Testimony of

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Mr. Chairman and Distinguished Members of the Committee:

Thank you for providing me with the opportunity to testify on an issue of considerable importance to the business community and federal law enforcement: corporate criminal liability and attorney-client privilege waiver. I take as my starting point the following question: What policy is in the best interests of the citizens of the United States as taxpayers, consumers, and shareholders in publicly-traded corporations? I am not concerned with the powerful vested interests of prosecutors, corporate boards and officers, attorneys, or accountants.

There can be no doubt that the attorney-client privilege is a central feature in the proper functioning of our system of justice. Nevertheless, the privilege is actually the exception, not the rule. The rule is that the government, acting on behalf of the people, is entitled to "every man's evidence" when attempting to uncover the truth. Moreover, even when the privilege would normally apply, the law has long recognized that sometimes it must give way to more significant interests. For example, the new ABA Model Rules of Professional Responsibility permit an attorney to disclose privileged information if disclosure is necessary to prevent "substantial injury to the financial interests" of another person (MR 1.6(b)(2)). Another example allows lawyers to breach a client's confidence when the lawyer is under a legal or ethical attack (MR 1.6(b)(3)). The question today, then, is whether S. 186 - by prohibiting prosecutors and other federal attorneys from requesting that a corporation voluntarily waive its attorney-client privilege to assist in the prosecution of white collar crime - strikes the right balance between the protection of client confidences and the need for effective law enforcement.

I will begin my examination of this issue with an exploration of why entity liability is essential to the successful pursuit of sophisticated white collar crime. That accomplished, I will discuss the many benefits of corporate cooperation with federal authorities. I will then explain how such cooperation often implicates a corporation's attorney-client privilege. I will demonstrate that, although waiver of such privilege should be sought by the government only as a last resort, sometimes waiver is the only means by which federal investigators and prosecutors can cut to the heart of the alleged criminality in an efficient and timely manner. That is why I believe that S. 186 is ill-advised. I believe, instead, that the McNulty Memorandum, perhaps with some tweaking around the edges, provides the proper balance between vigorous law enforcement and the prospect of governmental overreaching.

Public Benefits of Corporate Criminal Liability

Corporate culpability achieves significant additional deterrence beyond individual liability. Specifically, corporate liability deters high level corporate officials from creating an atmosphere in which lower-level employees know that criminal conduct is encouraged, but which acts as a shield for the higher-ups themselves. Managers can foster such an environment in several ways; a typical method is to set productivity targets so high that they cannot be met through legal means, then fire or demote employees who fail to meet them. Employees quickly understand what they need to do to keep their jobs and get promoted, while management hides behind a veil of plausible deniability.

Entity liability reverses this equation. If managers obliquely encourage widespread criminality and the entity itself is targeted and convicted, it will suffer a loss of reputation and revenues, criminal fines, and perhaps even program

debarment. Harm to the corporation means harm to the officers. They may lose their jobs, or at least suffer monetary losses such as a reduction in the value of their stock portfolios and perhaps the loss of future salary increases. Certainly their professional reputations will be tainted. Given these prospects, preventing - as opposed to encouraging - criminality within the corporation now looks like the better path to choose.

More specifically, the threat of criminal liability gives corporations an incentive to set up compliance programs with real teeth in them. Absent criminal liability, the decision whether to comply with the law is simply a matter of dollars and cents: Is compliance more or less costly than the cost of civil fines and penalties (multiplied by the risk of getting caught)? Criminal liability, with its negative stigma, raises the stakes to a higher level. It is hard to estimate in advance the degree to which a criminal conviction will harm a corporation's bottom line. The resultant uncertainty undoubtedly makes corporate officers much more risk adverse, increasing the attractiveness of implementing procedures and hiring experts to assure legal and regulatory compliance.

Finally, the threat of entity liability provides prosecutors with leverage to encourage the corporation to cooperate with an administrative or criminal investigation. Because this issue bears directly on the heart of the matter - attorney-client privilege waivers - I will take it up separately.

