STATEMENT OF

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Before

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

WASHINGTON, D.C.
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Mr. Chairman and Ranking Member Sessions:

Public corruption investigations and prosecutions continue to deserve to be among the highest priorities of federal prosecutors. Public corruption is an insidious wrong that engenders in our citizens disrespect for the rule of law and cynicism about the rectitude of public institutions. When the legislative process is corrupted by personal financial gain or the deliberative process is warped by corrupt practices, fundamental guarantees made to the people by law are thwarted and the democratic process itself is undermined.

To briefly relate aspects of my experience that inform my testimony today, during the time that I was privileged to serve as Deputy Attorney General of the United States, I was called upon to make final judgments concerning recommended prosecutions of several members of this body and other public officials. In private practice, I have been counsel to members of this body and of the other house, as well as for appointed officials in the executive branch and high ranking state officials. I have seen first-hand the horrible toll that investigations and accusations can exact on an individual. I am thus especially grateful to have the opportunity you have afforded me today to participate in the committee's consideration of anti-corruption legislation.

I agree with the committee's apparent goal of providing federal prosecutors with the tools they need to address corruption not just in the federal government, but at the state and local level as well. In terms of the specifics of the proposal, and as elaborated further below, I think great care needs to be taken, as is always the case, in defining federal crimes, especially when it comes to defining crimes by state and local officials

where there are federalism and jurisdictional concerns. In addition, undisclosed self-dealing by federal officials may better be addressed by amendments to chapter 11 of the criminal code which deals with bribery and conflicts of interest involving federal officials. Because of the complex jurisdictional and other issues dealing with state and local officials, and the added complexity of incorporating vastly differing state and local disclosure obligations into a broad federal prohibition, as the current proposal envisions, I would urge further analysis and consideration of the appropriate scope of that aspect of the proposal and due consideration of how the substantive offense could best be defined, including whether amending the mail and wire fraud statute is the best way to achieve it.

Part of the potential legislation under discussion addresses undisclosed financial interests outside the government setting, suggesting a new federal offense for certain undisclosed private self-dealing. That appears to me to present a daunting challenge to define the enforcement objective and to draft clear terms to achieve it. There has been considerable new legislation recently in this area, suggesting also the need to determine how any new prohibitions would interact with those already on the books. For these reasons and because the legislation would necessarily be a broad new criminal prohibition reaching private conflicts of interest, I would respectfully recommend further analysis and consideration before proceeding with it.

As to these provisions affecting private conflicts of interest and all aspects of the matters under discussion, I urge the utmost care in defining clearly that conduct which is to be proscribed under federal law. As Justice Ginsburg observed in the *Skilling* decision, a new statute

"would have to employ standards of sufficient definiteness and specificity to overcome due process concerns," (*Skilling v. United States*, 561 U.S. ---, 130 S.Ct. 2896, 2934 n.45 (2010)). Ambiguous statutory terms and requirements present interpretive problems that may require substantial judicial and other resources to resolve, and are unfair to public officials and others who deserve to be able to refer to and abide by clear lines between lawful and unlawful behavior.

The need for clarity is especially important in connection with the financial affairs involving alleged conflicts of interest and undisclosed self-dealing. One only needs to lightly survey the range of public corruption prosecutions in the last twenty or thirty years to see that many arise from the financial dealings of public officials. While bribery and kickback schemes often present great challenges to investigate and successfully prosecute, the line between lawful and unlawful conduct is fairly clear in those cases once the facts are developed. More difficult, however, are the cases that involve circumstances where legislation or official action may be of keen interest to companies and individuals who also provide substantial financial support to political candidates, parties and other political organizations. These present yet another level of difficulty in drawing lines between lawful and unlawful conduct.

Lastly, and most relevant to the legislation on the table for discussion today, are issues that arise where public or corporate officials have private or personal financial interests which may affect, or be affected by, their execution of duties. These circumstances present an even greater challenge in trying to write clear laws that both recognize the complex financial and regulatory world we live in today and nonetheless

provide the clarity necessary to delineate conduct which could subject individuals to criminal conviction. Given the complexity of determining corporate and other disclosure obligations, heeding Justice Ginsburg's admonition may well suggest further study and consideration before taking legislative action on this type of activity.

To date in drawing the lines between lawful and unlawful conduct, Congress has in some instances written with a broad and rather generalized brush and in others has been quite specific. An example of general proscriptions are those of the wire and mail fraud statute, including the 1987 so-called *McNally* fix that established honest services fraud as a federal crime under the wire and mail fraud statute after the Supreme Court had nullified that basis for prosecution. In the interest of full disclosure, I was a United States Attorney at the time the Justice Department considered its position after the *McNally* decision and I supported adding the loss of honest services to the wire and mail fraud statute.

