

TESTIMONY OF

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BEFORE THE

**UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL,
AND ANTITRUST LAW**

**THE ESSENTIAL ROLE OF COMMUNITY SERVICE IN ADDRESSING THE HARM
CAUSED BY ENVIRONMENTAL CRIMES AND OTHER REGULATORY OFFENSES**

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Thank you Chairman Marino, Congressman Johnson, and Members of the Subcommittee for holding today's hearing and for inviting me to testify.

My name is David Uhlmann. I am the Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. My research, scholarship, and advocacy focuses on corporate misconduct and criminal and civil enforcement under the environmental laws, including cases ranging from the Gulf oil spill and the Upper Big Branch mine disaster to the Volkswagen debacle and the Flint drinking water crisis. I lead the Environmental Crimes Project at Michigan, which is an ongoing empirical study involving nearly 200 law students that collects data on all matters investigated by the Environmental Protection Agency that have resulted in criminal charges for pollution violations between 2005 and 2014. We will update the database next year to include 2015-16.

Prior to joining the Michigan faculty in July 2007, I served for 17 years in the United States Department of Justice, the last seven as Chief of the Environmental Crimes Section (ECS). As ECS Chief from 2000 to 2007, I was responsible for approving all indictments and plea agreements in matters prosecuted by the 40 attorneys assigned to our office, who handled cases jointly with Assistant United States Attorneys throughout the country. Before becoming the ECS Chief in June 2000, I served as an Assistant Section Chief, a Senior Trial Attorney, and a Trial Attorney. A copy of my *curriculum vitae* is attached as Exhibit A to this testimony.

As ECS Chief, I chaired the Justice Department's Environmental Crimes Policy Committee, which set national policies for the prosecution of environmental crime, and I served on the Environmental Issues Subcommittee of the Attorney General's Advisory Committee, which set priorities for the prosecution of environmental crimes as well as civil enforcement under the environmental laws. In addition, I was responsible for coordinating parallel

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proceedings (contemporaneous criminal and civil cases based on the same violations) with the Chief of the Environmental Enforcement Section at the Justice Department.

During my tenure at the Justice Department, ECS prosecuted hundreds of criminal cases involving misconduct by corporations that ranged in size from large Fortune 500 companies and mid-size companies to smaller companies and sole proprietorships. In some of those cases there were identifiable victims that qualified for restitution under federal law. In the overwhelming majority of cases, however, the harm from the misconduct was more generalized, which led United States Attorneys in both Republican and Democratic administrations to seek funding for third-party programs that would help address the significant harm caused by the offenses.

I understand that the focus of today's hearing is on civil cases and the question of whether third-party payments other than restitution are appropriate as part of civil settlements. I believe that my experiences with similar issues in criminal cases may inform your approach to civil settlements. In both criminal and civil cases, harm to our communities often occurs that cannot be addressed by restitution. In such cases, third-party payments may be appropriate, as long as government attorneys ensure that such payments are made in accordance with the governing law.

My view is that clear rules are helpful regarding the circumstances where third-party payments are authorized in both criminal and civil settlements, much like those the Justice Department developed for environmental crimes when I was ECS Chief in December 2000 (which were updated in January 2009), as well as those that EPA developed for Supplemental Environmental Projects (SEPs) in 1998 (which were updated in March 2015). I would respectfully suggest, however, that the "Stop Settlements Slush Fund Act of 2016" proposal would not provide greater clarity and instead goes too far. The proposed legislation could preclude third-party payments even in cases when there is a nexus to the underlying violation and third-party payments are the best way for defendants to redress the harm caused by their conduct.

In my testimony this morning, I will briefly describe my experience with third-party community service payments and the circumstances where they are appropriate in both criminal and civil cases. I then will address efforts that began during my tenure at the Justice Department to establish policy guidelines for third-party payments to ensure that they met legal requirements, advanced the purposes of criminal sentencing, and avoided any potential conflicts of interest. I will conclude by explaining why a sweeping prohibition of third-party payments in civil settlements is undesirable and why it would be more appropriate for Congress to focus instead on providing clear guidance about when third party payments are authorized.

