest opportunity where the government has resolved to decline prosecution. The right to repose is a critical element of our criminal jurisprudence which services the need to "protect a defendant who with the passage of time could lose all credible means of defense"[58] and recognizes that defendants should not have to live with the constant threat of criminal prosecution particularly in the face of overwhelming defense costs,[59] and remain, at least in perception, subject to further proceedings indefinitely.[60]

To strengthen repose in the criminal setting, the Department could adopt a

presumptive rule which would require United States Attorney Offices and components of Main Justice to inform the targets and subjects of investigations when a decision has been made to decline prosecution. Such a policy would do nothing to weaken the authority of DOJ to prosecute and exact no toll whatsoever on the free exercise of prosecutorial discretion.

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An amended procedure could also expand the relatively narrow present categories of criminal declinations defined under DOJ internal policy, which applies where evidence demonstrates a violation of a federal criminal statute, but charges are not pursued for prudential reasons.[61]

A presumptive notice rule should instead apply in all circumstances where the prosecutor declines to pursue charges, including where the facts or law do not support a criminal prosecution. Similarly, notice should also be issued where an investigation is terminated because the facts suggest the applicability of an affirmative defense.

A presumptive notice rule would serve three important functions related to repose in the white collar and corporate crime arena:

- *Businesses will be restored to the status they rightfully deserve in a timely manner, thus removing obstacles to exercise of corporate responsibility to shareholder welfare.* Issuing notice to businesses that they are no longer the target of an investigation or that criminal charges will be declined would allow businesses to settle expectations, obtain credit, and seek investment opportunities and underwriting from insurance

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providers that may accurately identify risk after an investigation is cleared, and provide stimulus to an anemic recovery at a time when the government should be doing all it can to encourage economic growth.[62]

- *Individuals will be able to move on with their lives.* A presumptive notice rule would better enable the movement of human and other capital as individuals could carry on with their lives and jobs, and seek new opportunities unshackled from the no longer necessary or deserved hindrances of a pending investigation.

- *Avoiding potential for overreach and imbalance.* Finally, presumptively notifying subjects of investigations that criminal charges would be declined would help foster fundamental fairness in the criminal justice system by bringing matters to a clearly marked resolution in a timely manner.

A presumptive rule could be drafted in a way similar to the existing permissive rule found in section 9-11.155 of the U.S. Attorneys' Manual, which already contains an exception to safeguard ongoing investigations. Under the proposed new guidance, notice of declination or discontinuation of target status would still be handled and evaluated at the individual prosecution unit, but the default would shift to a presumption of notice being issued at the time of declination, subject to the already-existing exceptions. Under the new presumptive notice guidance, the U.S. Attorney or other supervisory official would retain the discretion not to issue notice if providing notice "would adversely affect the integrity of the investigation or the grand jury process."[63]

Additionally, a presumptive rule would not preclude the U.S. Attorney or the grand jury from reinstituting an investigation on the discovery of additional evidence or information related to the subject of the investigation, or for any other appropriate reason.[64]

The recent number of declinations issued in FCPA-related investigations is testament to the fact that the Department is capable of and willing to file declination notices where the circumstances warrant it.[65] Indeed, issuing notice in an effort to provide repose to innocent individuals and businesses is consistent with the Department's mission "to ensure fair and impartial administration of justice for all Americans."[66] For example, in a matter that gained positive notoriety in recent months, the Department publicly declined to prosecute Morgan Stanley for FCPA violations committed by the former managing director of its real estate business in China, Garth Peterson.[67] The Department publicly credited Morgan Stanley's system of internal controls, noted that the defendant had actively evaded those controls, and noted that the company voluntarily disclosed the matter to DOJ and cooperated in the Department's subsequent investigation.[68] Similarly, DOJ publicly stated it would not pursue charges against investment bank Goldman Sachs ("Goldman") or its executives after the firm was referred for investigation by the Senate Permanent Subcommittee on Investigations, concluding there was "not a viable basis to bring criminal prosecution" for Goldman's role in certain mortgage-backed securities transactions.[69]

These declinations, and others like them, suggest that a relatively simple change in Department policy could bestow the benefits of repose to a large number of businesses and individuals currently languishing in criminal investigations that will ultimately go unindicted.

III. Call for Published Declinations Guidance

Section Highlights

To facilitate a better understanding of the circumstances—both positive and negative—that matter to the Department in weighting a decision to pursue charges, DOJ should publish annual guidance regarding its major declination decisions.

Such reporting would further the Department's enforcement interests by:

- Discouraging unlawful conduct before it happens; and
- Promoting the types of effective compliance practices DOJ considers in deciding whether to pursue charges.

This more open communication with the regulated community regarding the criteria underlying the Department's declination decisions will provide needed guidance and greater clarity for individuals and companies as they seek to understand and comply with federal law.

The Department could significantly further its policy goals aimed at fair enforcement by providing more substantive explanation and guidance concerning the criteria and reasoning behind its declination decisions. This greater clarity would, in turn, help to promote to the public the integrity of DOJ's exercise of its broad discretion as to whether or not to initiate prosecution. Therefore, in addition to implementing a presumptive rule requiring notice to individuals and businesses that have had criminal charges declined, the Department should also publish the circumstances and criteria underlying major declinations decisions, by case category, at the end of each fiscal year.[70]

While the presumptive notice rule discussed above would help companies and individuals facing ongoing investigations minimize the economic and social costs associated with potentially years-long investigations, the related reform of providing greater guidance would help companies facing extensive investigations better understand the facts and factors that matter to the Department in weighing whether to pursue charges. To make such guidance meaningful, the Department's reporting should go beyond broad descriptions of the matters it declined and loose categories of its supporting reasons, and should instead include, as specifically as possible, descriptions of the key circumstances and factors underlying the declination decisions. Such reporting should also, of course, omit information that would tend to reveal the identity of those who had previously been investigated, but were not charged.

