DOI INVESTIGATION INTO DELAY OF AMBULANCE DISPATCH TO QUEENS FATAL FIRE IN APRIL 2014 REVEALS SIGNIFICANT ONGOING FLAWS IN OVERALL SYSTEM

Mark G. Peters, Commissioner of the New York City Department of Investigation ("DOI"), issued a Report today on DOI's investigation of the delay in dispatching an ambulance to a fatal fire at Bay 30th Street, Queens, in April 2014. The Report concluded that the New York City Fire Department ("FDNY") dispatch system is unduly complicated and unacceptably flawed, and these flaws, combined with human error, delayed medical assistance to two children trapped in the building who ultimately died. The Report found the dispatch of the ambulance – which took approximately 21 minutes to arrive after the initial 9-1-1 calls came in -- was impeded by a highly cumbersome ambulance dispatching process that involved interaction between no less than seven staff members from the New York City Police Department ("NYPD"), FDNY, and Emergency Medical Services (EMS"). A copy of the Report is attached to this release.

DOI Commissioner Mark G. Peters said, "DOI's investigation exposed an antiquated, unwieldy system for dispatching ambulances to the scene of an active fire that substantially increases the opportunity for human error. We must start to overhaul this process immediately. The Fire Department, at DOI's urging, has taken positive first steps by implementing preliminary remedies to streamline the process, but it must continue to pursue more advanced solutions. DOI will continue to monitor this process."

The investigation did not find criminal wrongdoing but determined that there are systemic problems with the City's system for dispatching an ambulance to the scene of an active fire. Specifically:

- The system for dispatching an ambulance to a fire scene requires multiple staff to take multiple steps, increasing the possibility of error and delay.

- Poor supervision of the dispatch staff contributed to the errors in responding to the fire that occurred on April 19-20, 2014, including the mistaken belief by one dispatcher that another had notified EMS of the need to dispatch an ambulance, and the failure to take steps to reassign or retrain a dispatcher with a history of mistakes.

- The City's bifurcated computer-aided dispatch system does not allow FDNY and EMS dispatchers to efficiently share critical information, such as the borough where a fire is
occurring, so EMS dispatchers typically must wait until they receive a telephone call from a FDNY dispatcher to dispatch an ambulance.

DOI recommended the FDNY take several steps to immediately address these problems, specifically:

1. Streamline the dispatch process as much as possible within the current technological constraints of the system, and eliminate some steps so a shorter process can be implemented. FDNY has begun to tighten the dispatch process, including by making EMS the first of the two-step notification process, rather than dispatchers reaching out first to an FDNY Deputy Chief.

2. Improve supervision of dispatchers, including scheduling meal breaks and one-to-one relief at Fire Dispatch Central Offices and enforcing FDNY policy regarding the unauthorized use of technology while on duty to ensure that dispatchers are not distracted while they are working. FDNY must better train and manage its supervisors, since in this incident, FDNY leadership was put on notice regarding a dispatcher’s skill deficiencies and failed to take any steps.

3. Take immediate steps to enhance communication between the Fire and EMS computer-aided dispatch systems. While the City has undertaken a large-scale project to integrate emergency response, the Emergency Communications Transformation Project, the FDNY must not wait until the completion of that project to address the problems outlined in the Report. To that end, in response to DOI’s recommendation, the FDNY has studied the issue and has come up with an interim solution to link the computer-aided dispatch system used by the FDNY with the computer-aided dispatch system used by EMS, which will take up to six months to implement; and a short-term fix, already implemented, that allows EMS dispatchers to view a hard-copy printout of complete information regarding an active fire and then manually enter information into their dispatch system to dispatch an ambulance. DOI notes that while this is an improvement, it still requires a dispatcher to monitor a teleprinter while at their workstation. DOI recommends that FDNY develop additional solutions to further simplify the process.

Commissioner Peters thanked FDNY Commissioner Daniel A. Nigro and Anne Roest, Commissioner of the City Department of Information Technology & Telecommunications, and their staffs, for their assistance in this investigation.

The investigation was conducted by DOI’s Office of the Inspector General for the FDNY, including Counsel to the Inspector General Adam Libove and Assistant Inspector General Kate Zdrojeski under the supervision of Inspectors General Shannon Manigault and John Tseng and Associate Commissioner Paul Cronin.

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New York City Department of Investigation

Investigation into Significant Delay in Dispatching an Ambulance to a Queens Fatal Fire in April 2014 and Overall Systemic Flaws of Dispatch System

MARK G. PETERS
COMMISSIONER

October 2014
Executive Summary

On the night of April 19-20, 2014, a fire started at 10-31 Bay 30th Street in the Rockaway neighborhood of Queens (the Bay 30th Street fire). The first calls about the fire came into the City’s 9-1-1 system at approximately 11:51 pm. As with all calls to 9-1-1, the calls were initially received by a Police Department (NYPD) telephone dispatcher. Because the calls related to a fire emergency, they were transferred to the Fire Department (FDNY). Less than a minute after the initial calls were received, the first wave of FDNY firefighting resources were dispatched to the Bay 30th Street fire. At approximately 11:56 pm, firefighters arrived at the scene and confirmed an active fire via radio to the FDNY’s Queens Fire Dispatch Central Office. The FDNY commander on scene further reported that people were trapped inside the building. However, due to the complex and multistep process required to send an ambulance to the scene of an active fire combined with human error which occurred during the dispatch process, EMS was not officially notified of the incident until seven minutes later, substantially delaying the arrival of medical assistance to two children trapped in the building who ultimately died. At approximately 12:12 am, the first Emergency Medical Service (EMS) ambulance arrived at the scene of the Bay 30th Street fire – approximately 21 minutes after the initial calls about the fire were made to 9-1-1.

After reports that there had been a significant delay by the FDNY in dispatching an ambulance to the scene, the Department of Investigation (DOI) began an investigation to determine the cause of the delay, and, in particular, whether the delay was the result of systems failures that required corrective action. DOI’s investigation revealed that the process for dispatching an ambulance to the scene of an active fire is highly cumbersome, often involving multiple staff members from the NYPD, FDNY and the EMS. This multi-step dispatch process, combined with an antiquated and complex 9-1-1 system, creates a systematic vulnerability that substantially increases the likelihood that human error will occur in dispatching an ambulance to the scene of an active fire.

Under the FDNY procedures which were in-place on the night of the Bay 30th Street fire, dispatching an ambulance to the scene of an active fire following a call to 9-1-1 required action by no fewer than seven individuals: one member of NYPD; four members of FDNY; and two members of EMS. DOI’s investigation determined that, on the night of the fire, this dispatch process was marred by errors. Due to the complexity of the dispatch system as well as a series of errors and miscommunications between the primary dispatcher who handled the call and the supervisor on duty, a timely notification to EMS to send an ambulance to the scene of the fire was not made. Thus, the initial ambulance arrived on the scene approximately 21 minutes after the first call to 9-1-1. When combined with the complex and antiquated fire dispatch system, the dispatchers’ errors resulted in this significant and unacceptable delay.

After four months of investigation, including the review of procedural and technical documents, audio recordings and witness interviews, and collaboration with FDNY’s Bureau of Investigations and Trials (BITS), DOI has concluded that the FDNY system for dispatching an ambulance to a confirmed fire scene—including the onerous steps needed to actually summon the ambulance, the inadequate supervision of some dispatchers and the
outdated technology supporting the system – is unacceptably flawed. Specifically, the system requires complicated interaction between multiple individuals that dramatically increases the possibility that errors will occur delaying the dispatch of emergency medical assistance.

DOI’s investigation initially focused on the cause of the delay on the night of the Bay 30th Street fire. However, that investigation demonstrated that the issues contributing to the delay were not unique to that incident but were systemic in nature. As a result, DOI has now concluded that the following problems exist with the FDNY’s system for dispatching emergency medical assistance to the scene of an active fire:

1. **Process – The system for dispatching an ambulance to a fire scene is cumbersome and requires multiple staff to take multiple steps, thus increasing the possibility of error and delay.** In addition to the two initial individuals from NYPD and FDNY who receive a 9-1-1 call and dispatch firefighting resources, respectively, from the time that a firefighter on the scene confirms an active fire and requests medical assistance to the time an ambulance is actually dispatched, five separate individuals from FDNY and EMS must take five discrete steps. Not only does this chain of responsibilities take time, it dramatically increases the chance of human error since if even one of these steps is delayed, the entire process is at risk. This is exactly what occurred on the night of April 19-20, 2014. While the dispatch system is scheduled to be redesigned as part of the City’s overhaul of its 911 system, that redesign is not scheduled to be complete until August 2016 – approximately two years from now.

2. **Supervision – Poor supervision of the dispatch staff contributed to the errors on April 19-20.** Additionally, workers with a history of error continued to sit in crucial posts. The multiple errors by staff on the night of the fire included:

   - The failure to have all positions covered at the FDNY dispatch center. Dispatchers were away from their positions at crucial moments and the ad hoc backup system failed.

   - The mistaken belief by one dispatcher that another dispatcher had notified EMS of the need to dispatch an ambulance. Because of poor communication, the dispatcher who should have notified EMS did not initially do so because she mistakenly believed another dispatcher had made the call.

   - The inability of the supervising dispatcher to competently use the computer technology at issue. She mistakenly input commands that eliminated a reminder that EMS needed to be notified to dispatch the ambulance.

   - Inadequate supervision. The supervisor on duty failed to make sure that employees carried out all of their necessary responsibilities and properly backed up employees who were off of the dispatch floor.
During the course of the investigation, DOI found evidence of the following other issues that exacerbated the errors made on the night of the Bay 30th Street fire:

- The FDNY’s informal break policy does not require one-for-one relief. At times, as many as two dispatchers can be off the floor at the same time requiring remaining staff to juggle multiple responsibilities, which, as here, can lead to errors.

- The disciplinary history of dispatch staff on duty. The dispatcher in question had been disciplined for dispatch-related issues in the past. Nonetheless, no steps had been taken to provide her with appropriate remedial training even after supervisors had made such recommendations. Additionally, the supervising dispatcher had been disciplined in the past for failure to properly supervise dispatchers under her command.

3. Technology – The present computer aided dispatch (CAD) system does not permit EMS dispatchers to see vital information, such as the borough where a fire is occurring. Thus, they cannot dispatch an ambulance until they receive a telephone call from the FDNY dispatcher. When a firefighter in the field requests an ambulance over the radio, that transmission comes into an FDNY dispatcher who will then call EMS to dispatch an ambulance. Although much of the information about the fire will have already been entered into the FDNY computer system prior to the call, the EMS dispatchers are not trained to access this information. Nor are they required to listen to the fire scanner reporting communications from firefighters in the field. Therefore, when they know a potentially life-threatening fire is in progress, they do not, in practice, dispatch an ambulance until after receiving the call. On April 19-20 there was a delay in making that call and EMS had no ability to react in advance.

Finally, as noted above, preparations for a new FDNY CAD system have been underway since 2011, in connection with the City’s Emergency Communications Transformation Project (ECTP), but the system not expected to be operational until August 2016. As the City awaits this long-term solution to improve data sharing between emergency responders, in the interim, FDNY has been pursuing a technological fix to automate Fire-EMS notifications as part of the CAD Operational Readiness Project (COR). One of the components of COR would allow Fire Dispatch to automatically initiate calls for EMS service and vice versa. FDNY has already implemented a short-term fix and a more robust technological solution is under development. FDNY anticipates that the technological solution will cost approximately $200,000 and be completed in four to six months. These solutions are interim measures designed to correct the problem during the development of the FD CAD system and must be made fully operational with no further delay and certainly within FDNY’s expected time period of four to six months.
DOI’S INVESTIGATION

I. Background – Dispatching an Ambulance to the Scene of a Fire

In general, the process for dispatching an ambulance to the scene of a fire is highly cumbersome, often involving multiple staff members from the NYPD, FDNY, and EMS. Reports of an active fire frequently come from civilians via calls to 9-1-1. Those calls are fielded by NYPD dispatchers who, in turn, relay the information to FDNY. The FDNY responds by sending firefighting resources to the scene to confirm whether there is an active fire. Upon confirmation, firefighters at the scene report the fire to FDNY dispatchers, who then telephone EMS to request an ambulance if needed.

In sum, as described in more detail below, dispatching an ambulance to the scene of a fire following a call to 9-1-1 requires action by no fewer than seven individuals: one member of NYPD (a telephone dispatcher to take the 9-1-1 call and send the information to FDNY); four members of FDNY (a dispatcher to send firefighting resources to respond to the incident; a firefighter to confirm the active fire and request EMS; a second dispatcher to enter the request for EMS into the FDNY’s computer system; and a third dispatcher to telephone EMS); and two members of EMS (a dispatcher to enter the request for an ambulance into EMS’s computer system and a second dispatcher to send the ambulance).

When a fire is reported by a call to 9-1-1, as with the Bay 30th Street incident, that call is first routed to a NYPD telephone dispatcher—not the Fire Department. The NYPD dispatcher gathers information about the fire from the 9-1-1 caller and enters that information into the NYPD’s Intergraph Computer Aided Dispatch system (ICAD). The NYPD dispatcher then electronically transmits the information to the FDNY’s computer aided dispatch system, known as Starfire.

The NYPD dispatcher also initiates a conference call between the 9-1-1 caller and an FDNY telephone dispatcher, who asks the caller a series of questions to verify the nature and location of the fire.1 While the FDNY telephone dispatcher, known as an Alarm Receipt Dispatcher (ARD), speaks to the 9-1-1 caller, another FDNY dispatcher2 reviews the information that has been transmitted electronically from ICAD to Starfire and begins assigning firefighting resources to respond to the incident. The firefighting resources respond to the scene and communicate with FDNY dispatch via radio. If firefighting resources arrive on scene and confirm an active fire, they notify dispatch by radioing the FDNY code, “10-75” (i.e., active fire).

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1 FDNY dispatchers work out of Fire Dispatch Central Offices (COs). Each borough has its own CO, staffed by dispatchers assigned to that borough. In general, when a fire is reported via a call to 9-1-1, the incident is routed to the corresponding borough’s CO.

2 This dispatcher, called the Decision Dispatcher, is the manager of FDNY field resources during a fire emergency. He or she is responsible for making continuous choices regarding the nature of the FDNY’s response to an incident.
Two additional FDNY dispatchers are assigned to monitor radio communications to and from the firefighters in the field. One dispatcher, the Radio Out (RO) position, speaks over the radio with the firefighters who have been dispatched to the scene. The second dispatcher, the Radio In (RI) position, inputs the information received from the field into the Starfire system.

The information entered by the RI causes the Starfire system to generate lists of “secondary notifications” that, depending on the nature of the fire, need to be made telephonically to one or more agencies (e.g., notifications to EMS, to the NYPD, to ConEd, etc.). The secondary notifications may be requests for resources from an agency or updates as to the status of an incident. The FDNY dispatcher responsible for making those notifications is assigned to the Voice Alarm/Notification (VA/Notification) position. Entering the code “10-75” into Starfire causes the system to prompt the dispatcher seated at the VA/Notification position to make two secondary notifications: first, to an FDNY Deputy Chief and second, to EMS.

An EMS dispatcher, upon receiving telephonic notification of an active fire from FDNY, enters the information into the EMS Computer Aided Dispatch system (EMSCAD). The information is then transmitted electronically to a second EMS dispatcher, who assigns an ambulance to respond to the incident.

As set forth below, on the night of the Bay 30th Street fire, this fire dispatch process was marred by errors.

II. Chronology of FDNY Dispatchers’ Actions During the Bay 30th Street Fire

On April 19, 2014 at 11:51 pm, the NYPD was notified of a house fire at 10-31 Bay 30th Street, Queens, via two calls to 9-1-1. As with all calls to 9-1-1, these calls were automatically routed to NYPD telephone dispatchers who collected information related to the type of emergency and the callers’ locations. The first 9-1-1 call came into the NYPD at 11:51:06 pm.4

As they spoke with the 9-1-1 callers, the NYPD dispatchers entered the information they gathered regarding the incident into the NYPD’s ICAD system and sent the information electronically to Starfire. According to Starfire documents, the FDNY was

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3 Within FDNY dispatch centers, there are two types of notifications: primary and secondary. Primary notifications are those made by the Decision Dispatcher to field units that will ultimately respond to an incident. Secondary notifications are every other kind of notification, and are made over the telephone before being documented in Starfire. See Exhibit A for an example of a secondary notification screen.