1. Community Service Payments in Environmental Crimes Address Generalized Harm Caused by Violations and Help Communities Recover from Corporate Misconduct

In 1996, I was one of the lead prosecutors in *United States v. John Morrell and Company et al.* in the District of South Dakota. Morrell, which was one of the largest employers in the State of South Dakota, operated a slaughterhouse in Sioux Falls that discharged its waste into the Big Sioux River. Under the terms of its Clean Water Act permit, Morrell was required to treat its waste to limit the concentration of ammonia nitrogen as well as other chemicals that could harm aquatic life in the river. The permit also required Morrell to test its waste at least three times each week to ensure that the facility was complying with its permit discharge limits.

Instead, over a period of several years, Morrell officials engaged in a conspiracy to violate the Clean Water Act, discharging ammonia at levels nearly 40 times more than allowed under the company's permit. Morrell concealed those violations from EPA and the State of South Dakota, first by selective sampling (taking more than three samples each week and reporting only the best results), then by what employees called the "flow game" (holding back waste on days that they sampled), and eventually by falsifying their monthly discharge monitoring reports (literally moving the decimal point to report one tenth or one hundredth of actual discharge amounts). The illegal scheme was well-known within the company; the senior vice president in charge of the Sioux Falls facility asked "who's going to jail this month" when he signed the monthly reports.

The Justice Department prosecuted Morrell and four senior officials within the company for conspiracy to violate the Clean Water Act, monitoring violations, discharge violations, and falsifications of reports to EPA and the State of South Dakota. In February 1996, Morrell agreed to plead guilty. In our discussions about a plea agreement, the United States Attorney wanted to include terms that would require Morrell to address the environmental harm caused by its misconduct, even though it was not possible for EPA or the State of South Dakota to monetize the ecological harm to the Big Sioux River. For its part, Morrell was anxious to make amends to the community by providing funding that would support pollution reduction in the Big Sioux River and promote its future use for fishing and recreational activities.

With the approval of the federal district court, the Morrell plea agreement created the Big Sioux River Environmental Trust Fund to support cleanup efforts on the river and restore recreational opportunities for communities harmed by the company's misconduct. Morrell paid a \$2 million criminal fine and \$1 million in restitution and community service to the trust fund. Later, when all four Morrell officials were convicted, the court ordered each of the individual defendants to pay restitution and community service to the trust fund as part of their sentences. The defendants also were sentenced to jail time, community confinement, probation, and fines.

In the years that followed, the Justice Department followed the approach of the Morrell cases whenever there was indeterminate harm to the environment or public health, to ensure that criminal defendants remedied the harm caused by their conduct. In a number of asbestos cases, where construction workers, homeless people, and undocumented immigrants were exposed to deadly carcinogens, defendants were required as part of their sentences to provide funding for long-term health care monitoring, which was necessary because the harmful effects of asbestos take 20-30 years to become apparent. The health care monitoring funds established by these cases were operated by third-party community-based organizations where the crimes occurred.

In a number of vessel pollution cases, where unlawful pollution occurred on the high seas with aggregate discharges of oil every year that exceeded the amount spilled by the Exxon Valdez, the Justice Department required corporate defendants to pay community service to Congressionally-chartered foundations, such as the National Fish and Wildlife Foundation. The purpose of these community service payments was to address the harm caused by the vessel pollution, under the authority provided by United States Sentencing Guidelines § 8B1.3.

Perhaps the most significant environmental case involving community service payments to third parties was the 2012 prosecution of BP for its role in the Gulf oil spill. BP agreed to pay \$4 billion to resolve the criminal charges against the company—by far the largest sum ever imposed for environmental crime. That sum included \$1.256 billion in criminal fines, \$2.394 billion to the National Fish and Wildlife Foundation for projects to address the catastrophic harm to the Gulf of Mexico ecosystem that occurred because of BP's misconduct, and \$350 million to the National Academy of Sciences to help prevent similar spills in the future.

While I share the concern expressed by some members of the Subcommittee that criminal fines typically should be larger than third-party community service payments, the Gulf oil spill was a unique environmental catastrophe. I support the Justice Department's efforts to ensure that the criminal sanctions imposed against BP would help address the catastrophic harm BP caused. In my view, the size of the Gulf oil spill community service payments do not set a precedent for future cases, which will be governed by relevant Justice Department policies that I describe next.

