Hearing before the
Senate Judiciary Committee on
"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
Tuesday, September 12, 2006
Dirksen Senate Office Building Room 226
9:30 a.m.

PANEL I

The Honorable Paul J. McNulty
Deputy Attorney General
U.S. Department of Justice
Washington, DC

PANEL II

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(The Honorable Dick Thornburgh was unable to attend on Sept. 12, but his testimony was still submitted.)

Testimony
United States Senate Committee on the Judiciary
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations
September 12, 2006

The Honorable Paul McNulty
United States Attorney, Eastern District of Virginia

STATEMENT
OF
PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
"THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS"
PRESENTED ON
SEPTEMBER 12, 2006

Testimony of
Deputy Attorney General Paul J. McNulty
Senate Judiciary Committee

"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
September 12, 2006

Chairman Specter, Senator Leahy, and Members of the Committee, thank you for the opportunity to be here today to talk about the Thompson memo, an important criminal charging policy at the Department of Justice.

To begin, I want to take us back to 2002. It was a time of great concern to all of you in Congress and to American workers and investors. The public's trust in corporate America was deeply shaken by the large-scale bankruptcies of companies like Enron. The American people and their representatives here in Congress demanded that those responsible for corporate malfeasance be brought to justice. Senator Leahy captured the prevailing mood on Capitol Hill and in the country when he observed during a hearing of this Committee in July 2002 that "We cannot have a system where a pickpocket who steals 50 dollars faces more jail time than a CEO who steals 50 million dollars. The integrity of our judicial system depends on accountability. In addition, as the mounting scandals and declining stock market have demonstrated, the integrity of our public markets depends on the same accountability."

The Department of Justice responded to this crisis in corporate America with vigor and action. We prosecute gangsters, drug traffickers, and felons with guns -- corporate criminals are treated no differently. As these various scandals emerged, the American public needed to know that a CEO or a CFO of a Fortune 500 company was not immune from prosecution because of his wealth, position, or friends. They needed to know that the companies in which they invested their hard-earned savings

were not above the law and that the managers of those companies could not lie, cheat or steal, or tolerate those who do. What were the results of our efforts? Since 2002, the Department of Justice obtained more than 1000 corporate fraud convictions and convicted more than 160 corporate presidents and executive officers. In Adelphia, we obtained convictions of John Rigas and his sons and obtained an order for $1.5 billion in forfeited assets. In Worldcom, we obtained the conviction of the CEO Bernie Ebbers, who was sentenced to a substantial prison term and ordered to pay up to $45 million in fines and restitution with companion civil recoveries of many millions more. AIG was ordered to pay $25 million in penalties and to pay fines and disgorge profits of $800 million. In the Enron investigation, we obtained 25 convictions of corporate executives and recovered assets of more than $162 million for Enron's victims.

These prosecutions - when combined with reforms that Congress passed in the aftermath of the scandals - have helped to instill a climate of accountability in corporate boardrooms, and to restore investors' confidence in the integrity of our markets. These prosecutions were tough, complicated and resource-intensive.

The guidance contained in the Thompson Memorandum, the successor to the Holder Memorandum, must be viewed in the context of these massive corporate scandals. And what gets lost in the dialogue about the Thompson Memo is a very important threshold point. We must start with the fact that corporations are considered "legal persons" capable of being sued and capable of committing crimes. Corporate criminal liability is a form of vicarious liability – a doctrine that imposes criminal liability on one for the actions of another. Simply put, a corporation is criminally liable for the acts of its employees. In fact, the acts of employees are the acts of the corporation if the corporation's officers, agents and employees committed the fraud within the scope of their employment for the benefit of the corporation. And a corporation doesn't even have to profit from the acts of its agent to be held criminally responsible. The government just has to prove that the agent acted with intent to benefit the corporation even if the agent himself also received a substantial personal benefit. United States v. Automated Medical Laboratories, 770 F.2d 399 (4th Cir. 1985). The threshold for charging a corporation is fairly low.

But in most cases we don't have to rely on that low threshold because the fraudulent conduct usually does benefit a corporation in some concrete way. For instance, a company benefits if its stock price rises because of the false statements of its CEO. Even if the CEO makes millions at the same time through his corporate compensation plan, that CEO's motive to make a personal profit in falsifying results to the marketplace does not relieve the corporation of criminal liability for the CEO's actions. In short, federal law favors charging a corporation, not allowing it to escape the consequences of its employee's misdeeds. Federal prosecutors could lawfully exercise their discretion to charge a corporation in many instances where we have stayed our hand.

Why stay our hand? Because a corporation, while legally a person, also represents a unique entity in which many have a stake – shareholders, employees and customers to name but three. Those kinds of considerations are taken into account, along with others in the Thompson Memo. The memo was drafted to look beyond the case law that favored the government and supported charging the corporate entity. It guides our federal prosecutors to consider not simply the legally possible and traditional factors like the harm done by the crime, but the collateral consequences of their charging decisions - such as the impact to innocent shareholders,
pensioners, employees. Prosecutors only begin an evaluation of the Thompson Memo factors after they have already determined that a corporation is vicariously liable and can be charged.

For both the Department of Justice and for corporate counsel and their clients, the benefit of a clear,

multi-factor guidance memo is superior to any alternative. For example, would the critics of this guidance prefer strict adherence to a "zero tolerance" policy? Would they prefer that the Department abbreviate the Thompson Memo and simply direct prosecutors to consider only whether the corporation can be held vicariously liable for the actions of its employees, and if there is vicarious liability, to charge in every instance? Alternatively, would they prefer a world in which the Thompson guidance is eliminated entirely, leaving each individual prosecutor free to exercise his own unguided discretion about which corporation to charge and which not to? The irony of the attacks on the Thompson Memo is that the federal criminal justice system would be a much harsher, less predictable, and less transparent environment for corporations and their counsel in the absence of this guidance.

As Deputy Attorney General, I support the principles articulated in the Thompson Memorandum. In my experience as a former United States Attorney supervising prosecutors in the trenches, this guidance provides a road map to prosecutors and corporate counsel to ensure reasoned, thoughtful decision-making in the charging process. The Thompson Memorandum was prepared with the benefit of years of experience and the expertise of white collar prosecutors throughout the country. It is a time-tested and fair summary of the factors a prosecutor considers in charging a corporate entity, and it commits to paper what good prosecutors have been doing for decades.

Most important, the memo promotes transparency in the one area that a prosecutor can exercise the most individual choice and judgment — the charging process. Our critics should welcome the Department's efforts to shed light on what was once hidden from public view.

The charging analysis in the Thompson Memo is nothing more than a structured recitation of what common sense would lead a prosecutor to consider. It tells a prosecutor, in determining whether to charge a corporation, to consider nine factors, including the nature and severity of the alleged conduct, its pervasiveness, a corporation's history of similar conduct, the existence and adequacy of the corporation's compliance program, and whether the corporation cooperated in the course of the government's investigation.

With respect to one of the nine factors listed in the Thompson Memo – cooperation – one factor or element a prosecutor may weigh in assessing the adequacy of cooperation is the completeness of the company's disclosure, including, whether the company identified the culprits, made witnesses available, disclosed the results of any internal investigation, and, if necessary, waived attorney-client and work product protections. Waiver then is one sub factor or element that might come into play in evaluating one of the nine factors in the Thompson analysis. Thus, recent criticisms of our position on waiver tend to distort its importance in the overall charging decision by inaccurately describing waiver as essential or the only thing prosecutors consider. Let me be very clear: a corporation that chooses not to waive the privilege will not necessarily be charged. 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.

Let me step back for a minute to put this in context. The Department opens an investigation of a corporation and the company tells us it wants to fully cooperate. We ask the company to tell us the facts: what happened, who did it and how did they do it. Often, the company has hired attorneys to conduct an internal investigation, and it has learned the facts through the interviews conducted during that investigation, interviews covered by the attorney client and work product protections. If the

company wants to cooperate, it has to tell us the facts and identify the wrongdoers. If the company can do that without waiving the privilege, the Department is satisfied and we are happy to work with the company to eliminate or minimize any need for privilege waivers. But if the company can't get us the facts and identify the culprits without waiving the privilege, for whatever reason, then prosecutors may ask the company – which has volunteered to cooperate – to waive the privilege in certain respects. That, Senators, is what this is all about. Frankly, I have a hard time understanding the criticisms from corporations which claim they want to cooperate, and then complain when we ask them to disclose the facts and evidence they have uncovered.

Corporations under investigation sometimes profess factual and legal corporate innocence. A prosecutor cannot take that claim at face value. The government has a duty to conduct an independent investigation in that circumstance as well, but diligent counsel on both sides often realize that access to the results of an internal investigation would obviously assist the government in conducting a more streamlined inquiry, which would benefit everyone.

We see nothing wrong in asking a corporation to disclose to us the results of their internal investigation to assist us in investigating a corporation's claim of innocence. Indeed, we believe it is good practice because it conserves public and private resources and, if the corporation's claim is well-founded, it brings a quick conclusion to the government's investigation.
Prosecutors do not make a determination on whether to charge a corporation based solely on the corporation's willingness to waive attorney-client or work product protections. In fact, we do not ask for waiver in every investigation. In those cases where it is appropriate to waive attorney-client privilege, the company often makes the offer without a government request. The guidance specifically cautions prosecutors to seek waiver only in appropriate circumstances – and then goes on to limit those circumstances to the facts obtained in an internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. The Thompson Memo is clear that waiver of attorney-client privilege is "not an absolute requirement" and that prosecutors should consider it as "one factor" in evaluating a corporation's cooperation. So the claim that Thompson compels a waiver in every corporate investigation is contradicted by the plain language of the memo itself.