4 Appendix C contains a timeline of the incident. The bolded text indicates a radio or telephonic communication; regular text indicates a computer entry in Starfire.
electronically notified of the fire at 11:51:51 pm. The information related to the fire was transferred to FDNY Fire Alarm Dispatchers (FADs) located in the Queens CO.\(^5\)

At the time the NYPD dispatchers notified the FDNY of the fire, there were five FADs and one Supervising FAD (SFAD) on duty in the Queens CO and assigned to the following positions: Justin Zydor (Decision Dispatcher), James Morrison (VA/Notification), John Newsom (RI/RO),\(^6\) Kathleen Valentine (ARD), Christopher Kalisak (ARD), and Jacquelin Jones (SFAD). At some point before the NYPD notified the FDNY of the fire, FADs Zydor and Newsom had both stepped away from their positions. According to the other FADs on duty that night, Zydor was in the kitchen area at the time that the notification of the Bay 30\(^{th}\) Street fire came in, while Newsom had been in and out of the bathroom all night due to illness. Various witnesses stated that SFAD Jones assigned FAD Morrison to cover the RI/RO position while Newsom was away and assigned FAD Valentine to cover the VA/Notification position for Morrison.\(^7\) As is customary, Jones herself covered the Decision Dispatcher position while Zydor was off the floor.\(^8\) In sum, only four of the six FDNY dispatchers on duty were physically at their positions at 11:51:51 pm, when the FDNY was first notified of the Bay 30\(^{th}\) Street fire.

At 11:51:55 pm and 11:51:59 pm, respectively, the NYPD connected ARDs Kalisak and Valentine to the two 9-1-1 callers who reported the fire. Valentine and Kalisak gathered details about the fire from the callers and entered the information into the Starfire system.

At 11:51:58 pm, SFAD Jones, acting as the Decision Dispatcher, used the Starfire system to assign the first wave of FDNY firefighting resources that responded to the fire: three engines, two ladder companies and one Battalion Chief. Those resources arrived on scene between 11:56:26 pm and 11:56:48 pm, approximately five minutes after dispatch.

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5 The Queens CO is located in a two-story building on Woodside Avenue in Queens. The second floor of the building, as depicted in the diagram attached as Appendix A, serves as the central work area for staff assigned to the Queens CO. Within the rotunda and annexes are a number of workstations (desks with multiple computers and various radios/scanners). The Queens CO can accommodate many more FADs than the average number assigned there per tour, as the building is designed to serve as the backup center for both the Brooklyn and Staten Island borough facilities. Queens CO staff use approximately one third of the workstations currently available, as described below and depicted in the diagram.

6 In general, two FADs are assigned to monitor radio communications. However, from 11:00 pm through 7:00am, the Queens CO is staffed with five FADs rather than six and one FAD covers both the RI and RO positions.

7 FADs are trained on all five positions and may be assigned to work at any of them during a given tour. A description of the duties and responsibilities of each FAD position and the SFAD is attached as Appendix B.

8 According to various witnesses, the SFAD typically takes over the Decision Dispatcher function when coverage is needed.
At 11:56:55 pm, the Battalion Chief on scene radioed the FDNY code “10-75,” to the Queens CO. That radio transmission was received by FAD Morrison, who was assigned to cover the radio for FAD Newsom at the time. The FDNY code “10-75” indicates that there is an “active fire,” and the transmittal of this code requires the dispatch of additional firefighting resources (e.g., engines and ladders). The code also requires the FADs to notify an FDNY Deputy Chief and EMS of the fire. The FAD assigned to the VA/Notification position is ultimately responsible for making both of those notifications. Here, as FAD Valentine was assigned to cover the VA/Notification position while FADs Newsom and Zydor were away from their positions, the responsibility for notifying EMS was hers.

At 11:57:10 pm, FAD Morrison entered the 10-75 code into the Starfire system. Morrison’s entry caused the Starfire system to prompt both the Decision Dispatcher (here, SFAD Jones) and the VA/Notification position (here, SFAD Valentine) to take additional action (i.e., dispatch additional fire resources, and notify an FDNY Deputy Chief and EMS).

At 11:57:18 pm, in response to the 10-75, SFAD Jones used the Starfire system to dispatch additional FDNY resources to the fire. Meanwhile, recordings of calls from the Queens CO indicate that from 11:57:15 pm until 11:57:52 pm, FAD Valentine was on the phone with an FDNY Deputy Chief (Division 13), notifying him about the fire. At 11:57:58 pm, FAD Valentine documented the notification to the Deputy Chief in Starfire. At the conclusion of her call to the Deputy Chief, Valentine should have notified EMS. Due to a series of errors and miscommunications between Valentine and SFAD Jones, discussed in Section III infra, the notification to EMS was not made.

At 11:58:58 pm, the Battalion Chief on scene radioed to FAD Morrison: “We have one line stretched; good source of water; we have reports of people trapped.” At 12:00:47 am, FAD Valentine entered the following comment into Starfire: “BC47 RPTS 1L/S THEY HAVE GOOD WATER SOURCE” (i.e., Battalion Chief 47 reports one line stretched, they have a good water source). Valentine did not enter the comment, “PEOPLE TRAPPED,”

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9 According to witnesses, entry of the 10-75 into the Starfire system was followed by a tone alert, generated by FAD Morrison from the RI/RO position, over the radio. The tone alert is audible in the background of recordings of the phone calls made to and from the Queens CO during the incident. FAD Kalisak and FAD Valentine both testified that they recognized this tone as indicative of the 10-75 and heard it via the fire scanner located on FAD Kalisak’s desk.

10 Although the RI/RO position is responsible for entering the “10” codes received via radio transmission into Starfire, the VA/Notification position is responsible for listening to the radio and entering substantive comments made by field personnel. The RI/RO position, unlike the other FAD positions, does not have a full keyboard and therefore cannot enter text comments into Starfire.
into the Starfire system; nor did Valentine enter a 10-44 code (i.e., “request EMS”) into the Starfire system.\textsuperscript{11}

At 12:03:11 am, the Battalion Chief radioed a “10-45” code (i.e., “fire-related injury”)\textsuperscript{12} to FAD Morrison. Approximately one minute into this radio transmission, the Battalion Chief demanded that EMS be sent to the front of 10-31 Bay 30\textsuperscript{th} Street. At 12:03:25 am, FAD Morrison entered the 10-45 code into the Starfire system, which prompted the VA/Notification position to take additional action (e.g., notify EMS).

At 12:04:03 am, the first recorded telephonic communication between FAD Valentine and the EMS dispatch center (EMS ARD Christopher DeFrancesco)\textsuperscript{13} began. Audio recording of the call indicates that FAD Valentine called DeFrancesco and stated: “I have a 10-45 from that fire on Bay 30\textsuperscript{th} Street.” ARD DeFrancesco responded: “Um...Bay 30\textsuperscript{th} Street, did you guys give us Bay 30\textsuperscript{th} Street? I was just about to call you."

In the background, the recording of the call indicates that Valentine then asked FAD Kalisak: “Did we ever get in touch with EMS on that fire?” Kalisak responded: “No idea. I didn’t call them.”\textsuperscript{14}

Valentine ended the call with EMS at 12:05:41 am and documented the notification into the Starfire system at 12:05:47 am.\textsuperscript{15} According to EMS records, EMS assigned two

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\item \textsuperscript{11} As discussed in \textbf{Section III.B}, although such entries are not required by FDNY dispatch policy, multiple witnesses testified that a notification to EMS would have been appropriate following a radio transmission of “PEOPLE TRAPPED.”
\item \textsuperscript{12} A 10-45 requires five notifications in the following order: EMS, FDNY Staff Chief, FDNY Operations Center (FDOC), FDNY Deputy Chief and FDNY’s Bureau of Fire Investigation (BFI).
\item \textsuperscript{13} As discussed in \textbf{Section III.C}, ARD DeFrancesco was on duty at the EMS Fire Liaison Desk on the night of the fire. This desk is part of the EMS Emergency Medical Dispatch center located in Brooklyn.
\item \textsuperscript{14} Also on the audio recording of that telephone call, a “chirp” from a cell phone is audible. In her DOI interview, FAD Valentine identified the chirp as an alert from her cell phone. Valentine testified that her cell phone was in her purse at the time she was making the call to EMS. The use of personal cellphones for phone calls or texting by Fire Dispatch personnel is prohibited in any Operations Area, \emph{see} FDNY Bureau of Communications, Unauthorized Use of Technology, June 9, 2009, and multiple witnesses testified that cell phones should not be visible while staff are on duty.
\item \textsuperscript{15} At 12:04:11 am, while FAD Valentine was on the phone with EMS, the FDNY Battalion Chief at the fire scene again demanded EMS at the location via radio. One second later, at 12:04:12 am, FAD Morrison entered fire code 10-44 (i.e., “Request EMS”) into the Starfire system. At 12:05:39 am, the Battalion Chief radioed two additional 10-45’s (now three in total) to FAD Morrison and again demanded EMS. Each 10-45 corresponds to a different injured person. FAD Morrison entered the additional 10-45 codes into the Starfire system and informed the Battalion Chief that EMS has been notified. In the minutes following her initial notification to EMS, FAD Valentine made two additional calls to EMS to report information received from FDNY field personnel: At
\end{itemize}
ambulances to respond to the scene 35 seconds later, at 12:06:12 am. EMS records, corroborated by a radio transmission from the Battalion Chief, indicate that the first ambulance arrived at the fire scene at 12:12:03 am. Thus, the ambulance arrived on the scene approximately 21 minutes after the first call to 9-1-1.16

III. Systemic Issues Raised by the Bay 30th Street Fire: Process, Supervision, and Technology

A. Process – The Process for Dispatching an Ambulance to a Fire is Cumbersome and Requires Numerous Actions by Members of Service from Multiple Agencies

As set forth above, among the multiple steps necessary to dispatch an ambulance to a fire, a fire dispatcher must make a secondary notification to EMS so that an EMS dispatcher may assign an ambulance to an incident. In this instance, although FAD Morrison entered the 10-75 into Starfire at 11:57:10 pm (requiring notifications to Deputy Chief and EMS) and FAD Valentine made telephonic notification to the FDNY Deputy Chief approximately 8 seconds later, at 11:57:18 pm, she failed to notify EMS until 12:04:04 am.

In her testimony to DOI, FAD Valentine stated that she believed she had been “moded in”17 to the VA/Notification position on April 19-20, 2014 and that she was moded in at the time of the Bay 30th Street fire. Valentine remembered the 10-75 code being transmitted over the radio and confirmed that she knew the code required two notifications: one to an FDNY Deputy Chief and one to EMS. Valentine said that she spoke with the Deputy Chief over the phone, and documented the notification in Starfire.

Valentine testified that when she released the screen related to the Deputy Chief notification, she expected another screen prompting her to call EMS to pop up. Instead, she received a notification screen for an unrelated job. The notification screen prompted her to

approximately 12:08:45 am, FAD Valentine, as required, notified EMS via telephone of the three 10-45’s; she also informed EMS that FDNY units on scene were requesting a rush. At 12:10:45 am, the Battalion Chief on scene radioed to FAD Morrison the following transmission in sum or substance: “We have three 10-45’s two in cardiac arrest, is there any word on EMS?” At 12:11:08, FAD Valentine notified EMS of the two patients in cardiac arrest.

16 According to the Fiscal Year 2014 Mayor’s Management Report, the average response time for “life-threatening medical emergencies by ambulance units” was 9 minutes, 33 seconds. (Sept. 2014 MMR, p. 41.)

17 The Starfire system contains a function, known as “moding,” that allows a FAD seated at one workstation to remotely perform the functions of another FAD. The function is most often performed to “mode in” a FAD to the VA/Notification position. Starfire alerts the position moded in that there are notifications pending in the queue by turning the screen red.
verify the address of the unrelated job. Valentine said that it was around this time that SFAD Jones informed her that she (Jones) had pulled up the EMS notification screen at the VA/Notification computer terminal. Valentine said that she told Jones to release the EMS notification screen to her (Valentine) and she would make the telephonic notification.

According to Valentine, however, she never received the EMS notification screen. She assumed that, because the screen never appeared on her computer, one of her colleagues made the notification to EMS. Valentine stated that it is not unusual for two or more FADs to divide up the notifications on a particular job, but she acknowledged that for a 10-75, the same person often makes the notifications to both the Deputy Chief and EMS. Valentine further acknowledged that because she was assigned to cover the VA/Notification position, it was her responsibility to ensure that all requisite notifications had been made.

Valentine had a second opportunity to notify EMS at 12:00:47 am, when she heard the Battalion Chief indicate that there were “PEOPLE TRAPPED.” She failed to do so. Other FADs on duty that night testified to DOI that they would have notified EMS after hearing a firefighter in the field report that people are trapped. However, FDNY policy and regulations do not affirmatively require such a notification.

According to FDNY data from January 1, 2014 through September 30, 2014, the citywide average time between receipt of a 10-75 by a fire dispatch Central Office and EMS notification was approximately 1.33 minutes. Here, the notification to EMS took seven minutes.

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18 When a FAD is moded in, the Starfire prompts indicating that a notification is pending appear on both that FAD’s computer and at the VA/Notification terminal. However, the actual notification can only be accessed by one position at a time. For example, if the FAD physically seated at the VA/Notification position brings up a notification screen on his or her computer terminal, that notification screen cannot be accessed by another FAD until it is released from VA/Notification position’s computer, and vice versa. Here, data from the Starfire system indicates that FAD Valentine was moded into notifications from 10:00:39 pm on April 19, 2014 until after the incident at issue.
B. Supervision – Poor Supervision of FDNY Dispatch Staff Contributed to the Delay in Dispatching An Ambulance to the Bay 30th Street Fire

The delay in dispatching an ambulance to the scene of the Bay 30th Street fire was primarily due to human error on the part of FAD Valentine, who failed to make a timely telephonic notification to EMS. However, as described below, SFAD Jones, FAD Valentine’s supervisor, also contributed to the delay by failing to properly supervise her staff and by executing a series of incorrect commands while working in the Starfire system. When combined with the complex, antiquated fire dispatch system, the dispatchers’ errors resulted in a significant delay on the night of April 19-20, 2014. As currently configured, the system does not have internal safeguards to prevent such errors.

*Actions of SFAD Jones*

While FAD Valentine was ultimately responsible for making the telephonic notification to EMS, SFAD Jones, was responsible for ensuring that the Starfire system was properly monitored at all times and that all required notifications to emergency responders were properly made. Therefore, when two of the assigned FADs were off the floor at the time that the Bay 30th Street fire calls came into the Queens CO, Jones had the duty to ensure that all positions were adequately covered and both FDNY and EMS were sent to the fire scene.

On April 19, 2014, at 11:51:51 pm, the Queens CO was first notified of the Bay 30th Street fire call when the NYPD dispatcher transmitted the incident from ICAD to Starfire. Within seven seconds of receiving this notification, the Queens CO dispatched FDNY firefighting resources to the scene. Because Jones was covering the Decision Dispatcher position, she became actively engaged in assigning FDNY units to the fire scene in addition to performing her supervisory duties.

When the 10-75 call was entered into Starfire, a secondary notification alert to contact the FDNY Deputy Chief and EMS appeared on both FAD Valentine’s terminal

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19 It is worth noting that over the course of its investigation, DOI learned that FDNY’s training standards for FADs and SFADs currently fail to comply with state and industry standards, including the New York State Minimum Standards Regarding Call-Taker/Dispatcher Training, 21 NYCRR Part 5201, and various industry standards promulgated by The Association of Public-Safety Communications Officials (APCO) International and the National Fire Protection Association (NFPA). For instance, according to the Director Designee of FDO, Christopher Carver, and corroborated by other witnesses, there is only minimal formal training for newly-promoted SFADs, focusing only on basic policy and procedures, equipment and other related matters, with no instruction regarding principles of supervision, liability and other critical tasks as described in applicable standards. FDO has implemented a plan to ensure compliance with these standards by 2015. This plan was in motion before the Bay 30th Street fire.
screen and the screen for the regularly assigned VA/Notification position. 20 At 11:57:58 pm, FAD Valentine made the required notification of the active fire to the FDNY Deputy Chief, but did not notify EMS of the active fire.

During this time, SFAD Jones testified that she was walking back and forth between her assigned supervisor’s terminal, where she was also performing the functions of the Decision Dispatcher, and the VA/Notification position. While standing at the VA/Notification position, Jones noticed that there was a pending secondary notification for EMS and pulled up the notification onto the screen. Due to the functional limitations of the Starfire system, when Jones accessed this notification, the other FADS, including FAD Valentine, were unable to simultaneously access the notification.21

Audio recordings of communications from the Queens CO to FDNY units sent to the Bay 30th Street fire captured some of the background conversation on the floor. DOI’s review of these recordings revealed that, at approximately 11:59 pm, Jones and Valentine had a brief exchange about the pending secondary notification alert.22 In the exchange, Valentine asked Jones to release the secondary notification screen, so that she (Valentine) could access it. Starfire data indicates that Jones made several attempts to clear the secondary notification alert from the VA/Notification position terminal but she executed the wrong commands and the alert remained on the screen.23

Jones testified that she attempted to release the screen, so that Valentine could document the notification to EMS. However, Jones admitted that she executed the wrong commands, which is corroborated by the Starfire data. As a result, the notification screen remained on the VA/Notification terminal and did not appear on Valentine’s screen. Valentine did not ultimately make the notification to EMS until approximately 12:04 am.

20 See note 18, supra.

21 Starfire data examined by DOI indicates that after a system alert appeared on the VA/Notification terminal, Jones executed a command to view this notification screen.

