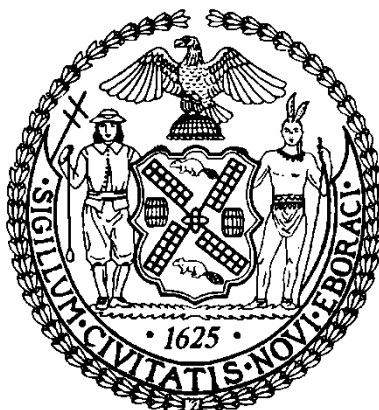


**CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER**

**John C. Liu  
COMPTROLLER**

**BUREAU OF FINANCIAL AUDIT**

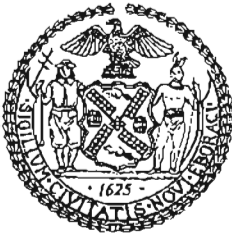
**H. Tina Kim  
Deputy Comptroller for Audit**



**Audit Report on the New York County District  
Attorney's Administration of Deferred  
Prosecution and Non-Prosecution Agreements**

*FM10-111A*

**March 24, 2010**



THE CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
1 CENTRE STREET  
NEW YORK, N.Y. 10007-2341

John C. Liu  
COMPTROLLER

**To the Residents of the City of New York:**

My office has audited the New York County District Attorney's (DANY) administration of deferred prosecution and non-prosecution agreements to determine whether DANY properly administers the receipt, safeguarding, and distribution of proceeds received through these agreements. We audit entities such as DANY as a means of ensuring that they comply with established policies and procedures.

DANY's Fiscal Department is responsible for monitoring office finances, including the collection and distribution to the State and City of funds received through deferred prosecution and non-prosecution agreements. From January 1, 2007, to December 31, 2009, DANY received and properly accounted for \$448 million in such funds, but the lack of a formal distribution policy results in a corresponding lack of transparency for the process. Disbursements of \$815,324 out of \$2,574,353 (31.6 percent), were made from one of DANY's escrow accounts that were supported only by e-mail correspondence from DANY's staff, not by court decree. DANY does not adequately segregate duties that mutually pose risk of error within the Fiscal Department; and as of October 31, 2009, DANY held approximately \$86 million in 58 private bank accounts that were not registered with the Comptroller's Office and that were outside the City's fiscal controls.

The audit recommends that DANY should establish a formal policy for the distribution of settlement payments derived from deferred prosecution and non-prosecution agreements; separate duties among Fiscal Department personnel to ensure that no one person can both perpetrate and conceal errors or fraud; ensure that proper documentation is submitted and reviewed by the Fiscal Department prior to the distribution of funds; coordinate with Department of Finance and the Comptroller's Bureau of Accountancy to transfer the funds currently held in private accounts to the City's custody; establish Fiduciary Accounts where appropriate; and register any remaining accounts deemed confidential with the Comptroller's Office.

The results of the audit have been discussed with DANY officials, and their comments have been considered in preparing this report. Their complete written responses are attached to this report.

If you have any questions concerning this report, please e-mail my audit bureau at [audit@Comptroller.nyc.gov](mailto:audit@Comptroller.nyc.gov) or call my office at 212-669-3747.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Liu".

John C. Liu

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*The City of New York  
Office of the Comptroller  
Bureau of Financial Audit*

**Audit Report on the  
New York County District Attorney's  
Administration of Deferred Prosecution and  
Non-Prosecution Agreements**

**FM10-111A**

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**AUDIT REPORT IN BRIEF**

In November 2009, the Mayor and the District Attorney of New York (DANY) publicly discussed the issue of the distribution of funds received from deferred prosecution and non-prosecution agreements and DANY's maintenance of private (non-City) bank accounts outside the City's fiscal control. On December 9, 2009, the Comptroller's Office initiated an audit of DANY focusing on DANY's administration of the receipt and distribution of funds received through the aforementioned agreements.

From January 1, 2007, to December 31, 2009, DANY received \$448 million in settlement payments through three of these agreements. These funds were received, held, and transferred, from DANY's private bank accounts.

According to DANY, as of October 31, 2009, more than \$86 million in ancillary funds was held in 58 different accounts—33 checking accounts, 11 money market accounts, and 14 certificates of deposit. The City treasury funds DANY, and ancillary funds supplement operations. Generally, ancillary funds comprise money received through State and federal asset forfeiture, proceeds from deferred prosecution and non-prosecution agreements, and other large cases. Also included among the ancillary funds is more than \$30 million in funds that are held in escrow for use by other parties for such purposes as victim restitution or distribution to other government agencies.