What is not often discussed in this debate is that a privilege waiver is often volunteered or agreed to by a company for specific, business reasons. When a criminal investigation is launched, receipt of subpoenas must be publicly reported, stock prices fall, and the company undergoes the protracted and disruptive process of responding to multiple document subpoenas and providing employees to the government for interviews or grand jury testimony. At the same time, the company's lawyers are conducting their internal investigation or have already completed it. If the company decides to cooperate, it can face additional delay while the government duplicates the company's efforts in collecting documents and interviewing witnesses, or it may choose to waive privilege and offer the results of its internal investigation so that the government moves faster. The choice to waive often allows the government to make a charging decision within months rather than years, and saves the company money and employee time and protects the value of its stock. So waiver often occurs solely because the corporation wants something from the government – a speedy resolution – not because the government acts
unilaterally.

Of course, waivers can be obtained for other reasons. In the course of an investigation, companies

oftentimes identify an “advice of counsel” defense to the contemplated charges. That is, the company argues it relied on the advice of its attorneys in committing what the government now alleges is a fraudulent act. Without a waiver, documents related to that defense are ordinarily produced to the government after the case has been indicted and is in litigation. If a company is trying to convince the government not to charge the corporation or its principals because of reliance on this defense prior to indictment, it must waive its privilege. Otherwise, the government has no other means to obtain this information and evaluate the viability of the defense. Corporations often offer to make privileged documents and attorney witnesses available in these circumstances.

Along with criticisms of the guidance itself, you also hear criticisms that individual prosecutors are too aggressive in seeking privilege waivers. But in evaluating what is being said, you must also look to the other side of the counsel’s table - the government’s side. Prosecutors complain to me that in some instances, corporate counsel run virtually every document through the corporation’s legal department just so that they can assert attorney-client privilege or work product protection. Some attorneys assert privilege like that famous scene of Lucille Ball gobbling chocolates off of a conveyor belt. Everything is swallowed up by the in-house legal department. Memos about routine business activities are claimed as privileged. Accounting or financial records are similarly hidden. Yet the law is clear that documents are not confidential attorney-client communications just because they are copied to or sent through a lawyer. Too often, we have seen the privilege claimed for documents that are, on their face, just not privileged.

In a criminal investigation, if the privilege is used in this fashion, it is not only meaningless; it obstructs the government’s efforts to discover the truth. And many U.S. Attorneys’ Offices have spent tens of thousands of dollars in taxpayer money in years of senseless litigation over pretrial privilege matters, delaying justice and accountability. I don’t need to tell you that justice delayed is justice denied. The Thompson Memo offers us an alternative. With its offer of a cooperation benefit for above-board disclosures, it creates a disincentive to engage in these tactics.

That is not to say that the Department of Justice does not recognize and honor the importance of the attorney-client privilege. The Department supports the protection of that privilege. For example, as I have already said, prosecutors are willing to work with companies to minimize the need for any waiver by permitting the company to provide the relevant facts by other means. In addition, with respect to the recently proposed revisions to the Federal Rules of Evidence, we have supported the concept of selective waiver, so that disclosure to the government is not necessarily a waiver of the privilege from which third parties can benefit. (Proposed FRE 502) We have worked diligently with corporate counsel and attorneys in private practice and met with them at their request numerous times to consider their views. It was these discussions, together with substantial input from our field offices, which led the Department to issue the McCallum Memo. That memo provides that prosecutors seeking waivers must first obtain supervisory approval before making such a request. Offices throughout the country have adopted local policies to put this memo into effect.

Like the Thompson Memo, the McCallum Memo has been distorted by the critics. They suggest that it has been used to create 92 different and inconsistent policies throughout the nation. However, the memo is a strong and fair response to corporate counsel’s complaints that individual AUSAs had too much autonomy in making waiver requests during an investigation. We listened to them and issued that supplemental guidance even though, to date, no critic has produced any empirical data demonstrating that prosecutors are routinely requesting, let alone coercing waivers. And contrary to

criticism, the McCallum Memo does not promote the development of different policies in field offices. It simply created a supervisory review process for AUSA waiver requests governed by the Thompson Memorandum. This ensures proper oversight of these requests and promotes a uniform and consistent waiver policy throughout the country.

Recently, attention has also been focused on the Thompson Memo's reference to the payment of attorneys' fees by a corporation as a factor or element to consider when assessing cooperation. This reference, like that of waiver, is a small part of the overall assessment as to whether a corporation cooperated. The guidance discusses certain actions that may "depending on the facts and circumstances" relate to the "extent and value of a corporation's cooperation" and thus may reflect upon the authenticity of the company's cooperation. More specifically, we look at whether the company "appears to be protecting culpable employees and agents" through (1) the corporation's promise of support to culpable employees and agents through the advancing of attorneys' fees; (2) retaining the employees without sanction for their misconduct; or (3) providing information to the employees about the government's investigation pursuant to a joint defense agreement – all legitimate areas of inquiry by the government. The minor reference to advancement of fees in this context has been misconstrued.

A corporation that chooses to advance attorneys' fees to its employees who are under government investigation is not branded a non-cooperator because of that choice. The payment of legal fees may be fully consistent with the corporation's cooperation and, in fact, desired by government counsel. The untold story is that the government's investigation is generally enhanced when experienced and informed defense counsels represent targeted employees.

However, a corporation's advancement of legal fees can concern prosecutors where that fact, taken with other facts, gives rise to a real concern that the corporation is "circling the wagons," or, in other words, is using or conditioning the payment of attorneys' fees as a tool to limit or prevent the communication of truthful information from current and former employees to the government, in order to protect either the employees or the corporation itself. You typically see this in combination with other indicators of non-cooperation – overly broad assertions of corporate representation of its employees, a refusal to sanction wrongdoers, a failure to comply with document subpoenas and a failure to preserve documents. In contrast, where those factors aren't present --- the corporation does not make overbroad assertions regarding representation, takes quick action against culpable employees, and promptly responds to requests for information -- a company's advancement of legal fees will not cause the same concerns.

This is most often true where a corporation's policies about the advancement of legal fees are applied consistently across the entire range of employees and agents – witnesses, subjects, and targets of the government's investigation – and where other non-cooperative factors are not present. In that case, there is no cause for government concern based on the advancement of fees alone. And the Thompson Memo specifically instructs prosecutors not to consider advancement of fees at all when it is done pursuant to governing state law.

Like waiver, a corporation may make a decision not to advance fees, if it has the discretion to do so, but it is the company's choice alone. It is a business decision we do not control. Experienced and sophisticated counsels weigh what is in the best interests of the corporation and its shareholders. Sometimes, because of legal requirements, a longstanding corporate practice, or even the

corporation's concern in protecting its ability to attract the right kind of employee, a corporation will advance fees. Other times, it chooses not to. In short, the Department's reference to attorneys' fees as one small element that may, in limited cases, affect the cooperation analysis under the Thompson Memo does not, and could not, drive corporate policy or practice. With the level of skill of opposing counsel we have in these cases, it is wrong to suggest that we make their decisions for them.

The Thompson Memo is a set of principles, the basic structure of which is used every day in the criminal justice system. We ask cooperating drug dealers, bank robbers and gun-toting felons to waive their Fifth Amendment privilege against self-incrimination all the time – and the vast majority of them do not have access to the high-priced legal talent corporations do. If a corporation has committed a crime, it is no more deserving of special treatment than any of these defendants. The American public rightly demands that we judge all defendants by the severity of their crimes, not the size of their pocketbooks.

In closing, let me reiterate that the Department continues to listen and is always open to considering opposing views. I pledge to keep the dialogue open about the Thompson Memo and I welcome constructive criticism of this, and any other, policy. The time may come when revisions are needed to this policy and I will gladly make them when I am convinced they are necessary and in the public interest. In the meantime, I support our prosecutors in their charging decisions and their use of these guidelines. The guidance is consistent with long-standing charging practices and is fair to corporations under investigation and to the current and former officers and employees. I believe that the Thompson Memorandum strikes an effective balance between the interests of the business community and the investing public.

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

Testimony
United States Senate Committee on the Judiciary
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations
September 12, 2006

The Honorable Edwin Meese
Former US Attorney General; Chairman, Center for Legal and Judicial Studies , Heritage Foundation

STATEMENT OF

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BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

REGARDING
THE THOMPSON MEMORANDUM'S EFFECT ON
THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS

SEPTEMBER 12, 2006

Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for inviting my views on the United States Department of Justice's policies and procedures for investigating suspected financial crimes by business organizations, including the Justice Department's January 2003 memorandum, Principles of Federal Prosecution of Business Organizations, commonly referred to as the Thompson Memorandum. For the record, I served as the United States Attorney General from 1985-1988. I am currently the Ronald Reagan Distinguished Fellow in Public Policy at The Heritage Foundation and also serve as Chairman of The Heritage Foundation's Center for Legal and Judicial Studies.

The subject of today's hearing raises important questions that reach beyond waivers of the attorney-client privilege, beyond employers' payments of their employees' legal defense fees, and beyond even the Thompson Memorandum itself. Thus, I am grateful to the Committee for addressing these issues, including in today's hearing.

Judge Lewis Kaplan of the United States District Court for the Southern District of New York framed the issue well in his written opinions this summer delivering two important rulings in United States v. Stein et al., a case involving the Justice Department's investigation and prosecution of KPMG's now-admitted tax-shelter abuses. At the outset of the first of Judge Kaplan's two opinions finding that the Thompson Memorandum, coupled with the specific conduct of the federal prosecutors, violated the Fifth and Sixth Amendment rights of twelve former KPMG employees, he addressed the fundamental duties of the government whenever it exercises its law enforcement power.

Those who commit crimes – regardless of whether they wear white or blue collars – must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.