22 The layout of the Queens CO is such that the ARDs sit in a different section than the main dispatch floor where the SFAD and other dispatch staff sits. This requires staff to yell across a large room when communicating with one another. Witnesses indicated that the layout presents a communications challenge. See Appendix A for a diagram of the Queens CO.

23 Automated command functions within the Starfire system help facilitate dispatch. The NOTIF command is used to display a notification on the Starfire terminal. The DEFER command is used by the Decision Dispatcher to temporarily postpone automatically suggested resources while a fire incident develops. Data from the Starfire system examined by DOI indicates that the “DEFER” function was executed on the VA/Notification terminal three times at 11:58:34, 11:59:07 and 11:59:08 pm, followed by the “NOTIF” command at 11:59:11. According to Starfire experts at FDNY, the execution of the DEFER and NOTIF commands at the VA terminal while there is a notification on the screen produces an error, which would appear to the user as if nothing was happening.
Jones testified that she took no steps to ensure that Valentine actually notified EMS because, in Jones’ opinion, receipt of a 10-75 is an ordinary and regular occurrence and she had no reason to believe that EMS had not been notified by Valentine. Nor did she direct any of her staff to assist FAD Valentine with notifications or any of her duties and responsibilities. Further, Jones testified that she did not consider calling FAD Zydor back from the kitchen to assist on the dispatch floor, also due to the routine nature of a 10-75.

Dispatcher Valentine Had Been Previously Disciplined For Operational Errors But Received No Additional Training

Valentine’s failure to make a timely notification to EMS on April 19-20, 2014 was not the first time she has made an error on duty. On two occasions in November 2013, FDNY supervisors documented serious failures by Valentine for: (1) entering incorrect information into the Starfire system; and (2) failing to process alarms according to FDNY protocol.24 Further, Jones was disciplined by a Chief Dispatcher for Valentine’s failure to enter incorrect information into the Starfire system.25

In addition to Valentine’s documented instances of poor work performance, her supervisors had expressed concern to senior EMS officials about her ability as a dispatcher. SFAD Jones testified to DOI that, in her opinion, Valentine was not a “strong dispatcher.” Jones said that following the November 12, 2013 incident, she verbally recommended to her supervisor, Chief Dispatcher Juan Gonzalez, that Valentine receive retraining. Jones testified that Chief Dispatcher Gonzalez spoke to then Deputy Director Christopher Carver about providing retraining for Valentine but that Valentine never received any such training.26 Additionally, a second SFAD assigned to the Queens CO said he met with Deputy Director Carver in March 2014 and expressed concern about Valentine’s inattentiveness on duty, job knowledge, and work performance. Specifically, the SFAD said that he told Carver he believed Valentine was “a liability” if she was allowed to remain at the Queens CO.

24 On November 12, 2013, while attempting to enter a Signal 2-2 for Queens Alarm Box 9689, FAD Valentine entered a Signal 2-2 for Queens Alarm Box 5386 at the Radio position. While the error in entering this incorrect signal did not cause a disruption in the assignment of companies to Box 9689, it caused a disruption in the availability of dispatch personnel to receive and process alarms. On November 18, 2013, FAD Valentine received a conference call for Alarm Box 6632-01 stating “smoke” and made it a complaint. She also did the same thing for Box 3137-01. Had she processed these alarms properly, they would have dispatched prior to the NYPD alarm as is protocol.

25 Jones was disciplined for Valentine’s November 12, 2013 mistake for failing to supervise.

26 Emails provided to DOI by FDO confirm that in or about early March 2014, Chief Dispatcher Gonzalez requested that Valentine receive retraining. Based on this request, then-Deputy Director Carver noted that there were not any serious deficiencies in Valentine’s 2013 Annual Evaluation and asked Gonzalez for examples, which were never provided. It appears that the request for Valentine to receive retraining did not advance any further. It is also worth noting that Valentine’s 2012 evaluation indicates “FAD Valentine should have access to additional training.”
FDNY Dispatch Relief Policy

According to multiple witnesses, FADs and SFADs at Fire Dispatch Central Offices work 12-hour shifts and do not have a formal break schedule. As such, they take breaks as necessary, for example, to use the restroom, cook, purchase meals or make personal cell phone calls. Under the current practice, when a FAD takes a break, there is no designated FAD to cover his or her position. As such, the SFAD will direct the remaining dispatchers to cover the position of the FAD who is off the floor and often cover another position him or herself. Accordingly, at times, as many as two dispatchers can be off the floor at the same time. The informal break policy requires remaining staff to juggle multiple responsibilities, which, as during the Bay 30th Street fire, can lead to errors. The failure to have a formal break schedule increases the likelihood that staff will not be properly in place and thus increases the chance of human error in an emergency.

C. Technology – EMS ARDs at the Fire Liaison Desk are not trained to use FDNY Technology

Although EMS uses its own CAD system, EMSCAD, the agency has access to Starfire and can electronically view fire incidents. However, EMS dispatchers are not trained to interpret Starfire data and, therefore, must wait for telephonic notification from FDNY before they are able to dispatch an ambulance to the scene of a fire.

FDNY Requests for EMS

In the event that a firefighter in the field requests an ambulance over the radio, the VA/Notification position makes the telephonic notification to an Assignment Receiving Dispatcher (ARD) assigned to the Fire Liaison Desk at the Emergency Medical Dispatch (EMD) Center located at the Public Safety Answering Center in downtown Brooklyn (PSAC-1). The EMS ARD assigned to the Fire Liaison Desk is required to monitor the Starfire terminal. That terminal, however, does not indicate in which borough the incident is occurring. During DOI’s investigation, multiple witnesses testified that the ARDs assigned to the Fire Liaison Desk are not trained in how to use the Starfire system. As a result, the Fire Liaison Desk ARDs are left to simply observe fire incidents on the Starfire monitor; because they cannot view additional details, they cannot take action regarding an incident.

Actions of EMS ARDs at the Fire Liaison Desk

In addition to the delay caused by FAD Valentine’s and SFAD Jones’ actions, DOI and FDNY’s BITS determined that the actions of the EMTs assigned to the Fire Liaison Desk at EMD also contributed to the delay in dispatching ambulances to the scene of the incident.

27 All the ARDs assigned to EMD are certified Emergency Medical Technicians or Paramedics.
incident. EMS ARD Ann Grochulski was scheduled as the Relief ARD on the night of April 19-20, meaning she covered other ARDs’ positions while they took their scheduled breaks. Grochulski testified that she did not see the Bay 30th Street fire on the Starfire terminal during her 11:30am – 12:00am shift at the Fire Desk. Surveillance video shows Grochulski leaving the dispatch floor at approximately 11:56 pm and returning at approximately 12:00am. Grochulski testified that she did not recall leaving the dispatch floor but that she was not feeling well and probably left the floor to use the restroom, after notifying a colleague who was stationed at the adjacent Community-Based Emergency Medical Services (CBEMS) desk. ARD Ortiz, who was assigned to the CBEMS position, testified that he did not recall Grochulski asking him to cover her position so she could step away. EMS ARD DeFrancesco, who was assigned to the Fire Desk that evening, testified that when he came back to his position close to 12:00am, Grochulski was not there.

In addition to Grochulski’s leaving the Fire Desk unstaffed for several minutes, no one on duty at PSAC-1 took independent action to dispatch an ambulance to the scene of the fire. During the course of its investigation, DOI learned that EMS has a policy (Dispatch Order #12-032) specifically related to 10-75 Fire Assignments. The policy’s stated purpose is “to expedite EMS response to a reported 10-75 fire,” which it purports to accomplish by requiring EMS dispatchers seated at the Fire Liaison Desk to take action upon receiving notification of a 10-75 fire by any means (e.g., radio, telephone, computer terminal). Thus, according to the policy, EMS dispatchers who heard the 10-75 over the radio or observed the entry in Starfire would be required to take action. However, according to witnesses, the policy is unworkable in practice as most EMS dispatchers (1) are not trained to read Starfire incident histories; (2) do not – nor are they required to – listen to the Fire radio while on duty; and (3) cannot dispatch resources without knowing the borough location of the fire, information that is not viewable at the Starfire terminal at the EMS Fire Liaison desk.

IV. Policy and Procedure Recommendations

In the course of its investigation, DOI determined that a variety of systemic problems in the dispatch system increases the risk of human error. As such, DOI recommended the following measures to FDNY.

Process Recommendations

The multi-step process for dispatch increases the chance that human error will occur. DOI recommended that FDNY streamline the process as much as possible within the current technological constraints of the system. Specifically, DOI recommended that some of the steps (and thus individual actors) be eliminated and a shorter process be implemented.

28 Unlike the FDNY dispatchers, EMS dispatchers have break schedules and one-for-one relief.

29 Grochulski identified herself in the surveillance video.
In addition, DOI recommends that FDNY issue a dispatch directive to formalize its practice of requiring dispatchers to enter a 10-44 into the Starfire system (i.e., “request EMS”) when radio transmissions indicate that people are trapped.

DOI is still waiting for FDNY’s full re-structuring plan, but notes that FDNY has already begun to implement some steps to tighten the dispatch process. FDNY has changed its dispatch process such that the notification to EMS is the first of the two-step notification – dispatchers will now contact EMS before reaching out to an FDNY Deputy Chief.\(^{30}\) We believe this is an important first step and will monitor its utility going forward. However, we anticipate that the integration of the FDNY and EMS dispatch systems, discussed in detail below, will significantly improve the process.

**Supervision Recommendations**

DOI found that dispatch personnel were away from their positions due to the 12-hour shifts they work and the informal break and meal policy. To address this, DOI recommends that FDNY implement scheduled meal breaks and one-to-one relief at Fire Dispatch Central Offices. Similarly, to ensure that dispatchers are not distracted while on duty, FDO should ensure that the memorandum dated June 9, 2009 issued to Fire Dispatch personnel regarding Unauthorized Use of Technology\(^{31}\) is enforced at all FDO facilities.

To ensure that SFADs are able to effectively supervise dispatchers, FDO should consider relocating the ARDs at the Queens Central Office so that they are closer and within line of sight and sound to the SFAD and the rest of the dispatch staff. This would lessen the chances of miscommunications about which staff has made required notifications.\(^{32}\)

Finally, FDNY leadership was put on notice regarding a dispatcher’s skill deficiencies and failed to take any steps to improve such dispatcher’s performance. FDNY

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\(^{30}\) In addition, FDNY is making EMS radio frequencies available in all field apparatus. This will ensure that firefighters on scene are able to communicate directly with responding EMS units instead of having to communicate with dispatch as an intermediary.

\(^{31}\) A copy of the June 9, 2009 memorandum is attached as Appendix D.

\(^{32}\) With respect to training, FDNY should implement the training and retraining initiatives for SFADs and FADs it has proposed and also include additional training regarding secondary notifications. In addition, FDNY should ensure that FDO complies with New York State and industry training standards regarding SFADs and FADs. While these standards are advisory and not required by law, they represent best practices to which FDNY should adhere. FDNY plans to and should continue to provide basic training to EMS ARDs assigned to the Fire Desk in how to operate the Starfire system, including how to view additional details about a pending fire incident and should provide those ARDs will full access to the system.
must better train and manage its supervisors to ensure that appropriate re-training and enhanced supervision are provided where necessary.

Technology Recommendations

During the course of this investigation, DOI observed the Starfire CAD system used by dispatchers at Fire Dispatch Central Offices. As discussed above, multiple dispatchers are needed to dispatch an ambulance to the scene of a fire. In addition, the system is antiquated and requires constant communication among dispatchers who are each carrying out discrete tasks. The failure to notify EMS that occurred in connection with the Bay 30th Street fire led DOI to question what the City is doing to replace the Starfire system.

As described in greater detail below, the City has undertaken a large scale project to integrate emergency response, the Emergency Communications Transformation Project (ECTP), which will include the unification of computer aided dispatch for Fire and EMS. To address the issues set forth in this report pending the completion of ECTP, DOI recommended that FDNY implement an electronic link between Starfire and EMSCAD that would automate the request for an ambulance when a 10-75 is communicated to FDO. Utilizing this link, a 10-75, 10-45 and any other appropriate communication called in from field units would automatically trigger the dispatch of an ambulance with input from fewer dispatchers.

In response to DOI’s recommendation, FDNY has studied the issue, solicited vendor input and come up with two solutions, described in greater detail below: A short-term fix that FDNY has already implemented and a more robust technological solution in development, which is estimated to cost $200,000 and be completed in four to six months. These solutions are interim measures designed to correct the problem during the development of the FD CAD system, which is being designed to enhance dispatch Department-wide, as well as address the 10-75 situation. DOI recommends that the crucial interim measures detailed below be implemented immediately and fully funded by the City.

FDNY’s Long-Term Solution – ECTP

Launched in 2004, the Emergency Communications Transformation Project (ECTP) is a multi-year initiative to enhance communications and dispatch operations for NYPD and the Fire and EMS functions of FDNY. ECTP includes a portfolio of projects, all related to the 9-1-1 system, and provides for upgrades to computer dispatch systems, improved integration and data sharing between agencies, new 9-1-1 telephony networks and software, and other improvements. In March 2008, FDNY requested a certificate to proceed from the New York City Office of Management and Budget (OMB) in connection with elements of Stage 1 of ECTP. At the time that FDNY made the request, a combined CAD system was projected to be completed within five to seven years. Thus, FDNY

33 At the request of the Mayor, DOI is currently investigating ECTP and will issue a report once its investigation is complete.
requested interim funds for the “Stay Alive Projects” to continue to support, maintain and repair its two CAD programs, Starfire and EMSCAD, until the completion of a consolidated system.

According to documents produced by FDNY and witnesses interviewed by DOI, the Starfire Stay Alive Projects included a System Change Request to implement a functionality allowing a dispatcher to enter a request for a Fire response to an Emergency Medical Dispatch (EMD) incident or for an EMD response to a Fire incident.

According to documents produced by OMB, the Stay Alive Project was funded until in or about June 2012. At that point, OMB declined to continue capital funding for the projects pursuant to Comptroller’s Directive No. 10 because a unified FDNY CAD system to replace Starfire and EMSCAD, known as FD CAD or Fire CAD, was scheduled to be implemented under ECTP in less than five years. At the time that capital funding was discontinued in June 2012, the Office of Citywide Emergency Communications (OCEC) projected that FD CAD would go live within two to two and half years.

It should be noted that there have been numerous iterations of the FD CAD project (i.e. consolidation of Starfire and EMSCAD into a single CAD system) that have failed, dating back to at least 2000. Preparations for the most current FD CAD replacement project, anticipated to be developed and implemented by Intergraph, began in February 2011. According to testimony of the former director of OCEC taken before DOI in August 2013, OCEC’s plan was to transition Starfire and EMSCAD to an Intergraph

34 As initially outlined, there were three phases of the project: Phase 1 covered the initial implementation of critical upgrades and development of detailed requirements; Phase 2 covered CAD software and interface changes; and Phase 3 contemplated upgrades for the EMSCAD and the Starfire Message Switch.

35 Section 3.3 of that directive provides in part: “A project’s expected useful life, for City purposes, must be at least five years for the expenditure to be classified as a Capital Project.”

36 According to a Statement of Work (SOW) prepared by DoITT and Northrop Grumman Corporation (NGC), (the former system integrator of the FD CAD project) during contract negotiations starting in mid-2010 and completed in the end of 2011, the objectives of the FD CAD project are “to design, implement, install, integrate, test, cut over, operate and maintain a CAD Subsystem for FDNY Fire and Emergency Medical Dispatch, EMS Command, the Office of Medical Affairs, Voluntary Hospital Personnel, the Office of Emergency Management, City Hall and other current EMSCAD and Starfire users, and provide training for Operators and System Administrators.” According to the SOW, the proposed FD CAD system would perform the following functions: E9-1-1 Call Handling, Event Receipt, Event Entry, Dispatch Functions, Mapping Functions, Messaging, Hospital sub-system, Event Query and Report Generation, Mobile Functions, User Preferences, Voluntary Hospital Functions, User Preferences, Voluntary Hospital Functions, and System Administration. Further, pursuant to the SOW, the proposed FD CAD system will integrate with the following other ECTP Subsystems: Facility, Network Infrastructure, E9-1-1, NYPD’s ICAD system, Voice and Data Radio systems, logging and recording, ERS/BAAS, FDNY Data warehouse and computerized triage.
product either in the fourth quarter of 2014 or the beginning of 2015. As of May 19, 2014, the FD CAD project was scheduled for installation in PSAC-1 by July 17, 2015. According to documents provided by OCEC, as of June 2, 2014, the FD CAD project is now scheduled for completion by August 31, 2016, more than 18 months after OCEC estimated. The delays in completion of the FD CAD project will be examined in more detail in a subsequent DOI report. For purposes of this report it is sufficient to note that a solution at least two years away is not, alone, a properly timely response to this immediate problem.

According to witnesses from OCEC, the FD CAD system will still require FDNY field units to manually communicate a 10-75 to an FDNY Dispatch Central Office, but the CAD system will automatically notify the Deputy Chief and EMS. When implemented this will be a significant, though not complete, solution to the issues noted here.