The objective of this audit was to determine whether DANY properly administers the receipt and distribution of proceeds received through deferred prosecution and non-prosecution agreements.

**Audit Findings and Conclusions**

DANY received and properly accounted for all of the \$448 million in payments derived from deferred prosecution and non-prosecution agreements since 2007. However, there is lack of transparency in the distribution of these funds between the City and the State because DANY has

no formal distribution policy. Unless DANY formalizes a policy, the distribution of these funds will continue to be questioned and scrutinized.

Also, DANY does not adequately segregate duties that mutually pose a potential risk of error within the Fiscal Department, a situation further exacerbated by the use of off-the-shelf personal financial management software (Quicken) to track ancillary funds. Furthermore, disbursements totaling \$815,324 out of \$2,574,353 (31.6 percent) were made from one of DANY's escrow accounts that were supported only by e-mail correspondence from DANY's staff, not by court decree. Although proper documentation was later provided, the lack of support at the time of processing constitutes a control weakness that can result in errors. These control risks could have been mitigated had DANY placed these funds with the City's Department of Finance (DOF).

In addition, as of October 31, 2009, DANY held approximately \$86 million in 58 private bank accounts that were not registered with the Comptroller's Office and that were outside the City's fiscal controls. The use of private bank accounts is contrary to the County and the Civil Practice Laws and Rules of New York State. Cash held in private accounts is inherently at greater risk and subject to less oversight than that held in the City's general fund. Finally, DANY may have improperly transferred approximately \$47,200 from one of the escrow accounts to a less restrictive account. Funds that cannot be returned to the appropriate parties should not be retained by DANY but rather transferred to the New York State Comptroller as unclaimed funds.

### **Audit Recommendations**

The audit recommended that DANY should:

- Upon the expiration of existing legislation, establish a formal policy for the distribution of settlement payments derived from deferred prosecution and non-prosecution agreements;
- Coordinate with DOF and the Comptroller's Bureau of Accountancy to transfer the funds currently held in private accounts to the City's custody, establish Fiduciary Accounts (Trust and Agency) where appropriate, and register any remaining accounts deemed confidential with the Comptroller's Office;
- Separate duties among personnel of the Fiscal Department to ensure no one person can both perpetrate and conceal errors or fraud;
- Ensure that proper documentation is submitted and reviewed by the Fiscal Department prior to the distribution of funds.

## INTRODUCTION

### **Background**

The New York County District Attorney is the elected district attorney for Manhattan. DANY is responsible for the investigation and prosecution of a wide variety of crimes, from subway fare-beating to murder and complex white collar cases. DANY's principal activities include screening new cases, preparing information and gathering resources for court hearings, and presenting trial and appeal cases in court. DANY's Fiscal Department is responsible for preparing and monitoring the office's budget, purchasing expenditures, and authorizing and preparing disbursements for requested services, equipment, and materials.

In November 2009, the Mayor and the DANY publicly discussed the distribution of funds received from deferred prosecution and non-prosecution agreement settlements and DANY's maintenance of private (non-City) bank accounts outside the City's fiscal control. On December 9, 2009, the Comptroller's Office initiated an audit of DANY focusing on DANY's administration of the receipt and distribution of funds received through the aforementioned agreements.

Generally, deferred prosecution and non-prosecution agreements are voluntary alternatives to indictment and adjudication in which a prosecutor agrees to grant amnesty in exchange for corporations agreeing to fulfill certain requirements, which usually include payments in lieu of fines and forfeiture. These agreements attempt to avoid the harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. Since January 1, 2007, to December 31, 2009, DANY received \$448 million in settlement payments through three of these agreements. These funds were received, held, and transferred from DANY's private bank accounts.

According to DANY, as of October 31, 2009, more than \$86 million in ancillary funds was held in 58 different accounts—33 checking accounts, 11 money market accounts, and 14 certificate of deposits. The City treasury funds DANY, and ancillary funds supplement operations. Generally, ancillary funds comprise money received through State and federal asset forfeiture, proceeds from deferred prosecution and non-prosecution agreements, and other large cases. Also included among the ancillary funds are monies held in escrow. According to DANY, ancillary funds include more than \$30 million in funds on deposit that are held in escrow for use by other parties for such purposes as victim restitution or distribution to other government agencies.

### **Objective**

The objective of this audit was to determine whether DANY properly administers the receipt, safeguarding, and distribution of proceeds received through deferred and non-prosecution agreements.