Judge Kaplan's observation reminds me of key points made in a speech by Robert Jackson, who would later serve as an associate justice of the Supreme Court. Before he became a justice, and before he served as the chief prosecutor in the Nuremberg trials of Nazi war criminals, Robert Jackson served in President Franklin Roosevelt's Administration as Attorney General of the United States. I used this speech by Attorney General Jackson during my tenure as Attorney General because I believe its analysis and principles are timeless.

When he addressed a meeting of all United States Attorneys at the Justice Department in Washington in April 1940, Attorney General Jackson started by putting them in mind of the great power they wielded in their offices. "The prosecutor has more control over life, liberty, and reputation than any other person in America," Jackson said. "His discretion is tremendous." Jackson went on to enumerate some of the temptations that confront a prosecutor to misuse his power, often in subtle manners that no one would ever be able to prove wrongful even if all the objective facts were known. He admonished them to rededicate themselves "to the spirit of fair play and decency that should animate the federal prosecutor" and not to measure their success based primarily on convictions or similar statistics.

Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance.

The tension that Attorney General Jackson identified between obtaining impressive conviction statistics and taking care to do justice has always confronted prosecutors and probably always will.

What does change is the type of crimes a federal prosecutor is asked to focus on. In the 1960s and 1970s, the focus was on violent crime that was increasingly making it unsafe in America to walk the

streets. In the 1980s and 1990s, it was on the destructive effects illicit drugs and drug dealing organizations were having upon our inner cities and families.

In this decade the focus is necessarily on terrorism and, particularly after the collapses of Enron and WorldCom, on white collar crime. Nevertheless, it remains necessary to ensure that members and suspected members of whatever criminal class that the public most wants punished still receive the full benefit of the constitutional rights and fairness considerations that belong to every American.

Deferring to others to engage in a more detailed analysis of Judge Kaplan's legal conclusions, I will focus primarily on the facts of the Stein case as well as the relevant Justice Department policies and practices.

When an individual's constitutional rights are implicated, the government may not do indirectly – through others – what it is forbidden to do directly. The Constitution would not have allowed the prosecutors in the Stein case to, for example, subject the KPMG defendants' bank accounts to forfeiture with the sole justification and for the sole purpose of depriving them of the money they needed to retain competent legal counsel. The Constitution would not allow the prosecutors to threaten the KPMG defendants with the loss of employment if they refused to proffer testimony during the investigation or invoked their Fifth Amendment rights.

Instead of accomplishing these ends directly, Judge Kaplan found that the prosecutors made keen use of the enormous pressure placed upon KPMG by the existence of the Thompson Memorandum and the realities of what a federal indictment may mean to a financial services firm. The indictment and swift demise of the Arthur Andersen accounting firm has taught every business organization a stern lesson: Failure to meet federal prosecutors' expectations for your cooperation in the government's criminal investigation of your employees could result in a death sentence, well before a jury is ever impaneled or opening statements are delivered at trial.

Before being indicted for its alleged wrongdoing in the Enron scandal, Arthur Andersen was an 89-year-old accounting powerhouse with annual worldwide revenues of $9.3 billion and 28,000 employees. Long before the Supreme Court reversed Andersen's conviction, the firm was gone, its partners and employees dispersed. All that remained were relatively paltry assets against which numerous litigants have asserted claims, most of which piggy-back on Justice Department allegations of Enron-related wrongdoing.

The Thompson Memorandum understandably sought to achieve the effective prosecution of white-collar crime and to prevent companies from deliberately or inadvertently obstructing the investigation and prosecution of criminal offenses by misusing the attorney-client privilege or through the payment of employees' attorney fees. Nevertheless, experience has shown that the Memorandum has resulted in the dilution of essential rights encompassed by the attorney-client relationship.

For example, the pressure on KPMG apparently came from two sources. First, the Thompson Memorandum itself pressures companies to fulfill its nine factors, including by waiving their attorney-client privilege and cutting off their employees' attorney fees. Even if no prosecutor ever mentions either factor to a company, the fact that the Thompson Memorandum requires federal prosecutors to take all nine of its factors into consideration when deciding whether to indict a business organization necessarily places great pressure on the company to take these two steps. As

the Thompson Memorandum itself emphasizes, a "prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute" a business organization. The company and its counsel know that the prosecution team will eventually go through each of the nine factors point by point. Any outright 'No' in response to whether the company has cooperated with one of the factors will be glaringly apparent. In light of these realities, it is no wonder that KPMG's chief in-house counsel testified at a deposition that "KPMG's objective was 'to be able to say at the right time with the right audience, we're in full compliance with the Thompson Guidelines.'" Anything less might well have constituted legal malpractice.

The second source of pressure on KPMG to persuade its employees to forego their rights and cooperate with the government was the Thompson Memorandum itself. Much of the Memorandum's coercive power lies in its lack of specific, concrete language explaining how the prosecutors will decide whether to indict and what weight they will assign to the various factors. Justice Department officials may point to this lack of specificity as illustrating that the Thompson Memorandum's factors are voluntary rather than mandatory. The Memorandum does not, they might suggest, state that a company will definitely be indicted if it chooses not to waive its attorney-client privilege or to pay attorney fees for employees the Department suspects of wrongdoing.

However, the Memorandum also fails to specify which of the examples under each of its nine factors prosecutors can or may ignore, and in what circumstances. It is axiomatic that when a governmental body or agency defines rules for its own conduct that are vague and indefinite, it thereby retains to itself near-absolute discretion to act as it may choose in any given circumstance. No independent third-party is available to an indicted business organization to review whether prosecutors applied the factors in a fair and rational manner.

Companies reasonably consider each of the Thompson Memorandum factors to be mandatory. Given the Thompson Memorandum's indefiniteness about how the government will weigh its nine factors and the examples provided for each, in my judgment, corporate counsel would be irresponsible to advise their clients otherwise.

Not only are the Department's written policies on indicting business organizations coercive in their own right, Judge Kaplan found that the conduct of the prosecutors in the KPMG tax-shelter case parlayed that pressure into a method for using the firm to do what the Department could not do directly, including pressuring KPMG's partners and employees into forfeiting constitutional rights. The prosecution team planned before its first meeting with KPMG's counsel to ask several questions about the firm's plans for paying its employees' attorney fees. During the first meeting, prosecutors repeatedly returned to the subject, mentioned the Thompson Memorandum as something that must be considered in the firm's decision whether to pay fees, and at the very least strongly suggested that any decision that KPMG made to pay fees would be scrutinized closely in the prosecution team's decision whether to indict the firm.

KPMG's counsel made it clear from the start that the firm would do anything the government wanted in order to avoid indictment and that its objectives did not include protecting any current or former employees. As Judge Kaplan noted, KPMG no doubt had taken to heart the lesson of Arthur Andersen. This should have caused the prosecution team to tread lightly and ensure that KPMG did not overstep the bounds of fairness or use its economic leverage over its employees in an improper manner.

Instead, when KPMG told the government that it would like to be informed whenever one of its employees was not cooperating so that, the implication was clear, KPMG could pressure them to do so, the government did just that. Judge Kaplan found several instances in which KPMG employees changed their course after the firm stated that it would cut off their attorney fees, strongly implied that it would fire them, or both. When recalcitrant witnesses whom the government reported to KPMG suddenly decided to be cooperative, prosecutors could not have failed to notice that the system was working.

The judge asserted that the government nevertheless asked for more. Dissatisfied with the language and tone of KPMG's form letter encouraging its employees to cooperate with the government investigation, prosecutors went so far as to craft language that it wanted the firm to use. The language the government wanted KPMG to use emphasized that the employees were free to meet with government investigators "without the assistance of counsel." KPMG used a version of this language in a follow-up document to its employees.

The government apparently did not encourage KPMG to inform its employees that the firm's objectives did not include protecting its employees or that KPMG and the government were, in effect, working as a team. In light of the prosecutors' expressions of displeasure that KPMG's initial form letter did not go far enough, the firm itself certainly could not afford to inform its employees of these important facts affecting their essential rights and interests.

Judge Kaplan concluded that this conduct violated the KPMG defendants' Fifth and Sixth Amendment rights. This is a simple application of the rule that prosecutors must be careful not to accomplish through others what they are forbidden to do directly.

There is now widespread feeling among business counsel that methods and tactics similar to those engaged in by the prosecutors in the KPMG tax-shelter investigation are frequently part of the Justice Department's standard procedures and practices in white-collar criminal investigations. A few days after the first Stein ruling, the Justice Department sent Judge Kaplan a short letter that speaks volumes. The media focused on the letter's request that, in order to protect the individual prosecutors' professional reputations, Judge Kaplan remove their names from his opinion. But the first sentence of the letter's second paragraph is more relevant here. It states:

The Government appreciates the Court's acknowledgement that the prosecutors' conduct in this case was in accordance with established Department of Justice policy that had never before been addressed by a court.

This admission is not surprising given recent surveys of corporate attorneys, including both in-house and outside counsel. In a survey conducted by the Association of Corporate Counsel (ACC), the National Association of Criminal Defense Lawyers (NACDL), and several other organizations that have joined together to defend the attorney-client privilege from encroachments by the federal government, approximately 75% of respondents agreed that a "culture of waiver" exists "in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive [its] attorney client privilege." This survey demonstrates that waiver is at least common.

The Justice Department has criticized this survey, including in testimony by then Deputy Associate Attorney General Robert McCallum before a House judiciary subcommittee in March. McCallum claimed that the survey's results could not be trusted because the respondents were self-selected.

Nevertheless, only the Justice Department has access to the actual numbers regarding how frequently federal prosecutors request privilege waivers and how many times companies have in fact waived, either upon request or "voluntarily." The Department has not been willing to date to collect and publish its own statistics that would allow interested parties to determine how prevalent waiver is.