FDNY’s Interim Solution – The CAD Operational Readiness Project (COR)

According to witnesses at FDNY, the projects formerly known as EMSCAD and Starfire Stay Alive Projects are now included under the CAD Operational Readiness Project (COR). COR includes several projects to enhance the interaction between the two CAD systems used by Fire and EMS. One planned component is the establishment of a link between Starfire and EMSCAD that would allow Starfire users to open an incident in EMSCAD automatically, which it cannot currently do. In sum, FDNY would be able to automatically dispatch an ambulance to a fire incident without making a manual or telephonic notification to EMS. Because the operational specifications of this component have not been fully defined yet, some manual input by dispatchers may still be required. Moreover, no firm date for implementation has been given to DOI, but we have been informed that it is at least four to six months in the future.

FDNY’s Short-term Solution

Due to the four to six months required to implement the link between Starfire and EMSCAD described above, the FDNY is pursuing a short-term solution in two (2) phases.

In phase one, FDNY has installed an Alarm Teleprinter Selector (ATS) device at the Fire Liaison Desk at EMD, which replaces the existing Starfire monitor. This allows fire dispatch to assign an incident to the ATS for each 10-75. The assignment appears on the ATS and prints a “ticket” automatically. EMD then acknowledges this assignment on

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37 According to witnesses, the current interface between Starfire and EMSCAD could be configured to open incidents in the other system for anything for which there is an operational need but those requirements would need to be ascertained from operational staff. DOI was provided with the interface control document (ICD) generated by FDNY’s technical staff. It contains details of already existing functionality, but does not include operational details, such as whether receipt of a 10-75 would automatically cause Starfire to communicate with EMSCAD to request an ambulance. However, according to FDNY’s draft COR Summary, the proposed link would allow Fire Dispatch to automatically initiate calls for EMS service and vice-a-versa.
the ATS and enters the call information into EMSCAD. The use of the ATS device supplements the telephonic notification and provides a safeguard in case the telephone call is delayed or omitted.

FDNY estimates that most, if not all, of the work on Starfire will be done in-house for approximately $50,000, if vendor support is needed for development and/or testing. FDNY estimates that this initiative will take approximately one month to fully complete, barring any unforeseen technical issues.

In phase two, FDNY plans to add to the existing CFR infrastructure by adding to the existing Starfire call table and EMSCAD call type. This function will provide an acknowledgement back to Starfire once the incident is entered in EMSCAD, thus improving coordination and documentation. In addition, this will allow FDO and EMD to see each other’s data.

FDNY will be able to perform most, if not all, of the Starfire and EMSCAD work in-house. Approximately $50,000 to $100,000 may be expended if vendor support is needed for development and/or testing. This initiative is likely to take two months to complete barring any unforeseen technical issues.

V. Conclusion

In the course of our investigation into the events of the night of April 19-20, 2014 at 10-31 Bay 30th Street in Queens, DOI identified several deficiencies in FDNY’s processes, practices, and systems that raised larger concerns about the way that ambulances are dispatched to the scene of an active fire. That night, as a result of the complexity of the dispatch system as well as a series of errors and miscommunications between the primary dispatcher who handled the call and the supervisor on duty, EMS did not receive timely notification to send an ambulance to the scene of the Bay 30th Street fire. EMS was not officially notified of the incident until seven minutes after FDNY received a report that people were trapped inside the burning building, delaying medical assistance to two children who ultimately died. The multi-step process for dispatching an ambulance to the scene of an active fire is extremely cumbersome, which, when combined with an antiquated and complex 9-1-1 system, creates a systematic vulnerability that substantially increases the likelihood that human error will occur. The recommendations issued in this report endeavor to mitigate this vulnerability.

As a result of this investigation, FDNY has already implemented two measures to improve the process of dispatching an ambulance to the scene of an active fire. First, after confirmation of an active fire, FDNY dispatchers now first call EMS to request that an ambulance be sent to the fire scene – prior to calling the FDNY Deputy Chief to report an active fire. This procedural change reverses the order of the calls from the procedures in place on the night of the Bay 30th Street fire in order to expedite the dispatch of emergency medical resources to an active fire scene. Although this is an improvement over the previous process, this measure does not eliminate the need to make a phone call in order to notify EMS. The process of dispatching of an ambulance to a fire still contemplates an FDNY dispatcher placing a call to an EMS dispatcher. Accordingly, the reversal of the
order of calls in the dispatch process is a positive step, but it is plainly not sufficient to address the larger issue of streamlined communication between FDNY and EMS.

Second, FDNY has installed a teleprinter device at the Emergency Medical Dispatch Center that allows EMS dispatchers to contemporaneously view a printout of complete information from Starfire regarding an active fire. As a result of the implementation of this provisional solution, EMS dispatchers are now able to manually enter information obtained from the Starfire printout into EMSCAD to dispatch an ambulance. We note that this interim measure provides a safeguard to the telephonic notification to EMS. However, dispatchers must currently monitor the teleprinter device and turn from their workstations to obtain the necessary information from Starfire regarding the active fire. The teleprinter device offers a helpful safety net, but it ultimately adds (albeit on a parallel track) rather than eliminates a step in the process – and thereby does not address the urgent need to simplify the ambulance dispatch process. While the installation of the teleprinter was a cost-effective and easy to implement temporary fix for the inability of EMS dispatchers to view Starfire data, we strongly recommend that FDNY develop additional technical provisional solutions to further simplify the complexity of the ambulance dispatch process and integrate the FDNY and EMS dispatch systems.

The best solution to the issues discussed in this report is the integration of the FDNY and EMS dispatch systems, the Long-term Solution. Unfortunately, the completion of a unified system is at least two years away. The Short-term Solution that has been implemented by FDNY is truly stop-gap. The Interim Solution, which would create a link between Starfire and EMSCAD, would most closely approximate the Long-term Solution, in that it would allow FDNY to dispatch an ambulance to an active fire at their workstations, (albeit on a split screen), without manual or telephonic notification to EMS. Although FDNY has received estimates for the approximate cost and time of completion, it has not yet finalized its plans to implement this measure. It should do so immediately.
Appendix A – Diagram of Queens CO
Appendix B – Description of FAD and SFAD Positions

**Alarm Receipt Dispatcher (ARD):** An ARD’s primary responsibility is to converse with 9-1-1 callers. NYPD telephone dispatchers conference 9-1-1 callers with FDNY ARDs, who verify the address of an emergency and enter pertinent information (beyond that which has been gathered by the NYPD) into Starfire. Any additional information entered into Starfire by an ARD is transmitted to the Decision Dispatcher.

**Decision Dispatcher (DD):** The Decision Dispatcher is responsible for assigning FDNY units (e.g., fire engines, ladders, Battalion Chiefs, etc.) to respond to an incident, and assigning additional fire resources when the need arises. The DD receives the data from Starfire after an incident is entered by the NYPD dispatcher and the ARD and begins assigning resources to respond to the incident.

**Radio Out (RO):** The Radio Out FAD is responsible for communicating with FDNY resources in the field (e.g., engines, ladders, Battalion Chiefs, etc.). The RO communicates with and receives reports from field personnel over the radio and is responsible for relaying those messages to the Radio In FAD and other dispatch personnel assisting with an incident.

**Radio In (RI):** The Radio In FAD is responsible for entering the radio communications received by the RO (above) into Starfire, using the SEP terminal. For example, if a firefighter radios the code “10-75,” the RO would receive the communication, and the RI would enter “10-75” into Starfire using the SEP terminal. The RI position is eliminated between the hours of 11:00 pm and 7:00am. During that time, the FAD assigned to cover the RO position handles both the RO and the RI positions.

**Voice Alarm (VA)/Notification:** The VA/Notification position’s primary responsibility is to notify various agencies regarding an incident after the RI generates the notifications in Starfire. For example, after the RI enters the code “10-75” into Starfire using the SEP terminal, Starfire sends electronic and audio alerts to the VA that there are notifications pending. The VA FAD will make the requisite notifications over the phone and document his or her actions in Starfire. Starfire alerts the VA FAD that there are notifications pending in the queue by turning the screen red, and if the dispatcher does not hit the “Next” button, an audible alarm goes off at the terminal.

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38 Three ARDs are on duty from 7:00am through 11:00 pm, while only two work from 11:00 pm through 7:00am.

39 The VA’s secondary responsibility is to serve as a backup in the event firehouses lose connection to the Starfire system. When communication is lost, the VA uses the voice alarm to make audio notifications over a loud speaker at a firehouse.

40 FDNY has a list of 10 codes and each requires anywhere from two to eight or more separate notifications.
**SFAD**: The SFAD is responsible for monitoring the staff on duty and the dispatch of FDNY resources to fire emergencies. He or she must also ensure that all positions are covered when a FAD steps away for a break. In addition, the supervisor has various administrative tasks to complete (e.g., paperwork, staff timesheets, etc.).

41 Dispatchers Directive No. 09-01 requires SFADs to ensure compliance with the procedures outlined in that directive, including provisions on professionalism, routine telephone answering procedure, alarm receipt interrogation procedure and phraseology, procedures for responding to persons trapped or seeking instruction, mandatory use of recorded telephones and accountability. Section 6.1.1 provides: “Tour Supervisors will ensure compliance with these procedures; and Chief Dispatchers will oversee that compliance. Each will be held accountable for failure to take immediate corrective action appropriate to any deficiency noted.”
Appendix C - Timeline of Incident
[Bolded text represents recorded audio communications]

- 11:51:06 pm – NYPD dispatch center receives 9-1-1 call regarding fire at 10-31 Bay 30th Street
- 11:51:50 pm – NYPD dispatcher transmits electronic notification regarding the fire from ICAD system to FDNY’s Starfire system
- 11:51:51 pm – Starfire receives electronic notification sent by ICAD regarding the fire
  - 11:51:55 pm – NYPD dispatcher conferences FAD Kalisak with 9-1-1 caller reporting the fire
  - 11:51:59 pm – NYPD dispatcher conferences FAD Valentine with 9-1-1 caller reporting the fire
- 11:51:58 pm SFAD Jones uses Starfire system to dispatch FDNY resources (3 engines, 2 ladders, 1 Battalion Chief)
- 11:52:03 pm - NYPD dispatch center enters second 9-1-1 call regarding fire at 10-31 Bay 30th Street into ICAD
- 11:56:26 pm-11:56:48 pm – FDNY resources arrive on scene
  - 11:56:55 pm – Battalion Chief on scene radios 10-75 to FAD Morrison. A 10-75 (i.e. “active fire”) requires a two-step FDNY response: (1) notification to an FDNY Deputy Chief; and (2) notification to EMS
- 11:57:10 pm – FAD Morrison enters 10-75 notification into Starfire
  - 11:57:15 pm – A tone alert for the 10-75 can be heard on the audio recording of an unrelated 9-1-1 call. The presence of this tone on the recording demonstrates that FADs Kalisak and Valentine had scanner turned on at the ARD positions and were able to hear the alerts.
- 11:57:18 pm – SFAD Jones uses Starfire system to dispatch additional FDNY resources (1 squad, 1 engine, 1 ladder, 1 battalion, 1 rescue)
  - 11:57:15 pm – FAD Valentine notifies FDNY Deputy Chief of 10-75 via telephone
- 11:57:58 pm – FAD Valentine enters notification to Deputy Chief into Starfire
  - 11:58:58 pm – Battalion Chief on scene radios to FAD Morrison: “We have people trapped … good water source”
- 12:00:47 am – FAD Morrison enters comment into Starfire: “BC47 RPTS 1L/S THEY HAVE GOOD WATER SOURCE” (i.e. Battalion Chief 47 reports one line stretched, they have a good water source). Morrison does not enter, “PEOPLE TRAPPED,” or a 10-44 notification (i.e. “request EMS”), which is not required by protocol but is considered best practice.
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- 12:03:11 am – Battalion Chief on scene radios 10-45 (i.e. “fire-related injury”) to FAD Morrison.
- 12:03:25 am – FAD Morrison enters 10-45 notification into Starfire
  - 12:04:03 am – First recorded telephonic communication between FAD Valentine and EMS dispatch center begins
  - 12:04:11 am – Battalion Chief, via radio, demands EMS to front of the building
- 12:04:12 am – 10-44 (i.e. “request EMS”) entered into Starfire by FAD Morrison
  - 12:05:41 am – Recorded phone call between FAD Valentine and EMS (ARD No. 8690) ends
  - 12:05:39 am – Battalion Chief on scene radios two additional 10-45’s (now three in total) to FAD Morrison; Battalion Chief again demands EMS, FAD Morrison tells him EMS has been notified
- 12:05:47 am- Notification to EMS entered into Starfire by FAD Valentine
- 12:06:12 am – EMS assigns 2 ambulances to respond to scene
- 12:06:33 am – FAD Morrison enters second 10-45 notification into Starfire
- 12:06:35 am – FAD Morrison enters third 10-45 notification into Starfire
- 12:06:35 am – FAD Valentine enters notification to EMS into Starfire
  - 12:06:38 am – FAD Valentine notifies FDOC via telephone of the three 10-45’s
- 12:07:13 am – FAD Valentine enters notification to FDOC into Starfire
  - 12:07:40 am – FAD Valentine notifies Fire Marshall via telephone of 10-45’s
- 12:08:32 – FAD Valentine enters notification to Fire Marshall into Starfire
  - 12:08:45 am – FAD Valentine notifies EMS via telephone of the three 10-45’s, tells EMS that FD on scene is requesting a rush
- 12:09:15 am – FAD Valentine enters second notification to EMS into Starfire
  - 12:10:45 am – Battalion Chief on scene radios to FAD Morrison “We have three 10-45’s two in cardiac arrest, is there any word on EMS?”
- 12:11:08 – RSEP position (FAD Morrison) enters 10-44 into Starfire
  - 12:11:08 – FAD Valentine notifies EMS (EMS ARD No. 8690) via telephone that there are two patients in cardiac arrest
- 12:11:59 am - FAD Valentine enters third notification to EMS into Starfire
  - 12:12:03 am – First EMS ambulance (Basic Life Support) arrives on scene
Appendix D – Unauthorized Use Memorandum

The City of New York

FIRE DEPARTMENT
Bureau of Communications
Office of the Director

MEMORANDUM

To: Fire Dispatch Personnel

All Units

From: Gerard Neville

Director of Communications

John Porcelli

Director - Fire Dispatch Operations

Date: June 9, 2009

Subject: UNAUTHORIZED USE OF TECHNOLOGY

Fire Dispatch Operations personnel are reminded that the use of personal laptop computers, voice recording equipment, and/or photographic devices, is strictly prohibited in any Fire Dispatch Operations Facility while on-duty.

Additionally prohibited is the use of a personal cell phone and/or Blackberry for voice or “texting” while at an Operations Area position; or the use of its voice recording and/or photographic capabilities anywhere in the facility or on its grounds at any time.

The use of Fire Department equipment with any of the indicated capabilities is governed by, and subject to, the FDNY POLICY ON LIMITED USE OF OFFICE AND TECHNOLOGY RESOURCES, which is found on the Home Page of the FDNY Intranet.

Fire Dispatch Operations personnel are also reminded that, in accordance with existing policy, the photographing / video taping of any facility, or its operation, equipment, personnel, CAD screens, etc., shall be considered unauthorized, whether on or off duty, unless Bureau management level authorization has been obtained. Likewise, any voice recording or audio reproduction of an operation or its personnel is also unauthorized. Furthermore, the publishing of any unauthorized photos, videos or recordings, whether on the internet or another venue is a serious infraction that will be subject to appropriate and formal disciplinary action.

The ranking Supervisor On-Duty in the facility shall be responsible for ensuring compliance in the above; and shall take immediate, appropriate action in cases of non-compliance. Supervisors shall also monitor the use of applicable FDNY equipment to ensure compliance with the FDNY POLICY ON LIMITED USE OF OFFICE AND TECHNOLOGY RESOURCES.

Borough Supervisors shall review and reinforce this Memorandum with their respective borough personnel; indicating specifically that failure to comply with the outlined internal Bureau policies and the FDNY LIMITED USE OF OFFICE AND TECHNOLOGY RESOURCES will result in disciplinary action and may also be subject to the penalties delineated within the aforementioned limited use policy.

A COPY OF THIS MEMORANDUM SHALL BE POSTED CONSPICUOUSLY, AND EACH MEMBER OF THE OPERATION SHALL BE ISSUED A COPY THAT IS TO BE ACKNOWLEDGED ON A REQUIRED DOCUMENT RECEIPT FORM.

GN:JFjip
Memo 09 - Reinforcement Unauthorized Devices
Exhibit A - Depiction of the Secondary Notification Displayed on the Voice Alarm Terminal at 11:58 pm

23:58:01.39
Terminal: QMNT
ALT1 SECONDARY NOTIFICATION
BOX # - LOCATION 1169 - 10-31 BAY 30 ST
MAIN STREET 10-31 BAY 30 ST
INTERSECTION DWIGHT AVE
BESSEMUND AVE
DESCRIPTION D=PRIVATE DWELL 10-75
X. DEPUTY CHIEF
. EMS
PERSON NOTIFIED:
Glossary of Terms

10-44 FDNY radio code meaning “request EMS.”