Public Benefits of Corporate Cooperation

I can attest from personal experience that the prosecution of white collar crime is slow and resource-intensive work. There are numerous reasons for this. First, the crime itself is often very complex. Indeed, sophisticated white collar criminals frequently do all they can to add to the complexity of their crime by disguising what they did beneath layers of accounting tricks, false or fraudulent transactions, deleted records, and second sets of books. In a case of any significance, investigators might face hundreds of thousands if not millions of pages of documents, increasingly in electronic form, that they must sort through to unravel the criminal behavior. This work might take a team of investigative agents and several prosecutors years to carry out.

Second, white collar defendants usually have the resources to hire excellent attorneys who specialize in that kind of defense. These attorneys have the ability to slow down an investigation to a considerable extent. They can object to subpoenas on a whole host of grounds, forcing repeated hearings relating to enforcement. Defense counsel can advise their clients not to give voluntary statements to government investigators and to exercise their Fifth Amendment right not to be compelled to testify in the grand jury absent immunity. If they are coordinating their efforts through a joint defense agreement, counsel can ensure that this lack of cooperation is widespread, forcing prosecutors to decide which potential witnesses to immunize in a situation of substantial uncertainty. Unless it is fueled by a whistleblower or other inside information, these tactics can slow an investigation to a snail's pace, and perhaps even cause it to stall altogether.

Third, the difficult nature of white collar investigation means that it often must be prosecuted bit by bit, as prosecutors unravel the wrongdoing and work their way up the corporate ladder. Charges are first brought against the lower level employees, who are much more likely to have been caught red-handed, with the hope that their conviction will lead to cooperation against mid-level management. If this succeeds, the mid-level managers are prosecuted with the hope that they will implicate responsible corporate officers at the highest level. If so, prosecutors can finally bring these individuals to justice. The whole process can take many, many years.

A company that chooses to cooperate, however, shifts the balance of power against the alleged criminal activity dramatically. No longer foes, the corporation and the government can team up to unmask the individuals who were at the center of the criminal activity, thereby getting to the heart of the matter quickly and efficiently. With corporate cooperation, the successful completion of a complex white collar prosecution, including resolution of corporate as well as all individual charges, can very well be reduced from a matter of years to a matter of months. This huge efficiency gain represents a significant public good. Far more white collar criminal behavior can be attacked with the same amount of resources devoted to the effort. The efficiency argument is equally strong even when prosecutors erroneously target an innocent company. The fastest way a company can convince government agents of its innocence is to share all pertinent information with them so that they can draw this conclusion themselves.

There is more to be gained from cooperation, however, than mere efficiency. By cooperating, those in charge of the company signal to the company's workforce in no uncertain terms that illegal behavior is not acceptable. Cooperation lets the criminals in the organization know that, although the company may have tolerated their unscrupulous activities in the past, it will not be hospitable to such activities in the future. The company's collaboration with law enforcement makes a statement to the outside world as well, effectively declaring that, when wrongdoing is found in its midst, the company will do the right thing by ousting those responsible and seeing to it that they are brought to justice. Certainly, a business environment in which companies consistently make clear that criminal behavior is unacceptable is in the public's best interest.

Some of the complaints about DOJ's emphasis on corporate cooperation make it sound as if the technique of "squeezing" cooperation from a putative defendant is unique to the white collar setting. This is obviously untrue. American prosecutors have been striking deals with cooperators at least since the nineteenth century. Is the process of convincing a putative defendant to cooperate against others coercive? Of course it is. Does it require the defendant to give up fundamental rights? Again, the answer is, "of course." To facilitate cooperation, a non-corporate (human) defendant must waive his Fifth Amendment right against self-incrimination, along with his Seventh Amendment right to trial by jury, in addition to his right to appeal a guilty verdict. He must also go through the ordeal of being debriefed and prepared to testify against his confederates. He can choose this unpleasant experience or fight the charges. His Hobson's choice is not caused by an unfair or overbearing government; rather, it is the direct result of his prior criminal conduct. The same is true for a company faced with having to choose between cooperating to minimize the damage done by wrongdoing, on the one hand, and fighting the charges, on the other.