The McCallum Memorandum

The Department of Justice has represented that the directive it issued in 2005 to all U.S. Attorneys and all Heads of Department Components through a memorandum from Robert McCallum is a significant reform by the Justice Department to the Thompson Memorandum policies in response to concerns and criticism of those policies by the legal profession and business community. I greatly appreciate the Justice Department's willingness to listen to and engage in discussion with those who disagree with or fault its policies as well as the Department's willingness to make changes that reflect the legitimate concerns that are being raised. I believe such openness has served the Department and the nation well and will continue to do so as we work toward a common solution to these concerns.

Nevertheless, it appears that the McCallum Memorandum does not represent a sufficient improvement. The main objectives of the Memorandum included providing greater uniformity, predictability, and transparency to the process that federal prosecutors use when requesting a waiver of a business organization's attorney-client privilege. But the McCallum Memorandum does nothing to address the inherently coercive nature of the Thompson Memorandum factors that take into account whether a company has waived its privilege.

As to the specifics, because the McCallum Memorandum does not require the written waiver processes established by each U.S. Attorney to be made publicly available to business organizations, companies have no better understanding today than they did before October 2005 as to whether and when they must waive privilege in order to satisfy prosecutors' expectations. Justice requires citizens to be fully informed of what the law and law enforcement officials expect so that citizens may conform their conduct to those expectations.

The McCallum Memorandum similarly fails to require any uniformity in the waiver request process among the 93 U.S. Attorneys Offices. Rather, it encourages each U.S. Attorney to adopt the procedures that he or she deems best for that local office. Presumably, at least the waivers requested in that office will conform to a fixed set of principles and procedures, but even that is not assured because the Memorandum neither requires nor recommends that a U.S. Attorney put in place any oversight or accountability mechanisms to ensure that individual prosecutors conform their practices for requesting waiver to the Office's policies.

Recommendations

• My primary recommendation on the subject of today's hearing is that the Thompson Memorandum be amended to eliminate any reference to the waiver of attorney-client privilege or work-product protections in the context of determining whether to indict a business organization. In the same

manner and same context, all references in the Memorandum to a company's payment of its employees' legal fees should be eliminated. In my experience, justice is always best served when all parties to litigation are well-represented by experienced, diligent counsel. We should be deeply suspicious of anything that undermines such representation. If government action is involved, as the Stein case illustrates, it may well violate fundamental Fifth and Sixth Amendment rights.

• Further, the Justice Department's written policies should explicitly state that requests for waiver will not be approved apart from exceptional circumstances. Exceptional circumstances should be limited to those that would bring into operation the well established crime fraud exception to the attorney-client privilege.

• In the meantime, in order for any interim reforms – such as those attempted by the McCallum Memorandum – to be meaningful, the Justice Department must make available to the public specific, uniform national policies and procedures governing waiver requests. All requests for waiver by federal prosecutors and other Justice Department officials should require approval at the national level. Only published national procedures and national oversight can ensure that the waiver request process is uniform, predictable, and transparent.

• In order to promote the responsible use of waiver requests – as well as to counter the culture of waiver – the Justice Department should collect and publish statistics on how often waiver is requested, how often business organizations agree to such requests, and how often organizations waive even apart from any request from prosecutors.

Hearings such as this are of great value. They convey the sense of Congress's views to the Justice Department on the inestimable importance of the attorney-client relationship as it has been constituted by centuries of Anglo-American law and on the proper policies and practices for enforcing our white-collar criminal laws.
Thank you for inviting me to share my views.

Senate Judiciary Committee

Hearing on:
The Thompson Memorandum's Effect
on the Right to Counsel in Corporate Investigations

Oral testimony By Thomas J. Donohue
President & CEO, U.S. Chamber of Commerce

224 Senate Dirksen Office Building
September 12, 2006

- Good morning, Mr. Chairman and members of the committee. My name is Tom Donohue. I am president and CEO of the U.S. Chamber of Commerce, the world's largest business federation, representing some 3 million businesses.

- I am also testifying on behalf of the Coalition to Preserve the Attorney Client Privilege, which includes most of the major legal and business associations in the country.

- I am here to ask the Committee, either through oversight of the Department of Justice or by enacting legislation, to invalidate provisions of DOJ's Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly and confidentially consulting with their attorneys.

- While the intention of former Deputy Attorney General Larry Thompson to crack down on corporate wrongdoers was laudable, the policies set forth in the Thompson memo violate fundamental constitutional and other long recognized rights in this country.

- They obstruct – rather than facilitate – corporate investigations.

- And, they were developed – and implemented -- without the involvement of Congress or the judiciary.

- This would perhaps be just another classic case of a federal agency overstepping its bounds if the consequences were not so profound.

- The attorney client-privilege is a cornerstone of America's justice system – this privilege even predates the Constitution and the Bill of Rights.

- The Thompson memo violates this right by requiring companies to waive their privilege in order to be seen as fully cooperating with federal investigators.

- This has effectively served notice to the business community, and the attorneys that represent them, that if you are being investigated by the Department and you want to stay in business, you better waive your attorney-client privilege.

- A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a settlement.

- The "uncooperative" label severely damages a company's brand, shareholder value, their relationships with suppliers and customers, and their very ability to survive.

- Being labeled uncooperative also drastically increases the likelihood that a company will be indicted and one need only look to the case of Arthur Andersen to see what happens to a business that is faced with that death blow.

- Once indicted, a company is unlikely to survive to even defend itself at trial or make the outcome of that trial relevant. Keep this fact in mind the next time you hear a Justice official use the phrase "voluntary waiver."

- The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

- The opposite is true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

- If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek legal guidance.

- The result is that the company may fall out of compliance – not intentionally – but because of a lack of communication and trust between the company's employees and its attorneys.

- Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all.

- That means that both the company and the government will be unable to find out what went wrong, punish the wrongdoers, and correct the company's compliance system.

- And there's one other major consequence – once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

- Despite our coalition's repeated attempts to work with Justice to remedy these problems, Justice has refused to acknowledge the problem or has argued that the attorney-client privilege waiver is only very rarely formally requested in an investigation.

- However, to debate the frequency of "formal" waiver requests or "voluntary waivers" is to engage in a senseless game of semantics.

- As the CEO of this country's largest business association and as a member of three corporate boards, I know how this game by prosecutors is played. As long as the Department of Justice exercises a policy that threatens companies with indictment if they do not waive their privilege, companies will feel compelled to waive -- whether a front-line prosecutor "formally" requests the waiver or not.

- Efforts to reform the Thompson Memorandum have been ineffective. Last year, then-Associate Attorney General Robert McCallum issued an update to the Thompson Memo that instructs U.S. attorneys to issue a waiver review process for each of their offices but does nothing to change internal policy that penalizes companies for preserving their attorney-client privilege.

- What's perhaps most disturbing is that the Thompson Memo was developed without any input from the Congress or the Judiciary. In fact, the only independent bodies that have actually reviewed these policies have rejected them.

- Compromise reforms or half baked ideas for softening the Thompson memo will not fix its fundamental shortcomings and may threaten to cause more problems than they solve.

- The only solution is for Congress, either through its oversight of the Department or directly by enacting legislation, to enact new policies that do not allow DOJ or other agencies to threaten businesses with the death penalty for exercising their fundamental right to consult freely with their attorneys.

- Let me be very clear about our motivation: we are not trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than legitimate and honest businesspeople.

- Rather, our efforts are designed to protect well established and vital Constitutional and common-law rights and to facilitate legitimate investigations by encouraging candid and confidential conversations.

- Thank you very much. I look forward to your questions.

AMERICAN BAR ASSOCIATION

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STATEMENT OF

KAREN J. MATHIS

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

"THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS"

SEPTEMBER 12, 2006

Mr. Chairman, Ranking Member Leahy and Members of the Committee:

My name is Karen J. Mathis. I am the President of the American Bar Association (ABA) and a practicing attorney with the firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP in Denver, Colorado. Thank you for the opportunity to testify before you today on behalf of the ABA and its more than 410,000 members on the critical issues surrounding "the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations."

The ABA strongly supports preserving the attorney-client privilege and the work product doctrine. We are concerned about language in the Department of Justice's Thompson Memorandum—and other related federal governmental policies and practices—that have begun to seriously erode these fundamental rights.[1] We also are concerned about the separate provision in the Thompson Memorandum that erodes employees' constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination.

The Importance of the Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, the privilege facilitates self-

[1] On August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Previously, in August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm.

investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The Thompson Memorandum's Erosion of the Attorney-Client Privilege and the Work Product Doctrine

A number of federal governmental agencies—including the Department of Justice and the U.S. Sentencing Commission—have adopted policies in recent years that weaken the attorney-client privilege and work product doctrine in the corporate context by encouraging federal prosecutors to routinely pressure companies and other organizations to waive these legal protections as a condition for receiving credit for cooperation during investigations.

The Department of Justice's privilege waiver policy is set forth in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled "Principles of Federal Prosecution of Business Organizations."[2] The so-called "Thompson Memorandum" instructs federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in the Thompson Memorandum is the organization's willingness to waive attorney-client and work product protections and provide this confidential information to government investigators. The Thompson Memorandum stated in pertinent part that:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors,

[2] Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), at p. 7, available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

> and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

The Thompson Memorandum expanded upon a similar directive that a previous Deputy Attorney General, Eric Holder, sent to federal prosecutors in 1999.[3]

Although the Thompson Memorandum, like the earlier Holder Memorandum, stated that waiver is not an absolute requirement, it nevertheless made it clear that waiver was a key factor for prosecutors to consider in evaluating an entity's cooperation. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

While the Department's privilege waiver policy was established by the 1999 Holder Memorandum and expanded by the 2003 Thompson Memorandum, the issue of coerced waiver was further exacerbated in November 2004 when the U.S. Sentencing Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Department's policy, authorized and encouraged prosecutors to seek privilege waiver as a condition for cooperation.[4]

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[3] *See* Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html. The so-called "Holder Memorandum" stated in pertinent part as follows:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges.