Although such guidance would be helpful across all case categories, it would be particularly helpful for the Department to publish information regarding its major case declinations involving white collar offenses. In today's corporate criminal enforcement environment, with its emphasis on large matters and correspondingly larger investigations, the vast majority of cases are often settled without trial or even a formal charge through direct negotiation and cooperation with government agencies.[71] Companies simply cannot afford to risk the collateral consequences associated with criminal indictment, which affords government enforcement agencies, such as DOJ, strong negotiating positions during settlement discussions.[72]

The Department enjoys a commanding position of strength when negotiating and resolving matters of corporate criminal liability.[73] This uneven negotiating position of the parties to an agreed-upon resolution of a white collar matter adds to the need for more fundamental fairness in the process. That objective is served by better informing the business community of

the parameters and factors considered by the Department in making enforcement decisions. The cases where DOJ initiates action are highly visible, and we simply propose expanding visibility to shed better light on the rationale behind those cases where it elects to decline to take action.

For companies working to meet enforcement expectations, it is especially important to understand the parameters of those declination decisions that turn on DOJ's assessment of corporate compliance programs, internal investigations, and voluntary disclosures. As the Department made clear last year in its response to Congress regarding declinations in the FCPA context, prosecutors consider compliance efforts in deciding whether to pursue or decline a case.[74] DOJ reinforced the same point earlier this year in its press release announcing its decision to decline to pursue charges against Morgan Stanley.[75] Against this backdrop of indirect guidance, it would be particularly helpful for the Department to provide more concrete and meaningful guidance to businesses implementing compliance initiatives, so that these programs are not only effective in preventing and detecting internal malfeasance, but also meet the expectations of regulators. In a world of scarce legal and compliance resources, this type of guidance would be particularly valuable.

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Existing Department Guidance

Through the U.S. Attorneys' Manual, the Department makes publicly available internal policies providing guidance to federal prosecutors when determining whether to bring charges against a corporation or other business entity.[76] Federal prosecutors are directed to consider nine factors "[i]n conducting an investigation, determining whether to bring charges, and negotiating plea agreements," to determine the appropriate treatment. These factors include:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;

3. The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

5. The existence and effectiveness of the corporation's pre-existing compliance program;

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. The adequacy of remedies such as civil or regulatory enforcement actions.[77]

Critics have noted that the existing DOJ guidance, combined with the general factors the Department considers when reaching a charging decision,[78] is largely self-serving internal guidance that offers little in the way of concrete, workable guidance to inform those outside the Department as to what conduct will invite criminal scrutiny and what conduct will not.[79]

The current available guidance also allows for irregular application, requiring each of the 93 U.S. Attorneys to promulgate their own (frequently informal) policies, particularly as to declinations.[80] While ostensibly these policies do not depart dramatically from the guidelines promulgated in the U.S. Attorneys' Manual and elsewhere,[81] an inherent degree of variance may make it difficult for businesses to reasonably predict what conduct matters. While absolute uniformity is foreign to the recognized and accepted exercise of meaningful prosecutorial discretion, the possibility of wide variation in practice creates an environment of uncertainty and doubt about the fairness of decision-making measured on a national basis.

Although the Department maintains the authority to issue advisory opinions on questions submitted by corporations to determine the outer bounds of permissible conduct in some contexts, such as the FCPA,[82] this avenue is underutilized,[83] and will likely remain so as corporations have little desire to attract the Department's attention to the type of marginal conduct requiring advisory opinion guidance. Furthermore, while some opinions indicate the Department does not intend to prosecute the described conduct,[84] these opinions only create a rebuttable presumption that the specified conduct is permitted under the FCPA and provide no precedential value, as they apply only to those parties joining in the opinion request.[85] As such, the Department itself has recognized the need for greater clarity in the Department's interpretation of the FCPA's provisions through published guidance.[86]

Proposing an Annual Report on Major Declination Decisions, by Case Category

The Department does not currently publish information, aside from statistics, regarding its declination decisions. To the extent such information is made public, it is usually through corporations' public filings or press reports.[87] Because the information that makes it into the public

domain is limited, it is difficult to measure the parameters of declination decisions generally or derive meaningful guidance as to specific categorical factors the Department may have considered.

This lack of meaningful public information on declinations was recently illustrated in a report on FCPA-related declinations by James G. Tillen and Marc Alain Bohn of Miller & Chevalier.[88] In the report, they identified at least twenty-five formal declinations by the DOJ or SEC between 2008 and 2011 based on publicly available information, but found that the guidance provided by these declinations was significantly wanting.[89] Public companies typically "do not state the basis for the declinations they receive and often provide only limited information about the conduct that was investigated."[90] Observers are thus left to wonder whether the matters are declined because no violations were found to have occurred, for lack of jurisdiction, in deference to a foreign enforcement action, or whether the "declination itself represents a benefit in recognition of a company's voluntary self-disclosure, remediation and/or cooperation."[91]

"Because the information that makes it into the public domain is limited, it is difficult to measure the parameters of declination decisions generally or derive meaningful guidance as to specific categorical factors the Department may have considered."

A simple reform, which would provide substantially more case-specific guidance than is currently available and require little change in current DOJ practice, would be to publish more fulsome information regarding the factors contributing to major declinations each year. This guidance would be particularly helpful in the realm of investigations brought against corporations, where the guidance could be used to inform internal compliance efforts and decisions.

The proposed report would present little burden to the Department. Not only does DOJ publish its prosecution statistics each year and major prosecution outcomes,[92] but each Assistant U.S. Attorney is required to record the reasons a case has been declined, even where no notice is issued.[93] The information that is gathered from U.S. Attorneys on declinations is compiled and published annually by the Department, but in a table format that sheds little light on the actual reasons and factors motivating declinations decisions.[94] For example, the Department's 2011 annual report shows that, of the 5,814 white collar matters declined during the 2011 fiscal year, only twenty-two were listed in the broad category "Suspect Cooperating or Restitution Being Made," with no further information provided about how cooperation efforts were evaluated or whether the other 5,792 declinations involved cooperation as a factor in the declination decision.[95] More information can and should be provided, especially if the Department established a presumptive practice of providing notice to former targets or subjects of investigations upon a declination decision that also included the reasons criminal charges were declined.