10-75 FDNY radio code meaning “notification fire/emergency;” used by firefighters to indicate there is a working fire.

ARD (EMS) Assignment Receiving Dispatcher: an emergency medical technician (EMT) who has received specialized training and whose job is to evaluate incoming emergency calls and data and enter the information into the EMSCAD system.

ARD (FDNY) Alarm Receipt Dispatcher: an FDNY employee assigned to an FDNY Central Office responsible for conversing with 9-1-1 callers. NYPD telephone dispatchers conference 9-1-1 callers with ARDs, who verify the address of an emergency and enter pertinent information (beyond that which has been gathered by the NYPD) into Starfire.

BITS FDNY Bureau of Investigations and Trials, the disciplinary unit at the FDNY.

BTDS FDNY’s Bureau of Technology, Development and Systems.

CAD system Computer Aided Dispatch system.

CO Fire Dispatch Central Office: FDNY location responsible for dispatching FDNY resources (e.g., fire engines, ladders, Battalion Chiefs, etc.) and communicating with firefighters in the field and other agencies, including EMS, NYPD and Con Ed.

DD Decision Dispatcher: The Decision Dispatcher is responsible for assigning FDNY units (e.g., fire engines, ladders, Battalion Chiefs, etc.) to respond to an incident, and assigning additional fire resources when the need arises. The decision dispatcher receives the data automatically after an incident is entered by the NYPD dispatcher and/or an ARD and then the DD begins assigning resources.

ECTP Emergency Communication Transformation Program: an initiative launched by the City in 2004 to enhance call taking and dispatch operations for NYPD, FDNY, and EMS.

EMD FDNY’s Emergency Medical Dispatch Center at 11 Metrotech in Brooklyn
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>EMS</td>
<td>Emergency Medical Service, a division of the FDNY.</td>
</tr>
<tr>
<td>EMSCAD</td>
<td>Emergency Medical Service Computer Aided Dispatch system.</td>
</tr>
<tr>
<td>FAD</td>
<td>Fire Alarm Dispatcher: an FDNY employee assigned to a Fire Dispatch Central Office responsible for managing the dispatch of Fire resources (e.g., fire engines, ladders, Battalion Chiefs, etc.) and communicating with firefighters in the field and other agencies, including EMS, NYPD and Con Ed.</td>
</tr>
<tr>
<td>FD CAD</td>
<td>Unified computer aided dispatch system planned for use by EMS and FDNY.</td>
</tr>
<tr>
<td>MDT</td>
<td>Mobile Data Terminal, a touchscreen computer that runs the EMSCAD program in ambulances or the Starfire program in Fire apparatuses, by which emergency personnel can see incidents to which they are being assigned.</td>
</tr>
<tr>
<td>NYPD ICAD</td>
<td>Intergraph Computer Aided Dispatch system.</td>
</tr>
<tr>
<td>OCEC</td>
<td>Mayor’s Office of Citywide Emergency Communications.</td>
</tr>
<tr>
<td>PSAC-1</td>
<td>Public Safety Answering Center at 11 Metrotech in Brooklyn, part of the ECTP initiative and the co-location of NYPD, FDNY and EMS.</td>
</tr>
<tr>
<td>Queens CO</td>
<td>The Fire Dispatch Central Office located in Queens.</td>
</tr>
<tr>
<td>RI</td>
<td>Radio In: The RI position at the CO is responsible for entering the radio communications received by the RO (below) into Starfire, using the Status Entry Panel (SEP) terminal.</td>
</tr>
<tr>
<td>RO</td>
<td>Radio Out: The RO position at the CO is responsible for communicating with FDNY resources in the field (e.g., engines, ladders, Battalion Chiefs, etc.). The RO communicates with and receives reports from field personnel over the radio and is responsible for relaying those messages to the Radio In operator and other dispatch personnel assisting with an incident.</td>
</tr>
<tr>
<td>SFAD</td>
<td>Supervising Fire Alarm Dispatcher; responsible for monitoring the staff on duty and the dispatch of FDNY resources to fire emergencies. He or she must also ensure that all positions are covered when a FAD steps away for a break. In addition, the supervisor has various administrative tasks to complete (e.g., paperwork, staff timesheets, etc.).</td>
</tr>
<tr>
<td>Starfire</td>
<td>Computer aided dispatch system used by Fire Dispatch</td>
</tr>
</tbody>
</table>
Voice Alarm/Notification: The VA/Notification position’s primary responsibility is to notify various agencies regarding an incident after the RI generates the notifications in Starfire. The VA makes the requisite notifications over the phone and documents his or her actions in Starfire. The VA’s secondary responsibility is to serve as a backup in the event firehouses lose connection to the Starfire system. When communication is lost, the VA uses the voice alarm to make audio notifications over a loud speaker at a firehouse.
WASHINGTON—The former chief executive officer (CEO) of ArthroCare Corporation was sentenced to serve 20 years in prison, and the former chief financial officer (CFO) was sentenced to serve 10 years in prison today for their leading roles in a $750 million securities fraud scheme. Two other former senior vice presidents of ArthroCare were also sentenced to prison terms for their roles in the scheme.

Principal Deputy Assistant Attorney General Marshall L. Miller of the Department of Justice’s Criminal Division and Special Agent in Charge Christopher H. Combs of the FBI’s San Antonio Field Office made the announcement. U.S. District Judge Sam Sparks in the Western District of Texas imposed the sentences.

“Earlier today, in federal court in Austin, Texas, we witnessed the culmination of an epic tale of greed,” said Principal Deputy Assistant Attorney General Miller. “The CEO, CFO and two vice presidents of ArthroCare sentenced today ran a successful business, but they wanted more. Their greed led to fraud, and their fraud caused investors to lose hundreds of millions of dollars. At the Criminal Division of the Department of Justice, we are committed to prosecuting individuals who commit crimes to make money, whether they do so on street corners or in corner offices. The aggressive pursuit of corporate executives who commit fraud is at the core of our mission to pursue justice and protect the American public.”

“This scheme of betrayal and deceit was carried out by the defendants without regard to the deep-reaching and irreparable harm their actions caused to thousands of victims, here in Texas, and throughout the United States,” said FBI Special Agent in Charge Combs. “While it is important to recognize the financial losses sustained by all victims, which includes individual investors and institutional investment firms, many of the victims will never recover from the financial ruin caused by the defendants’ greed. Many of the victims worked hard their entire lives, saving money for retirement or their children’s college funds. Some were already living on fixed incomes and are now struggling to make ends meet. The FBI will continue to aggressively work to uncover these fraud schemes in an effort to prevent future victimization and to protect the integrity of the securities and commodities market.”

On June 2, 2014, former ArthroCare’s CEO Michael Baker, 55, and former CFO Michael Gluk, 56, were convicted by a jury of wire fraud, securities fraud, and conspiracy to commit wire and securities fraud; Baker was also convicted of making false statements. On June 24, 2013, John Raffle, 46, the former Vice President of Strategic Business Units, pleaded guilty to conspiracy to commit securities, mail and wire fraud, and two false statements charges. On May 9, 2013, David Applegate, 55, the former Senior Vice President of the Spine Division, pleaded guilty to conspiracy to commit securities, mail and wire fraud, and a false statements charge. At sentencing, the court found that investors lost approximately $756 million as a result of the defendants’ scheme to artificially inflate the share price of ArthroCare stock through sham transactions.

According to court documents, between 2005 and 2009, Baker, Gluk, Raffle and Applegate executed a scheme to artificially inflate sales and revenue through a series of end-of-quarter transactions involving several of ArthroCare’s distributors. Products were shipped to distributors at quarter end based on ArthroCare’s need to meet Wall Street analyst forecasts, rather than distributors’ actual orders. ArthroCare then fraudulently reported these shipments as sales in its quarterly and annual filings at the time of the shipment, enabling the company to appear to meet or exceed internal and external earnings forecasts. ArthroCare’s distributors agreed to accept these shipments of millions of dollars of excess inventory in exchange for lucrative concessions from ArthroCare, such as upfront cash commissions, extended payment terms, and the ability to return products. In some cases, like that of ArthroCare’s largest distributor, DiscoCare, the defendants agreed ArthroCare would acquire the distributor and the inventory so that the distributor would not have to pay ArthroCare for the products at all.

Between December 2005 and February 2009, ArthroCare’s shareholders held more than 25 million shares of ArthroCare stock. On July 21, 2008, after ArthroCare announced publicly that it would be restating its previously reported financial results to reflect the results of an internal investigation and

restating its previously reported financial results to reflect the results of an internal investigation and account for the defendants' fraud, the price of ArthroCare shares dropped from $40.03 to $23.21 per share. On Dec. 19, 2008, ArthroCare again announced publicly that it had identified more accounting errors and possible irregularities related to the defendants' fraud. That day, the price of ArthroCare shares dropped from approximately $16.23 to approximately $5.92 per share.

In addition to the underlying conduct, Baker was convicted of lying to the U.S. Securities and Exchange Commission during its investigation of the conduct. The court further found, as part of sentencing, that Baker and Gluk each lied under oath during their trial testimony, in which they attempted to escape responsibility for their actions.

In addition to their prison terms, Baker and Gluk were sentenced to serve five years of supervised release. In addition, the court ordered Gluk and Baker to forfeit $25,040,810, the amount of their profits from the scheme.

John Raffle was sentenced to serve 80 months in prison followed by three years of supervised release. David Applegate was sentenced to serve 60 months in prison followed by three years of supervised release.

The case was investigated by the FBI’s San Antonio Field Office. The case was prosecuted by Deputy Chief Benjamin D. Singer and Trial Attorneys Henry P. Van Dyck and William S.W. Chang of the Criminal Division’s Fraud Section. The Department recognizes the substantial assistance of the Criminal Division’s Asset Forfeiture and Money Laundering Section and the U.S. Securities and Exchange Commission, as well as the critical role of the U.S. Attorney’s Office for the Western District of Texas, which provided invaluable support to the prosecution team during all phases of the litigation.

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Former Detroit Mayor Kwame Kilpatrick, Contractor Bobby Ferguson, and Bernard Kilpatrick Sentenced on Racketeering, Extortion, Bribery, Fraud, and Tax Charges

Former Detroit Mayor Kwame M. Kilpatrick, 43; contractor Bobby Ferguson, 44; and Bernard Kilpatrick, 72, have all been sentenced for their roles in the wide-ranging Detroit public corruption scandal, announced United States Attorney Barbara L. McQuade.

McQuade was joined in the announcement by John Robert Shoup, Acting Special Agent In Charge of the Detroit Field Office of the Federal Bureau of Investigation; Randall Ashe, Special Agent in Charge of the U.S. Environmental Protection Agency, Criminal Investigation Division; Richard Weber, Chief of IRS-Criminal Investigation; and Barry McLaughlin, Special Agent in Charge, U.S. Department of Housing and Urban Development-Office of Inspector General.

Kwame Kilpatrick was sentenced to 28 years in federal prison for using his position as mayor of Detroit and Michigan State House Representative to execute a wide-ranging racketeering conspiracy involving extortion, bribery, and fraud.

Bobby Ferguson was sentenced to 21 years in federal prison for being the catalyst at the center of an extortion scheme that netted him millions of dollars in city contracts.

Bernard Kilpatrick was sentenced to 15 months on a charge of subscribing false tax returns. The jury was unable to reach a unanimous decision on the racketeering conspiracy charge.

United States Attorney Barbara L. McQuade stated, “This case is not so much about punishing for the past as it about shaping the future. These sentences will deter other officials from stealing from the people and will attract honest public servants to office.”

In March, Kwame Kilpatrick was convicted by a jury of 24 counts of extortion, mail fraud, tax violations, and racketeering. The jury deliberated for about 14 days before returning the verdicts, concluding a five-month long trial before United States District Judge Nancy G. Edmunds.

The evidence presented at trial established that Kwame Kilpatrick and contractor Bobby Ferguson participated in a racketeering conspiracy to financially enrich themselves, their associates, and their families by using the power and authority of Kwame Kilpatrick’s position as mayor of Detroit, as well as his position as a member of the Michigan House of Representatives, to commit extortion, bribery, and fraud, and to defraud donors to nonprofit entities under the control of Kwame Kilpatrick and his associates, including the Kilpatrick Civic Fund, Kilpatrick for Mayor, and the Kilpatrick Inaugural Committee.

At the heart of the conspiracy was a scheme to use the power and authority of Kwame Kilpatrick’s office as mayor of Detroit to extort municipal contractors by coercing them to include Ferguson in public contracts and to rig the awarding of public contracts to ensure that Ferguson obtained a portion of the revenue from those contracts. Ferguson obtained at least $73 million in revenues from municipal contracts through this scheme, a portion of which he shared with his co-conspirators.

Evidence showed that during Kwame Kilpatrick’s tenure as a representative of the Michigan House and as the mayor of Detroit, Kwame Kilpatrick and Bobby Ferguson obtained more than half-a-million dollars from the state of Michigan and donors to non-profit entities they controlled, including the Kilpatrick Civic Fund, Kilpatrick for Mayor, and the Kilpatrick Inaugural Committee, under the false pretense that the money would be used to better the community or for campaign expenses when, in reality, the money was used for personal or other impermissible expenses, including vacations to luxury resorts, spa treatments, yoga lessons, and golf clubs.

Further evidence showed that during Kwame Kilpatrick’s tenure as mayor, he solicited and accepted payments and property valued at over $1 million from persons seeking business with the city or its General Retirement System or police and fire pension funds.

Evidence was also presented that in return for the proceeds from the public contracts Ferguson received, Ferguson kicked back significant sums of cash, items of value, or other benefits to Kwame Kilpatrick. Further evidence was presented that during his tenure as mayor, Kwame Kilpatrick used more than $840,000 cash, derived from the conspiracy, to make deposits into his bank accounts, pay his credit card bills, purchase cashier’s checks and clothing, and to renovate loans.
As a result of the lengthy and wide-ranging investigation into corruption in the city of Detroit, the
government has obtained convictions from 32 other individuals.

The investigation of this case was conducted by agents of the FBI, EPA-CID, and IRS-CID. The case
was prosecuted by Assistant U.S. Attorneys Mark Chutkow, R. Michael Bullotta, Jennifer Blackwell,
and Eric Doeh.

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REPORT OF THE
NEW YORK STATE
WHITE COLLAR CRIME
TASK FORCE

An Initiative Of
The District Attorneys Association
of the State of New York
REPORT OF THE
NEW YORK STATE
WHITE COLLAR CRIME
TASK FORCE

Approved July 2013
Issued September 2013
I. Executive Summary

A. Introduction

The criminal law in New York State has not undergone a comprehensive revision since the Bartlett Commission drafted the “new” Penal Law in 1965, which was intended to be a “complete reconstruction” of the existing Penal Law dating back to 1909. Derived from the American Law Institute’s Model Penal Code, but still very much New York’s own product, the Bartlett Commission’s Penal Law was regarded as “the most sophisticated legislation yet achieved in the evolution of a twentieth century criminal code.”

With respect to white-collar crime, however, the 1965 Penal Law was relatively rudimentary. It contained provisions against Larceny, Forgery, False Written Statements, Bribery, and Fraud Against Creditors, but little else. This is understandable, as neither New York nor federal prosecutors had yet made the concerted and widespread efforts against fraud and corruption that started in the 1960s, but did not gain full steam until much later. Nor did we have the benefit of the experience gained during the last five decades in the history of fraud, corruption, and chicanery of all sorts. And with the 21st century, of course, has come a revolution of commerce and technology, taking us from an industrial world where large corporations were beginning to exploit expensive computer technology, to a technological one where almost everyone – including criminals – has access to once-unimaginable electronic marvels.

In short, although in 1965 there did not seem to be much reason to go further than the basic crimes recommended by the Bartlett Commission, the intervening years have brought an evolution of crimes and factual scenarios not contemplated by the Commission: transnational cybercrime rings, the rise in value of intellectual property and the corresponding activities of thieves, billion-dollar securities fraud schemes, computer hacking, and increasingly-sophisticated corruption schemes at every level of state government. And as our population has aged, so, too, have the number of scams targeting the elderly increased in every corner of the state. These new breeds of white-collar crime have victimized individuals, businesses, and government entities alike. Some of them have made national headlines; most have not. But despite its multifarious forms, all modern white-collar crime in New York shares one feature: it costs our taxpayers dearly.