[4] The 2004 amendment to the Sentencing Guidelines added the following language to the Commentary:

In an attempt to address the growing concerns expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and local U.S. Attorneys are now in the process of implementing this directive.[5] The McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, the McCallum Memorandum is likely to result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from government-coerced waiver.

Unintended Consequences of Prosecutor Demands for Privilege Waiver

The American Bar Association is concerned that the Department of Justice's privilege waiver policy—like the 2004 privilege waiver amendment to the Sentencing Guidelines—has brought about a number of profoundly negative, if unintended, consequences.

First, the ABA believes that these waiver policies adopted by the Department of Justice and the Sentencing Commission have resulted routinely in the compelled waiver of attorney-client privilege and work product protections. Although the Thompson Memorandum and the privilege waiver language in the Sentencing Guidelines state that waiver is not mandatory and should not be

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> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]…unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." As a result, the exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required. For a detailed discussion of the 2004 privilege waiver amendment, please see the ABA's March 28, 2006 written comments to the U.S. Sentencing Commission, available at www.abanet.org/poladv/abaussc32806.pdf.

[5] A copy of the McCallum Memorandum of October 21, 2005 is available online at http://www.abanet.org/poladv/mccallummemo212005.pdf.

required in every situation, these policies have led many prosecutors to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when requested to do so, as the government's threat to label them as "uncooperative" will have a profound effect not just on charging and sentencing decisions, but on each company's public image, stock price, and credit worthiness as well.

The growing trend of government-coerced waiver was confirmed by a recent survey of over 1,200 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006.[6] According to the survey, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the 2004 amendment to the Sentencing Guidelines were among the reasons most frequently cited.

One example of this growing "culture of waiver" came to light last year when then-U.S. Attorney (and current Deputy Attorney General) Paul McNulty met with approximately fifty corporate general counsel to discuss the growing erosion of the attorney-client privilege. The former General Counsel of a now defunct steel company was one of those attending the meeting, and his story follows.

[6] The detailed Survey Results are available online at http://www.acca.com/Surveys/attyclient2.pdf.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Department of Justice did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At its very first meeting with the General Counsel, the Department of Justice demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle-ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example exemplifies a situation where prosecutors—operating under an increasingly expansive interpretation of the Thompson Memorandum—do not wait for a company to volunteer waiver, but rather seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. When the other general counsels in the room were asked if they had had similar experiences, 75% of the attendees said they had.

Second, the ABA believes that these governmental policies seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board, and must be provided with all relevant information necessary to properly

represent the entity. By requiring routine waiver of an entity's attorney-client and work product protections, these governmental policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This harms not only companies, but the investing public as well.

Third, while these waiver policies were intended to aid government prosecution of corporate criminals, they are likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client and work product protections will seriously undermine systems that are crucial to compliance and have worked well.

For all these reasons, the ABA believes that the Department of Justice's privilege waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines are counterproductive. They undermine rather than enhance compliance with the law, as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

The ABA's Response to the Privilege Waiver Problem

The ABA is working to protect the attorney-client privilege and the work product doctrine in a number of ways. In 2004, the ABA Task Force on Attorney-Client Privilege was created to study and address the policies and practices of various federal agencies that have eroded attorney-client privilege and work product protections. The Chair of our Task Force, Bill Ide, is a prominent corporate attorney, a former president of the ABA, and the former senior vice president, general

counsel, and secretary of the Monsanto Corporation. The ABA Task Force has held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy—unanimously adopted by our House of Delegates—supporting the attorney-client privilege and work product doctrine and opposing government policies that erode these protections.[7] The ABA's policy and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/.

The ABA and our Task Force are also working in close cooperation with a broad and diverse coalition of influential legal and business groups—ranging from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers—in an effort to modify both the Department of Justice's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.[8] The remarkable political and philosophical diversity of that coalition shows just how widespread these concerns have become in the business, legal, and public policy communities.

After receiving extensive written comments and testimony from the ABA, the coalition, numerous former senior Department of Justice officials, and other organizations,[9] the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment

[7] *See* ABA resolution regarding privilege waiver approved in August 2005, discussed in note 1, *supra*.

[8] The Coalition to Preserve the Attorney-Client Privilege consists of the following entities: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation.

[9] These statements and other useful resources on the topic of privilege waiver are available at www.abanet.org/poladv/acprivilege.htm.

to the Sentencing Guidelines. The change was included in the package of amendments that the Commission sent to Congress on May 1, 2006. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006.

While the Commission's vote to remove the privilege waiver language from the Guidelines is a very positive and encouraging development, the Department of Justice has not yet taken steps to reexamine and remedy its role in the growing problem of government-coerced waiver. As a result, many federal prosecutors continue to demand that companies waive their privileges on a routine basis as a condition for receiving cooperation credit. In addition, the McCallum Memorandum, which requires all 93 U.S. Attorneys around the country to adopt their own local privilege waiver review procedures, will further complicate this issue.

In an effort to address the problems created by the Department's waiver policies, the ABA sent a letter to Attorney General Alberto Gonzales on May 2, 2006. In that letter, which is attached to this written statement as Appendix A,[10] the ABA expressed its concerns over the Department's privilege waiver policy and urged it to adopt specific revisions to the Thompson Memorandum that were prepared by the ABA Task Force and the coalition.

These suggested revisions to the Department of Justice's policy would help remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information they need to effectively enforce the law. To accomplish this, our proposal would amend the Department's policy by prohibiting prosecutors from seeking privilege waiver during investigations, specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective

[10] The ABA's May 2, 2006 letter to Attorney General Gonzales also is available at www.abanet.org/poladv/acprivgonz5206.pdf.

cooperation. This new language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege and work product protections.

The Department of Justice formally responded to the ABA's May 2 letter on July 18, 2006, and a copy of that letter is attached to this written statement as Appendix B. This response failed to address many of the specific concerns raised by the ABA and simply reasserted the Department's existing policy of coerced waiver. The ABA and the coalition were very disappointed by the Department's response.

Former Senior Justice Department Officials' Opposition to the Thompson Memorandum's Privilege Waiver Provisions

On September 5, 2006, a group of ten prominent former senior Department of Justice officials from both parties—including three former Attorneys General, three former Deputy Attorneys General, and four former Solicitors General—submitted a letter to Attorney General Gonzales expressing their opposition to the privilege waiver provisions of the Thompson Memorandum.[11] A copy of the correspondence is attached to this statement as Appendix C. In this letter, the former officials voiced many of the same concerns previously raised by the ABA and the coalition and urged the Department to amend the Thompson Memorandum "…to state affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation."

This remarkable letter, coming from the very people who ran the Department of Justice a few short years ago, demonstrates just how widespread the concerns over the Department's privilege waiver policy have become. The fact that these individuals previously served as the nation's top law enforcement officials—and were able to convict wrongdoers without demanding the wholesale production of privileged materials—makes their comments even more credible.

[11] A similar comment letter was submitted to the U.S. Sentencing Commission by many of these former Department of Justice officials—and former Attorney General Edwin Meese—on August 15, 2005, and that letter is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

Congressional Review of the Department's Waiver Policy and Suggested Reforms

In addition to the ABA, the coalition, and former Department of Justice officials, many Congressional leaders have also raised concerns over the privilege waiver provisions in the Department's Thompson Memorandum. On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue.[12] The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.[13] During the hearing, virtually all of the Subcommittee members from both political parties expressed strong support for preserving the attorney-client privilege and serious concerns regarding the Department's waiver policy.

Although the ABA and the coalition are very encouraged by the Sentencing Commission's recent decision to reconsider and reverse its 2004 privilege waiver amendment to the Federal Sentencing Guidelines, the Department of Justice has declined to modify its privilege waiver policy as stated in the Thompson Memorandum. As a result, many federal prosecutors continue to demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous different waiver policies throughout the country.

For these reasons, the ABA urges the Committee, in the course of exercising its oversight authority, to send a strong message to the Department of Justice that the attorney-client privilege and the work product doctrine are fundamental principles of our legal system that must be protected, and that the Thompson Memorandum and other related Department directives to its prosecutors are improperly undermining those fundamental rights. The ABA urges the Committee

[12] An unofficial transcript of the March 7, 2006 hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is available online at: http://www.abanet.org/poladv/attyp_transcript5706.pdf.

[13] The written statements of the ABA and the witnesses appearing at the hearing are available at http://www.abanet.org/poladv/testimony306.pdf

to encourage the Department to modify the Thompson Memorandum to: (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

The Thompson Memorandum's Erosion of Employees' Constitutional and other Legal Rights and Suggested Reforms

While preserving the attorney-client privilege and the work product doctrine is critical to promoting effective corporate governance and compliance with the law, it is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. In addition to its privilege waiver provisions, the Thompson Memorandum also contains language directing prosecutors, in determining cooperation, to consider an organization's willingness to take certain punitive actions against its own employees and agents during investigations. In particular, the Thompson Memorandum encourages prosecutors to deny cooperation credit to companies and other organizations that assist or support their so-called "culpable employees and agents" who are the subject of investigations by (1) providing or paying for their legal counsel, (2) participating in joint defense and information sharing agreements with them, (3) sharing corporate records and historical information about the conduct under investigation with them, or (4) declining to fire or otherwise sanction them for exercising their Fifth Amendment rights in response to government requests for information.[14]

[14] The Thompson Memorandum provided in pertinent part that:

> …a corporation's promise of support to culpable employees and agents, either through the advancing of

The ABA strongly opposes these provisions in the Thompson Memorandum[15] for a number of reasons.