Promulgating more about the basis for these decisions would provide much-needed substantive guidance to the bulk of the business community that strives to create and maintain compliance programs that, in addition to being effective, also meet government expectations.[96] Providing businesses with a clear picture of the circumstances under which the Department has determined to take no action would provide greater predictability to corporate criminal enforcement[97] and, by extension, better focus to corporate compliance efforts.

> *"Providing guidance to the business community in this way would help promote greater cooperation between the government and businesses seeking, rightfully, to comply with the law. "*

To its credit, the Department is already moving in this direction. Recognizing that greater communication of compliance requirements and objectives advances the interests of both the DOJ and regulated businesses and entities, the Department has taken steps to provide additional resources to the regulated community, recently stating its intention of publishing revised FCPA guidance expected to supplement the currently available "Lay Persons Guide to the FCPA."[98] This new guidance, which has been anticipated for public release in the fall of 2012, is expected to provide, at least in part, the Department's view of the criminal intent requirement, the definitions of "foreign official" and facilitation payments, conspiracy and aiding and abetting liability in the FCPA context, penalties and enforcement, and the benefits of effective compliance programs, successor liability, and due diligence.[99] Additionally, the Department has recently expanded its archives of available FCPA cases, including judicial decisions dating to 1977, the year of the FCPA's enactment.[100] Communication between the Department and regulated entities could be advanced even further if the Department were to provide a fulsome picture of its compliance expectations by publishing an annual survey of not only those cases in which charges are filed through indictment or information, but also those in which corporate conduct and compliance initiatives were deemed sufficient to allow a corporation to avoid criminal liability.

Providing guidance to the business community in this way would help promote greater cooperation between the government and businesses seeking, rightfully, to comply with the law. The interests of businesses and the government are already aligned in ferreting out criminal malfeasance, and not simply due to the draconian impact of indictment on a company's survival. Both the government and business community benefit from legally compliant companies, which promote investor trust and public confidence in the markets, which in turn promotes the nation's economy.[101] Corrupt markets cannot be free markets and corporate leaders have an obligation to their shareholders and employees to comply with the law.[102]

Guidance that informs corporations to accurately anticipate enforcement trends and priorities will work to the mutual benefit of both government enforcement agencies and the businesses themselves. The government is interested not only in punishing corporate crime but also in preventing it, and issuing guidance on the types of conduct the Department takes seriously will enable business to devote resources to preventing and detecting that activity, enhancing the deterrent effect to the law.

For example, published declination decisions could further encourage voluntary self-disclosure by corporations.[103] A recent draft study by New York University School of Law professors Steven Choi and Kevin Davis found no evidence that voluntary disclosure of wrongdoing results in lesser penalties.[104] While the researchers recognized that they could not rule out the possibility that voluntary disclosure resulted in some form of leniency, they concluded that without any evidence of the benefits of voluntary disclosure, "current enforcement practices are not creating clear incentives" for companies facing a potential prosecution.[105] Providing clear evidence that voluntary disclosure has factored into actual declination decisions, as frequently claimed in generic terms by the Department,[106] will encourage fuller cooperation between businesses and law enforcement agencies seeking to prevent and detect corporate malfeasance.

Businesses will also benefit by being able to more efficiently devote resources to compliance initiatives in a way that will allow them to structure compliance policies in a cost-maximizing manner. Because businesses take seriously their legal obligations, it is estimated that they spend tens of millions of dollars annually on compliance reviews and implementing effective programs.[107] However, due to corporations' tendencies to be risk-averse, these programs may be structured in such a way as to be overly-cautious and stifling of investment and other growth opportunities.[108] Clear guidance from the Department could create efficiencies and greater compliance by allowing for the drafting of policies focused on the known contours of legal risk and the targeting of training and compliance efforts towards

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activities that present the greatest risk of criminal violations.

Furthermore, as with its treatment of voluntary disclosure, the Department could demonstrate the degree to which it credits robust compliance programs in determining not to prosecute potential violations. With a growing chorus of commentators calling for the adoption of a good faith compliance defense to FCPA violations, a defense DOJ formally opposes but recognizes *de facto*, [109] the Department could reinforce the priority it gives to such programs and effectively influence programs for maximum impact. If the Department were to publish an annual report of declination decisions that highlighted the compliance efforts and programs that factored into declination decisions, companies and their compliance professionals would have a much better sense of what types of programs, training, and controls should be adopted.[110] While the announcement of the Morgan Stanley declination is a step in the right direction for providing greater guidance on this front, greater detail would benefit all involved.

A hypothetical illustrates the point. Suppose, for example, that the Department has determined internally that it will not prosecute FCPA violations involving the presentation of small gifts that memorialize major business deals or transactions. Suppose further that the Department has declined to prosecute three companies that gave such post-deal mementos to the counterparties in major transactions with state-owned entities. If the Department were to publish its declinations decisions, noting that it has declined to prosecute a series of cases involving small post-deal mementos based upon the Department's priorities and belief that such gifts were outside the true focus of the FCPA's intent, it would

be far easier for corporations engaging in commerce abroad to give meaningful and concrete compliance guidance as to the nature of gifts that fall inside and outside the ambit of FCPA enforcement.