The Legislature has, of course, amended the Penal Law on a number of occasions since its inception. The last time that it made significant changes with respect to white-collar

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crime was in 1986, as part of Governor Mario Cuomo’s Criminal Justice Program. The years since have brought a relative paucity of new or amended laws relating to fraud and corruption, far outpaced by the explosion in both technical innovation and criminal deviousness. The words of former Governor Cuomo are undoubtedly as true today as they were in 1986:

The incidence of white-collar crime has not abated in the last decade; instead, it has spiraled ever-upward as economic crime has become increasingly profitable and sophisticated. The effects of major economic crime can be devastating: the whole society suffers as crimes against business become crimes against consumers. Greedy, white-collar profiteers will not be stopped until we adopt strong measures to stop them.4

This continuing problem led to the creation of the New York State White Collar Crime Task Force in October 2012 by Cyrus R. Vance, Jr., the 2012-13 President of the District Attorneys Association of the State of New York (DAASNY). In an essay published in the New York Law Journal, DA Vance observed that although Congress and the United States Sentencing Commission had addressed financial issues on a regular basis for well over a decade, in recent years “the near-silence from New York has been striking.”5 While acknowledging that New York’s policymakers had, to be sure, made a few “modifications to a handful of laws,” Mr. Vance concluded that “New York State prosecutors are fighting 21st Century crime with 1970s-era tools.”6

In recognition of “the traditional primary role of District Attorneys in New York law enforcement,” the Task Force was asked “to analyze thoroughly the tools available to law enforcement in New York, and make legislative recommendations to strengthen our laws, as needed.”7 For the first time in DAASNY’s history, the membership of one of its consultative bodies was not limited to New York State prosecutors, but included private defense attorneys; academics, including a retired Judge of the New York Court of Appeals; a state tax official; and a federal prosecutor. Four of its members, including a co-Chair, were elected District Attorneys; the other co-Chair and several other members were Assistant District Attorneys.8

As DA Vance observed in a speech at the New York City Bar Association on May 20, 2013, although the public often thinks about financial crimes on Wall Street when it thinks of white-collar crime, New Yorkers throughout the state are victims or potential victims of a

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4 Governor’s Approval Memorandum, Bill Jacket, L.1986, c.515.
6 Id.
7 Id.
8 A complete list of the members, staff, and advisers to the Task Force can be found at the end of this report and in Appendix A.
wide range of scams that do not necessarily “attract the attention of the international financial press.” The Task Force would thus be giving due attention to issues that affect the entire panoply of white-collar crime, such as, for example, elder fraud, counterfeit trademarking, tax fraud, and public corruption, to name a few.

B. Organization and Methodology

With those issues in mind, the Task Force split into five committees: Procedural Reforms, Fraud, Cybercrime and Identity Theft, Anti-Corruption, and Tax and Money Laundering. The Fraud Committee included an Elder Fraud Working Group, tasked with examining legal and procedural issues relating to fraud against the elderly, an issue of growing importance to several areas of the state with aging populations of retirees.

Early on, the Task Force settled on three key principles to guide its work. First, we determined not to consider the political viability of ideas that were presented. This would be a “good government” effort that judged each idea on its own merits, and not based on how likely or unlikely it was to garner support in the Legislature.

Second, the Task Force decided to proceed by consensus rather than by majority votes on each issue or sub-issue. Therefore, every recommendation submitted has been made after careful deliberation and, where necessary, compromise for the purpose of achieving consensus. Those ideas that did not achieve consensus – and there were a good number – were discarded.

Finally, we did not examine sentencing in white-collar cases, a topic we acknowledge is of crucial importance to New Yorkers. In 2010, Chief Judge Jonathan Lippman formed the New York State Permanent Commission on Sentencing. Because that body is charged with reviewing New York’s sentencing laws, the Task Force strongly believed that it should not duplicate efforts. We understand that the Sentencing Commission is examining New York’s indeterminate sentencing scheme for non-violent crimes.

The Task Force met as a body 10 times between October 2012 and July 2013. Each of the five committees and the working group met multiple times on an as-needed basis, as determined by each committee Chair. As described more fully below, the Task Force benefited greatly from guest speakers, experts in various fields, and the diverse experiences of the members and their staffs and colleagues. The Task Force also solicited input from various

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governmental bodies and bar associations, and benefited as well from those who lent their expertise.\footnote{We were encouraged by a communication from Mylan Denerstein, Counsel to Governor Andrew M. Cuomo, who advised the Task Force that “Governor Cuomo has made reform in this area a priority,” and “this is an area that warrants study, new ideas and meaningful action.” (on file with the Task Force).}

In examining its mission, the Task Force made two overarching observations that influenced its conclusions and recommendations: (1) well-drafted statutes that attack fraud, theft, and corruption are generally preferable to narrower laws, which the Task Force characterized as “boutique” laws, aimed only at particular harms in particular industries, and (2) where consistent with fairness and proportionality, the potential punishment for more serious crimes should be greater than that for less serious crimes. We discuss these principles in the following subsections.

1. **Boutique Statutes**

Early in its work, the Task Force noticed the proliferation of crimes that it came to refer to as boutique laws. These statutes were aimed at narrow slivers of criminal conduct, and had often been heralded by supporters as important tools for prosecutors to use in combating white-collar crime.\footnote{For example, one official opined that the package of health care fraud legislation containing the new criminal penalties would “prove to be one of the best things” the Legislature did during the 2006 session. N.Y. Senate Debate on Senate Bill S8450, June 21, 2006 at 5466.} The key examples are Residential Mortgage Fraud,\footnote{PENAL LAW §§ 187.00 et seq.} Health Care Fraud,\footnote{PENAL LAW §§ 177.00 et seq.} Life Settlement Fraud,\footnote{PENAL LAW §§ 176.40 et seq.} Defrauding the Government,\footnote{PENAL LAW §§ 195.20.} and, to a much lesser extent, Insurance Fraud.\footnote{PENAL LAW §§ 176.00 et seq.} A look at the data reveals that far from supplying the answer to the fraud problem, many of these tools are gathering dust.

Health Care Fraud is a case in point.\footnote{PENAL LAW §§ 177.00 et seq.} When it was enacted in 2006, one official predicted that the law would “send a clear message to health care providers that the state remains vigilant and will punish fraud against the health care system.”\footnote{Bill Jacket, L.2006, c.442.} The message delivered ended up being more muted: between 2007 and 2011, only 16 defendants were charged with felony-level Health Care Fraud.\footnote{New York State Division of Criminal Justice Services, SCI and Indictment Database (DCJS Data) (on file with the Task Force).} Although that figure is vanishingly low, it towers in comparison to the number of defendants charged with Life Settlement Fraud since that crime’s 2009 enactment: zero.\footnote{Id. These numbers account for the most recent indictment statistics available, which are through the year 2011.} And as for Defrauding the Government, a law that had great promise to protect the public fisc, 41 defendants were charged in the five years between 2007 and
2011. As a point of comparison, the general anti-fraud law, Scheme to Defraud, was charged 1,348 times as a felony in the same period. A central recommendation of this report, as discussed in Section IV(B), is to greatly strengthen the Scheme to Defraud law.

Another example of a boutique law is Residential Mortgage Fraud, enacted in 2009 in response to the sub-prime mortgage crisis. Although the law eliminates certain obstacles posed by the law of Larceny by false promise, like most of its sister boutique laws, Residential Mortgage Fraud is rarely used. In the three-year period from 2009 through 2011, only 35 defendants – in only four counties – were charged with felony-level Residential Mortgage Fraud. Of those, only two received prison sentences. In the right case, to be sure, the statute can be valuable. But it is very narrow. The Task Force concluded that a better way to eliminate the obstacle to mortgage fraud caused by current law is to enact a graded version of Scheme to Defraud, as we propose in Section IV(B). Scheme to Defraud has the flexibility of Residential Mortgage Fraud, but it applies beyond this narrow category, to any kind of fraud.

We note that at least some boutique fraud laws have enjoyed some success. Insurance Fraud, enacted in 1981 as “an indication by the Legislature that the State will no longer tolerate crime in the insurance field,” is an example. The gravamen of the crime is the submission of a false claim to an insurance carrier, and it “is complete upon an attempted taking.” During the five-year period between 2007 and 2011, a total of 749 defendants were charged with felony Insurance Fraud, but only fifteen of those were charged with the most serious level, Insurance Fraud in the First Degree.

Having studied these laws carefully, the Task Force is of the view that, although the boutique laws may offer some marginal added benefit to our core anti-fraud laws, a better approach would be to strengthen the basic statutes – Larceny and Scheme to Defraud – rather than enact laws piecemeal to address particular categories of fraud more seriously. If, for example, a future malefactor were found to have defrauded a thousand immigrants of $10,000 each, the answer should not be to create a new law called Immigration Fraud. The better course of action would be, long before such crime occurs, to ensure that the existing crime of Scheme to Defraud properly measures culpability by, among other things, the number of victims targeted by the scheme. We propose exactly that in Section IV(B).

21 Id.
22 PENAL LAW §§ 187.00 et seq.
23 See Section IV(B), infra.
24 DCJS Data.
25 Id.
27 Id.
28 The data also suggest that the state courts have not necessarily heeded the Legislature’s call to take the crime of Insurance Fraud seriously. The vast majority of all defendants sentenced for Insurance Fraud (71%) are sentenced to conditional discharge or probation. DCJS Data.
2. Gradation of Crimes According to Level of Harm

In our discussions around the state, a common theme resounded: the key laws against fraud and theft in New York are not always calibrated to a defendant’s culpability. Put another way, our laws often treat serious crime no more seriously than relatively minor crime. In the words of former Attorney General Robert Abrams in 1986: “Sophisticated criminals, who frequently weigh the risks they face before commencing their criminal enterprise, are rarely deterred by the minimal danger, under current law, that substantial penalties might be imposed upon them if they are caught.”

The Task Force did not believe that the answer to the white-collar crime problem is necessarily to increase penalties. But we found a number of examples of crimes where both serious and less-serious violations were treated the same or similarly. An example is the crime of Identity Theft, meant to be the prosecutor’s sharpest tool in the fight against the fastest-growing crime in the United States. Under our current Penal Law, Identity Theft in the First Degree is a Class D felony, and applies whether the defendant obtained $2,001 or $2 million, and whether he assumed the identities of two or two thousand victims. As a consequence, what should be a sharp tool is blunted substantially. The same is true of Scheme to Defraud, which is limited to a Class E felony no matter the size and scope of the fraud, and Computer Tampering, which is limited to a Class C felony no matter how great the harm caused. As explored throughout this report, these limitations lead to anomalous, unjust, and unjustifiable results.

As Blackstone put it, “a scale of crimes should be formed, with a corresponding scale of punishments.” The law provides a mechanism to do so: gradation. Larceny is an excellent example. The different degrees of Larceny, from Petit Larceny, a Class A misdemeanor, to Grand Larceny in the First Degree, a Class B felony, are triggered by monetary thresholds determined by the amount of property the defendant wrongfully obtained. Those thresholds – substantially upgraded in 1986 as part of the last major legislative effort against white-collar crime in New York – measure the defendant’s relative culpability. Plainly, the thief who steals $100 million deserves more severe punishment than the one who steals $1. Gradation thus reflects “the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness.”

That principle guided the Task Force’s work. In this report, we propose new gradation levels for the following crimes: Scheme to Defraud, Trademark Counterfeiting, Identity Theft, Computer Tampering, Bribery, and Defrauding the Government. Some of these crimes are already gradated, but, in our view, do not adequately measure a defendant’s cul-

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29 Memorandum to the Governor, Bill Jacket, L.1986, c.515.
30 The standard penalties for non-violent felonies under current law are set forth in Appendix I.
31 4 WILLIAM BLACKSTONE, COMMENTARIES *18.
pability. To take the Identity Theft example, we propose that it be gradated up to a Class B felony, and that thresholds be set by the amount of property wrongfully obtained or the number of identities assumed by the defendant. For other crimes, gradation represents a new concept; however, borrowing from existing law, we suggest that culpability be measured (and thresholds be set) according to the amount of property wrongfully obtained or the number of victims harmed.

The details of our recommendations are set forth in the body of this report. A table delineating existing and proposed gradations is included in Appendix I.

C. Summary of Recommendations

The Task Force’s recommendations were suggested by each of the five committees and one working group. Those that achieved consensus with the full Task Force were adopted, without dissent, and are summarized in this subsection. They are discussed in greater detail in Sections III through VIII of this report.

1. Procedural Reforms

- Reform grand jury procedure to lower the cost to taxpayers of grand jury presentations, reduce lost productivity of employees of private businesses, and reduce wear and tear on civilian witnesses.

- Expand the Criminal Procedure Law to allow all businesses to authenticate by certification any records they keep and maintain in the ordinary course of business.

- Allow witnesses located out of state or more than 100 miles from the grand jury to testify via videoconference under a secure connection.

- Allow lack of consent for Identity Theft prosecutions to be established by sworn certification, as it currently is in Larceny, Forgery, and Criminal Possession of Stolen Property cases.

- Amend the Criminal Procedure Law to authorize a grant of use immunity rather than transactional immunity, thereby conforming New York law to federal law and the law of most other states and allowing for fuller use of the grand jury to investigate complex crime.

- Amend, but do not eliminate, the accomplice corroboration requirement of the Criminal Procedure Law to allow cross-corroboration by a separate accomplice.
2. Fraud

- Gradate the crime of Scheme to Defraud to punish more serious fraud schemes more seriously, based on the amount of money wrongfully obtained or the number of victims the defendant intended to defraud. The gradations would range from the existing Class E felony for schemes that obtain more than $1,000 or intend to defraud 10 or more victims, up to a new Class B felony for schemes that obtain more than $1 million or intend to defraud 1,000 or more victims.

- Eliminate the requirement that a Scheme to Defraud must target more than one victim in all instances.

- Expand the crime of Larceny to cover theft of personal identifying information, computer data, computer programs, and services.

- Provide state jurisdiction and county venue over cases involving Larceny of personal identifying information, computer data and computer programs where the victim is located in the state or the county.

- Gradate Trademark Counterfeiting based on the number of counterfeit goods possessed, maintaining the current cap of a Class C felony.

3. Cybercrime and Identity Theft

- Strengthen the laws against computer intrusions:
  - Expand the definition of “computer material” to allow for the prosecution of Computer Trespass cases that do not necessarily involve an “advantage over competitors.”
  - Upgrade Computer Tampering and create a first-degree crime (Class B felony).

- Gradate the existing crime of Identity Theft, up to a Class B felony, based on dollar threshold amounts or the number of victims.

- Upgrade the crime of Unlawful Possession of a Skimmer Device.

- Amend the crime of Enterprise Corruption under the Organized Crime Control Act to add Identity Theft as a predicate crime.
4. Elder Fraud

- Amend the Criminal Procedure Law to allow for the conditional examination of victims who are 75 years old or older.

- Incorporate the holding of People v. Camiola\(^ {33} \) into the definition of Larceny so that purported consent by a victim with diminished mental capacity is not a defense to Larceny.

- Amend the Criminal Procedure Law to permit a caregiver to accompany a vulnerable victim into the grand jury. The definition of “caregiver” would include both informal caregivers and professional social workers.

- Allow prosecutors to obtain medical records of mentally impaired victims of financial exploitation, without requiring a waiver from those very victims.

- Amend the crime of Larceny by false promise to make clear that partial performance, standing alone, does not defeat a prosecution that is otherwise legally sufficient. This aims to clarify the rulings of some courts, in reliance on People v. Churchill.\(^ {34} \)

5. Anti-Corruption

- Strengthen the laws against bribery:

  - Replace the “agreement or understanding” requirement in New York’s Bribery law with a requirement of an “intent to influence” the public servant, legislatively overruling People v. Bac Tran.\(^ {35} \) Make clear that where the alleged bribe is a campaign contribution, an “agreement or understanding” would still be required.

  - Remove the $250 economic harm requirement from the felony Commercial Bribery statutes.\(^ {36} \) The economic harm element has made felony-level prosecution all but impossible, and allowed private corruption schemes to go unpunished.

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\(^{33}\) 225 A.D.2d 380 (1st Dept. 1996).

\(^{34}\) 47 N.Y.2d 151 (1979).


\(^{36}\) See People v. Wolf, 98 N.Y.2d 105, 110 (2002).
• Enact a new crime of Undisclosed Self-Dealing by public servants. This would deal with courses of conduct where public servants have secret interests in government business above a certain threshold.

• Upgrade the existing crime of Official Misconduct, currently only a misdemeanor, to create two new crimes of Official Misconduct in the Second and First degrees (Class E and D felonies, respectively).

• Enact a sentencing enhancement for Abuse of Public Trust, to increase sentence ranges by one crime level in cases where public servants use their position to commit crimes that are not otherwise defined as corruption crimes.

6. Tax and Money Laundering

• Enact a law, based on the existing federal statute, that criminalizes structuring of cash transactions to avoid a reporting requirement.

• Enact a state statute analogous to 18 U.S.C. § 1957, which criminalizes the knowing spending and depositing of criminal proceeds, with an express carve-out for bona fide attorneys’ fees.

• Amend the Tax Law to permit aggregation of tax loss across multiple years in prosecutions for Criminal Tax Fraud.

• Provide access to tax returns in non-tax cases with a showing of necessity and court approval.

• Amend “particular effect” jurisdiction to allow for prosecution in any county of New York City of schemes to defeat City taxes, and in Albany County for schemes to defeat state taxes.