## **Scope and Methodology**

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope period of this audit was January 1, 2007, to December 31, 2009. To gain an understanding of DANY's general procedures and controls over cash, we conducted a walkthrough and interviews with DANY Fiscal Department officials, including administrative staff. In addition, we reviewed Comptroller's Directive #11, "Cash Accountability and Controls," and DANY's policies and procedures for administering bank accounts, expenditures, and reimbursements. We also evaluated the suitability of the off-the-shelf accounting software package (Quicken Premier 2006) that DANY uses to manage the ancillary funds. Finally, we documented our understanding through written narrative.

To achieve our objectives, we obtained a list from DANY of all deferred and non-prosecution agreements since 2007 that resulted in payments to the office. To determine the completeness of our population, we reviewed all press releases on DANY's Web site and conducted other research via Lexis Nexis and the Internet. Subsequently, we discovered United States Government Accountability Office (GAO) testimony before Congress regarding the Department of Justice's use and oversight of deferred prosecution and non-prosecution agreements. Using that testimony, we identified and contacted a University of Virginia Law professor, who consulted for GAO and who maintains an independent compilation of these agreements. We reviewed the compilation to determine whether there were any additional agreements applicable to DANY. In addition, we reviewed DANY's Ancillary Funding Report as of June 30, 2009, which outlines the disposition of major cases. Based on this research, we believe we obtained reasonable assurance that DANY provided all deferred and non-prosecution agreements that resulted in payments to the office since 2007 until December 2009.

We reviewed the terms and conditions of each agreement and noted the amounts to be paid to DANY. For each agreement, we obtained and reviewed all correspondence from the Fiscal Department relating to the receipt and distribution of these funds. To obtain a full accounting of these funds, we reviewed bank statements, reconciliations, and financial records associated with each account into or out of which these funds were initially deposited or internally transferred, and from which they were subsequently disbursed. To determine whether DANY's controls over cash in these accounts were effective, we tested the bank reconciliations for accuracy and supervisory review. We also tested 100 percent of all disbursements (not including deferred prosecution and non-prosecution funds), totaling \$2,574,353, made from these accounts to parties other than the City or State. We determined whether each disbursement was adequately supported, whether proper approvals were obtained, and whether checks were signed only by authorized signatories. Finally, we determined whether any payments to the City and

State, in reference to deferred prosecution and non-prosecution agreements, were made in accordance with the laws applicable at the time of disbursement.

### **Discussion of Audit Results**

The matters covered in this report were discussed with DANY officials during and at the conclusion of this audit. A preliminary draft report was sent to these officials and discussed at an exit conference held on February 17, 2010. On March 2, 2010, we submitted a draft report to the DANY with a request for comments. We received a written response from DANY on March 23, 2010.

Although DANY officials generally agreed with most of the findings and recommendations, they stated, “ We do not believe it appropriate to place all DANY funds in the custody of the New York City Department of Finance. However, we are open to registering our accounts with the Department of Finance in a manner that safeguards the Office’s independence, and will pursue this issue with City officials.”

The full text of the response from DANY is included as addendum to this report.



## FINDINGS

DANY received and properly accounted for all of the \$448 million in payments derived from deferred prosecution and non-prosecution agreements since 2007. However, there is lack of transparency in the distribution of these funds between the City and the State because DANY has no formal distribution policy. Unless DANY formalizes a policy, the distribution of these funds will continue to be questioned and scrutinized.

Also, DANY does not adequately segregate duties that mutually pose a potential risk of error within the Fiscal Department, a situation further exacerbated by the use of off-the-shelf personal financial management software (Quicken) to track ancillary funds. Furthermore, disbursements, totaling \$815,324 out of \$2,574,353 (31.6 percent), were made from one of DANY's escrow accounts that were supported only by e-mail correspondence from DANY's staff, not by court decree. Although proper documentation was later provided, the lack of support at the time of processing constitutes a control weakness that can result in errors. These control risks could have been mitigated had DANY placed these funds with the City's DOF. While our audit tests revealed no evidence of fraud, we believe that by implementing the report's recommendation DANY will further reduce the possibility that an irregularity will occur.

In addition, as of October 31, 2009, DANY held approximately \$86 million in 58 private bank accounts that were not registered with the Comptroller's Office and that were outside the City's fiscal controls. The use of private bank accounts is contrary to the County and the Civil Practice Laws and Rules of New York State. Cash held in private accounts is inherently at greater risk and subject to less oversight than that held in the City's general fund. Finally, DANY may have improperly transferred approximately \$47,200 from one of the escrow accounts to a less restrictive account. Funds that cannot be returned to the appropriate parties should not be retained by DANY but rather transferred to the New York State Comptroller as unclaimed funds.

