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Written Testimony of

Rick Claypool
Research Director, Office of the President at Public Citizen

before the

U.S. Senate Committee on the Judiciary

on

“Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals”

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Introduction

Chair Durbin, Ranking Member Graham, members of the committee. Thank you for the opportunity to offer testimony on U.S. Department of Justice enforcement against corporate crime. I am a research director in the office of the president for Public Citizen, a national non-profit organization with more than 500,000 members and supporters. For more than 50 years, we have advocated for the public interest with considerable success through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues, including strengthening enforcement against corporations engaging criminal misconduct.

Corporate crime is rampant – and our systems for deterring corporate crime and holding corporate criminals are failing to protect the public. A Harvard Business School analysis recently concluded that major firms are engaging in criminal misconduct at least twice a week.¹ The annual cost of corporate and white-collar crime to Americans is estimated at between \$300 and \$800 billion a year, while low-level street crime costs about \$16 billion.² The massive scale on which major corporations operate means their misconduct can cause harm on a massive scale.

It would be a mistake, however, to reduce corporate crime to its financial effects, significant as they may be. Corporate crime is often violent crime. The infants who were poisoned and families whose lives were upended by formula shortages caused by Abbott Laboratories' allegedly unsanitary facilities – which as of 2023 were under federal criminal investigation³ – were no less victims of violence than an individual attacked on the street. The victims of air and water pollution from the disastrous Norfolk Southern train derailment in East Palestine, Ohio⁴ – which received a criminal referral to Pennsylvania authorities – are no less deserving of accountability for the transportation company's recklessness than are victims of individual recklessness. The same is true of the 346 lives lost to Boeing's 737 Max crashes and the hundreds of thousands of lives lost to Purdue Pharma and its peers' pushing prescription opioids.⁵

The unfathomable cost of corporate misconduct means a strong and effective federal enforcement system is required to deter, discipline, and hold accountable lawbreaking corporations. But instead of prosecuting corporate offenders to the fullest extent of the law, our federal law enforcers in the U.S. Department of Justice (DOJ) all-too-often bend over backwards to protect corporate criminals from the full legal consequences of their crimes. A significant symptom of the current approach's failure is its lenient approach even to corporate recidivists.

¹ Russell Mokhiber, "Study Finds Major Corporations Engage in Wrongdoing Twice A Week," Corporate Crime Reporter (Sept. 8, 2021), <https://www.corporatecrimereporter.com/news/200/study-finds-major-corporations-engage-in-wrongdoing-twice-a-week/>

² Robin Kaiser-Schatzlein, "How White-Collar Criminals Get Away With It," The New Republic (Sept. 15, 2020), <https://newrepublic.com/article/159361/white-collar-criminals-get-away>

³ Liz Essley Whyte, "Abbott Under Federal Criminal Investigation Over Baby Formula," The Wall Street Journal (Jan. 20, 2023), <https://www.wsj.com/articles/abbott-under-criminal-investigation-over-baby-formula-11674255871>