2. Justice Department Policies That Limit Third-Party Community Service Payments

During the late 1990s, as terms of community service became more widely sought by environmental prosecutors, the Justice Department decided that it should develop policies to ensure that any third-party payments met the requirements of federal law, advanced the purposes of criminal sentencing law, and did not create conflicts of interests. In consultation with the

Office of Legal Counsel at the Justice Department, ECS developed extensive policies regarding the appropriate use of what was then termed “supplemental sentencing” in environmental cases. I approved the policy in December 2000 and distributed it to all 93 United States Attorney’s Offices. A copy of the December 2000 policy is attached as Exhibit B to my testimony.

Under the December 2000 policy, criminal fines must be paid to the Crime Victims Fund, as required by federal law, and cannot be diverted to community service payments. That term is essential so that any community service payments comply with the Miscellaneous Receipts Act. In addition, the policy requires a nexus between the violation and the community service:

There must be a clear nexus between the supplemental sentence and the criminal violation to help ensure that any harm or threatened harm to victims or the environment is addressed. In considering the harm caused by the offense and the remedy proposed by the supplemental sentence, both a geographical and an environmental medium nexus should be considered.

Exhibit B at A-4. The policy also stipulated that federal agencies could not be involved in the administration of third-party funds in order to comply with the Anti-Deficiency Act.

During my tenure as ECS Chief, I approved scores of plea agreements that included community service terms, because that was the best way to ensure that the generalized harm that often occurs in environmental crimes was addressed by the defendant. In each of those cases, ECS prosecutors ensured that (1) no funds were diverted from the Crime Victims Fund; (2) there was a strong nexus between the criminal conduct and the community service; and (3) any third-party payments were not administered by any federal government agencies.

With experience over time, two additional terms emerged for community service payments, at least in cases handled by ECS that required my approval. First, we concluded that in most cases ECS should limit community service to 25 percent of the total value of the settlement and never should exceed 33 percent of the total value of the settlement. We reached this conclusion because criminal penalties should be the largest component of any criminal settlement, to emphasize the criminal nature of the misconduct and ensure appropriate punishment. We did so after several United States Attorneys entered plea agreements where community service payments equaled or exceeded fine payments, which might be inconsistent with the goals of federal criminal sentencing as set forth by United States Code Section 3553.

Second, we concluded that in most cases community service payments should be made to one of the Congressionally-chartered foundations that were authorized by Congress to receive

such payments. We reached this conclusion after a number of United States Attorneys included community service payments to public interest groups or other charities in their communities. While we had no reason to question the bona fides of those organizations, we were concerned about the potential appearance of a conflict of interest or favoritism toward non-profit groups.

Both of these additional requirements were included in an updated version of the ECS guidance document, which was issued in January 2009 by the Assistant Attorney General for the Environment and Natural Resources Division and is attached as Exhibit C to my testimony. The January 2009 policy stresses the need to negotiate criminal fines and community service payments separately, so that there is no diversion of money from the Crime Victims Fund, which would be a violation of the Miscellaneous Receipts Act. The January 2009 policy carries forward the emphasis on the need for a clear nexus between the environmental violation and the proposed community service payment. The January 2009 policy also formalizes the 25 percent limit on community service payments, except in extraordinary circumstances.

It merits emphasis that current Justice Department policy largely limits the use of third-party community service payments to environmental crimes, unless otherwise authorized by statute. The relevant provisions of the United States Attorney's Manual (USAM) states:

Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.

USAM § 9-16.325. That section of the USAM contains a cross-reference to other portions of the USAM that authorize community service in environmental cases and reference the 2009 policy:

Environmental crimes often can result in widespread degradation of the environment and threaten the health and safety of entire communities. In such circumstances, community service may be used in conjunction with traditional criminal sentencing options, provided that the community service comports with applicable law and furthers the purposes of sentencing set forth in 18 U.S.C. § 3553.

USAM § 5.11-115(B). I would suggest that the 2000 and 2009 ECS policy statements and the USAM provisions I have cited above provide guidance for how the Subcommittee might approach third-party community service payments more generally, with the caveat that I do not

think environmental crimes are the only criminal violations that can create the kind of widespread harm that would warrant corporate community service. Similar harms could occur in criminal cases brought under consumer protection laws and in fraud cases—and generalized harm also occurs often in civil cases brought under the environmental laws and other statutes.