Some observers have noted the Department may be reluctant to announce bright-line declination policies. First, publishing guidelines such as these may reduce the criminal law's deterrent effect for marginal conduct, informing potential defendants and defense lawyers that certain conduct will simply not be pursued.[111] However, by publishing information regarding major declination decisions, the Department would simply be acknowledging internal policies for clear behavior in a manner that would allow businesses—and individuals—to better predict their potential criminal liability. The Department would, of course, retain discretion to determine how its guidance would be presented and where guidance might be confusing or inappropriate. For example, if marginal conduct were involved, the Department could qualify the nature of how such conduct factored into a declination decision by explaining that other factors were also considered. Likewise, if the Department granted a declination in a case involving a unique factual setting, it could clarify that the declination was based on the particular circumstances of that case, allowing businesses to determine whether and how much weight to afford such a declination determination. Furthermore, the guidance provided by the Department could be focused or phrased in such a way to reward or encourage positive behavior, not to highlight discretionary declinations based on limited Department resources or enforcement priorities.

Second, such a policy may provide too much authority to prosecutors who will now be tasked with defining criminal conduct.[112] However, the reality is that prosecutors already wield this type of authority based on the prosecutorial discretion inherent to our system. Publishing certain declination decisions would simply serve to shine some sunshine onto the process.

Finally, the Department itself has stated it is reluctant to publish declination decisions for fear that publishing such information may "penalize a company or an individual that has been investigated and not prosecuted."[113] This point is a bit of a red-herring as any declination decision could be summarized in such a way to keep the individuals or companies involved anonymous. Additionally, publically-traded corporations disclose their involvement in criminal investigations themselves, making it a matter of public record that an investigation is pending.

In sum, there is little reason for the Department not to provide more meaningful annual reporting and true guidance outlining the factors and circumstances behind its major declinations decisions. Indeed, the Department's Antitrust Division already allows for the publication of public statements upon the closing of investigations. The Antitrust Division's policy states that the Division, "on appropriate occasion may issue a public statement describing the reasons for closing an antitrust investigation."[114] The Antitrust Division recognizes that such statements are important to help businesses and individuals better understand complex antitrust laws while attempting to comply with their requirements.[115] Recognizing the value gained from transparent guidance, the Antitrust Division has led the way for the Criminal Division and other components to provide similar guidance.

> *"In sum, there is little reason for the Department not to provide more meaningful annual reporting and true guidance outlining the factors and circumstances behind its major declinations decisions."*

IV. Conclusion

At a time when policy makers should be doing all they can to help encourage economic growth, two relatively simple reforms to internal Department of Justice policies could help businesses and individuals subject to lengthy investigations find repose, settle expectations, and encourage the movement of capital and investment. These reforms, which would present little marginal cost to the Department of Justice, would reap significant benefits to businesses and individuals, and make the criminal investigative process no more onerous than warranted for those who will be prosecuted for no crime.

[1] Authored on behalf of the U.S. Chamber Institute for Legal Reform. Mr. Terwilliger is a partner in the Washington, D.C. office of White & Case LLP and head of the firm's global White Collar Practice. Prior to entering private practice, Mr. Terwilliger served as Deputy Attorney General as well as other line and supervisory roles within the Department of Justice. Mr. Miner is also a partner in White & Case's Washington office and is a member of the global White Collar Practice. Prior to joining White & Case, Mr. Miner served as both a federal prosecutor and as the Minority Staff Director of the United States Senate Committee on the Judiciary. The authors wish to thank Dallas J. Kaplan, an associate at their firm, for his contributions to this paper.

[2] Deloitte LLP, Look Before You Leap 7 (2011) (reporting results of a survey of more than 500 North American business professionals where 63% of respondents reported that issues related to anti-corruption and the FCPA resulted in an aborted deal or renegotiation over the previous three years); *see also* Peter Jeydel, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 Geo. J. Int'l L. 523, 528-29 (2012) ("[T]his noxious combination of extremely harsh penalties and an ambiguous set of rules . . . makes the FCPA so disruptive to commercial activity. It causes prudent managers to forego potentially lucrative opportunities when they simply cannot determine whether proceeding would put them on the wrong side of the law."); New York City Bar, Comm. on Int'l Bus. Transactions, the FCPA and its Impact on International Business Transactions: Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption 11 (Dec. 2011) ("[T]he risk of FCPA enforcement may prevent corporations subject to the Act from engaging in behavior that is permitted . . . . [A]s discussed above, the FCPA's scope is unclear and the DOJ and the SEC advocate a broad interpretation of its provisions. This dynamic may render corporations and individual officers overly cautious, avoiding not only objectionable conduct but also acts that should be permitted and even encouraged.").

[3] United States Attorneys' Manual § 9-11.155.

[4] *See, e.g.,* Jeffrey Benzing, *'Blackwater' FCPA Probe Closed with no Charges*, Just Anti-Corruption, Main Justice, Aug. 14, 2012, http://www.mainjustice.com/justanticorruption/2012/08/14/blackwater-fcpa-probe-closed-with-no-charges; Samuel Rubenfeld, *Huntsman Faces no Enforcement over India Joint Venture*, Wall St. J. Corruption Currents Blog, Aug. 3, 2012, http://blogs.wsj.com/corruption-currents/2012/08/03/huntsman-faces-no-enforcement-over-india-joint-venture/; C.M. Matthews, *DOJ Closes Hercules FCPA Probe*, Wall St. J. Corruption Currents Blog, Apr. 27, 2012, http://blogs.wsj.com/corruption-currents/2012/04/27/doj-closes-hercules-fcpa-probe/.

Recent analysis by Miller & Chevalier found a total of 34 declinations from both DOJ and Securities and Exchange Commission ("SEC") through June 30, 2012. *See* Miller & Chevalier, *FCPA Summer Review 2012* (July 11, 2012) available at http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=83501.

[5] Robert H. Jackson, Attorney General of the United States, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), 31 Am. Inst. L. & Criminology 3 (1940-41).

[6] *Id.*

[7] Avon Products, for example, announced in a recent SEC filing that its internal investigation into potential FCPA violations cost $93.3 million in 2011. Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times Dealbook, Mar. 5, 2012, [hereinafter *Costs of Internal Investigations*] http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/.Siemens A.G. reportedly incurred $1 billion in expenses related to a global inquiry into FCPA violations. *Id.*

[8] Mark Motivans, Bureau of Justice Statistics, Federal Justice Statistics, 2009 7 (Dec. 2011), *available at* http://www.bjs.gov/content/pub/pdf/fjs09.pdf.

