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October 11, 2007

Senator Patrick Leahy
Attn: Jennifer Price, Hearing Clerk
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

***Hearing on "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum* – Response to Written Question of Senator Leahy**

Dear Senator Leahy:

As I noted in my testimony on September 18, 2007, I expect that, even were Congress to bar federal prosecutors from requesting corporate privilege waivers and from considering a corporation's willingness to waive in charging decisions, many corporations would continue to conduct internal investigations and would, in a broad range of cases, readily disclose materials thereby obtained to prosecutors. Corporations often have nothing to hide, and the matters in which the government has expressed an interest may involve an isolated case of employee misconduct or no misconduct at all. Moreover, the sooner corporate counsel can satisfy the government's interest in a matter and persuade prosecutors to move on to other cases, the better for the corporation.

That this dynamic will continue in many cases, irrespective of legislative intervention, does *not* mean that the proposed legislation would not affect *other* cases. It would indeed, and the cases that it would make harder to prosecute would include many that the government very much ought to be pursing, i.e. cases against corporations that – to use Senator Specter's dichotomy – are "guilty."

Were the proposed legislation enacted, there would undoubtedly be a class of corporations that would not waive privileges and would avail themselves of the protection the legislation offers. That, after all, is the whole point of the bill. Some corporations within this class would have legitimate reasons for not wanting to make their workings transparent to the government. Others would simply be hoping to escape further investigation with bland

assurances that no misconduct has occurred, even though corporate counsel never bothered to look very hard, or did look and is misrepresenting what was found.

In the face of such bland assurances, prosecutors might well move on, leaving these cases uninvestigated and any misconduct unpursued. Should prosecutors not move on, the investigation would be far more resource-intensive, and possibly more invasive or disruptive than in a waiver regime. Unable to draw on corporate counsel's materials, enforcers would have to rely more on grand jury subpoenae, searches, consensual tape-recordings, search warrants, and other such investigative techniques. The effect that this increased cost (monetary and social) will have on white-collar enforcement is worth considering. Moreover, even when the government is able to bring a case without relying on, or even trying to obtain, corporate privilege waivers, it will have to deal with regular claims that it has acted with an illegal motivation, because defendant's failure to waive affected prosecutorial decisionmaking. Such allegations will be easy to make, and hard to rebut without extensive and disruptive inquiry into prosecutors' calculus, making even the most appropriate cases more difficult to bring.

I appreciate the chance to contribute to the Committee's important work. Please let me know if I can be of further assistance.

Very truly yours,

Daniel Richman