3. The Proposed Legislation Sweeps Too Far and Would Compound the Harm Suffered in Communities Where Regulatory Violations Have Occurred

I have reviewed the proposed “Stop Settlement Slush Funds Act of 2016” and would respectfully submit that it is far too sweeping and would compound the harm already suffered by communities where regulatory violations have occurred by making it more difficult for the Justice Department and regulatory agencies to ensure that generalized harm is addressed.

While the proposed legislation does not apply to criminal cases, it fails to adequately address the fact that generalized harm arises in civil cases under the environmental laws, just as it does in criminal cases under the environmental laws. Indeed, generalized harm also occurs in civil cases brought under consumer protection, antitrust, civil rights, and civil fraud laws. In my view, the Justice Department and regulatory agencies must remain able to address the problem of generalized harm in civil cases, just as they are authorized to do for environmental crimes.

There is no principled reason why companies should be required to address generalized harm in criminal cases but not required to address generalized harm if the government declines criminal prosecution in favor of civil enforcement. If regulatory violations result in harm to the environment and our communities, the government should have the ability to require defendants to address that harm, regardless of whether the government elects criminal or civil enforcement. To proceed differently would risk unintended over-criminalization of regulatory violations.

The proposed legislation, as currently drafted, could be construed to preclude all third-party payments in settlement agreements, other than restitution to identifiable victims. If that unfortunate result occurred, it would curtail EPA’s highly successful SEPs program, which addresses the generalized harm caused by civil violations of the environmental laws. Like the Justice Department policies on community service, EPA has established SEP policies that include nexus requirements, impose limits on the organizations that can receive payments, and contain rules regarding offsets to comply with the Miscellaneous Receipts Act. Pursuant to these policies, SEPs have been widely used to restore damaged ecosystems, replaced destroyed marshlands, and support community health organizations. These valuable settlement terms should not be undermined by Congress. EPA’s 2015 SEP policy is attached as Exhibit D.

Because the proposed legislation contains no definition of “donation,” courts interpreting the legislation could conclude that it precludes third-party payments as part of civil settlement agreements, other than restitution, even in cases of generalized harm to the environment or consumers. The proposed legislation contains an exclusion for payments that “provide restitution for or otherwise remedy the actual harm (including to the environment) directly and proximately caused by the alleged conduct of the party, that is the basis for the settlement agreement.” The ambiguous wording of this exclusion, however, could lead courts to conclude that restitution or remediation is only allowed in cases involving identifiable victims. In this way too, the proposed legislation could hamper the government’s ability to address generalized harm.

To protect the government’s ability to address generalized harm in settlement agreements, the proposed legislation would need to include a definition of what donations would be covered, as well as language that makes clear that actual harm includes generalized harm. In addition, the legislation would need to make clear that it does not impose limitations on long-standing programs that address generalized harm, like EPA’s highly-effective SEP program. Even with these changes, however, the proposed legislation would be inferior to Congressional action that makes clear when third-party payments can occur in civil settlements. It is far preferable to make clear what is allowed by Congress than to impose limits that make legal authorities unclear.

I would recommend that any Congressional action focus on codifying the positive features of existing Justice Department and EPA policies. It would be reasonable to require a nexus between any third party payments and the violations that are addressed by settlement agreements. It also would be reasonable to insist that third party payments are negotiated separately from criminal fines or civil penalties and do not create conflicts of interest. And it might be reasonable to impose caps on third-party payments and to make clear that third-party payments cannot be used to fund programs that Congress has determined should be de-funded. Unfortunately, the proposed legislation includes none of these salutary terms.

Conclusion

I understand the Subcommittee’s concern that third-party payments as part of settlement agreements could be made in ways that creates the appearance of conflicts of interest, as well as the view of at least some members of the Subcommittee that the Justice Department and regulatory agencies are encroaching on legislative authority. In my view, those concerns should be addressed, if at all, by legislation that makes clear when third-party payments are allowed, not by a law that could preclude third-party payments even when they serve essential functions.

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It is not possible for Congress to legislate every time a regulatory violation occurs that causes generalized harm to the environment or an American community. Congress can and should rely on the Justice Department and regulatory agencies to ensure that companies who commit regulatory violations make appropriate payments to remedy the harm they have caused. We should not limit the discretion of the Executive Branch to ensure the faithful administration of the law and to provide necessary relief to communities where corporate wrongdoing occurs.

Thank you again for the opportunity to testify before you today.