• Amend the crime of Defrauding the Government to cover schemes that defraud government agencies of government revenue. Gradate the statute to treat more serious schemes more seriously.
VII. Anti-Corruption

Over the past several years, New York has seen an astonishing number of its elected officials implicated in serious corruption scandals. Last year, the State Integrity Investigation, a partnership of the Center for Public Integrity, Global Integrity and Public Radio International, gave the New York State government a grade of “D” for its corruptibility. According to a state-by-state analysis of the laws and practices that deter corruption and promote accountability, New York scored 65% and ranked 37th among the 50 states. The existence, or even the perception, of corruption and lack of accountability in government has far-reaching effects, including depleting our public coffers, wreaking havoc on public confidence, and weakening the civic spirit of our communities.

Unfortunately – some might say heartbreakingly – this phenomenon is not new. Our state suffers from the perennial human problem of short memory. In the words of Dean John Feerick, Chair of the former New York State Commission on Government Integrity, appointed in 1987 by Governor Mario Cuomo and Mayor Edward Koch:

Tragically, the citizens of New York State witnessed during the 1980s the degradation of public service by the wrongdoing of public servants and party leaders. It would be a mistake to label such malfeasance as unique to our times, and it must be acknowledged that most officials are hard working and honest. But the recent spectacle of public figures in the prisoners’ dock inspires sober reflection on what behavior we as citizens will accept and what we can do to alter the state of affairs. When public officials violate the public trust, much more is at stake than the breaking of the law, for such violations strike at the very foundations of government.

The same could be said about New York in the 2010s: public service has been degraded by wrongdoing, most officials are honest, corruption strikes at the heart of government, the sight of high officials being led away in handcuffs is deeply demoralizing. What was old is new again.

334 Id.; see also New York’s Troubled Politicians: The Fall of the Harlem Clubhouse, THE ECONOMIST, May 4, 2010, www.economist.com/node/15608375 (“Dysfunctional Albany’ . . . is frequently cited as the nation’s worst state government – a title for which there is intense competition.”).
336 A 1987 article reported, among other things, that “[h]alf a dozen district attorneys said local officials they believe to be corrupt have gone unprosecuted because New York laws make it too difficult – more difficult
New York must face up to this serious problem by strengthening its anti-corruption statutes. With that goal in mind, the Task Force canvassed the law enforcement community for ideas for penal reform. In particular, it sought input from experts experienced in corruption investigations, including a number of state and federal prosecutors, as well as senior investigative staff within the Office of the State Comptroller. The Task Force also looked to the recommendations within the report of the New York State Bar Association Task Force on Government Ethics in January 2011.

Our proposals are set forth below.

A. Bribery

1. Public Sector

In an effort to address one aspect of what will inevitably be a multi-pronged solution, the Task Force examined New York’s law governing the bribery of public officials. Currently, the statutes governing the bribery of public officials unnecessarily heighten the burden for prosecuting such conduct. Following the decision of the New York Court of Appeals in *People v. Bac Tran*, courts have made clear that bribery requires a mutual agreement between the bribe-giver and public official, or at least a unilateral belief by the bribe-giver that the bribe will in fact influence the public official. By comparison, New York’s other bribery laws, as well as the bribery laws of the vast majority of other states, merely require that the bribe-giver “intend[s] to influence” the bribe-receiver. Given the crucial importance than in most other states – to bring corruption cases.” Jeffrey Schmalz, New York Officials Shifting Blame in Efforts to Combat Corruption, N.Y. TIMES, Aug. 19, 1987.

337 Among these were James Liander, Bureau Chief of the Integrity Bureau in the Queens County District Attorney’s Office; Daniel Spector, Deputy Chief of the Public Integrity Section of the U.S. Attorney’s Office for the Eastern District of New York; and Daniel Cort, Chief of the Public Integrity Unit at the New York County District Attorney’s Office. The Task Force is grateful for their input.


339 On April 9, 2013, in the wake of a series of federal corruption charges, Governor Cuomo announced a proposal for a new anti-corruption legislative package, the Public Trust Act, which would create a new class of public corruption crimes. See Press Release, Governor Andrew M. Cuomo (Apr. 9, 2013), available at www.governor.ny.gov/press/04092013New-Class-of-Public-Corruption-Crimes. The District Attorney’s Association – with the unanimous approval of all 62 District Attorneys – supported the Governor’s proposals. However, the legislation did not pass by the end of the last legislative session. A copy of the District Attorneys’ letter of support is included in Appendix B. The Task Force believes that the five proposals set forth in this report are consistent with the spirit, and in some cases the letter, of the laws proposed in the Public Trust Act.

340 PENAL LAW § 200.00.


342 *Id.* at 176-177.
of restoring confidence and faith in our government and its representatives, the Task Force believes that the New York Legislature should amend the mens rea element of the public-servant bribery statutes to require only an intent to influence. Separately, the Task Force also recommends amending the statute to ensure that the broader “intent to influence” language is not read to criminalize legitimate campaign contributions, and lowering the dollar threshold associated with public servant bribery in the second degree from $10,000 to $5,000.

Each of New York’s public-servant bribery statutes states that “[a] person is guilty of bribery . . . when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant’s vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.” On the one hand, the “agreement or understanding” formulation appears to be a deliberate shift away from the statutes’ predecessors, all of which used the phrase “with intent to influence” or otherwise focused on the mental state of the bribe-giver. On the other hand, the Bartlett Commission specifically stated that it intended to make “no major substantive changes” to the former public-servant bribery statutes but rather “by a largely formal restatement, to simplify and clarify.” What is clear is that by including the word “offers” in the bribery law, the Legislature intended to criminalize bribe offers as seriously as completed bribes.

Before the 1965 Penal Law, courts had construed the “agreement or understanding” statutory phrase to be “tantamount to ‘with the intent.’” Almost three decades after the 1965 revision, the New York Court of Appeals held that the phrase “agreement or understanding” means more than “intent to influence.” In Bac Tran, a municipal fire safety inspector told the defendant, a fire safety director of two hotels, that a new violation would be reported. The defendant then put $310 into the shirt pocket of the inspector, who immediately removed the money and said that he could not accept it and the violation would still be reported. The defendant responded by telling the inspector to keep the money “even if [he] wrote a violation” and “do whatever [he] had to do, but keep [the money].” In holding that the prosecution’s evidence was legally insufficient to sustain the charge of bribery, the court stated: “[I]f a benefit is offered with only the hope that a public servant would be influenced thereby, then the crime of bribe giving is not committed.” In other words, “[a]
mere ‘hope’ and a statutory ‘understanding’, in common parlance and in criminal jurisprudence, are miles apart.”

As pointed out by the dissent in Bac Tran, the import of the decision is that “bribery of a public official [will] hinge upon the mens rea of the bribe-receiver, not the bribe-giver.” In the words of the dissent: “The gist of the crime of bribery is the wrong done to the people by the corruption in the public service. . . . It is the effort to bypass the orderly processes of government to secure an impermissible advantage that is criminal.” Perhaps for that reason, in analogous statutes the “agreement or understanding” formulation has generally been reserved for statutes targeting bribe receiving, not bribe-giving.

Notably, too, the statutory language requiring an “agreement or understanding” for bribe giving – i.e., “something qualitatively and quantitatively higher than the long-standing, simple ‘intent to influence’” – is out of sync both with laws in other states and with other New York bribery laws. The public-servant bribery statutes of 48 other states use the “intent to influence” language to describe the requisite mens rea of the bribe-giver. And in New York, every other bribery statute, including commercial bribery, sports bribery and labor official bribery, uses the “intent to influence” formulation. Finally, the federal bribery statute relies on the intent of the bribe-giver, penalizing “[w]hoever . . . corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act” (emphasis added).

As a consequence of New York’s statutory formulation, those who bribe public officials are less likely to be prosecuted than those who bribe athletes, businesspeople or labor officials. To be sure, an offer could, if other elements are met, be punished as an attempt to commit a bribery crime. But that crime, with its lower penalties, is hardly the tool that New York needs in its battle against public corruption. The reality is that white-collar crim-

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351 Id.
352 Id. at 180-81 (Simons, J., dissenting).
353 Id. at 181 n.16.
354 For example, a sports official is guilty of receiving a bribe in New York when “he solicits, accepts or agrees to accept any benefit from another person upon agreement or understanding that he will perform his duties improperly” (emphasis added). PENAL LAW § 180.45(2); see also PENAL LAW §§ 180.05, 180.25, 200.10 (“agreement or understanding” formulation used in the context of commercial bribe receiving, bribe receiving by a labor official and public-servant bribe receiving, respectively).
355 Bac Tran, 80 N.Y.2d at 176.
357 For example, a person is guilty of bribing a labor official in New York “when, with intent to influence a labor official in respect to any of his acts, decisions or duties as such labor official, he confers, offers or agrees to confer, any benefit upon him” (emphasis added). PENAL LAW § 180.15; see also PENAL LAW §§ 180.00 (commercial bribing), 180.40 (sports bribing).
360 PENAL LAW § 110.05. See also People v. Gordon, 125 A.D.2d 257, 258 (1st Dept. 1986).
nals are not particularly cowed by the prospect of prosecution for a Class E felony, and the non-incarceratory sentences that those crimes invariably draw.  

As set forth in Appendix G, the Task Force proposes that the Legislature amend the mens rea element of the public-servant bribery statute so that it requires proof of an intent to influence on the part of the bribe-giver, rather than proof of an agreement or understanding. Such an amendment would harmonize the statute with New York’s other bribery statutes and with the bribery statutes of 48 other states. The amendment would go a long way toward restoring public confidence in government and in the accountability of its representatives.

To ensure a reasonable interpretation and application of the revised language, the Task Force proposes further amending the statute to clarify that campaign contributions would require an agreement or understanding. While prosecutorial and judicial discretion likely serve as adequate safeguards against such an application of the broader “intent to influence” language, a strict reading of the statute would not foreclose such a result. Indeed, a campaign contribution, under current law, constitutes a “benefit,” as defined by the Penal Law, and might well be made “with the intent to influence [a] public servant’s vote, opinion, judgment, action, decision or exercise of discretion as a public servant.” Thus, as set forth in Appendix G, the Task Force proposes that if the alleged benefit is a campaign contribution, the prosecution is required to prove, as under current law, an “agreement or understanding” between the contributor and the public servant that the contribution will in fact influence the official.

Finally, Bribery in the Second Degree, a Class C felony, currently involves a bribe “valued in excess of ten thousand dollars.”  If the bribe is valued at ten thousand dollars or less, the applicable charge is public servant bribery in the third degree, a Class D felony. To set a more appropriate threshold for the crime of public servant bribery in the second degree, the Task Force proposes that the Legislature lower the dollar amount from $10,000 to $5,000. A parallel change would be made to Bribe Receiving in the Second Degree. These proposed amendments are also set forth in Appendix G.

361 Although this proposal does not directly affect the criminal liability of the bribe accepting public servant, it would serve as an important prosecutorial tool by providing an enhanced incentive for bribe givers to cooperate against the public officials they have bribed.

362 “Benefit’ means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.” PENAL LAW § 10.00.

363 This proposal is consistent with analogous federal law as interpreted by the Supreme Court. In McCormick v. United States, 500 U.S. 257 (1991), a state legislator was convicted of extorting payments, which he claimed were campaign contributions, “under color of official right” in violation of the Hobbs Act, 18 U.S.C. 1951(a). The Court reversed the conviction, holding that in the case of campaign contributions (though not in other cases), the Hobbs Act requires that “the payments [be] made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” Id. at 273. In the case of New York bribery, the Task Force recommends that this be explicitly legislated rather than left to court interpretation.

364 PENAL LAW § 200.03.

365 PENAL LAW § 200.00.

366 PENAL LAW § 200.11.
2. Private Sector

Bribery in the private sector – commercial bribery – is also devastating to the public interest. Commercial bribery is a crime under the laws of most states, including New York.367 Like its public sector analogue, commercial bribery traditionally involves kickback schemes whereby payments are made to agents to secure the business of their principals or employers, thereby edging out competitors.368 Recognizing business corruption as a serious problem, the Task Force reviewed New York’s Commercial Bribing and Commercial Bribe Receiving Statutes, found at Penal Law sections 180.00 through 180.08. It concluded that existing New York law is ineffective because, as written, it allows a wide swath of corrupt conduct to evade criminal punishment.

One problem stands out as the most significant. To charge felony-level commercial bribery or bribe receiving, the offered amount must be more than $1,000 and must cause “economic harm” in excess of $250 to the employer or principal. The Task Force believes that the economic harm component poses a serious impediment to prosecutions of serious commercial bribery and, therefore, recommends that it be eliminated from Commercial Bribery in the First Degree and Commercial Bribe Receiving in the First Degree. The $1,000 threshold for a felony bribe is more than adequate as a limiting principle, and recognizes that the harm done by bribery is the purchase of loyalty, not the economic result.369

The economic harm component is a relatively new addition to the law of commercial bribery. It was added to New York State’s Commercial Bribery statute in 1983 because legislators were concerned that the costs associated with commercial bribes were being passed on to the consumer, not borne by the employer.370 At first blush, this approach, and specifically the added element of economic harm, might have incentivized employers to (1) better police their employees’ conduct, and (2) take care that the cost of bribes were not passed on to customers if they wanted their disloyal, bribe-receiving employees punished at the felony level.

367 PENAL LAW §§ 180.00, 180.03, 180.05, 180.08. Thirty-five states have laws prohibiting commercial bribery, and in seventeen it is punishable as a felony. ALA. CODE § 13A-11-120; ALASKA STAT. §§ 11.46.660, 11.46.670; ARIZ. REV. STAT. § 13-2605; CAL. PENAL CODE § 641.3; COLO. REV. STAT. § 18-5-401; CONN. GEN. STAT. §§ 53A-160, 53A-161; DEL. CODE ANN. tit. 11, §§ 881, 882; FLA. STAT. §§ 838.15, 838.16; HAW. REV. STAT. § 708-880; 720 ILL. COMP. STAT. 5 / §§ 29A-1, 29A-2, 29A-3; IOWA CODE § 722.2; KAN. STAT. ANN. § 21-4405; KY. REV. STAT. ANN. §§ 518.020, 518.030; LA. REV. STAT. ANN. § 73; ME. REV. STAT. tit 17-A, § 904; MICH. COMP. LAWS § 750.125; MINN. STAT. § 609.86; MISS. CODE ANN. § 97-9-10; MO. REV. STAT. § 570.150; NEB. REV. STAT. § 28-613; NEV. REV. STAT. § 207.295; N.H. REV. STAT. ANN. § 638:7; N.J. STAT. ANN. § 2C:21-10; N.C. GEN. STAT. § 14-353; N.D. CENT. CODE § 12.1-12-08; 18 PA. CONS. STAT. ANN. § 4108; R.I. GEN. LAWS § 7-15-1; S.C. CODE ANN. § 16-17-540; S.D. CODIFIED LAWS §§ 22-43-1, 22-43-2; TEX. PENAL CODE ANN. § 32.43; UTAH CODE ANN. § 76-6-509; VA. CODE ANN. § 18.2-444; WASH. REV. CODE § 9A.68.060; WIS. STAT. § 943.85.

368 See BLACK’S LAW DICTIONARY 187 (7th ed. 1999); see, e.g., People v. Agha Hasan Abedi, 156 Misc.2d 904, 907 (Sup. Ct. N.Y. Co. 1993); Matter of Ingber, 239 A.D.2d 58, 59-60 (1st Dept. 1998); People v. Reynolds, 174 Misc.2d 812, 815 (Sup. Ct. N.Y. Co. 1997).

369 Misdemeanor commercial bribery and bribe receiving, which require neither a threshold value nor any economic harm, would not be affected by this proposal. See PENAL LAW §§ 180.00, 180.05.

Unfortunately, the amendment’s goal of affording greater protection to consumers was not ultimately achieved.

The economic harm requirement of sections 180.03 and 180.08 has made it all but impossible to prosecute commercial bribery and commercial bribe receiving at the felony level. Unlike crimes of theft or fraudulent deprivation of property, commercial bribery causes qualitative but not necessarily quantitative harm: the breach of trust between employer and employee; the corrupt influence that secures a contract or service; and the disadvantage to businesses that operate with integrity. It is the risk of tangible harm arising from a corrupt relationship that laws against commercial bribery should seek to protect rather than actual harm. Virtually all states with commercial bribery laws have recognized this truism: of the 35 such states, only Arizona requires something similar to economic harm.

New York’s sister states realize that economic harm is beside the point, not only because corruption is about loss of trust rather than loss of money, but also because the value of corrupt influence is difficult to quantify and prove. Many New York investigations have stalled because of the disconnect between a commercial bribe paid (and acted on) and a concrete monetary loss to an employer. If, for example, a company is awarded a contract in exchange for a $100,000 kickback to the contracting agent, the employer whose agent took the bribe in exchange for awarding the contract may have suffered no pecuniary loss, assuming the work was performed according to the contract and the contract amount was within a commercially reasonable range. Likewise, if the operator of a hoist at a construction site takes a $1,500 bribe to give priority to one subcontractor’s men or materials, his employer may well not have been economically harmed, notwithstanding the employee’s undeniably serious act of corruption.

