OPENING REMARKS

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Good afternoon. I should begin my opening remarks by telling you that Tod Perry[1] and Mark Stuaan[2] have been great partners to work with in preparation for this afternoon. I hope that what we have to offer you is of value. I was comfortable at the end of yesterday afternoon believing I was reasonably well prepared. Thereafter, someone suggested that, before my presentation this afternoon, I would be well-served to review a recent episode of PBS *Frontline*, an episode called The Untouchables.[3] So I took the advice and reviewed it. In fact, I did so at about a quarter to one today. Having done so, I almost called in sick. For those of you who did not see it, I am sure it will become clear in our discussion today what the episode was all about.

To begin, I am proud to be here as the United States Attorney and, therefore, as an employee of the Department of Justice. But I would also suggest that I do not see my role on this panel as being a representative simply of the Department of Justice. I have no interest in sitting here this afternoon reading a list of approved talking points. Nor do I think you would have much interest in me reading such a list. With your agreement, I would like to instead try to address an overview of our discussion, the debate that surrounds criminal enforcement matters, including both the positions that have been taken by federal prosecutors who actually prosecute these types of cases and by many of the critics. And there are many. If you question the latter, watch the *Frontline* episode I mentioned.[4]

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3. *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), *available at* http://www.pbs.org/wgbh/pages/frontline/untouchables/.

4. *Id*.

It strikes me as important to note that even as we sit in this room and discuss issues on the cutting edge of one particular area of the law, the focus of our attention rarely strays from questions that are not really new. In fact, the topic we will be discussing today—issues of corporate liability over and against prosecutorial discretion—is one which lawyers have struggled with for hundreds of years. The great Blackstone cited a case from 1612 where he summarized all of corporate law by saying "a corporation cannot commit treason or felony or other crime in its corporate capacity though its members may in their distinct individual capacities."[5] Those were simpler times. If you are interested, Blackstone also noted that corporations could not be ex-communicated because they do not possess a soul.[6] I believe this might lead some to suggest there are few areas of corporate liability that have never changed.

But change is upon us, and with the perilous rise of industry and corporate power, so too must the law rise up to meet the challenges of a new era. American law has struggled to keep up with the pace of economic progress from the basic theory of respondeat superior, all the way up to the New York Central Railroad case that created the foundation for modern corporate liability,[7] and most recently, as discussed today, passage of laws like the Sarbanes-Oxley Act[8] and the Dodd-Frank Act.[9] Although the law itself has evolved, all of these moments in time have come back to the same basic question that Blackstone sought to answer—how does one assign criminal blame to a fictional entity? As some scholars have more aptly put it, how do you punish a fictional entity in a legal system based on the intentional moral accountability of individuals? That is a complicated question.

This brings me to the recent testimony of Attorney General Eric Holder. I know that today's panel discussion is being videotaped so I want to disclose—he is my boss. Attorney General Holder's testimony has drawn some attention for comments that he made at a recent Senate Judiciary Committee meeting. The Attorney General was facing criticism from senators on the question as to whether prosecutors should appropriately take into consideration the size of a financial institution when making decisions as to whether criminal charges should be filed. For the record, here is what Attorney General Holder said.

> I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps

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5. 1 WILLIAM BLACKSTONE, COMMENTARIES *464 (referencing *Case of Sutton's Hospital*, 77 Eng. Rep. 960 (1612)).

6. *Id.* at *465.

7. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of the 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

9. Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., and 15 U.S.C.).

even the world economy.[10]

Attorney General Holder went on to say that he thought there was what he called an "inhibiting influence" in the size of modern institutions.[11]

The public reaction, as I am sure many of you are aware, was not particularly supportive of that observation. We will now get into some of the issues of financial institutions being too big to jail. As an introductory matter, it is important to provide some context to the remarks that were made by the Attorney General.

