Testimony of

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UNITED STATES
DEPARTMENT OF JUSTICE

STATEMENT OF
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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
"EXAMINING APPROACHES TO CORPORATE FRAUD PROSECUTIONS AND THE ATTORNEY-CLIENT PRIVILEGE UNDER THE
MCNULTY MEMORANDUM"

PRESENTED
SEPTEMBER 18, 2007

Chairman Leahy, Senator Specter, and Members of the Committee. Thank you for the opportunity to be here today to talk about the McNulty Memorandum, the corporate criminal charging policy at the Department of Justice, and pending legislation that will eviscerate that policy. The Attorney-Client Privilege Protection Act of 2007 will greatly harm our efforts to eradicate corruption in corporate boardrooms and protect our nation's financial markets.

Department of Justice Efforts to Combat Corporate Crime

In the aftermath of corporate scandals like Enron, Worldcom and Adelphia, the Department has worked very hard to bring corporate criminals to justice, protect investors, shareholders and our nation's retirees from the devastating effects of corporate fraud, and return assets to victims of crime. Since 2002, the Corporate Fraud Task Force -- a multi-agency Task Force charged with restoring investor confidence in America's corporations by investigating and prosecuting those who violate the trust of employees and investors -- has utilized enhanced statutory tools provided by Congress to pursue corporate wrongdoing through the dedicated and professional efforts of agents and prosecutors whose effective investigation and prosecution of complex schemes have resulted in more than 1200 corporate fraud convictions and the recovery of billions of dollars for investors and shareholders in criminal and civil proceedings.

Many positive benefits flow from criminal enforcement against corporations, including increased compliance and restoring the confidence of the investing public in the capital markets. At the same time, due to the nature of corporations, certain additional considerations are present. A corporation can be held vicariously liable for the criminal acts of its employees, but at the same time, charging a corporation criminally may have severe, collateral consequences to innocent employees, shareholders and pension holders.

For this reason, and to ensure consistency in corporate charging decisions, the Department of Justice memorialized the principles governing the Federal Prosecution of Business Organizations in the Holder Memorandum issued in 1999. That document, as well as the various iterations that followed - the Thompson Memorandum and the McNulty Memorandum - established a nine-factor test that prosecutors consider in determining whether to charge a corporation or other business entity. Those nine factors include the nature and severity of the alleged conduct, its pervasiveness, a corporation's history of similar conduct, the adequacy of the corporation's existing compliance program, and whether the corporation cooperated in the course of the government's investigation. A prosecutor must consider and weigh all of the relevant factors in order "to ensure that the general purposes of the criminal law - assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities - are adequately met, taking into account the special nature of the [corporation]."

The McNulty Memorandum, in part, was created in response to concerns that prosecutors lacked uniform guidance on what factors to consider when deciding whether to charge a corporation. The Memorandum creates greater transparency and predictability in the investigation and prosecution arena. Furthermore, the charging analysis in the McNulty Memorandum presents no new concepts; the analysis memorializes what common sense leads a prosecutor to consider when making a charging decision and what prosecutors have been considering for decades. Indeed, the very concept of corporate liability is well founded in our legal system and is an important tool - both in the criminal and civil law contexts - in holding corporations responsible for their wrongdoing.

Critics of the McNulty Memorandum tend to focus solely upon the role that corporate cooperation plays in a prosecutor's decision as to whether to charge a corporation. This focus, however, ignores the other key provisions of the Memorandum which provide structure and guidance to this important decision. Cooperation is just one of the nine factors a prosecutor weighs in determining whether to charge a corporation. A prosecutor assesses the adequacy of a company's cooperation by considering the completeness of a company's disclosure, including whether the company identified the culprits, made witnesses available, and, if necessary, waived attorney-client and work product protections to provide information about the criminal violations to the government. Waiver is simply one sub-factor that might come into play in evaluating one of the nine factors in the McNulty analysis.