Instead, the employers in such cases are harmed in non-economic ways – they may suffer reputational losses or missed opportunities for future bids, the kind that are difficult to value and prove in straightforward economic terms. The reality is that the likeliest scenario in which proof of economic harm does exist is when the prosecutor can prove that an invoice or a contract is actually inflated. But those cases, of course, also typically make out the crime of Larceny by embezzlement or by false pretense – crimes for which the E felony threshold is met in any event when the amount obtained exceeds $1,000. We thus have a statute that is useful only if an invoice is inflated by an amount between $251 and $1,000. In any event, a law that makes the payment or receipt of a million-dollar commercial bribe, in the absence of an inflated invoice, a Class A misdemeanor is tantamount to no law at all.

Bribery is extremely hard to prove in any case. It often requires long-term investigations, electronic eavesdropping, records obtained by search warrant, and cooperating wit-

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371 Id. at 111-12 (because economic harm is a separate element of commercial bribery, evidence independent of the kickback amount was required to prove that element). *Wolf* arose out of a larger prosecution of attorneys, middlemen, and insurance adjusters who colluded to settle negligence cases in exchange for kickbacks.

372 ARIZ. REV. STAT. ANN. § 13-2605.

373 PENAL LAW § 155.30.
nesses. Simply put, such techniques are either not available or do not justify the resources necessary where the highest-level prosecution is for a Class A misdemeanor. The actual economic harm – if any – suffered by the bribe receiver’s employer is not a reliable measure of the seriousness of the briber-giver’s or the bribe-receiver’s criminal conduct.

For these reasons, prosecutors throughout New York State report that felony commercial bribery cases are rarely prosecutable. Statewide arrest data, reflected in Figure 1, make that clear. In the ten-year period since 2002, felony prosecutions for commercial bribery have dropped more than 60% as compared to the ten-year period before 2002.374 In the last several years, the numbers are even starker: between 2009 and the middle of 2012, a grand total of two individuals were arrested for felony commercial bribery in the entire state, and four for commercial bribe receiving. 2010 represents a low point: not a single person in New York was arrested for a felony-level commercial bribery crime.

![Figure 1](image)

In sum, the 1983 amendment ultimately did nothing to afford greater protection to consumers. Law enforcement’s ability to rid our free markets of corrupt side-deals, which disadvantage those businesses that operate with integrity, is essentially where it was before the amendments. For these reasons, the Task Force urges that New York’s Commercial Bribery in the First Degree and Commercial Bribe Receiving in the First Degree statutes, codified at Sections 180.03 and 180.08 of the New York Penal Law, be amended to eliminate the requirement of economic harm to the employer.375 The proposed revision is found at Appendix G.

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374 These statistics are from the DCJS arrest database, and run through June 2012. New York State Division of Criminal Justice Services, Computerized Criminal History System (on file with the Task Force).

375 The possibility of adding the term “corruptly” to the statute was also considered so as not to criminalize benefits that might be associated with innocuous and essential social business development efforts. However, after considerable reflection, the Task Force decided that such addition would be redundant, as the statutes already contain a sufficient limiting principle, namely, that the conduct be taken without the consent of the
B. Undisclosed Self-Dealing

Corruption extends beyond bribery. The Task Force believes that New Yorkers have a right to honest public servants and transparent public processes. Accordingly, the Task Force considered the problem of undisclosed self-dealing by public servants – conduct that falls outside the scope of bribery but nonetheless impairs the functioning of good government. It concluded that New York State needs a law that specifically targets public servants who further their own undisclosed economic interests while claiming to act for their constituents or government employer.

The quintessential case of undisclosed self-dealing involves a public official who awards a contract or grant to a company in which he or she holds an undisclosed ownership interest. Assuming the bid is competitive – the contract’s economic terms are fair – and the company actually performs the work, the official’s constituents have suffered no tangible harm. No bribe changed hands; no kickback was paid. Nevertheless, the process has been corrupted: the official has worked not for the public interest, but for his or her own hidden self-interest. This concealment is “harmful because it masks self-dealing that deprives the public of its right to unbiased decisionmaking.” It also “undermines people’s faith in their government and destroys the integrity of our democracy.”

Federal prosecutions of undisclosed self-dealing were severely limited by the Supreme Court’s decision in *Skilling v. United States*. Prior to *Skilling*, federal prosecutors routinely charged undisclosed conflicts of interest as fraudulent deprivations of the public’s right to a government official’s “honest services,” under Title 18, United States Code, § 1346. That definitional section modifies the federal mail and wire fraud laws to make such deprivations actionable as fraud. Under the pre-*Skilling* regime, federal prosecutors took the position that “when a public official makes a decision that would otherwise be legitimate but fails to disclose a pecuniary interest in the matter, the public suffers a loss because it is ‘deprived of its right either to disinterested decisionmaking itself or, as the case may be, to full disclosure as to the official’s potential motivation behind an official act.’”

In *Skilling*, the Supreme Court rejected the government’s theory that § 1346 could be read to criminalize undisclosed self-dealing, absent actual bribes or kickbacks. Writing for the majority, Justice Ginsburg admonished that any “enterprise of criminalizing undisclosed self-dealing by a public official or private employee . . . [must] employ standards of sufficient

employer or principal. Moreover, because the word “corruptly” is nowhere else used in New York’s Penal Law, the Task Force believed that its introduction here would lead to unpredictable interpretation and potentially undermine the effort to deter this conduct.

378 130 S.Ct. 2896 (2010).
380 Griffin, *supra* note 376, at 1837 (quoting United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996)).
definiteness and specificity to overcome due process concerns.”381 She enumerated questions that a law against undisclosed self-dealing must answer:

How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.382

Skilling left a gap in the federal law. No longer can federal prosecutors charge conduct like that seen in *United States v. Keane*,383 in which a city alderman bought properties through nominees and voted on matters that favorably affected the properties without disclosing his interest, or in *United States v. O’Malley*,384 in which an insurance commissioner steered insurance companies to use a law firm in which he had an interest.

The Task Force believes that *Skilling* represents an opportunity for state prosecutors to lead the charge against local-level corruption in New York. Several other states already punish such conduct as felonies.385 New York prosecutors should be given a similarly powerful tool.

The current Penal Law is plainly insufficient. New York’s Scheme to Defraud statute requires the obtaining of tangible property. Defrauding the Government, for example, applies only to public servants who steal property or services from the government. Under current law, undisclosed self-dealing can at best be prosecuted as a failure to provide proper disclosure under Article 4 of the Public Officers Law, which is punishable as a Class A misdemeanor and only applies to state employees.386 Or, if the interest or transaction is one that must otherwise be disclosed in a filing with a public office, it could be prosecuted as Offering a False Instrument for Filing – which, depending on the circumstances could either be a Class A misdemeanor or a Class E felony387 – but that law also requires a filing in all circum-

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381 *Skilling*, 130 S.Ct. at 2933 n.44.
382 Id.
383 522 F.2d 534 (7th Cir. 1975).
384 707 F.2d 1240 (11th Cir. 1983).
386 PUB. OFF. LAW § 73-a. Even that minor penalty is marred by the requirement that prosecution be initiated only after a referral by the Joint Commission on Public Ethics. PUB. OFF. LAW § 73-a(4).
387 The difference between the felony-level false filing crime and the misdemeanor is that the Class E felony, Offering a False Instrument for Filing in the First Degree, requires that the defendant act “with the intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state.” PENAL LAW § 175.35. For purposes of section 175.35, “intent to defraud” does not require pecuniary or financial loss, but simply means seeking to defeat “legitimate official action and purpose . . . by misrepresentation,
stances. Neither, therefore, is a sufficient deterrent to self-dealing conduct. The state should demonstrate a more serious commitment to ending the abuses of public trust that accompany self-dealing behavior.

The Task Force considered different ways to criminalize undisclosed self-dealing. One proposal would amend the crime of Defrauding the Government by expanding its definition of “intent to defraud” to include undisclosed self-dealing by a public official. This route presents two disadvantages. First, under current law, the crime would be capped at a Class E felony, no matter the size of the hidden benefit obtained by the public servant. Second, the gravamen of Defrauding the Government (in its current form) is a public employee’s theft of property or services from the government, for example, through a phony invoice scheme. Inserting the concept of an intangible right could be cumbersome at best; at worst, it could create the statutory ambiguity that drove the Supreme Court to limit the federal honest services law.

In light of these concerns, the Task Force took a different approach. In 2011, the New York State Bar Association’s Task Force on Government Ethics issued its report, which included a draft law against Undisclosed Self-Dealing. The Task Force endorses that proposal, with some minor changes. Under the new law, a person would be guilty of Undisclosed Self-Dealing in the Second Degree, a Class D felony, when:

- being a public servant, he or she intentionally engages in conduct or a course of conduct in his or her official capacity in connection with the award of a public contract or public grant or other effort to obtain or retain public business or public funds that is intended to confer an undisclosed benefit on himself, herself or a relative, and thereby obtains or attempts to obtain a benefit for himself, herself or a relative with a value in excess of $3,000. A benefit is disclosed if its existence is made known prior to the alleged wrongful conduct to either (i) the relevant state or local ethics commission or (ii) the official responsible for the public servant’s appointment to his or her po-

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388 As described in Section VIII, below, the Task Force proposes that Defrauding the Government be amended and gradated to attack schemes by anyone—not just public servants and party officers—to defraud governmental entities.

389 Skilling, 130 S.Ct. at 2933.

situation, provided that person is not a participant in the alleged wrongful conduct. 391

The Task Force also recommends the passage of Undisclosed Self-Dealing in the First Degree, a Class C felony, which would require the same elements for conviction with a $10,000 threshold. 392 The proposed statute would borrow the definition of “relative” from the New York City Conflict of Interest Board: a spouse, domestic partner, child, parent, or sibling of the public servant; a person with whom a public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest. 393

Several aspects of the proposal bear mention. First, it criminalizes self-dealing “conduct or a course of conduct.” Prosecutors would therefore be empowered, for the first time in New York, to pursue both isolated acts and repeated incidents of self-dealing involving ongoing corrupt relationships. As with other “scheme” crimes, evidence of conduct that was part of the scheme – even conduct that took place over a course of years, or perhaps occurred in different counties – would be treated as part and parcel of the offense, as it has been in decades in federal prosecutions. 394 This approach would enable the efficient prosecution of the scheme in one county, and would allow a jury to hear the full scope of the illegal scheme.

Second, the proposal’s safe harbor disclosure structure imposes an ongoing disclosure obligation, thereby encouraging transparency. It also prevents gamesmanship. The Public Officers Law requires that financial disclosures for state employees be filed annually. Within the course of a year, a public servant could: file her disclosure form; acquire an ownership interest in a company; steer government business to that company; and sell her ownership interest. If the law against undisclosed self-dealing were linked to the requirements of the Public Officers Law or the equivalent local provision, she would commit no crime, despite her corrupt conduct. The safe harbor structure precludes that undesirable result. On the other hand, the required mental state – “intentional” – limits the law’s application to those who engage in corrupt transactions. It will, therefore, not ensnare a public servant who unwittingly omits items on her annual financial disclosure forms.

Third, the proposed statute answers the questions laid out by Justice Ginsburg in Skilling. It explains how “direct or significant . . . the conflicting financial interest” must be: the interest must be held by the public servant or a “relative,” a defined term. It measures the extent to which “the official action [has] to further that interest in order to amount to [a crime]” by setting dollar thresholds. And it identifies “[t]o whom should the disclosure be

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391 See Appendix G.
392 The Task Force also recommends that section 460.10(1) of the Penal Law be amended to include the new crimes of Undisclosed Self-Dealing as a pattern act for a charge of Enterprise Corruption, and that section 700.05(8)(b) be amended to authorize electronic eavesdropping for the new crimes.
393 RULES OF THE CITY OF NEW YORK, tit. 53, § 1-01.
made and what information should it convey”: it should be made to the relevant state or local ethics commission, and should reveal the economic interest from which the “benefit” will flow. Moreover, the statute clarifies that disclosure must predate the alleged wrongful conduct.

When a similar proposal was made by the State Bar Task Force in 2011, it was not acted on. The Task Force respectfully recommends that this version be enacted into law.

C. Official Misconduct

The Office of the State Comptroller (OSC), Thomas P. DiNapoli, shared a recommendation with the Task Force to enhance the penalties for the existing crime of Official Misconduct. Specifically, the OSC’s view was that “the penalties for Official Misconduct, Penal Law Section 195.00, are inadequate to address the types of abuse which the State has encountered,” and the OSC recommended “that two new sections be added to [the Official Misconduct section], creating second degree and first degree Official Misconduct offenses, depending on the amount of the benefit conferred as [a] result of the public servant’s misconduct.”

With some variations that relate to the grading of the existing and new proposed offenses, the Task Force adopted the OSC’s proposal.

By way of background, the crime of Official Misconduct is currently a single-degree crime – a Class A misdemeanor. It criminalizes a public servant’s unauthorized action (or his or her failure to perform an act his or her duty requires) with the intent to obtain a benefit or deprive another person of a benefit. Some hypothetical examples illustrate the current law’s shortcomings. If a high-ranking police official voids moving violations and parking tickets issued to her family members, the level of the offense is the same whether the revenue lost to the municipality totals $50 or $5,000. Similarly, if a law enforcement official fails to act on an embezzlement complaint because the alleged perpetrator is the son of a friend, the level of that offense is a Class A misdemeanor, regardless whether that failure to act prevented the victim company from recovering $500 or $5,000 in stolen funds. And, while our Penal Law includes sections for Rewarding Official Misconduct and Receiving a Reward for Official Misconduct, which present a range of E and C felonies, these offenses do not reach situations where there is no reward to the official, that is, when the breach of the official’s duty inures only to the benefit of a third party.

395 Letter from Nelson R. Sheingold, Counsel for Investigations, Office of the State Comptroller, to Daniel R. Alonso and Frank A. Sedita, III (July 10, 2013). See Appendix B.
396 PENAL LAW § 195.00 provides: “Official Misconduct. A public servant is guilty of official misconduct when, with intent to obtain benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”

397 Id.
398 See PENAL LAW §§ 200.20 et seq.
The inadequacies of the single-degree offense of Official Misconduct may be addressed by (1) retaining the current offense of Official Misconduct as a Class A misdemeanor but reclassifying it as a third-degree offense; (2) creating a second-degree offense, a Class E felony, which would include the elements of the third-degree offense and require proof that the public servant obtained a benefit or deprived another person of a benefit valued in excess of $1,000; and (3) creating a first-degree offense, a Class D felony, which would also include the elements of the third-degree offense but would require proof that the public servant obtained a benefit or deprived another person of a benefit valued in excess of $3,000. Proposed statutory text appears in Appendix G.

By adding two levels of Official Misconduct, with penalties calibrated to the financial benefit or harm associated with the conduct, our laws will finally recognize and punish serious acts of Official Misconduct as felonies, and perhaps more effectively deter those acts.

D. Abuse of Public Trust Sentencing Enhancement

The OSC provided another recommendation, which the Task Force supports, for a general sentencing enhancement for public servants who intentionally use their positions to facilitate significantly their commission (or concealment) of an offense. This enhancement would apply only when the underlying count of conviction does not capture the abuse of the official’s position as an element.

Bribery, bribe receiving, and rewarding official misconduct, as examples, all include the actor’s status as a public servant as an element of the offense, and our lawmakers plainly considered the actor’s status in grading the seriousness of the offenses and the potential penalties. But unfortunately, wayward public officials have not always confined their misdeeds to the sections of the penal statutes that specifically reference them. So, for example, if a Senator uses her position to embezzle money from a charity, or a police officer uses his position to facilitate a drug transaction, the elements of a Grand Larceny charge or a drug sale charge do not capture each defendant’s abuse of position, nor do the potential penalties. The Task Force believes that the facts that cause the additional harm – the public-servant status of the offender and the abuse of his or her official position – should be captured though an appropriate sentencing enhancement.

The OSC previously proposed a bill in January 2013, entitled “Abuse of Public Trust,” that would accomplish this goal. The proposed legislation sought to vest the prosecutor with the ability to enhance the potential penalties against a public servant who abuses his or her position by charging the defendant with a distinct offense, Abuse of Public Trust,

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399 The OSC recommended elevating the current Official Misconduct misdemeanor to a Class E felony as a third-degree offense, creating a second-degree offense as a Class D felony, and a first-degree offense a Class C felony.
400 The Task Force does not believe that adding a harm/benefit element to the two proposed sections of Official Misconduct will face the same challenges associated with the harm element in the current felony Commercial Bribery statutes discussed above. If there is no readily provable financial harm or benefit related to an act of official misconduct, the offense will simply remain a misdemeanor.
in addition to the substantive Penal Law violations. Upon a conviction for the substantive offense, the level of the underlying substantive offense would be elevated one category for sentencing purposes. The OSC’s proposal also included a mandatory fine upon conviction for an offense involving a public official’s abuse of his or her position. The Task Force endorses this proposal. The text for the Abuse of Trust Act appears in Appendix G.  

401 The OSC’s proposed bill may also be found at: open.nysenate.gov/legislation/api/1.0/html/bill/A3629-2013.