First, the Department of Justice's policy is inconsistent with the fundamental legal principle that all prospective defendants—including an organization's current and former employees, officers, directors and agents—are presumed to be innocent. When implementing the directives in the Thompson Memorandum, prosecutors often take the position that certain employees and other agents suspected of wrongdoing are "culpable" long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to fire the employees in question or refuse to provide them with legal representation or otherwise assist them with their legal defense as a condition for receiving cooperation credit. The Department's policy stands the presumption of innocence principle on its head. In addition, the policy overturns well-established corporate governance practices by forcing companies to abandon the traditional practice of indemnifying their employees and agents or otherwise assisting them with their legal defense for employment-related conduct until it has been determined that the employee or agent somehow acted improperly.

> attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

See Thompson Memorandum, note 4 *supra*, at pgs. 7-8. The Thompson Memorandum does not provide any measure by which an organization is expected to determine whether an employee or agent is "culpable" for purposes of the government's assessment of cooperation and, in part as a consequence, an organization may feel compelled either to defer to the government investigators' initial judgment or to err on the side of caution.

[15] On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees' constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. The ABA resolution and a detailed background report are available at http://www.abanet.org/buslaw/attorneyclient/.

Second, it should be the prerogative of a company to make an independent decision as to whether an employee should be provided defense or not. The fiduciary duties of the directors in making such decisions are clear, and they are in the best position to decide what is in the best interest of the shareholders.

Third, these provisions of the Thompson Memorandum improperly weaken the entity's ability to help its employees to defend themselves in criminal actions. It is essential that employees, officers, directors and other agents of organizations have access to competent representation in criminal cases and in all other legal matters. In addition, competent representation in a criminal case requires that counsel investigate and uncover relevant information.[16] The Thompson Memorandum seeks to undermine the ability of employees and other personnel to defend themselves, by seeking to prevent companies from sharing records and other relevant information with them and their lawyers. However, subject to limited exceptions, lawyers should not interfere with an opposing party's access to such information.[17] The language in the Thompson Memorandum undermines these rights by encouraging prosecutors to penalize companies that provide legal counsel, information or other assistance to their employees and agents during investigations.

The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars.

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[16] *See, e.g.*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.1(a) (3d ed. 1992) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

[17] *See, e.g.*, ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(d) (3d ed. 1992) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give."); *id.*, The Defense Function, Standard 4-4.3(d) ("Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give."); ABA Model Rules of Professional Conduct, Rule 3..4(g) (providing that a lawyer may not "request a person other than the client [or a relative or employee of the client] to refrain from voluntarily giving relevant information to another party.").

Therefore when government prosecutors—citing the Thompson Memorandum's directives—succeed in pressuring a company not to pay for the employee's legal defense, the employee typically may be unable to afford effective legal representation. In addition, when prosecutors demand and receive a company's agreement to not assist employees with other aspects of their legal defense—such as participating in joint defense and information sharing agreements with the employees with whom the company has a common interest in defending against the investigation or by providing them with corporate records or other information that they need to prepare their defense—the employees' rights are undermined.

Fourth, several of these employee-related provisions of the Thompson Memorandum have been declared to be constitutionally suspect by the federal judge presiding over the pending case of *U.S. v. Stein*, also known as the "KPMG case." On June 26 of this year, U.S. District Court Judge Lewis A. Kaplan issued an extensive opinion suggesting that the provisions in the Thompson Memorandum making a company's advancement of attorneys' fees to employees a factor in assessing cooperation violated the employees' Fifth Amendment right to substantive due process and their Sixth Amendment right to counsel.[18] In addition, Judge Kaplan subsequently determined that certain KPMG employees' statements were improperly coerced in violation of their Fifth Amendment rights against self-incrimination as a result of the pressure that the government and KPMG placed on the employees to cooperate as a condition of continued employment and payment of legal fees.[19]

For all of these reasons, the ABA urges the Committee to encourage the Department of Justice to modify the Thompson Memorandum to prohibit prosecutors from demanding, requesting,

[18] *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (June 26, 2006). For a more detailed discussion of Judge Kaplan's rulings in the case, please see the background report accompanying the ABA's August 2006 resolution referenced in note 15, *supra*. The background report is available online at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

[19] *See United States v. Stein*, July 25, 2006, Memorandum Opinion and Order at 36-37.

or encouraging that companies take any of these four types of punitive action against employees or other corporate agents as a condition for receiving cooperation credit.

The ABA believes that these changes, and the other proposed changes to the Thompson Memorandum discussed earlier in our testimony, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

We appreciate the opportunity to appear before the Committee and present our views on these subjects, which are of such vital importance to our system of justice, and I look forward to your questions.

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

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Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100

May 2, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposal for Revising Department of Justice Attorney-Client Privilege and Work Product Doctrine Waiver Policy

Dear Mr. Attorney General:

On behalf of the American Bar Association and its more than 400,000 members, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from Departmental policy and practices that seriously threaten to erode these fundamental rights. Towards that end, we urge you to consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition for receiving cooperation credit during investigations. Enclosed is specific proposed language that we believe would accomplish this goal without impairing the Department's ability to gather the information it needs to enforce federal laws.

As you know, the attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. Unfortunately, the Department of Justice has adopted—and is now following—a policy that has led many of its prosecutors to routinely pressure organizations to waive the protections of the attorney-client privilege and/or work product doctrine as a condition for receiving cooperation credit during investigations. While this policy was formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver was exacerbated in 2004 when the U.S. Sentencing Commission added language to Section 8C2.5 of the Federal Sentencing Guidelines that authorizes and encourages the government to seek waiver as a condition for cooperation.

In an attempt to address the growing concern being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt "a written waiver review process for your district or component," and it is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

According to a recent survey of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75% of the respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Holder/Thompson/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The ABA is concerned that government waiver policies weaken the attorney-client privilege and work product doctrine and undermine companies' internal compliance programs. Unfortunately, the government's waiver policies discourage entities both from consulting with their lawyers—thereby impeding the lawyers' ability to effectively counsel compliance with the law—and conducting internal investigations designed to quickly detect and remedy misconduct. The ABA believes that prosecutors can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for waiver of the privilege or doctrine.

The ABA and a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—previously expressed these and other similar concerns to Congress and the Sentencing Commission. In addition, a prominent group of nine former senior Justice Department officials—including three former Attorneys General from both parties—submitted similar comments to the Sentencing Commission last August. These statements and other useful resources on the topic of privilege waiver are available at http://www.abanet.org/poladv/acprivilege.htm and on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, and others, as well as the results of the new survey of corporate counsel that documented the severe negative consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines, the Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Guidelines. Unless Congress affirmatively takes action to modify or disapprove of the Commission's proposal, it will become effective on November 1, 2006. While we are extremely gratified by the Commission's action, the Justice Department's waiver policy continues to be problematic and needs to be addressed.

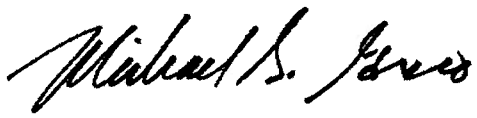
The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Holder/Thompson/McCallum Memoranda that would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information

that they need to effectively enforce the law. The revised memorandum enclosed herewith would accomplish these objectives by (1) preventing prosecutors from seeking privilege waiver during investigations, (2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation. We believe that this proposal, if adopted by the Department, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,



Michael S. Greco

enclosure

SUGGESTED REVISIONS TO DEPARTMENT OF JUSTICE POLICY CONCERNING WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS

PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE

FEBRUARY 10, 2006

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM:

DATE:

RE: Guidelines for Determining "Timely and Voluntary Disclosure of Wrongdoing and Willingness to Cooperate"

This Memorandum amends and supplements the October 21, 2005 memorandum issued by Acting Deputy Attorney General Robert D. McCallum, Jr. ("*McCallum Memorandum*") concerning Waiver of the Corporate Attorney-Client and Work Product Protections. In general, the *McCallum Memorandum* requires establishment of a review process for federal prosecutors to follow before seeking waivers of these protections. The *McCallum Memorandum* also notes the Department of Justice that "places significant emphasis on prosecution of corporate crimes."

This Memorandum also amends and supplements the Department's policy on charging business organizations set forth in the memorandum issued by Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereinafter *"Thompson Memorandum"*), reprinted in *United States Attorneys' Manual*, tit. 9, Crim. Resource Manual, §§ 161-62. As noted in the *McCallum Memorandum*, one of the nine (9) factors that was identified for federal prosecutors to consider under the *Thompson Memorandum* (§ II.A.4.) is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."

In particular, this Memorandum amends the *Thompson Memorandum* by striking the following portion of § II.A.4.: "...including, if necessary, the waiver of corporate attorney-client and work product protection." As amended, § II.A.4. directs that federal prosecutors consider "...the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."

This Memorandum also amends § VI.A. of the *Thompson Memorandum* by striking the last clause: "...and to waive attorney-client and work product protection;" and by striking the word "complete" from the third clause preceding "results of its internal investigation." As amended, that sentence of § VI.A. states: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; and to disclose the results of its internal investigation."