The Mechanics of Corporate Fraud Investigations -
Selective, Voluntary Waiver, and the McNulty Memorandum

When the government begins a corporate fraud investigation, it just wants to know the facts: How did the fraud occur? When did the fraud occur? Who was responsible for committing it? Occasionally, when a corporation wants to cooperate, it provides these facts by waiving work product and attorney client privileges. The Department does not seek information regarding an attorney's litigation strategy or legal tactics when requesting waiver of privilege. Indeed, an attorney's strategy, tactics, and legal advice regarding the government's investigation will rarely have a bearing on the outcome of any corporate fraud investigation unless the attorney is providing advice in furtherance of the fraud or to impede the government's investigation.

Waiver of privilege is not requested because the Department seeks to shift its investigatory burden onto companies. Rather, federal prosecutors have an independent obligation to investigate every case and, even if prosecutors are given the results of the corporation's internal investigation, they have to verify those facts. Waiver can streamline an investigation, but prosecutors cannot, and do not, simply rely on waiver to prove their case.
Waiver of privilege is only sought on a limited basis from corporations that wish to cooperate and to receive a benefit for that cooperation. This is not a novel approach. The notion that prosecutors extend leniency in charging or punishment in exchange for cooperation is a concept fundamental to our criminal justice system. See United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc); see also United States Sentencing Guidelines §§ 5K1, 8C2.5; 18 U.S.C. § 3553(e). It did not originate in the Department's corporate charging policy. In fact, Congress has long recognized that cooperation should be rewarded in its enactment of statutes authorizing immunity for witnesses and allowing the court to impose a sentence below the mandatory minimum to reflect a defendant's substantial assistance in an investigation or prosecution. See 18 U.S.C. § 6003 and 18 U.S.C. § 3553(e).

Even when a company offers its cooperation to the government, federal prosecutors do not request waiver at the outset of the investigation. The McNulty Memorandum specifically states that waiver is not a prerequisite to a finding of cooperation. Cooperation is but one factor in the analysis, and waiver is considered in weighing the adequacy of

the cooperation, but it is not a litmus test for cooperation. The Memorandum requires that prosecutors both initiate an investigation and show a legitimate need for potentially privileged materials before asking for permission to request a waiver.

When is it appropriate to request waiver? Prosecutors must satisfy a legitimate need test before the request is made. When that test is satisfied and, in certain circumstances, it is appropriate to seek waiver when speed in a complex investigation is important because the statute of limitations may expire, evidence may disappear, assets may dissipate, targets may flee, and victims may have to wait too long to obtain restitution. And fast action matters. Waiver of privilege can facilitate asset recovery for victims.

For instance, in the Southern District of New York, in United States v. Martin Armstrong, obtaining a waiver of privilege from the company HSBC/Republic Securities enabled the government to freeze $80 million before the defendant, who had a history of hiding assets, could move it. The case involved a billion dollar Ponzi scheme perpetrated by an American investment adviser on a host of major Japanese corporate victims. At the time of discovery, the government received a waiver of work product privilege for a forensic accounting analysis tracing the flow of money associated with securities trades. The waiver enabled the government to follow the money quickly enough to freeze approximately $80 million within two weeks of the onset of the investigation. The government was able to secure an arrest warrant for Armstrong (based in part on the privileged work product information) the following week. Absent this waiver, it would likely have taken at least six weeks to conduct the same analysis. In the interim, Armstrong would have been able to flee and/or transfer abroad the $80 million in cash. In fact, Armstrong would likely have done so because he was held in contempt, after his arrest, for secreting another $10 million in gold bullion.

In these types of cases, replicating a lengthy and expensive investigation that has already been performed by a cooperating company would burden taxpayers and do significant harm to the interests of the victims of a corporate fraud. In a survey of United States Attorneys' Offices, federal prosecutors have told us that waiver of privilege has expedited prosecution, avoided the necessity for extensive pre-trial litigation, resulted in the production of critical evidence that undermined the credibility of the targets of an investigation, proved a target's defenses were not viable, and, in certain cases, allowed the government to conclude an investigation quickly without bringing charges. Waiver allows the government to act quickly and effectively -- a goal that should be encouraged, not thwarted.