### **Lack of Formal Policy Regarding Distribution of Proceeds from Deferred Prosecution and Non-prosecution Agreements**

DANY lacks a formal policy regarding distribution of proceeds received through deferred prosecution and non-prosecution agreements. Although the use of these agreements is a relatively new practice that avoids the harmful effects that criminally prosecuting a company can have on stakeholders who were uninvolved in the company's criminal behavior, sufficient time has passed to develop guidelines for the distribution of any resulting funds. Since 2007, DANY received \$448 million in settlement payments from three companies. Either through temporary State law or its own discretion, DANY, after retaining a portion, distributed the proceeds from two of three agreements evenly to the City and State. For the remaining agreement, DANY distributed \$109 million to the State and \$66 million to the City. (See Table I on the next page.)

**Table I**

**DANY's Distribution of Settlements Derived from  
Deferred Prosecution and Non-prosecution Agreements**

Agreement	Total Settlement	Funds Retained by DANY	Funds Distributed To the State	Funds Distributed To the City
Chevron	\$5,000,000	\$1,000,000	\$2,000,000	\$2,000,000
Lloyds Bank	175,000,000	0*	109,000,000	66,000,000
Credit Suisse	268,000,000	8,555,000	129,722,500	129,722,500
<b>TOTAL</b>	<b>\$448,000,000</b>	<b>\$9,555,000</b>	<b>\$240,722,500</b>	<b>\$197,722,500</b>

\* DANY received \$6.9 million in return from the State after the initial disbursement.

After the State received its portion of the distribution for the Lloyds Bank case, DANY was entitled to \$6.9 million because the State legislature passed a budget bill on January 7, 2009, that enabled DANY to receive a portion of the recoveries remitted to the State. However, the bill was silent on how the proceeds should initially be split among the three parties. Had DANY evenly split the funds, the City would have received an additional \$21.5 million (\$87.5 as opposed to \$66 million). While there may be valid reasons, legal or otherwise, for not distributing these funds evenly, the absence of formal guidelines results in an opaque process.

It should be noted that the aforementioned portion of budget bill was superseded on December 4, 2009, through the passage of Chapter 503 of the State Laws of 2009. This law applies to the distribution of the Credit Suisse settlement and clearly states how the funds should be split among the three parties. However, this law was only temporary and is set to expire on March 31, 2010. Without a formal policy, any future distribution may result in further disputes. A policy that prescribes a transparent distribution process would highlight the results of DANY's efforts and moot any questions about the distribution of these funds.

**Controls over the Administration  
Of Cash Should Be Enhanced**

Our review of DANY's controls over cash revealed several weaknesses. As previously stated, DANY does not adequately segregate duties that mutually pose potential risk or error within the Fiscal Department, a situation further exacerbated by the use of off-the-shelf personal financial management software to track funds. Key duties and responsibilities need to be further divided or segregated among different staff members to reduce the risk of error or fraud. In addition, the software has difficulty processing dollar figures with eight or more digits. It should also be noted that certain disbursements were made from an escrow account without proper documentation at the time of processing. Sound internal controls provide the first line of defense in safeguarding assets and help in preventing or detecting errors and misappropriation. The lack

of adequate internal controls increases the risk of loss or misuse of funds and reduces the reliability of financial information.

### **Segregation of Duties Should be Enhanced**

DANY did not ensure that there was adequate segregation in the duties assigned to various employees within its Fiscal Department. Comptroller's Directive #1 states, "Key duties and responsibilities need to be divided or segregated among different staff members to reduce the risk of error or fraud." For example, the individual responsible for reconciling the 58 private accounts is also permitted to write checks and record transactions. Furthermore, there is no indication that the reconciliations are reviewed by a supervisor. Moreover, the same individual (reconciler) is permitted to use the signature stamp of the Fiscal Deputy Director to sign checks when she is not at work.

In addition, the Fiscal Deputy Director has the ability to write and sign checks and to record transactions; that individual is also *assigned* the responsibility for reviewing and approving bank reconciliations. It should be noted that check stock is not adequately secured and can be accessed by the other six Fiscal Department employees, who can also cut checks and record transactions. These checks are easily obtained in the Fiscal Director's office. While our audit tests revealed no evidence of fraud, one employee should not be in a position to both commit and conceal an irregularity.