This Memorandum also amends § VI.B. by striking the fourth paragraph and adding language in its place that recognizes the importance of the attorney-client and work product protections and the adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections. As amended, the fourth paragraph of § VI.B. states:

> "The Department of Justice recognizes that the attorney-client privilege and the work-product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Department further recognizes that an attorney may be an effective advocate for a client, and best promote the client's compliance with the law, only when the client is confident that its communications with counsel are protected from unwanted disclosure and when the attorney can prepare for litigation knowing that materials prepared in anticipation of litigation will be protected from disclosure to the client's adversaries. *See Upjohn Co. v. United States*, 449 U.S. 383, 392-393 (1981). The Department further recognizes that seeking waiver of the attorney-client privilege or work-product doctrine in the context of an ongoing Department investigation may have adverse consequences for the organizational entity. A waiver might impede communications between the entity's counsel and its employees and unfairly prejudice the entity in private civil litigation or parallel administrative or regulatory proceedings and thereby bring unwarranted harm to its innocent public shareholders and employees. *See also* § IX (Collateral Consequences). Attorneys within the Department shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity's cooperation, attorneys within the Department shall not draw any inference from the entity's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation."[1]

[1] Notwithstanding the general rule set forth herein, attorneys within the Department may, after obtaining in advance the approval of the Assistant Attorney General of the Criminal Division or his designee, seek materials otherwise

(footnote continued on next page)

Section VI. of the *Thompson Memorandum* is further amended and supplemented by adding new subpart C. that states:

> "C. In assessing whether an organizational entity has been cooperative under § II.A.4. and § VI.B., attorneys within the Department should take into account the following factors:
>
> "1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine.
>
> "2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine.
>
> "3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation.
>
> "4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps.[2]
>
> "5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine.

(footnote continued from previous page)

protected from disclosure by the attorney-client privilege or the work product doctrine if the organization asserts, or indicates that it will assert an advice of counsel defense with respect to the matters under investigation. Moreover, attorneys within the Department also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this paragraph, the attorneys within the Department shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

[2] Actions by an entity recognizing the rights of such individuals are not inconsistent with this factor.

"6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation."

U.S. Department of Justice

Office of Intergovernmental and Public Liaison

950 Pennsylvania Avenue, NW, Room 1629 (202) 514-3465
Washington, DC 20530 http://www.usdoj.gov/oipl/oipl.html

July 18, 2006

Mr. Michael S. Greco
President
American Bar Association
Governmental Affairs Office
321 North Clark Street
Chicago, IL 60610

Dear Mr. Greco:

Thank you for your May 2, 2006, letter to Attorney General Gonzales outlining the American Bar Association's views on the use of waivers of the attorney-client privilege. The Department of Justice shares your commitment to the attorney-client privilege and work product doctrines as fundamental elements of our legal system. We are also committed to encouraging responsible corporate stewardship and corporate governance, a goal the ABA no doubt shares as well. We appreciate the opportunity to respond to your proposed revision to the Thompson Memorandum as part of our continuing dialogue on the issue of corporate cooperation in corporate fraud investigations.

As you are aware, President Bush, Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. The Department of Justice is committed to fully and fairly enforcing the landmark Sarbanes-Oxley legislation of 2002 and prosecuting those in corporate America who would abuse their positions to enrich themselves unlawfully. We seek to protect the American public and to restore confidence in our financial markets. And we are proud of our record in that regard—from July 2002 through March 2006, the Department secured well over 1000 corporate fraud convictions.

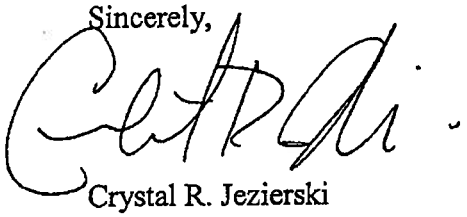
One key element of our success has been the ability to secure the corporation's cooperation. Our policy, as set forth in the Thompson Memorandum, provides that the degree to which a corporation cooperates with a criminal investigation may be a factor to be considered by prosecutors when determining whether or not to charge the corporation. There are numerous ways in which a corporation may indicate and provide a degree of cooperation that, under the Thompson Memorandum, will impact a decision on the charging of the corporation. One such factor, but certainly not the only factor, can be whether the corporation has waived its attorney-client and work product protections. In

such circumstances, corporations are generally represented by sophisticated counsel and make informed and considered decisions on whether to offer such waivers, to agree to requests for them from prosecutors, or to refuse such requests.

Although some have suggested that prosecutors routinely seek waivers of privileges, giving rise to a "culture of waiver," that should not occur under our guidelines, and we believe it does not routinely occur. Instead, waivers should be sought only when based upon a need for timely, complete, and accurate information and only with supervisory approval after a review of the underlying facts and circumstances. As we have recently confirmed through the McCallum Memorandum, clear guidelines for and supervisory oversight of any waiver requests are critical.

Thank you again for contacting the Department and for sharing your concerns. We hope to address the concerns you have raised, and view our previous meetings and the open lines of communication as important steps toward that goal. We can all agree that the Department should support both the societal benefits provided by traditional privileges, such as the attorney-client privilege, and those arising from the vigorous enforcement of the criminal laws against wrongdoers regardless of their stature or status. We look forward to continuing to work with you on these efforts. Please do not hesitate to contact this office if we may be of assistance with this or other matters.

Sincerely,



Crystal R. Jezierski
Director

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt a "written waiver review process for your district or component." It is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division (1989-1993)

Dick Thornburgh
Attorney General
(1988-1991)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

Testimony
United States Senate Committee on the Judiciary
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations
September 12, 2006

Mr. Andrew Weissmann
Partner , Jenner & Block LLP

Written Testimony
United States Senate Committee on the Judiciary
"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
September 12, 2006

Mr. Andrew Weissmann
Partner, Jenner & Block LLP

Good morning Chairman Specter, Ranking Member Leahy and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI.

I will make three main points regarding the Thompson Memorandum's effect on the right to counsel in corporate investigations.

A. A Lack of Uniform Standards Regarding
Requests for Waivers of the Attorney-Client Privilege

First, there have been and still are wide differences across the country regarding when and how to seek a waiver of the attorney-client privilege in white collar investigations. The Thompson Memorandum gives federal prosecutors a green light to seek waivers of the attorney-client privilege. It offers no guidance, however, about when it is appropriate to do so and when the government should consider a corporation's failure to waive as a sign of non-cooperation. The considerable variances in implementation of the Thompson Memorandum often subject corporations, many of which are national and even international in scope, to the vagaries and unreviewed decisions of an individual prosecutor. This problem can be exacerbated by the tradition of independence of each of the 93 United States Attorneys across the country, whose offices in practice often run quite autonomously of Main Justice here in Washington, D.C. Indeed, even though then-Acting Deputy Attorney General Robert McCallum, in a memorandum issued eleven months ago called for each Office to implement a written review process governing the request for waivers of the attorney-client privilege by individual federal prosecutors, I understand this process is not yet complete. But more to the point, even if the McCallum directive reaches successful completion, its positive effects will be limited. Individual written policies within a particular U.S. Attorney's Office may alleviate variations of interpretation within that same prosecutor's office, but do nothing to advance a national policy on the issue. Thus, although the theory of the Thompson Memorandum is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when to seek to charge corporations -- in practice the interpretation and implementation of its "factors" is left to the determination of

individual prosecutors. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance to diminish the wide variations that currently exist.

It is important to discuss specifics in order to understand the scope of the problem. There are two areas that I think are not of particular controversy in practice. First, it is quite common for prosecutors to request and corporations to agree to a waiver of attorney-client communications made at the time of the transaction that is under investigation. So, for instance, a prosecutor may examine, such as I did, a transaction at Enron that appears to be undertaken to manipulate earnings by transferring losses from a failing business segment to a profitable one. What Enron employees were saying to internal and outside counsel at the time regarding the legality of such a transaction would be particularly important in determining the intent of the employees who were responsible for the transaction. If the lawyers blessed the transaction, with full knowledge of the transaction and its purpose, the requisite criminal intent would likely not exist. On the other hand, if the lawyers were given less than the full factual picture, then the evidence from those attorneys becomes powerful proof that the employees were hiding facts precisely because they were conscious of the wrongfulness of the transaction. Corporations will generally waive the privilege in those situations both because the government's need for such information can be particularly strong and because the company itself may seek to rely on an advice of counsel defense, and thus a waiver would occur anyway.

Conversely, the Thompson Memorandum makes clear that it is generally inappropriate to seek a waiver with respect to communications between the corporation and its counsel regarding the company's defense of a current criminal investigation. Such communications are rarely if ever necessary to determine the legality of the underlying transactions, even though they may in fact be quite relevant to the government's investigation.

There is, however, a wide area in the middle where the practices of federal prosecutors vary considerably. Prosecutors have interpreted -- and unless someone intervenes will continue to interpret -- the Thompson Memorandum to mean that it is appropriate at the very outset of a criminal investigation involving a corporation to seek a blanket waiver of all attorney-client communications, other than current communications regarding how to defend the case. That waiver can include the disclosure of all reports prepared by counsel of its interviews of employees as part of a company's internal investigation as well as production of counsel's notes taken at any interviews (whether of a company employee or a third party) -- even when the government attorneys and agents can interview the witnesses themselves or were present at the interviews. In other words, disclosure is sought even though the government could replicate the information by rolling up its sleeves and interviewing the witnesses.

On the other hand, other prosecutors take a more surgical approach and proceed incrementally—only seeking a full waiver where it is truly important to the investigation and other interim steps have failed. This latter approach is of course far more responsible. Indeed, the Thompson Memorandum itself, insofar as it generally places off limits current communications with counsel regarding the company's defense, suggests such an approach. Those communications could be highly relevant to the investigation -- but disclosure would cut to the core of the attorney-client privilege, and they are rarely if ever necessary to an investigation. In my opinion, DOJ in Washington should promulgate guidance strictly cabining prosecutors' discretion to seek immediate blanket waivers and curtailing

the solicitation of waivers that are simply a shortcut where the government can obtain the information directly.