Implicating the Attorney-Client Privilege

When a live human being decides to cooperate with prosecutors, his decision usually has no bearing on the attorney-client privilege. To effectuate his cooperation, the individual must tell all he knows about the criminal activity in question; although this will involve repeating to the prosecutor the facts he told earlier to his attorney, the facts themselves are not attorney-client protected.

The same could be true for corporations. Upon learning about potential criminal conduct by its employees, corporations typically launch an internal investigation. This is the only way the "corporation" can figure out "what happened." If the corporation were exclusively to use non-lawyers as investigators, the results - witness statements, investigators' notes, the final report - would not be attorney-client protected. Nor would they be protected by any other privilege. If the government later undertook an investigation, these materials would have to be turned over pursuant to subpoena.

Of course, corporations typically choose to employ counsel to conduct their internal investigations. This practice is eminently rational. As experts in the legal and regulatory landscape, lawyers are in the best position to advise the corporation whether a crime has been committed and, if so, what course of action it should take. Moreover, by using lawyers to conduct the investigation, the materials generated thereby gain protection under the attorney-client privilege. This gives the corporation the ability to control whether it will reveal such materials to outsiders at a later time through privilege waiver.

In any event, when a corporation decides to cooperate with a federal investigation, much of the assistance it can offer will have no bearing on its attorney-client privilege. For example, the corporation can provide access to non-privileged computer files and documents, including organizational charts, books and ledgers, policy manuals, and internal (non-legal) memoranda. It can also make available for interviews and testimony officers and employees who are willing to speak. Corporate officers, or counsel, can explain to prosecutors how pieces of the puzzle fit together to form a coherent picture of the activity in question. If cooperation of this nature is sufficient, the case can be concluded without any impact on the corporation's attorney-client privilege. As the McNulty Memorandum indicates, this manner of resolution should be the prosecution's goal.

On other occasions, however, this level of corporate cooperation will be of more limited use. Some white collar investigations involve criminality that spans years, implicates multiple individuals, and bleeds across a seemingly infinite array of documents. Worse yet for prosecutors, cases of this magnitude often involve extremely sophisticated schemes that are difficult for an outsider to understand, let alone unravel. In such cases, a corporation might point

prosecutors in the right direction without waiving privilege, but this would be of only limited assistance. Only by waiving privilege can the corporation provide substantial assistance to the prosecution.

Arguments Against Privilege Waiver

One argument against privilege waiver is that it will discourage companies suspecting internal criminality from conducting an investigation because the materials generated by the investigation may be used against the company and its employees in a future criminal case. The proponents of this argument contend that, as a result, illegal conduct will be ignored or undiscovered for long periods of time, causing more harm to society than if corporate privilege were treated as sacrosanct. Though not completely without merit, this contention cannot survive careful scrutiny.

As an initial matter, a corporation that suspects criminality in its midst simply cannot afford to ignore it: the risks of regulatory and third party liability are too high. There is, however, an even stronger reason for high level corporate officials to investigate allegations of criminal activity amongst their subordinates: if they don't, and the government initiates a criminal investigation at a later date, the acquiescence of the officials in the criminal activity could subject them to personal criminal liability. One would think that the consequence of facing time in prison provides a strong incentive to act.

A related argument against waiver is that it causes in-house counsel to generate less paper in the course of an internal investigation because of the fear that it will fall into the government's hands at a later date. The power of this argument is limited because, in a complicated case, counsel really has no choice but to retain sufficient records to support and reconstruct her findings. More important, this barn door was opened a long time ago by the Supreme Court in Upjohn Co. v. United States, 447 U.S. 383 (1981). The Court held that corporate communications are protected by the attorney-client privilege regardless of the level or title of the employee who consulted with corporate counsel. The Court made clear, however, that the privilege belongs to the corporation as an entity, not to any of its agents. As a result, corporate counsel can never predict whether and to whom otherwise privileged documents might be released. Thus, if she is prudent, she will always attempt to minimize the records generated by an internal investigation - because of Upjohn, not DOJ's McNulty-limited use of waiver requests.

The most troubling arguments against privilege waiver stem from the impact it is said to have on the behavior of corporate employees who face questioning during an internal investigation and the lack of fairness that the prospect of waiver creates with respect to these individuals. These arguments merit careful consideration.