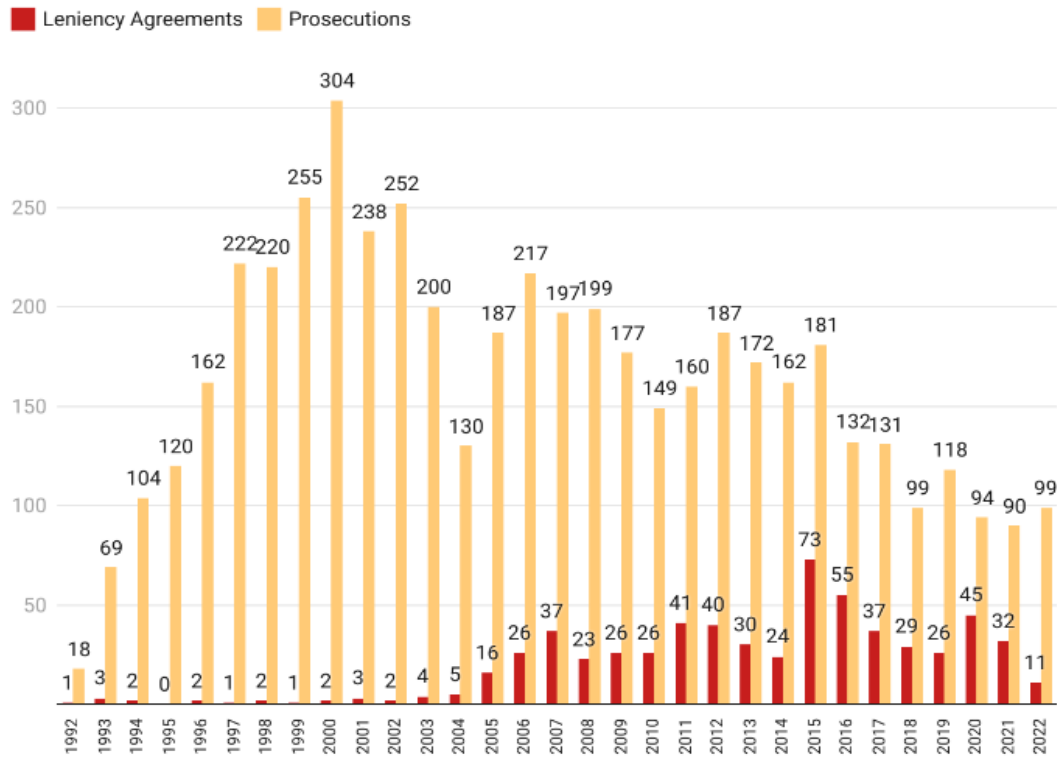
⁴ Rebecca Shabad, "Pennsylvania Gov. Josh Shapiro says his office made a criminal referral in Ohio train derailment," NBC News (Feb. 21, 2023), <https://www.nbcnews.com/politics/politics-news/pennsylvania-gov-josh-shapiro-says-office-made-criminal-referral-east-rcna71669>

⁵ Katie Benner, "Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal With Justice Dept.," The New York Times (July 20, 2021), <https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html>

The Decline of Prosecutions for Corporate Crime

Despite promises to ramp up enforcement, the DOJ prosecuted only 99 corporate offenders in 2022. As a result of this small uptick from the previous year's 90 prosecutions – a quarter-century low – the Biden administration's DOJ's second year is tied with the Trump administration DOJ's second year for having the fifth-lowest number of corporate prosecutions on record. The number of federal corporate prosecutions has been declining since 2000, when the DOJ prosecuted triple the number of corporations that it does today (304).⁶

Corporate prosecutions and leniency agreements, fiscal years 1992-2022



Source: Source: Public Citizen analysis of US Sentencing Commission and Corporate Prosecution Registry data • Created with Datawrapper

The DOJ has in recent years increasingly gone out of its way to avoid criminally charging large corporations. Prosecutors use leniency agreements – which the DOJ refers to as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) – to resolve criminal cases in a way that avoids filing charges against defendants. The agreements are supposed to deter corporations from committing subsequent crimes, but Public Citizen research shows that,

⁶ Rick Claypool, "Corporate Prosecution Doldrums: Corporate Crime Prosecutions Remain Near Record Low in 2022," Public Citizen report (Oct. 30, 2023), <https://www.citizen.org/article/corporate-crime-prosecution-doldrums-low-2022/>

historically, 15% of the agreements between the DOJ and large corporations involve repeat offenders.⁷

In 2022, the number of corporate leniency agreements fell to 11 – the lowest number since 2004, when there were just five. The agreements made up 10% of the total number of criminal enforcement actions against corporations – lower than the total has been since 2005, when there were 7%.

This decline in leniency agreements is notable. In 2021, one in four federal corporate cases (26%) were resolved using corporate leniency agreements; in 2020, it was one in three (32%).

If the DOJ's interest in prosecuting corporate crime was truly waxing, as Attorney General Merrick Garland has stated,⁸ one would expect to see increasing prosecutions accompany the decreasing leniency agreements. Instead, the near-record low number of corporate prosecutions combined with plunging corporate leniency agreements means the federal government concluded 110 criminal cases against corporations in fiscal year 2022 – fewer than any previous year since 1994, when it concluded 106.

Leniency agreement recipients tend to be bigger corporations. Public Citizen research into corporate recidivism found that the overwhelming majority of corporate repeat offenders that received leniency agreements from the Department of Justice were large multinationals. The inverse is true as well – smaller corporations are likelier to face prosecution. According to the U.S. Sentencing Commission, about 70% of the 4,946 corporations the federal government prosecuted between 1992 and 2021 were small businesses with fewer than 50 employees.⁹ Only about 6% had 1,000 employees or more.