[9] *Id.*

[10] United States Attorneys' Manual § 9-2.020 ("The United States Attorney is authorized to decline prosecution in any case referred directly to him/her by an agency unless a statute provides otherwise. . . . Whenever a case is closed without prosecution, the United States Attorney's files should reflect the action taken and the reason for it.");

Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 Notre Dame L. Rev. 221 (Dec. 2003).

[11] Dept of Justice, Exec. Office of United States Attorneys, Unites States Attorneys' Annual Statistical Report, at 7, 87 (2011) [hereinafter *2011 Annual Statistical Report*], *available at* http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf. *See also* Motivans, *supra* note 8 (setting forth similar data for 2009). In 2004, 48.7 percent of bribery cases were declined, whereas 39.7 percent of fraud cases were declined. *See* Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004 (Dec. 2006) [hereinafter *Compendium*], *available at* http://www.bjs.gov/content/pub/pdf/cfjs0402.pdf. Other white collar regulatory offenses, such as crimes involving food and drug regulations, or communications violations were declined at a rate of 50.3% and 24.9%, respectively. *Id.*

[12] United States Attorneys' Manual § 9-27.220.

[13] *Id.*

[14] *Compendium*, *supra* note 11. Department policy requires that federal prosecutors maintain a record of declinations as well as the reasons for the declination decision. United States Attorneys' Manual § 9-27.270.

[15] Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Rep. Sandy Adams (Aug. 3, 2011) [hereinafter *Weich Letter*] (citing the following eight types of circumstances as having been present in matters that had been declined over the previous two years: (1) "[a] corporation voluntarily and fully self-disclosed potential misconduct;" (2) "[c]orporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct;" (3) "[a] parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries;" (4) "[a] parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries; (5) "[a] company provided information to the Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;" (6) "[a] company agreed to a civil resolution with the Securities and Exchange Commission, while also demonstrating that a declination was appropriate for additional reasons;" (7) "[a] single employee, and no other employee, was involved in the provision of improper payments;" and (8) "[t]he improper payments involved minimal funds compared to the overall business revenues.").

[16] *Id.*

[17] *See* Motivans, *supra* note 8; *Compendium*, *supra* note 11.

[18] Motivans, *supra* note 8; *Compendium*, *supra* note 11.

[19] Office of the Inspector Gen., U.S. Dep't of Justice, Resource Management of United States Attorneys' Offices, Audit Rep. No. 09-03 at 39-40 (Nov. 2008) *available at* http://www.justice.gov/oig/reports/EOUSA/a0903/final.pdf. *But see id.* at 40 (noting that based on the surprised reaction of Executive Office of U.S. Attorneys to this data, the OIG selected a sample of 50 pending matters to determine the accuracy the reporting; of this sample, 22 matters (approximately 44%) were accurately reported as awaiting a prosecution or declination decision while the remaining 28 matters had actually been terminated).

[20] *See* United States Attorneys' Manual § 9-11.153 (encouraging the notification of a target of a grand jury investigation of his target status "a reasonable time before [the government seeks] an indictment in order to afford him or her an opportunity to testify before the grand jury," subject to certain limits under which notification may not be appropriate).

[21] ERHC Energy Inc., Annual Report (Form 10-K) (Feb. 8, 2011).

[22] *Id.* ERHC received confirmation that the investigation was closed in April 2012, nearly six years after the warrant was issued. *See* Press Release, ERHC Energy Inc., ERHC Energy Inc. Announces Formal Closure of All Government Probes (Apr. 27, 2012) available at http://erhc.com/news/formal-closure-of-all-government-probes/.

[23] United States Attorneys' Manual § 9-11.155. In some cases, however, a formal declination may not be issued without prior approval from the Assistant Attorney General with supervisory responsibility for the given subject matter. See United States Attorneys' Manual § 9-27.640 (requiring prior approval for non-prosecution agreement, in part because "[a]n agreement not to prosecute resembles a declination of prosecution . . . in that the end result in each case is . . . a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense.").

[24] *Id.*

[25] *Id.* (emphasis added).

[26] *Id.*

[27] ERHC reported net losses in each of the years 2007-2011 averaging $4.6 million and claimed only $19,748,238 in total assets in 2011. ERHC Energy Inc., Annual Report (Form 10-K) at 23 (Feb. 8, 2011).

[28] *See* ERHC Energy Inc., Quarterly Report (Form 10-Q) at 18 (May 9, 2008) (reporting legal fees of $1,535,724 for the six months ending March 31, 2007 and $786,325 for the six months ending March 31, 2008).

[29] *Costs of Internal Investigations*, *supra* note 7.

[30] Peter J. Henning, *Adding Up the Government's Legal Bills for Fannie and Freddie*, N.Y. Times Dealbook, Sept. 25, 2012, http://dealbook.nytimes.com/2012/09/25/adding-up-the-governments-legal-bills-for-fannie-and-freddie/.

[31] *Costs of Internal Investigations*, *supra* note 7.

[32] Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 73 (2007); see also Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & Econ. 757, 758 (1993) ("[T]he reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud.").

[33] Fitch Ratings, U.S. Foreign Corrupt Practices Act—No Minor Matter (June 1, 2010) *available at:* http://www.fitchratings.com.

[34] *Id.*

[35] Samuel Rubenfeld, *S&P Downgrades Avon Debt Over Bribery Probe, Weak Results*, Wall St. J. Corruption Currents Blog, Mar. 16, 2012, http://blogs.wsj.com/corruption-currents/2012/03/16/sp-downgrades-avon-debt-over-bribery-probe-weak-results/.

[36] Fitch Ratings, *supra* note 33.

[37] *Id.*

[38] Barry A. Bohrer and Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 Am. Crim. L. Rev. 1481, 1483 (2007).