When you become a United States Attorney, two things happen. First, you spend a lot of time explaining to your family and friends exactly what a United States Attorney is. After that you are then handed a huge binder, known as the United States Attorney Manual (the "USAM").[12] The manual is supposed to be a guide for all federal prosecutors in their actions on behalf of the United States, including issues of prosecutorial discretion. In fact, there is an entire section devoted to corporate prosecution guidelines.[13] Those guidelines require federal prosecutors to consider many factors when deciding whether to file charges against any corporate entity and many of them were actually first developed in 1999 by then Deputy Attorney General Eric Holder.[14] He authored the Holder memo, which stated that prosecutors should consider (1) the nature and seriousness of the offense, (2) whether the offense was an isolated incident or a systemic pattern of behavior, (3) whether the corporation voluntarily disclosed the wrongdoing, and (4) what steps the corporation has taken to correct the conditions.[15] There are others, but these give you a feel for the wide scope of considerations that prosecutors may consider in exercising prosecutorial discretion.

The final factor I will mention is so important to this discussion this afternoon that I will even give you the citation: Title 9, Section 28.1000. The heading of this section is called "Collateral Consequences" and it reads "[p]rosecutors may consider the collateral consequences of a criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."[16] The comments that follow in the USAM make clear that the main concerns here are the interests of innocent third parties.

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10. Evan Pérez, *First on CNN: Regulator Warned Against JPMorgan Charges*, CNN (Jan. 8, 2014), http://www.cnn.com/2014/01/07/politics/jpmorgan-chase-regulators-prosecutors/, *archived at* http://perma.cc/DC3J-XAQ6.

11. *Transcript: Attorney General Eric Holder on 'Too Big to Jail,'* AM. BANKER (Mar. 6, 2013), http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html, *archived at* http://perma.cc/Y82V-3346.

12. U.S. Dep't of Justice, United States Attorneys' Manual (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/, *archived at* http:// perma. cc/WX6C-K2VG.

13. *Id.* at 9-28.000.

14. *Id.* at 9-28.300.

15. *Id.*

16. *Id.* at 9-28.1000.

Prosecutors are instructed that where those collateral consequences for innocent third parties would be significant it may, I underscore may, be appropriate to consider non-prosecution or deferred prosecution agreements.[17]

Now, Attorney General Holder received criticism for saying that prosecutors may find it difficult to prosecute corporations if they have information that indicates doing so would cause significant harm to the national or the global economy. I would suggest that while his choice of words may not have been ideal, what he was saying really was not new policy, or anything close to it. This particular section of the manual that I quoted, in its current form, was put in place in August 2008, during the administration of President Bush, specifically to address what was a very real threat at that time: that a full out scorched earth prosecution of the financial industry's alleged criminal acts could in effect cause the collapse of financial markets. As an aside, I would suggest at this point that prosecution, in my opinion, in real time through sophisticated investigative techniques, including wire taps and surveillance, is the most effective way to hold individuals accountable. But that was back in 2008, and we now find ourselves in 2013.

Whether you agree or disagree with the principles of Section 28.1000, Collateral Consequences,[18] those decisions at that time set in motion a series of decisions that have brought us to where we are today. The Department of Justice would have me say that we are in a period of unprecedented aggressiveness when it comes to federal prosecution of corporate and financial wrongdoing. Over the last three years the Justice Department has filed 10,000 financial fraud cases against 15,000 defendants. The Department has obtained guilty pleas from UBS and RBS subsidiaries for their role in a well-known manipulation scheme,[19] and there have also been indictments of individual traders in the UBS case.[20] Rajat Gupta, a former Goldman Sachs board member, has been prosecuted.[21] Alan Stanford was sentenced to 110 years in prison for his $7 billion fraud scheme.[22]

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17. *Id.*

18. *Id.*

19. Press Release, U.S. Dep't of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-ag-1522.html, *archived at* http://perma.cc/FG8J-WTHT; Press Release, U.S. Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in connection with Long-running Manipulation of LIBOR Benchmark Interest Rates (Feb. 6, 2013), http://www.justice.gov/atr/public/press_releases/2013/292421.htm, *archived at* http://perma.cc/7MCN-JDX8.