Another example is 18 U.S.C. § 666, which on its face rather specifically criminalizes bribery in federal programs where a requisite amount of federal funds go to a state or local agency. However, as interpreted and applied by the courts, most notably the Supreme Court in *Sabri v. United States* (541 U.S. 600 (2004)), this statute renders any bribery at the state and local level subject to federal prosecution by virtue of its jurisdiction being not limited to specific programs receiving federal assistance, but entire states and subdivisions which do so. One may question whether Congress intended to occasion the wholesale importation of state and local corruption to the federal enforcement docket. Regardless of what was intended, one could consider what has resulted from the action of the courts and see the value of

legislative restraint and the careful consideration of consequences when sending the federal law enforcement establishment forth with new crimes directed at state and local jurisdictions. I also mention this statute because it seems to me that it might be prudent to separate the proscription of undisclosed self-dealing by federal officials from that applying to state and/or local officials and to amend Section 666 to cover the latter. There are two reasons that doing so may commend itself to a reasoned approach in the effort to restore some of what the Supreme Court's decision in *Skilling* took from the federal prosecutor's tool box.

First, part of the fundamental difficulty with adding deprivation of intangible rights to the fraud statute, as 18 U.S.C. § 1346 does, is that it is somewhat inconsistent with the established element of fraud as grounded in an economic loss by a victim. Rendering a fraud statute to include loss of something intangible, such as a right to honest services, results in expanding exponentially an already broad statute by adding the elasticity of what "honest services" means. In contrast, amending Section 666 to cover not just bribery, but undisclosed self dealing by state and local public officials is a relatively simple amendment that has the added benefit of streamlining the new offense by eliminating the need to prove a scheme or artifice to defraud.

Second, because two very different interests and enforcement objectives are at stake as to self-dealing by federal as opposed to state and local officials, separating them in the criminal code may be well-advised. Currently, Chapter 11 of the code (sections 201 to 227) addresses bribery, graft and conflicts of interest by federal public officials. The proscriptions and requirements therein attest to the plenary federal role in policing the conduct of its own officials; it may not be so with regard

to state and local officials. It is perhaps worth considering adding any proscription on undisclosed self-dealing by federal officials to that chapter and in so doing ensuring its harmony with existing law.

In addition, if disclosure is the enforcement objective, it may be more effective and more consistent with the traditional application of criminal law to regulate the disclosure conduct through sanctions for the required disclosure as provided by the entity that requires it, rather than painting with a broad brush in the federal criminal law. This may be especially important as Congress considers creating a new federal crime that reaches employees of private organizations engaging in undisclosed or improper self-dealing.

Failure to meet disclosure obligations may not even be a criminal violation under the "statute, rule, regulation or charter" that serves as a predicate for an offense in the draft bill, but could nonetheless become a federal violation. By pointing this out, I am not at all condoning self-dealing designed to harm an employer, but simply observing that doing so may not, in the broad scope of instances potentially to be covered, rise to the level of a federal felony. Combating corruption involving purely private financial interests raises even more difficult questions deserving in my judgment careful study and consideration before providing new statutory tools to federal prosecutors. I offer a few considerations worthy of additional study.

First, as suggested, deciding and defining precisely what corporate corruption in the form of self-dealing ought to be a felony under federal law deserves careful consideration on its own merits, even apart from self-dealing by government officials. While the lack of a required disclosure

may be a predicate for both kinds of conduct, the protected interests – the public versus the private interests – are quite different, as is the harm that results from each – namely, loss of the public's confidence in the government, versus private economic gain or loss.

Second, undefined terms in the draft legislation, including "financial interest," "harm" (to the employer), and "acts" (having an actual or intended value), may engender considerable legal controversy as to their meaning and the scope of what they encompass. Such controversy and uncertainty surrounding an unclear standard in any final piece of legislation will inevitably create and compound difficulties enforcing these provisions.

Third, given recent federal enactments covering a wide range of financial affairs, further consideration of criminalizing private self-dealing may benefit from ensuring that doing so would be in harmony with these enactments and the criminal and other provisions therein. These may be especially so in regard to disclosure requirements under existing federal securities laws.

While I urge the Committee to defer this legislation pending further study and consideration, I thank it for the opportunity to appear and comment on the matters of great importance raised by the need to protect our government and private systems from the highly corrosive effects of corruption.

Thank you, Mr. Chairman.