### **Limitations of Financial Software**

The Fiscal Department uses off-the-shelf, personal financial management software to manage more than \$86 million in ancillary funds. The inherent limitations of the system weaken controls over cash. Nearly the entire Fiscal Department, including the individual responsible for bank reconciliations, has access to all functions of the software, most notably check writing. The system is unable to segregate these functions among different users as unique user IDs are not required to access the financial managerial software. All that is required to access a particular set of accounts is a password. However, there is only one password, and it is shared throughout the department. In the absence of proper restrictions, individuals have easy access to certain functions that normally could not be accessed if a more sophisticated system were in place. Furthermore, in the event of an error or misappropriation, the system may not be able to identify the individual user or users involved since unique user IDs are not required.

In addition, the software cannot process certain numerical values that exceed seven digits (\$9,999,999). For example, DANY deposited \$175 million in January 2009 (Lloyds Bank settlement) in one of its escrow accounts. However, the transaction had to be recorded in the system as two separate transactions (\$87.5 million each) because it could not be processed as one entry due to the high dollar value. Subsequently, DANY issued a check totaling \$109 million to the State that also had to be recorded in the system as two separate transactions (\$54.5 million each).

In addition, DANY's bank reconciliations for January 2009, which are generated by the accounting software, had certain anomalies that had to be identified and corrected manually. For

example, a deposit totaling \$175 million that was split into two transactions was listed as \$1,600,654 each on the reconciliation instead of \$87.5 million, a difference of approximately \$172 million. Also, a disbursement totaling \$109 million was listed on the reconciliation as two transactions totaling \$23,100,654 (\$11,550,327 each), a difference of approximately \$86 million. Fiscal Department officials could not provide a logical explanation for the occurrence of these anomalies. Given the large amounts of funds that pass through or remain within DANY's private accounts, DANY has a fiduciary responsibility to ensure the system is capable of properly handling these sums of money. However, we should note that had these funds been recorded in the City's Financial Management System (FMS), the error would not have occurred.

**Lack of Documentation at the  
Time of Disbursement**

Our review of other disbursements from the accounts that held the proceeds from deferred prosecution and non-prosecution agreements revealed that \$815,324 out of \$2,574,353 were processed without adequate documentation at the time of distribution. Although proper documentation was later provided, the lack of support at the time of processing also constitutes a control weakness that can result in errors. DANY's general policy states, "You may not commit the office's resources without obtaining the necessary approvals, following the appropriate procedures, and submitting appropriate documentation." The disbursements in question did have the proper approval (staff e-mail correspondence), but were not accompanied by court decree or other form of documentation to justify the disbursement at the time payment was processed.

## Other Issues

### Bank Accounts Administered Outside City Fiscal Controls

DANY held approximately \$86 million in 58 separate private bank accounts that were not registered with the Comptroller's Office and were outside the City's fiscal controls. The use of private banks accounts for City business is strongly discouraged because they pose significantly higher risk than the use of City accounts. According to Comptroller's Memorandum #92-12, "internal controls afforded by the segregation of check writing, payment approval, and reconciliation are essentially eliminated." This warning is intended specifically to prevent control weaknesses, such as the lack of segregation of duties, that existed within DANY's Fiscal Department.

According to DANY, as of October 31, 2009, approximately \$86 million was held in 58 separate private accounts. Generally, these funds comprise money received through State and federal asset forfeiture proceedings, proceeds from deferred prosecution and non-prosecution agreements and other large cases, and money held in escrow.

New York State County Law §700(2) requires that all monies belonging to the County shall be paid by the district attorney to the county treasurer. Section 550 of New York State County Law states, "The county treasurer shall receive and be the custodian of all money belonging to the county or in which the county has an interest and shall keep a true account of all receipts and the expenditures in books provided by him at the expense of the county." Although the funds in DANY's private accounts may not necessarily belong to the county, or in this case the City, these funds ultimately are for the county's benefit and in its interest and therefore should be held in the custody of DOF unless otherwise prescribed by law.

In addition, funds distributed to DANY through State and federal asset forfeiture must be used only by DANY to enhance the office's law enforcement efforts and cannot supplant ordinary budget costs. However, these funds must be held in the custody of DOF or in a separate revenue account established by the DOF, but not in a private bank account. According to Article 13-A of New York State Civil Procedure Law and Rules, any funds distributed to DANY through asset forfeiture proceedings must be retained in a subaccount of the general fund of which the claiming agent or authority (DANY) is part, such as New York City's general fund, which is maintained by DOF.