[39] Michael Elston, *The Challenge of Cooperation: Cooperation with the Government is Good for Companies, Investors, and the Economy*, 44 Am. Crim. L. Rev. 1435, 1436 (2007); *see also* ERHC Energy, Inc., Quarterly Report (Form 10-Q) at 23 (May 9, 2008) (reporting that an ongoing government investigation and resulting negative publicity could result in damage to the company's operations and reputation; loss of goodwill, financial condition, business, prospects, profits, and value; and adverse consequences related to its ability to continue financing for current or future projects).

[40] *See* George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1418 (2007) (noting that the risk of criminal liability has a chilling effect on commerce).

[41] *See* Lucinda A. Low, Owen Bonheimer, and Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 Practicing Law Inst. Corporate Law and Practice Course Handbook Series 711, 746 (April-May 2008).

[42] Bohrer and Trencher, *supra* note 38 (recognizing the high toll of indictment on a corporation, the "severity and irreversibility" of which has "led many commentators to declare that a corporate indictment is tantamount to a death sentence"); *see also* Bharara, *supra* note 32, at 75.

[43] *See, e.g.*, John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 Am. U. L. Rev. 579, 621-23 (Feb. 2003); Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Dep't of Justice, Address at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf ("We recognize the issues of costs to companies to implement robust compliance programs, [and] to hire outside counsel to conduct in-depth internal investigations . . . .").

[44] Hasnas, *supra* note 43, at 628. A related issue is the pressure faced by corporations to toll or waive applicable statutes of limitations when agreeing to deferred prosecution and other pre-trial diversion agreements, forcing them to face the adverse effects of criminal investigation for a period even longer than prescribed by the statutory period of repose. *See* Susan E. Brune, *White Collar Crime Policy,* 34 APR Champion 43, 45 (Apr. 1, 2010); John Stinson, *Secret Indictments: How to Discourage Them, How to Make Them Fair*, 2 Drexel L. Rev. 104, 125-26 (Fall 2009) (discussing the adverse effect of tolling statutes of limitation in the context of sealed indictments).

[45] James R. Hagerty and Kris Maher, *Gibson Guitar Wails on Federal Raid Over Wood*, Wall St. J. , Sept. 1, 2011, http://online.wsj.com/article/SB10001424053111903895904576542942027859286.html. The Lacey Act, 16 U.S.C. § 3371, et seq., amended in 2008, prohibits the importation of wood that is improperly harvested pursuant to foreign law regulations and requires businesses to submit to U.S. Customs and Border Protection on importation of a foreign plant species a declaration that provides: (1) the scientific name of the plant; (2) the value of the importation; (3) quantity of the plant, and (4) name of the country from where the plant was harvested.

[46] *Id.*; Les Christie, *Gibson Guitar CEO fights back*, CNN Money, Sept. 2, 2011, http://money.cnn.com/2011/09/02/smallbusiness/gibson_guitar/index.htm.

[47] Jeff Poor, *Gibson Guitar CEO: Raid by feds to cost company $2 to $3 million*, The Daily Caller, Aug. 30, 2011, http://dailycaller.com/2011/08/30/gibson-guitar-ceo-fed-raid-to-cost-company-2-to-3-million/.

[48] Press Release, Dep't of Justice, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (Aug. 6, 2012) *available at* http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html.

[49] *See* Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury*, N.Y. Times, May 26, 1987, http://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html (quoting former Labor Secretary Raymond Donovan after he was acquitted of fraud charges).

[50] *United States v. Ciammitti*, 720 F.2d 927, 929 (6th Cir. 1983) ("The proffered testimony was that of the defendants' wives and their families suffered anxieties and hardships during the two-year period between arrest and indictment, and that the threat of indictment hung over them 'like a sword of Damocles.'").

[51] Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 Duke L. J. 857, 861-62 (Feb. 2009).

[52] *Id.* at 863-66. *See also United States v. Stein*, 495 F. Supp. 2d 390, 423-24 (S.D.N.Y. 2007) (noting that at the pre-trial stage, individual defendants had already incurred an average of $1.7 million in defense costs and finding that $3.3 million in total costs would be a "very conservative estimate" in a complex white collar prosecution). Criminal defense lawyers may not be paid on contingent fee bases, and thus individuals must provide retainers and pay hourly rates for representation, *see* Model Rules of Prof'l Conduct R. 1.5(d)(2), which can exceed $1,000 per hour for top practitioners. Vanessa O'Connell, *Big Law's $1,000-Plus an*

Hour Club, Wall St. J., Feb. 23, 2011, http://online.wsj.com/article/SB10001424052748704071304576160362028728234.html.

[53] Ribstein, *supra* note 51, at 869-72; Hasnas, *supra* note 43, at 621; Bohrer and Trencher, *supra* note 38, at 1489-90; Bharara, *supra* note 32, at 82-83.

[54] See *supra* note 42.

[55] United States Attorneys' Manual § 9-28.300.

[56] *See, e.g.*, U.S. Sentencing Guidelines Manual § 8C2.5(g) (2011).

[57] *See* Bohrer and Trencher, *supra* note 38, at 1491. Not only do individuals face immense economic pressure to end an investigation early by accepting an unfavorable, or sometimes even unjust, plea agreement, but societal pressure accumulating over the course of an investigation may constitute coercion for the purposes of waiver of Fifth Amendment privileges. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977) (holding threatening loss of prestige and political influence as coercive for Fifth Amendment purposes); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) ("The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion . . . .").

[58] J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial: When is a Crime Complete?*, 10 SUM Crim. Just. 2, 2 (Summer 1995).

[59] *See Stein*, 495 F. Supp. 2d at 423-24.