The main reason that an employee would refuse to cooperate with her company under threat of sanction is fear of self-incrimination. The employee might be worried about the prospect of suffering even worse employer sanctions upon discovery of the underlying conduct, or she might be fearful that her words will be used against her in a later criminal proceeding, or both. A potentially guilty employee thus faces a dismal set of options: (1) silence, and likely termination; (2) cooperation, and likely sanctions; and (3) lying, perhaps avoiding liability in the short term, but running the risk of facing worse consequences in the future.

Caught in this trilemma, the employee needs legal advice. If she is a high level officer, she is probably aware of Upjohn and will seek advice from a private attorney. If she is relatively unsophisticated, however, she might believe that, in speaking to corporate counsel, her confidences will be kept and her personal situation addressed. This, of course, is not the case. There can be no question that, if the employee is not made aware of this fact, she has not been treated fairly by the corporation and its attorney. Once again, however, the situation the employee finds herself in is not dictated by the possibility that DOJ might make a future request for privilege waiver. Rather, it rests on the mere ability of the corporation, post-Upjohn, to waive privilege voluntarily in any situation it sees fit. Upjohn puts the employee at risk.

Moreover, the employee's trilemma is of her own making; that is, it is a result of her apparent participation in criminal activity. If she suffers consequences as a result of this behavior - be it termination from employment or a criminal conviction - she is not a candidate for a whole lot of sympathy. Nevertheless, the employee should have the opportunity to consult with counsel, in an absolutely privileged context, prior to making any decisions about her reaction to the corporation's internal investigation. To the extent that the law and legal practice is lacking here, the culprit is not DOJ waiver policy. Instead, it is with the rules regarding when and how corporate counsel must advise

an employee that counsel does not represent the employee. In my opinion, these rules should be strengthened to protect employees in this situation.

Some might argue that strengthening such rules would have a chilling effect on internal investigations, thereby decreasing their utility and ultimately causing more corporate fraud rather than less. This is not the case. Undoubtedly, some employees would exercise their option to consult with counsel, which could slow down the pace of an internal investigation. But corporations would still possess considerable leverage to convince employees to be as cooperative as possible. The bulk of that leverage, of course, would come from the threat of the ultimate sanction: termination. Only an employee truly mired in criminality would suffer this consequence rather than cooperate. Thus, in most instances, the corporation should be able to discern the extent of the criminal activity from innocent employees and those whose conduct played only a minor role in it; it can then take any action the situation warrants.

Protecting Against Prosecutorial Excess

None of the foregoing should be taken to suggest that federal prosecutors are immune from abusing their authority. Protections should be in place to minimize the likelihood of such occurrences.

Attorney-client privilege waiver should be a last resort, not a prerequisite to a corporation's cooperation. Because of the important goals served by the privilege, a corporation should be permitted to invoke it if at all possible. Thus, if other means of assisting prosecutors are available to enable them to uncover the core criminality in a reasonable amount of time, such assistance should warrant full credit. Only if all else has failed or is likely to fail should the subject of waiver be broached. The McNulty Memorandum makes a decent effort in this direction, but it could be improved by incorporating an explicit statement that waiver should not be requested unless and until all other means of obtaining the necessary information through corporate cooperation have been pursued to no avail, or when it becomes clear that such means will not be sufficient to uncover the full extent of complex criminality in a reasonable amount of time.

Finally, care must be taken to prevent a corporate employee from being double-teamed by the government and his employer simultaneously. For example, the government should not encourage a cooperating corporation to exercise its authority over an employee to force the employee's cooperation with the government's investigation. This is the behavior that so exorcised Judge Kaplan in United States v. Stein, and rightly so. Already, DOJ has exhibited some agreement with Judge Kaplan by prohibiting prosecutors from considering a corporation's payment of its employees' attorney's fees when evaluating the corporation's cooperation. In my view, the McNulty memorandum should go further by making clear that the government will never pressure a company to use any power it holds over an employee (such as the power of termination) to coerce the employee into individual cooperation.

I hope these remarks have been assistance in shedding light on this complex issue. I look forward to taking questions from Committee members.