Why do we obtain waiver in certain cases? Obtaining cooperation from a corporation is different than cooperation by individuals. When a corporation approaches the government claiming that it wants to cooperate in an investigation, it makes different decisions to effectuate that cooperation than the individual defendant. With an individual, such as a drug trafficker who wants to cooperate with the government, the prosecutor requests an interview. The individual defendant then sits down with his own attorney, government agents, and a federal prosecutor and explains his role in a drug trafficking organization, the players, how the drugs moved, the quantities of drugs, and the distribution scheme. Unlike an individual defendant, a corporate entity is an artificial construct that does not have personal knowledge of criminal violations. A corporation seeking to cooperate usually conducts fact gathering about the crime through its lawyers. The information that the lawyers gather is the functional equivalent of a person's memory, but since it was collected by lawyers, it is protected by the attorney-client privilege or work product doctrine.

To obtain the truth regarding the misconduct, the government must ask the corporation what it knows. The corporation may then convey its knowledge through its lawyers and produce reports, interviews, and key documents that explain the scheme. It provides this information voluntarily, as does every other criminal defendant who seeks to cooperate with the government. Occasionally, in order to provide facts about how a fraud occurred, when it occurred, and who was responsible, the corporation may waive attorney-client or work product protections by producing the report of its own internal investigation. On the other hand, where a corporation can provide facts without waiving privilege -- by identifying documents or making employees available for interviews -- waiver may not be necessary. A corporation may still receive a cooperation benefit by providing facts without waiving privilege.

The McNulty Memorandum Addresses the Concerns About a "Culture of Coercion" that Legislative Proposals Purport to Address

The Department published the principles of charging corporations - which are the factors that prosecutors have always informally considered - to ensure consistency and transparency. We at the Department are aware that,

despite the Department's successes, some in the business community and criminal defense bar have expressed dissatisfaction arising out of a perception that federal prosecutors were "coercing" corporations to provide privileged materials in criminal investigations. The Department held numerous meetings with individuals representing this point of view and reviewed the materials submitted in support of their position, but no concrete information was provided to the Department to substantiate these claims.

Nevertheless, Department officials, led by the Deputy Attorney General, undertook an extensive and thorough review of our corporate charging policy. The Deputy Attorney General's Office sought input from members of the business community, bar associations, associations of corporate counsel, and our own prosecutors. The McNulty Memorandum was the result of this dialogue. The revisions that the Department made to the McNulty Memorandum preserve the transparency of our charging decisions while addressing and dispelling negative perceptions in very significant ways.

There has been no empirical evidence to suggest that prosecutors were routinely coercing privilege waivers in corporate criminal investigations and that a "culture of waiver" had developed. Even so, threshold requirements and approvals now contained in the McNulty Memorandum prohibit federal prosecutors from requesting waivers of privilege in corporate fraud investigations absent a demonstrated legitimate need and approval by a senior Department official. The Memorandum adopts a tiered approach as to when prosecutors may request that a corporation provide protected materials.

In order to address the perception that routine waivers were being sought, the new policy now makes clear that legal advice, mental impressions and conclusions and legal determinations by counsel are protected and should only be sought in rare circumstances. Any request for such materials must be in writing and "seek the least intrusive waiver necessary to conduct a complete and thorough investigation." When prosecutors wish to seek privileged attorney-client communications - the materials generally considered to be the most sensitive of all protected materials - the United States Attorney must now obtain written approval directly from the second highest official in the Department - the Deputy Attorney General - before making the request.

There is another category of information, facts obtained and documented by corporate counsel, that is subject to a different approval requirement. A prosecutor's request for facts most often comes up in the context of an internal investigation by the corporation. Corporate lawyers or outside counsel will interview witnesses and gather together key documents to determine whether wrongdoing has occurred. This may happen before or during the government's criminal investigation. When the corporation comes in asking to cooperate, the government needs to know what happened. Attorneys may assert privilege relating to this information. If there is a legitimate need, and subject to the process discussed below, the government may ask for a waiver of the privilege to obtain the facts attorneys for the corporation have collected.

Asking for this type of information is much less intrusive to the privilege than asking for legal advice. Most experienced corporate counsels recognize that if the corporation wants the benefits of cooperation, it should produce the facts that it has learned during the course of its own investigation. In fact, in our discussions with corporate counsel, they have acknowledged the benefits of proceeding quickly. Rather than facing additional delay while the government duplicates its efforts, the company will often offer the results of its internal investigation so that the government's investigation can move faster. This allows the government to make a charging decision within months, rather than years, which saves the company money and employee time and protects the value of its stock.