[60] Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statues of Limitations in Criminal Law*, 31 J. Legal Stud. 99, 99 n.3 (Jan. 2002). A recent reform proposal suggested by Homer Moyer, an attorney at Miller & Chevalier, recognized the importance of repose in this context. Mr. Moyer suggested that internal DOJ guidance should be revised so that voluntarily disclosed matters must normally be resolved by DOJ within 90 days after completion of an internal investigation. Interview by Mark Koehler with Homer Moyer, Member, Miller & Chevalier, FCPA Professor Blog (May 24, 2011) [referred to herein as "Moyer Interview"] *available at* http://www.fcpaprofessor.com/a-qa-with-homer-moyer.

[61] *See* United States Attorney's Manual § 9-27.220(A); *see also* Mike Koehler, *Morgan Stanley's So-Called "Declination,"* FCPA Professor Blog (July 26, 2012), http://www.fcpaprofessor.com/morgan-stanleys-so-called-declination (observing there is ambiguity as to what circumstances are actually a "declination" under existing DOJ policy).

[62] As noted above, an indefinite and pending investigation can create significant risks for businesses seeking to invest, in the form of repressed credit ratings, lost prospects, and adverse impact on its ability to finance. *See, e.g.*, ERHC Energy, Inc., Quarterly Report, *supra* note 28. "[E]ven a small but non-negligible likelihood of disaster will have chilling effects on business investment. Wait-and-see is often an option, and frequently a good one." George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295, 296 (2000-01). By providing corporations with repose at the earliest opportunity, DOJ can help businesses subject to investigation clear the uncertainty and settle expectations that help fosters the movement of capital. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 331 (1992) (White, J., dissenting in part) (observing that "legal certainty promotes business confidence").

[63] United States Attorneys' Manual § 9-11.155

[64] *Id.*

[65] In addition to the letters identified *supra* in note 4, declination letters are also known to have been sent to Kosmos Energy Ltd. and Allianz SE announcing the DOJ's intention not to pursue criminal FCPA charges in recent years. *See* Samuel Rubenfeld, *Kosmos Outlines DOJ Declination Letter*, Wall St. J. Corruption Currents Blog, Apr. 25, 2011, http://blogs.wsj.com/corruption-currents/2011/04/25/kosmos-outlines-doj-declination-letter/; C.M. Matthews, *What Does an FCPA Declination Letter Look Like*, St. J. Corruption Currents Blog, Feb. 24, 2012, http://blogs.wsj.com/corruption-currents/2012/02/24/what-does-an-fcpa-declination-letter-look-like/.

[66] *About DOJ*, Dep't of Justice, http://www.justice.gov/about/about.html (last visited Sept. 28, 2012).

[67] Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012) available at http://www.justice.gov/opa/pr/2012/April/12-crm-534.html.

[68] *Id.*

[69] Ben Protess and Azam Ahmed, *S.E.C. and Justice Dept. End Mortgage Investigations into Goldman*, N.Y. Times Dealbook, Aug. 9, 2012, http://dealbook.nytimes.com/2012/08/09/goldman-says-sec-has-ended-mortgage-investigation/.

[70] A similar proposal was also suggested by Homer Moyer, who suggested that government enforcement agencies charged with FCPA enforcement should publish sanitized summaries of its declinations. *See* Moyer Interview, *supra* note 60; *see also* Thomas R. Fox, Washington Legal Found., DOJ Should Release FCPA Declination Opinions (Jan. 13, 2012) (calling for publication of sanitized declination decisions in a form similar to the Department's existing FCPA Opinion Release Procedure).

[71] George J. Terwilliger III and Matthew Miner, *Reform is needed in anti-corruption enforcement*, Nat'l Law Journal, June 25, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560493301&Reform_is_needed_in_anticorruption_enforcement&slreturn=1.

[72] *Id.*; *see also*, Bharara, *supra* note 32, at 56; Elston, supra note 39 (noting that corporations are incentivized to "engage with government and end the investigation as quickly as possible.").

[73] *See, e.g.*, *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) [hereinafter referred to as "FCPA Hearing"] (prepared statement of The Hon. Michael B. Mukasey on behalf of the Inst. for Legal Reform, U.S. Chamber of Commerce) [hereinafter referred to as "Mukasey Testimony"].

[74] See Weich Letter, *supra* note 15 (crediting, among other things, a corporation's willingness to share details about its compliance program and internal controls procedures as factoring into the Department's consideration of whether to decline FCPA prosecutions).

[75] See *supra* note 67.

[76] *See* United States Attorneys Manual § 9-28.300.

[77] *Id.*

[78] *See* United States Attorneys' Manual § 9-27.220.

[79] *FCPA Hearing*, *supra* note 73, at 29 (Mukasey Testimony).

[80] O'Neill, *supra* note 10, at 235-36.

[81] *Id.* at 241.

[82] *FCPA Hearing*, *supra* note 73, at 17 (prepared statement of Greg Andres, Acting Deputy Assistant Attorney Gen., Criminal Div., Dep't of Justice); *see also* 28 C.F.R. part 80.

[83] *FCPA Hearing*, *supra* note 73, at 29 (Mukasey Testimony). Since 1993, the Department has only issued 35 FCPA Opinion Procedure releases. *See Opinion Procedure Releases*, Criminal Div., Dep't of Justice, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited, Sept. 24, 2011).

[84] *See, e.g.*, Dep't of Justice, FCPA Op. Procedure Release No. 09-01 (Aug. 3, 2009).

[85] 28 C.F.R. § 80.10 (providing that opinion requests provide a rebuttable presumption that the specified conduct is authorized under the FCPA); 28 C.F.R. § 80.5 (stating that opinions are only applicable to parties joining the opinion request).

[86] Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Dep't of Justice, Address at 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) *available at* http://

www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html (stating the DOJ expects to issue new guidance on the FCPA in 2012).

[87] *See* James G. Tillen and Marc Alain Bohn, *Declinations During the FCPA Boom*, Bloomberg Law Reports, 2011 *available at* http://www.millerchevalier.com/portalresource/lookup/poid/1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSwOZDm83!/document.name=/miller_chevalier_tillen_bohn_article.pdf.