This trend continued in fiscal year 2022. According to the commission's annual report, 81% of the corporations prosecuted had fewer than 50 employees, while 7% had 1,000 or more.¹⁰

Corporate Prosecution Policy

The Biden DOJ pledged to end the era of corporate impunity. In 2021, Deputy Attorney General Lisa Monaco urged prosecutors to “be bold” in holding corporate criminals accountable.¹¹

⁷ Rick Claypool, "Soft on Corporate Crime," Public Citizen report (Sept. 26, 2019),

<https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/>

⁸ "Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime," U.S.

Department of Justice press release (March 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>

⁹ https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf

¹⁰ Kathleen C. Grilli, Kevin T. Maass and Charles S. Ray, "The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence," U.S. Sentencing Commission report (August 2022),

https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY22.pdf

¹¹ "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," U.S. Department of Justice press release (Oct. 28, 2021),

<https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>

But the modest enforcement policies the administration later announced were far from bold.¹² In practice, the policies seem likely to accelerate the crisis of corporate impunity instead of addressing it.

The worst part of the new policy is the Justice Department's renewed and expanded promise to reward corporate criminals that self-report misconduct with declinations.¹³

A declination is a formal guarantee that the government will not bring a criminal case. Often, they include brief descriptions of alleged criminal misconduct. Despite a DOJ web page¹⁴ dedicated to posting declinations, they are not consistently disclosed. Corporate defense attorneys openly state their goal for clients subject to criminal investigations is to win a "non-public declination"¹⁵ – and may list the achievement on profiles they post to promote their services.¹⁶

A DOJ pilot program¹⁷ under President Barack Obama started rewarding corporations that self-report violations of the Foreign Corrupt Practices Act (FCPA) with declinations. The FCPA criminalizes corporations paying bribes to foreign governments, among other acts of illegal corruption. President Trump's DOJ made the pilot program permanent¹⁸ – and occasionally expanded the practice of rewarding self-disclosure with declinations to other offenses. The DOJ under President Biden has now expanded the practice of offering declinations to corporations that self-report,¹⁹ regardless of what criminal violation they are accused.²⁰

The idea is that corporations that come clean upon discovering criminal acts by their employees should not be prosecuted. Critics argue the policy encourages companies to create a culture of lawbreaking, and then "discover" violations if they are about to be caught.

Such leniency should be expected not only to fail to deter corporate crime, but to actually reassure corporations that push the limits of legality that they will not face consequences when their misconduct crosses the line into criminal violations. Depending on how it is implemented, the policy effectively affirms that corporations are above the law.

¹² "Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement," U.S. Department of Justice press release (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>

¹³ 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, U.S. Department of Justice (accessed Dec. 12, 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download>

¹⁴ CEP Declinations, U.S. Department of Justice web site (accessed Dec. 12, 2023), <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>

¹⁵ James M. Koukios et al., "In Revised Corporate Enforcement Policy, DOJ Increases Incentives for Voluntary Self-Disclosure and Cooperation," Morrison Foerster client alert (Jan 18, 2023), <https://www.mofo.com/resources/insights/230118-in-revised-corporate-enforcement-policy>

¹⁶ Jonathan R. Barr profile on Baker Hostetler web site (accessed Dec. 12, 2023), <https://www.bakerlaw.com/professionals/jonathan-r-barr/>

¹⁷ "CRIMINAL DIVISION LAUNCHES NEW FCPA PILOT PROGRAM," U.S. Department of Justice press release (April 5, 2016), <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program>

¹⁸ "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act," U.S. Department of Justice press release (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>

¹⁹ Jody Godoy, "DOJ Expands Leniency Beyond FCPA, Lets Barclays Off," Law 360 (March 1, 2018), <https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off>

²⁰ 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, U.S. Department of Justice web site (accessed Dec. 12, 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download>

Then-Assistant Attorney General for DOJ's Criminal Division, Kenneth A. Polite, Jr., described the policy during a speech in January, declaring, "if a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, *there is a presumption that we will decline to prosecute* absent certain aggravating circumstances involving the seriousness of the offense or the nature of the offender" (emphasis added).²¹ Polite then went on to announce an expansion of the policy:

"Namely, even if aggravating circumstances are present, although a company will not qualify for a presumption of a declination, under the revised [Corporate Enforcement Policy] I am announcing today, prosecutors may nonetheless determine that a declination is the appropriate outcome."