Even with this non-controversial request for facts, under the McNulty Memorandum prosecutors must submit a written request for approval to the United States Attorney. The request must be narrowly tailored. The United States Attorney considers that request in consultation with the Assistant Attorney General of the Criminal Division. The request and approval must be in writing and those records must be maintained. If after receipt of this factual information the prosecutors still believe that they need more information which may implicate attorney-client communications and legal advice, then they can request that the Deputy Attorney General approve their written request for that information. These process requirements address the concerns that have been raised by legal and business associations. They make sense, while still preserving the Department's right to obtain needed information quickly.

The divide is between legal advice and facts. To be clear, a prosecutor must take an incremental approach, first establishing a legitimate need and then submitting a narrowly- tailored written request. The United States Attorney, in consultation with the Assistant Attorney General of the Criminal Division approves a request for factual information; the Deputy Attorney General approves requests for legal advice, subject to two exceptions (when the company is asserting an advice of counsel defense or when the crime-fraud exception applies).

But the Department did more than just establish an approval process. Before prosecutors can even make a request of the Deputy Attorney General or their United States Attorney, they must establish a legitimate need for the information. "A legitimate need for the information is not established by concluding that it is merely desirable or convenient to obtain privileged information." To meet the legitimate need test, prosecutors must show: (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) collateral consequences to a corporation of a waiver.

This test ensures that evaluating the need for waiver is a thoughtful process and that prosecutors are not requesting it without examining the quantum of evidence already in their possession and determining whether there is real need to request privileged information. Prosecutors cannot even undertake this test until they take preliminary investigative steps to determine whether a corporation and its employees have engaged in criminal activity before seeking waiver, thereby ensuring that prosecutors cannot seek waiver at the outset of the investigation.

The privilege is fully protected in this approval process. Even if the prosecutors have established a legitimate need and the Deputy Attorney General approves the request for the waiver, if the request is made and the corporation declines to give the information, the Department will not hold it against the corporation or view it negatively in making a charging decision. This is to ensure that where a valid privilege is asserted for legal advice or strategy, that the corporation and its lawyers are not penalized for deciding that they want to preserve the confidentiality of their communications. Prosecutors, however, may consider a corporation's decision to refuse to waive privilege to provide factual information - a concept that is consistent with the notion that a cooperating corporation should be willing to provide the facts when requested.

The Memorandum also establishes various internal Department record-keeping requirements to document occasions when protected materials are sought. The results of this record-keeping do not support the finding that privilege waiver requests are widespread or abusive. Since December 2006, the Criminal Division has received ten requests for factual information under Category I of the McNulty Memorandum, only five of which involved a request for privileged documents actually covered by the Memorandum. Four of those five requests were approved. The Office of the Deputy Attorney General has not processed any requests for attorney-client communications under Category II of the Memorandum. The statistics gathered since the issuance of the McNulty Memorandum simply do not support a finding of widespread abuse. Legislative action is simply not needed.

Legislative Proposals to Establish a Blanket Prohibition on Waiver of Attorney-Client Privileged Information

Legislative efforts to establish a blanket prohibition on the government's ability to receive information voluntarily provided by cooperating corporations are deeply flawed and rest on faulty premises. For example, S. 186, the Attorney Client Privilege Protection Act of 2007 goes far beyond the Department's corporate charging policy, extending its protections to: (1) mere requests for information, involving the disclosure of privileged or protected facts; and (2) organizations and "person[s] affiliated with [those] organization[s]," potentially shielding not only corporations but also specific categories of individuals, namely corporate executives.

As an initial matter, the proposed legislation is problematic in one significant respect.
It creates two sets of rules, one more favorable set of rules for corporations and their employees and another set of rules for everybody else. The bill also creates the appearance of favoring corporate non-constitutional privileges over the constitutional rights of the individual. On a daily basis throughout this country, individuals outside the corporate context, some of whom are not represented by counsel, are asked by law enforcement officers - consistent with longstanding Supreme Court precedent - to waive their constitutional rights, such as the right to remain silent, the right to counsel, and the right not to have their homes searched without a court-authorized warrant. An individual

defendant in the garden-variety criminal case may waive his privilege against self-incrimination and confess to police officers without counsel. But unlike the individual, a corporate defendant waives its attorney-client privilege only after it consults counsel with specialized expertise in accounting, business, and corporate governance. It is difficult to understand why a more sophisticated, corporate defendant could claim that its will is overborne when the government asks it to waive a non-constitutional privilege, when generally less sophisticated, individual defendants waive their rights and cooperate with police officers on the street every day.