Maintaining these monies in private bank accounts that were not opened in accordance with City rules and regulations results in the weakening of controls over the funds. Since the accounts are not registered with the Comptroller's Office and are outside the City's fiscal control, there are other issues of concern.

***DANY Response:*** "We do not believe it appropriate to place all DANY funds in the custody of the New York City Department of Finance. However, we are open to registering our accounts with the New York City Department of Finance in a manner that safeguards the Office's independence, and will pursue this issue with City officials."

**Auditor Comment:** This report does not require DANY to transfer *all* funds to DOF. In fact, the report acknowledges that District Attorneys require confidential accounts to perform their duties. However, the establishment of such accounts must be handled with caution and cannot be done unilaterally. The City’s accounting system can provide the flexibility that DANY requires to carry out its duties and responsibilities. In that respect, our report recommends that DANY contact DOF and the Comptroller’s Bureau of Accountancy to determine the proper treatment of those funds it currently holds in private accounts.

### **Funds Held by DANY on Behalf Of New York State Police**

Since as early as June 2006, DANY has held at least \$7 million off the State’s books for the New York State Police (NYSP) and may have held as much as \$21 million of NYSP money since 1998. According to DANY records, DANY and NYSP agreed to an even split of the proceeds from a \$42 million settlement dating back to 1998. Over the past 11 years, DANY has periodically disbursed these funds to NYSP whenever NYSP made a request. The records provided to us do not indicate whether the settlement was paid in a lump sum or installments, but do indicate that DANY had at least \$7 million of NYSP money remaining as of June 30, 2006. According to DANY officials, its remaining obligation, which was in excess of \$4 million, was recently paid. These funds should have been paid to NYSP when received and not maintained by DANY in a “rainy day” account.

### **Funds Held in Private Accounts Are Not Protected by Collateralization**

Assets in DANY’s custody totaling approximately \$23 million are uninsured because DANY opened private accounts under its own tax identification number, or chose a bank that is not designated to receive deposits of City funds.<sup>1</sup> According to Section 10 of General Municipal Law, “All public deposits in excess of the amount insured under the provisions of the Federal Deposit Insurance Act as now or hereafter amended shall be secured.” DANY has a total of 24 accounts at two banks that are on the Banking Commission’s designated list, but the accounts are not collateralized because DANY did not open them with the City’s tax identification number.

Section 1524 of the New York City Charter authorizes the New York City Banking Commission to designate banks for the deposit of City funds. To be placed on the designated list, banks must meet certain standards, one standard being a collateralization agreement with the City. As of October 31, 2009, DANY had approximately \$8.7 of the \$23 million on deposit with a bank that is not on this list, and the deposit exceeds the \$250,000 limited protection coverage per bank depositor provided by the Federal Deposit Insurance Corporation (FDIC). DANY not only places at risk the funds it is entitled to use, but may also place the City itself at risk for the funds held in escrow for other parties (e.g., seized funds held pending the resolution of a case).

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<sup>1</sup> The remaining \$63 million was collateralized because these funds were held in accounts that were opened with the City’s tax identification number in a bank on the designated list.

According to the FDIC, more than 200 banking institutions have failed since 2002. Had these funds been placed in the City's general fund, or if DANY had at least opened the accounts with the City's tax identification number, the funds would be protected.

**Questionable Transfer of \$47,200**  
**From Escrow Account**

DANY may have improperly transferred \$47,200 held in escrow to a less restrictive account used for his office's expenditures. Fiscal Department personnel stated this money was held in escrow for more than 10 years and that they had never received direction from an Assistant District Attorney or a court order on how to disburse the funds. However, funds that are dormant for longer than five years and that are not held pending the resolution of a case may be considered abandoned. According to the State Comptroller, after five years, abandoned funds should be transferred to the State Office of Unclaimed Funds, which serves as the custodian until the funds can be returned to their rightful owners.

## **RECOMMENDATIONS**

DANY should:

1. Upon the expiration of existing legislation, establish a formal policy for the distribution of settlement payments derived from deferred prosecution and non-prosecution agreements.
2. Coordinate with DOF and the Comptroller's Bureau of Accountancy to transfer the funds currently held in private accounts to the City's custody, establish Fiduciary Accounts (Trust and Agency) where appropriate, and register any remaining accounts deemed confidential with the Comptroller's Office.
3. Separate duties among personnel of the Fiscal Department to ensure no one person can both perpetrate and conceal errors or fraud.
4. Ensure that proper documentation is submitted and reviewed by the Fiscal Department prior to the distribution of funds.