[88] *Id.*

[89] *Id.* Tillen and Bohn noted that the sample of available declinations was skewed in part because private companies, which are not required to publish the same type of information as publicly-listed corporations, may determine "the hazards of revealing a declination outweigh any potential benefits, particularly if the underlying investigation was not publicly disclosed." *Id.*

[90] *Id.*

[91] *Id.*

[92] *See, e.g.*, *2011 Annual Statistical Report*, *supra* note 11.

[93] United States Attorneys' Manual § 9-27.270.

[94] *2011 Annual Statistical Report*, *supra* note 11, at 87.

[95] *Id.*

[96] Demonstrating the thirst for insight into the Department's charging decisions for businesses, following the DOJ and SEC's public declination of charges against Morgan Stanley in the Garth Peterson matter, *see, e.g.*, Complaint, *S.E.C. v. Peterson*, No. 12-cv-2033 (E.D.N.Y. April 25, 2012), which cited the sufficiency of Morgan Stanley's internal controls program, *see id.* at 12, a number of articles appeared analyzing the declination and its impact on businesses trying to replicate Morgan Stanley's success. *See, e.g.,* Jerrod Baker, *What We've Learned from Morgan Stanley*, FCPA Blog, (Aug. 23, 2012), http://www.fcpablog.com/blog/tag/morgan-stanley; Arent Fox LLP, *Morgan Stanley Gets Cooperation Credit in FCPA Settlements: The De Facto "Adequate Procedures" Defense*, May 4, 2012, http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=3744; Steptoe & Johnson LLP, *Avoiding FCPA Prosecution For Employee Conduct*, May 25, 2012, http://www.steptoe.com/publications-8218.html.

[97] An included benefit of requiring the Department to publish its major declination determinations would be to allow companies to determine the line between criminal and civil liability. As Tillen and Bohn found, in at least six instances between 2008 and 2011, DOJ formally declined to prosecute FCPA charges while the SEC filed civil charges for violations of the accounting provisions or sought administrative cease-and-desist orders enjoining a company from future violations. Tillen and Bohn, *supra* note 87. Although it may be likely that the DOJ simply determined there was insufficient evidence to support criminal charges, *id.*, clarity as to this decision would help businesses predict the nature of liability they are likely to face.

[98] *See* Breuer, *supra* note 86.

[99] Rachel G. Jackson, *Holder Reveals Contours of Forthcoming FCPA Guidance*, Just Anti-Corruption, Main Justice, June 13, 2012, http://www.mainjustice.com/justanticorruption/2012/06/13/holder-reveals-contours-of-forthcoming-fcpa-guidance/ *(sub. req'd)*; *see also* Letter from Sens. Amy Klobuchar and Chris Coons to Eric Holder, Attorney General of the United States (Feb. 15, 2012) *available at* http://www.scribd.com/doc/81899022/Letter-to-AG-Holder-From-Senators-Klobuchar-and-Coons-Regarding-FCPA-Guidance (expressing desire to see new Department guidance provide, among other things, further guidance on expectations of corporate compliance programs).

[100] *FCPA and Related Enforcement Actions*, Fraud Section, Criminal Div., Dep't of Justice, http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited Sept. 28, 2012).

[101] *See* Elston, *supra* note 39.

[102] *Id.*

[103] Despite the incentives to self-report created by the current white collar enforcement environment (discussed above), companies may still be loath to self-disclose as "[a] significant portion of FCPA enforcement activity in recent years has resulted from conduct that companies chose to voluntarily self-disclose—constituting nearly 60 percent of combined corporate resolutions since 2007 . . . ." Tillen and Bohn, *supra* note 87; *cf.* Moyer Interview, *supra* note 60 (proposing that enforcement agencies publish their calculation credit for voluntary disclosures).

[104] Samuel Rubenfeld, *Study Says Voluntary Disclosure Doesn't Change FCPA Penalties*, Wall St. J. Corruption Currents Blog, Sept. 6, 2012, http://blogs.wsj.com/corruption-currents/2012/09/06/study-says-voluntary-disclosure-doesnt-change-fcpa-penalties/.

[105] *Id.*

[106] *See* Weich Letter, *supra* note 15.

[107] *See* Terwilliger and Miner, *supra* note 71.

[108] *See FCPA Hearing*, *supra* note 73, at 40 (prepared statement of George J. Terwilliger III, White & Case LLP) ("In calculating the risk arising from FCPA compliance obligations against the benefits of a given business venture, uncertainties exist as to the requirements of the FCPA and its interpretation and application by enforcement authorities. When faced with that uncertainty, companies sometimes forgo the deals they could otherwise do . . . .").

[109] *See, e.g.*, Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 Wis. L. Rev. 609, 646-47 (2012) (citing Weich Letter).

[110] *See* Jeydel, *supra* note 2, at 536-37 (recognizing that greater clarity regarding compliance initiatives would help ease the chilling effect on commerce of ambiguities in the law).

[111] Michael E. O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 Am. Crim. L. Rev. 1439, 1495 (2004). Additionally, if low-level defendants knew in advance that they would not be prosecuted, they may be far less willing to cooperate in the investigation and prosecution of more serious offenders. *Id.*

[112] *See* Marc L. Miller and Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125, 133 (Nov. 2008) (recognizing that the declination authority is the "height of prosecutorial discretion" because the rationale behind a decision is not typically published); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243, 1248 (Sept. 2011) (recognizing unfettered prosecutorial discretion may be akin to nullification).

[113] *FCPA Hearing*, *supra* note 73, at 67 (testimony of Greg Andres, Acting Deputy Assistant Attorney Gen., Criminal Div., Dep't of Justice).

[114] Antitrust Division, Dep't of Justice, Issuance of Public Statements Upon Closing of Investigations (Dec. 12, 2003), *available at* http://www.justice.gov/atr/public/guidelines/201888.htm.

[115] *Id.* ("Public dissemination of enforcement and non-enforcement rationales benefit businesses attempting to comply with complex antitrust standards and consumers through a better understanding of the antitrust laws.").

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