The proposed legislation creates a broad prohibition covering information requests and will chill the ordinary exchange of information between corporations and federal entities. To illustrate, imagine a publicly held corporation has identified a fraud within the corporation committed by the Chief Financial Officer (CFO). The public company has obligations to the Securities and Exchange Commission (SEC) and to the investing public to disclose that there is a problem with its financial statements. If this bill is passed, the following simple questions by the SEC or the Department of Justice could be stymied if the corporation retained counsel to look into the matter: How did you learn of the fraud? What remedial actions did you take? Can you disclose what happened? What were the processes put in place to prevent this? What is the breadth of the fraud? What did the officers know about the fraud? Whenever questions must be answered with information obtained by counsel in the internal investigation, i.e., protected by attorney-client privilege or work product, the legislation would prohibit asking these questions.

Subsection (c) of the bill entitled "Inapplicability" does not remedy this problem. That section provides that "Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine." To invoke this provision, a federal prosecutor would have to hold a "reasonable belief" that the information is not privileged. In cases where a prosecutor can establish that the legal advice was communicated in furtherance of a crime or fraud ("the crime-fraud exception"), the prosecutor will be entitled to ask for that information. However, in most investigations, the prosecutor will be hesitant to take advantage of this section because of the potential for adverse rulings from a court if the matter is later litigated and the court sets an unexpectedly high threshold for finding "reasonable belief" that the materials are not entitled to protection. Certainly, when the attorney is providing information directly from the internal investigation that he or she conducted, a federal prosecutor would be reluctant to argue that attorney-client and work product productions are not implicated. As a result, a prosecutor investigating corporate fraud may not be able to ask the most basic questions of corporate counsel.

Basic fact-finding with corporate counsel routinely assists the government in determining whether to open an investigation. Given the broad prohibitions of this bill, however, prosecutors will hesitate to engage in such fact-finding because of the litigation risks that could occur in asking for that information. The potential inability to broach vital topics with counsel prevents the United States from making an assessment of whether opposing counsel's assertion of privilege is even valid. Furthermore, the prohibition on seeking privileged information lengthens the government's investigations, resulting in delayed justice for victims of corporate fraud. This result would not occur with the McNulty Memorandum because prosecutors are able to make the request, as long as they seek approval from their supervisors and establish a legitimate need for the information before the request is made.

The bill also states that the government cannot "condition treatment" on the disclosure of protected information of a "person affiliated with that organization," which, if the plain language is read literally, extends the shield to individual employees, agents or affiliates of the organization1. Thus, the bill would effectively prohibit individuals from waiving their personal attorney client privilege (as opposed to the corporation's privilege) and receiving any benefit for this waiver.1 In the context of dealing with individuals who have retained counsel, such as whistleblowers or individuals who may be involved in criminal conduct, the legislation prohibits the United States from conferring any benefit on those individuals when they disclose wrongdoing inside the organization and waive their individual privilege. This practice would conflict with what occurs in nearly every other criminal prosecution. The United States is free to confer, and usually does, a benefit upon individuals who provide information, even when providing that information means waiving certain rights, including attorney client privilege. Such benefits are extended every day in courtrooms across the United States.

Critics claim that the Department's policies pit the individual's constitutional rights against the corporation's interests, but that ignores practical realities of the investigation of criminal wrongdoing. Due to the artificial nature of corporations, the discovery of wrongdoing by individual employees or officers will necessarily pit the interests of the

corporation against the interests of that employee or officer. While a corporation has a duty to its shareholders to detect and disclose wrongdoing, a culpable employee often wants the corporation to maintain confidentiality about his misconduct. In the past, because a corporation's attorney-client privilege does not extend to the individual employee, the employee could not rely upon the corporation's privilege to maintain that confidentiality. Indeed, employees routinely receive Upjohn warnings by corporate counsel to that effect in internal investigations to ensure that there is no misunderstanding. This legislation, however, now alters that playing field. If the government can give no charging benefit, companies will be less likely to report wrongdoing. Because the legislation removes the incentive to disclose by the corporation, culpable employees will be better able to better conceal evidence of their misconduct from the government. By placing these roadblocks in the government's efforts to obtain information, this bill will allow individual wrongdoers like Jeffrey Skilling and Kenneth Lay to shield their misconduct, and elevate the interests of a culpable CEO over that of the shareholder.