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ONE HOGAN PLACE  
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(212) 335-9000



CYRUS R. VANCE, JR.  
DISTRICT ATTORNEY

March 23, 2010

**BY HAND**

Honorable John C. Liu  
New York City Comptroller  
Office of the Comptroller  
City of New York  
1 Centre Street  
New York, New York 10007

Re: Audit Report FM10-111A

Dear Mr. Liu,

Enclosed is the New York County District Attorney's response to the above captioned Audit Report dated March 2, 2010. We are pleased that your report found that this office "received and properly accounted for all of the \$448 million in deferred prosecution and non-prosecution agreements since 2007." We look forward to implementing all necessary and appropriate measures to insure proper financial stewardship of the funds collected, while maintaining the independence and discretion required of an effective prosecutor's office.

We look forward to your review of this response, and working with you in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Frederick J. Watts", written over a horizontal line.

Frederick J. Watts  
Executive Assistant District Attorney

The New York County District Attorney's Office response to Office of the Comptroller's Audit Report dated March 2, 2010 appears below. The responses track the relevant portions of the Audit, where appropriate.

## **I. Factual Background**

This Audit was commenced at the request of the New York County District Attorney's Office ("DANY"). In November, 2009, questions were raised about certain funds collected by DANY; in response, on December 9, 2009, the District Attorney invited the Comptroller to conduct a full audit of funds the Office maintained for crime victims, City and State agencies, and prosecutorial initiatives which generate revenue for the City and State

The Comptroller found that from January, 2007 to December 31, 2009, DANY properly accounted for the entirety of \$448 million dollars which it collected and distributed in deferred and non-prosecution agreements. Of that amount, over \$438.4 million (or 98%) was promptly distributed to State and local government agencies (see Report at 7, Table I). As the Audit Report further notes, DANY retained the balance collected through deferred and non-prosecution agreements, which has been used to support critical investigative and public safety initiatives. Additionally, DANY holds a substantial amount of funds in escrow, to be distributed to crime victims, the City of New York, and other governmental entities.

The Audit Report notes that DANY holds funds in a number of bank accounts. Federal and State law require that certain funds held by DANY be segregated from other funds and must be held in individual accounts. For example, funds from federal entities such as the High Intensity Drug Trafficking Area (HIDTA); the Department of Justice; and proceeds from federal and state asset forfeiture are all subject to these requirements. (See U.S. Department of Justice Guide to Equitable Sharing for State and Local Law Enforcement Agencies; Department of Treasury Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement Agencies). In addition, a significant number of the accounts are merely Certificates of Deposit designed to maximize interest returns.

## **II. Findings**

We are pleased that the Comptroller has concluded that the office "properly accounted for all of the \$448 million in payments derived from deferred prosecution and non-prosecution agreements since 2007." (Report at 6.) We address in turn each of the findings set forth in the Report regarding specific practices.

## **Formal Policy Regarding Distribution of Proceeds from Deferred Prosecution and Non-Prosecution Agreements.**

The Audit considered the distribution of money from three deferred or non-prosecution agreements entered into between January, 2007 and December, 2009. As the Report states, distribution of proceeds from such agreements is currently governed by state law, which sets forth a formula for allocating these funds among New York City, New York State, and DANY. (Report at 7 [citing Chapter 503 of the State Laws of 2009]). Should that law expire without renewal, DANY will allocate funds according to a distribution policy, as recommended by the Report.

## **Controls over the Administration of Cash**

### **Segregation of Duties**

Although the Comptroller reports that this office properly accounted for all \$448 million audited, DANY acknowledges weaknesses in its controls. DANY will segregate duties among different staff members to reduce the risk of error or fraud. We note that during the time period covered by the Audit, DANY did employ various controls over the administration of cash. For example, pursuant to federal law (see U.S. Department of Justice Guide to Equitable Sharing for State and Local Law Enforcement Agencies), all funds collected by DANY through federal asset forfeiture proceedings are annually audited by an outside accounting firm. In addition, funds collected through state asset forfeiture proceedings are subject to reporting requirements set forth in state law. CPLR Section 1349 (4). With respect to the administration of cash, two signatures are required to complete a transaction. Additionally, the Financial Director reviews all cash transactions and completes a year-end closing report, which is reviewed by DANY executive staff.

### **Financial Software**

DANY acknowledges that a software upgrade is in order, and will take steps to implement this recommendation expeditiously.