20. Press Release, U.S. Dep't of Justice, ICAP Brokers Face Felony Charges for Alleged Long-Running Manipulation of LIBOR Interest Rates (Sep. 25, 2013), http://www.justice.gov/opa/pr/2013/September/13-opa-1064.html, *archived at* http://perma.cc/76ZK-EKK8.

21. Press Release, U.S. Dep't of Justice, Former Chairman of Consulting Firm and Board Director, Rajat Gupta, Sentenced in Manhattan Federal Court to Two Years in Prison for Insider Trading (Oct. 24, 2012), http://www.justice.gov/usao/nys/pressreleases/October12/Gupta Sentencing.php, *archived at* http://perma.cc/UW27-93AW.

22. Press Release, U.S. Dep't of Justice, Allen Stanford Sentenced to 110 Years in Prison for

In fact, to bring it close to home, the United States Attorney's Office convicted financier Tim Durham and his two associates just this past summer. Mr. Durham, if his appeal is denied, will spend the rest of his life in prison. The Department would also underscore that it has sued or settled claims with banks relating to actions taken during the mortgage crisis to the tune of more than $2 billion, including settlements from Deutsche Bank, CitiMortgage, and Flagstar.[23]

But for our purposes here today, I think it is less helpful to focus on who has been prosecuted. Rather I presume much of our conversation will focus on who has not been prosecuted. And this is foreshadowed by the August 2008 additions to the USAM. The calling card of the post-crisis criminal enforcement action is not the indictment so much as it is twin alternatives—non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).

Let me conclude by providing a general overview for those in our audience who may not be familiar with those new tools. Deferred and non-prosecution agreements are contracts between the government and a company accused of wrongdoing where, in return for not being prosecuted or for having charges deferred for a period of time, the corporation agrees to undertake specific actions. These terms usually require the payment of a fine, continued cooperation with any investigation or trial, and often require the creation of new and improved internal corporate policies. Much like any contract, the rules are simple: meet the conditions and the charges are dropped or never filed to begin with. If the corporation drops the ball, in the alternative, then the federal government drags the company into court. It has been these agreements that have dominated criminal law enforcement and its response by the Department of Justice in the aftermath of the financial crisis. In the past four years, the Department of Justice has entered into more than 250 of these agreements, extracting more than $32 billion in fines, penalties, forfeitures, and other settlements. The SEC has recently followed suit in embracing this new tool as the preferred method of enforcement.

I would like to add as a final observation that is critical to appreciate how significant the usage of non-prosecution agreements and deferred prosecution agreements have been to corporate criminal law. Until roughly twenty years ago, these tools simply did not exist for federal prosecutors. When confronted with any kind of criminal corporate wrongdoing there was a stark choice—indictment or declination. So many prosecutors walked away. Far too often, prosecutors decided to decline and allowed the corporations to walk away. The reasons are numerous. You are all probably familiar with the many reasons offered and why I believe that these non-prosecution agreements and deferred prosecution agreements have obtained such interest. It is that they provide more tools for the prosecutor to use to hold corporate wrongdoers to some level of accountability.

Orchestrating $7 Billion Investment Fraud Scheme (Jun. 14, 2012), http://www.justice.gov/opa/pr/2012/June/12-crm-756.html, *archived at* http://perma.cc/3WQC-FHTW.

23. Press Release, U.S. Dep't of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-ag-1439.html, *archived at* http://perma.cc/9QA6-FKT5.

Just to give you a feel for how rare these agreements previously were, there were only 18 DPAs prior to 2007. Since then, there have been more than 150 signed agreements. Some people applaud this move; they see it as a natural next step in the evolution of corporate law. Others argue very vigorously that it represents a cop-out; a refusal to fully hold accountable those institutions most responsible for the conditions that led to the financial collapse.

So this is where we find ourselves today: in a period of uncertainty as to what the role of criminal prosecution is and what that role should be. The stakes are high, and, as Attorney General Eric Holder can attest, the emotions in this debate are high as well. But I welcome the discussion.