Other provisions of this bill are simply unnecessary. The extension of this bill to a prosecutor's consideration of the advancement of attorney's fees is not needed. The Department's guidance already instructs prosecutors that they generally cannot consider a corporation's advancement of attorney's fees to employees when making a decision whether to charge the corporation. A rare exception is created for those extraordinary instances where the advancement of fees, combined with other significant facts, shows that such a step was intended to impede the government's investigation. In those limited circumstances, fee advancement may be considered only if personally authorized by the Deputy Attorney General. The Deputy Attorney General has not authorized any requests for consideration of the advancement of attorney's fees.

Similarly, prohibiting prosecutors from considering the existence of a joint defense, information sharing, and common interest agreements between a corporation and its employees is unnecessary in light of the Department's charging guidance. The McNulty Memorandum allows prosecutors to consider the existence of a joint defense agreement and information-sharing in making a determination as to whether the company is cooperating. Joint defense agreements are used when litigants have interests in common in a matter or common goals, and where the communication and sharing of privileged information are part of an effort to set up a common strategy. The agreements themselves are not per se considered against companies. They are only considered when prosecutors are attempting to determine when a company is actually cooperating and when the actual sharing of information between a corporation and its employees was intended or did, in fact, taint witnesses or obstruct the government's investigation.

Finally, the bill prohibits prosecutors from considering the corporation's failure to sanction or terminate its employee when the employee exercises his constitutional rights by refusing to respond to a government request. This provision is unnecessary because the Department simply does not penalize a corporation for an employee's exercise of a constitutional right, including invocation of the Fifth Amendment privilege in response to a government's request for an interview. Moreover, this provision of the bill is confusing and appears to conflate the corporation's internal investigation with the government's investigation. In so doing, this provision may embolden employees from providing critical information about corporate wrongdoing to their employers.

The corporation's internal investigation is separate and distinct from the government's investigation. The government does not ask or expect the corporation to act as an agent of the government in conducting an investigation. Apart from whether an employee asserts his constitutional rights in a government investigation, the company may have developed evidence in its own investigation about wrongdoing by the employee which justifies disciplinary action. When an employee declines to participate in a corporation's internal investigation, the corporation can make the choice to sanction that employee. In fact, if the corporation fails to take remedial action against an individual it knows to be a corporate wrongdoer, which failure would most probably be in conflict with its own internal policies, it is appropriate for the government to consider that fact in deciding whether the corporation itself should be charged.

The guidance does not state in any way that the prosecutor may consider the fact that an employee is exercising his right against self-incrimination as a factor against the corporation. It just allows a prosecutor to consider whether a corporation is properly policing itself. If the Department is to encourage good corporate governance, the way in which a corporation disciplines its wrongdoers must be considered. This provision chills not only government investigators from seeking relevant information, but discourages culpable employees from participating in a corporation's internal policing mechanisms.

Conclusion

When a corporation decides to cooperate, it should be required to provide information to the government -- how the crime was committed, who did it, and when it happened. Sometimes disclosing that information may implicate work product or attorney-client privilege protections. The McNulty Memorandum strikes the proper balance between the protection of the attorney-client privilege and the legitimate need of law enforcement to prosecute corporate misconduct. It should be given time to work. If the Department loses the ability to ask for relevant information in a criminal investigation, privileged or not, it will be far more difficult to bring corrupt corporations and their executives to justice. If history is our guide, in the next decade, the impact of this legislation will fall on American retirees and pension holders. We should not turn back the clock. Having learned the lesson of Enron all too well, we need to maintain our vigilance so that it does not happen again.

Thank you again for the opportunity to appear before you today, and I look forward to answering the Committee's questions.

1 That provision is in conflict with established case law that the corporation's privilege belongs to the corporation, not the individual. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985).