### **Documentation for Disbursement**

The Audit Report states that documentation for certain disbursements from accounts holding proceeds of deferred and non-prosecution agreements was not provided at the time of distribution, although the documentation was later provided. (Report at 9) The Report acknowledges that the disbursements in question had proper approval, but were not accompanied by a court decree or other form of documentation. Id.

We note that the Fiscal Department made disbursements from accounts holding funds from deferred or non-prosecution agreements upon written directive from either the Assistant District Attorney responsible for handling the relevant matter, or his or her superiors. In DANY's view, it is appropriate for the Fiscal Department to rely upon a written directive from such individuals, who have direct knowledge of the relevant legal proceedings, in making disbursements. In addition, DANY notes that court directives may not be reduced to writing, but instead may be oral pronouncements by a judge in open court. Nonetheless, DANY will seek to furnish the Fiscal Department with court orders regarding disbursements of funds from deferred or non-prosecution agreements, where available.

### **Bank Accounts Administered Outside City Fiscal Controls and Collateralization of Funds**

The Audit Report discourages the holding of funds in private bank accounts that are not registered with the Comptroller's Office and outside the City's fiscal control, and notes that certain DANY funds are apparently held in accounts that are not fully collateralized. (Report at 10, 11). We agree that the collection and use of public funds should be transparent; we also agree that DANY's accounts should be registered with appropriate agencies, provided that the Office can do so in a manner that preserves its prosecutorial independence. Additionally, we concur that all funds should be held in a secure manner, and will take steps necessary to accomplish this objective.

With regard to the Report's recommendation that DANY's accounts be registered with the Comptroller's Office (Report at 10), Comptroller's Memorandum 92-12 (CM 92-12) recognizes that procedures regarding the opening and registration of accounts may not be fully applicable to law enforcement efforts and directs that "...District Attorneys incorporate these (bank registration) guidelines to the extent practicable..." (emphasis supplied). In accordance with Directive 11 and CM 92-12, DANY will register its accounts with the Comptroller's Office. Should law enforcement concerns necessitate some greater degree of confidentiality, we will discuss such issues with the Comptroller's Office if and when they arise.

With respect to the Comptroller's recommendation that DANY transfer funds currently held in private accounts to the City's custody (Report at 13), the Report relies on sections 550 and 700 of the County Law for this conclusion. We note that both of these provisions apply, on their face, only to funds "belonging to the county" or "in which the county has an interest." County Law §§ 550 (2); 700 (2). As the Report acknowledges, "the funds in DANY's private accounts may not necessarily belong to the county, or in this case, the City." (Report at 10) In fact, such funds do not belong to the City, and accordingly do not fall within the scope of these provisions. We also note that the District Attorney's Office, unlike agencies subject to mayoral control, is a State Constitutional officer, with duties outlined in State law. See N.Y. Const., Art. XIII, § 13; County Law §§ 700, 926, 927. And when the District Attorney functions as a prosecutor, he acts as a State official who prosecutes in the name of the People of the State of New

York. For these reasons, as well as practical concerns regarding the confidentiality of law enforcement investigations and the need for expeditious action in certain matters, we do not believe it appropriate to place all DANY funds in the custody of the New York City Department of Finance. However, we are open to registering our accounts with the New York City Department of Finance in a manner that safeguards the Office's independence, and will pursue this issue with City officials. With respect to funds obtained through state asset forfeiture proceedings, we concur that these funds should be held as described in the Audit Report.

Finally, the Audit Report notes that certain DANY funds are apparently not fully collateralized. (Report at 11) DANY agrees that it is appropriate to fully collateralize all funds held in DANY accounts, and will maintain its accounts in banks designated by the Banking Commission to hold City funds.

#### **Funds Held for New York State Police**

The Audit Report notes that DANY disbursed certain funds to the New York State Police over a period of 11 years. (Report at 11) As the Report further notes, these funds have been fully disbursed (*id.*) and no further action remains as to this item.

#### **Escrow Transfer of \$47,200**

The Audit Report suggests that DANY held \$47,200 in escrow for more than 10 years without disbursement, and “may have improperly transferred [the funds] to a less restrictive account.” (Report at 12) We note that the full balance of these funds remains on deposit with DANY, and can readily be accounted for and properly distributed. Additionally, we note there is some ambiguity in the law governing disposition of unclaimed funds. While the State Comptroller contends that such money should be transferred to the State Office of Unclaimed Funds (Report at 12), County Law section 935 suggests that such funds should be transferred to the New York City Employees Retirement System. DANY will resolve the legal questions presented by this matter, and make a proper distribution.