AAG Polite goes on to say that corporate penalties will be slashed by as much as 75% from the low end of the sentencing range and then affirms "we will generally not require a corporate guilty plea — including for criminal recidivists." He concludes the speech with the claim, "We need corporations to be our allies in the fight against crime."

Among the aggravating circumstances Polite lists as not disqualifying an accused corporation from receiving a declination: a history of "criminal recidivism."

Seven months later, Polite left the DOJ for private corporate defense practice at Sidley Austin.²²

Using "carrots" such as declinations to incentivize offending corporations to self-report is not the only way to achieve disclosure. Another approach – which has achieved significant successes as implemented by the Securities and Exchange Commission²³ – is to pay bounties to whistleblowers. But the Justice Department's main whistleblower enforcement program, its False Claims Act case load, appears to be on the decline. The DOJ filed fewer of these cases in 2022 than in any year since 2004.²⁴

Looking to the 2023 fiscal year, which concluded at the end of September, and farther into the future, the signs for how the DOJ will proceed are mixed. Deputy Attorney General Monaco announced in October²⁵ that structural remedies – including requiring corporations to divest lines of business – are on the table for corporate resolutions. The DOJ's fresh willingness to impose this

²¹ "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy," U.S. Department of Justice press release (Jan. 17, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>

²² "Kenneth A. Polite Jr., Former DOJ Criminal Division Assistant Attorney General, Will Join Sidley As Co-Leader of its White Collar Defense and Investigations Practice," Sidley Austin press release (Aug. 7, 2023), <https://www.sidley.com/en/newslanding/newpressreleases/2023/08/kenneth-a-polite-jr-will-join-sidley-as-co-leader-of-white-collar-practice>

²³ "THE SEC WHISTLEBLOWER PROGRAM IS A RESOUNDING \$5 BILLION SUCCESS STORY WITH A BRIGHT FUTURE," Better Markets press release (Jan. 20, 2022), <https://bettermarkets.org/newsroom/the-sec-whistleblower-program-is-a-resounding-5-billion-success-story-with-a-bright-future/>

²⁴ Geoff Schweller, "DOJ Drops Ball on Fraud Cases: 2022 FCA Stats a 'Disgrace'," Kohn, Kohn & Colapinto LLP (Feb. 8, 2023), <https://kkc.com/blog/doj-drops-ball-on-fraud-cases-2022-fca-stats-a-disgrace/>

²⁵ "Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions," U.S. Department of Justice press release (Oct. 4, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>

kind of structural reform as a consequence for corporate crime is a positive development for strengthened deterrence. However, another policy Monaco announced in the same speech may do more harm than good: a department-wide “Safe Harbor Policy” for criminal misconduct that is uncovered and disclosed when one corporation merges with or is acquired by another. This is another manifestation of the DOJ policy of overemphasizing rewarding voluntary self-disclosure. Depending how it is implemented, the policy can effectively reassure corporations that engage in criminal misconduct that they can avoid accountability if they are subsequently acquired by another corporation.

Conclusion

The corporate enforcement policies the DOJ has adopted mean the corporate prosecution are likely to remain low – and that corporate lawbreakers will remain undeterred. As a state of affairs, it is both unsafe and unjust. The light-touch approach to enforcement creates opportunities for corporate scofflaws to push the limits of what is legally allowed – risking our health and safety, our environment, our finances, and our communities – in their efforts to maximize profits.

The DOJ’s practice of bending over backwards to protect corporate offenders from the consequences of their own misconduct creates the ideal criminogenic conditions for the next corporate catastrophe. The stories of two of the worst corporate-caused crises of the 21st Century – the pharmaceutical industry-driven opioid epidemic and the 2008 financial crisis – are partly stories about enforcement agencies failing to fight systemically criminal misconduct before it was too late. This foreseeable failure can be prevented, but only if the top U.S. prosecutors prioritize protecting the public over protecting corporate criminals.

A society that punishes the crimes of the poor while permitting the crimes of the powerful is not a just society. The principle that no one should be above the law must include lawbreaking corporations.