B. Penalizing Assertions of a Constitutional Right

The second point I would like to make concerns the credit given under the Thompson Memorandum to companies that fire or do not pay legal fees for employees who refuse to speak with the government based on the Fifth Amendment. These aspects of the Thompson Memorandum have garnered significant attention recently by virtue of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case. Judge Kaplan addressed two of the Thompson Memorandum factors that govern whether to indict a company -- whether a company elects to pay the legal fees of its employees and whether it retains personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation.

Judge Kaplan's opinions highlight that the Thompson Memorandum -- and the way it is wielded by federal prosecutors -- is causing companies to fire employees for merely asserting their constitutional right to remain silent, and is interfering with the ability of employees to mount a defense by essentially restricting the employee's access to counsel that the corporation would otherwise have funded.

In the first Stein decision, Judge Kaplan found that prosecutors had invoked the Thompson Memorandum at the very outset of its investigation to pressure KPMG to break its long-standing tradition of paying its employees' legal fees. KPMG's payment of legal fees was at the top of the prosecutors' agenda from their very first discussions with KPMG, and the court found that the prosecutors had indicated that the government would not look favorably on the voluntary advancement of legal fees. Judge Kaplan concluded that by causing KPMG to cut off legal fees to employees, the Thompson Memorandum violated the Fifth Amendment's due process clause and the Sixth Amendment right to counsel.

In the second Stein decision, issued one month later, Judge Kaplan concluded that certain statements made to the government by KPMG employees had been coerced and thus obtained in violation of the Fifth Amendment. KPMG had threatened certain employees that if they did not cooperate with the government's investigation they would be fired or their legal fees would not be paid. The court concluded that KPMG took those steps at the behest of the government and that the Thompson Memorandum precipitated KPMG's use of economic threats to coerce statements from its employees. Under these circumstances, the court found that such an identity existed between the government and KPMG that KPMG's conduct could be legally attributed to the government. Because he found that the government had coerced the pre-trial proffer statements of two defendants, Judge Kaplan suppressed them.

The factual situation in KPMG is not unique. Across the country corporations have instituted strict policies that call for firing employees or refusing to advance legal fees to employees who do not "cooperate" with the government. The motivation behind these policies is often to enable the company to be in full compliance with the Thompson Memorandum factors so that it can avoid being indicted. Employees at these companies who refuse to speak with the government based on their Fifth Amendment rights against self-incrimination risk losing their jobs or having payment of their defense fees cut off.

Regardless of the legal firmness of the Stein decisions and of Judge Kaplan's attribution of state action to KPMG, the case underscores the need to reevaluate the Thompson Memorandum as a policy matter. It should be revised so that it no longer encourages an environment where employees risk losing their jobs or legal defense merely for exercising their constitutional right not to speak to the government. In determining whether to indict a company, the DOJ should not permit consideration of the company's treatment of an employee who has asserted her Fifth Amendment right. This factor should simply not come into play in the analysis of whether a corporation has or has not cooperated. Although a company itself can properly fire an employee or cut off legal fees based on whether she cooperates with an investigation, the DOJ should not weigh in on this determination -- and not because a court may ultimately deem the company's actions as government conduct. Rather, for policy reasons, the DOJ should simply not base its decision to prosecute a company on whether a person has been punished by her employer for asserting a constitutionally guaranteed right.

Moreover, with respect to a corporation's advancement of employees' legal fees, the Thompson Memorandum should be revised to make mandatory the current approach employed by cautious prosecutors. The wary prosecutor, for instance, will raise the issue of whether a company is paying for its employees legal fees only after the government has determined it has a prosecutable case against the company and only if that factor could make a difference in the calculus of whether to charge the company. And even then, the advancement of legal fees should only count against a company if the payment is part of a scheme to obstruct the government's investigation.

C. Rethinking Criminal Corporate Liability

The issues being addressed today by this Committee are symptoms of a larger problem with the current state of the law of criminal corporate liability. To understand what is wrong with the Thompson Memorandum and how the guidelines for prosecutorial decision-making can be improved, we need first to consider the context in which the Thompson Memorandum operates. There are two principal forces at work.

The first is the prevailing understanding that a corporate indictment could be the equivalent of a death sentence. One of the lessons corporate America took away from Arthur Andersen's demise in 2002 is to avoid an indictment at all costs. A criminal indictment carries potentially devastating consequences, including the risk that the market will impose a swift death sentence -- even before the company can go to trial and have its day in court. In the post-Enron world, a corporation will thus rarely risk being indicted by a grand jury at the behest of the Department of Justice. The financial risks are simply too great.

The second principle at work is the current standard of criminal corporate liability under federal common law. A corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted.

In light of the Draconian consequences of an indictment and the fact that the federal common law criminal standard can be so easily triggered -- despite a company's best efforts to thwart criminal conduct -- the Thompson Memorandum offers prosecutors enormous leverage. To avoid indictment, corporations will go to great lengths to be deemed "cooperative" with a government investigation. KPMG is a prime example, and one that has been spotlighted in the two decisions by Judge Kaplan in the United States v. Stein case.

Although the Thompson Memorandum has recently received significant negative attention, and is in some ways an easy target, it is not the real source of the problem. The root cause that renders the Thompson Memorandum such a sharp weapon is the standard for criminal corporate liability and the absence of systemic checks to restrict the government's power to charge corporations whenever an employee strays. The current standard for corporate criminal responsibility affords prosecutors enormous -- and unduly disproportionate -- leverage and power. In this climate, a corporation has little choice but to conform its conduct to the Thompson Memorandum factors, even in the absence of a prosecutor's overt threats.

A rethinking of criminal corporate liability is in order. The standard for criminal liability should take into account a company's attempts to deter the criminal conduct of its employees. Holding the government to the additional burden of establishing that a company did not implement reasonably effective policies and procedures to prevent misconduct would both dull the threat inherent in the Thompson Memorandum as well as help correct the imbalance in power between the government and the corporation facing possible prosecution for the acts of an errant employee. A more stringent criminal standard, one that ties criminal liability to a company's lack of an effective compliance program, would have the added benefit of maximizing the chances that criminality will not take root in the first place -- since corporations will be greatly incentivized to create and monitor a strong and effective compliance program. The objectives of law-abiding society, the criminal law, and even of the DOJ Thompson Memorandum itself, would then be well served.

Thank you for this opportunity to testify today.

Testimony of Mark B. Sheppard, Esquire
Before the Senate Committee on the Judiciary Regarding
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations
Tuesday, September 12, 2006

Good morning Chairman Specter, Ranking Member Leahy, and distinguished members of the Judiciary Committee. My name is Mark Sheppard. I practice white collar criminal defense and complex civil litigation at the Philadelphia law firm of Sprague & Sprague, where I have the privilege of practicing with noted trial attorney Richard Sprague. Before joining the firm, I was a partner in the firm of Duane Morris LLP. Over the last 19 years, I have represented corporations as well as individual directors, officers and employees in federal grand jury investigations and related enforcement matters.

I want to begin my remarks by thanking you for the opportunity to voice my concerns, as a practitioner, about the deleterious effect of the "cooperation" provisions of the Thompson Memorandum[1] and similar federal enforcement policies such as the Securities Exchange Commission's Seaboard Report. [2] These policies have so drastically altered the enforcement landscape that they threaten the very foundation of our adversarial system of justice.

This threat is brought about by the confluence of two recent trends: increasing governmental scrutiny of even routine corporate decision making and untoward prosecutorial emphasis upon waiver of long recognized legal protections as the yardstick by which corporate

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[1] Memorandum from Deputy Attorney General Larry D. Thompson to U.S. Attorneys of January 20, 2003 regarding "*Principles of Federal Prosecution of Business Organizations*" Section VI, at pages 6-8.

[2] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Rel. No. 44969 (Oct. 23, 2001)

cooperation is measured. These policies and, in particular, those provisions which inexorably lead to waiver of the attorney-client and work product privileges, upset the constitutional balance envisioned by the framers, impermissibly intrude upon the employer/employee relationship, and in real life, result in the coerced waiver of cherished constitutional rights.

The Thompson Memorandum sets forth the "principles to guide (federal) prosecutors as they make the decision whether to seek charges against a business organization." While the majority of the stated principles are minor revisions of prior DOJ policy, the Memorandum makes clear that corporate enforcement policy in the post-Enron era will be decidedly different in one very important respect: The preamble to the Memorandum states:

> The main focus of the revisions is increased emphasis on and scrutiny of the *authenticity* of a corporation's cooperation.

According to the Memorandum, "authentic" cooperation includes the willingness to provide prosecutors with the work product of corporate counsel from an internal investigation undertaken after a problem was detected. Authentic cooperation also includes providing prosecutors with the privileged notes of interviews with corporate employees who may have criminal exposure, yet have little or no choice to refuse any request to speak with corporate counsel. This means that employees effectively give statements to the government without ever having had a chance to assert their Fifth Amendment right against self-incrimination. Incredibly, the Thompson Memorandum is explicit in this goal of performing an end-run around the Constitution. It states, "Such waivers permit the government to obtain statements of possible witnesses, subjects and targets without having to negotiate individual cooperation or immunity

agreements." 3 Even further, "authentic" cooperation includes disclosure of the legal advice provided to its corporate executives before or during the activity in question. Lastly, and most troubling, is the impact that the Thompson Memo has upon the ability of corporate employees to get access to and secure separate and competent counsel. The Memo specifically denounces long recognized corporate practices such as the advancement of legal fees, the use of joint defense agreements and even permitting separately represented employees to access the very records and information necessary to defend themselves.

Despite these draconian outcomes, corporations are complying with these demands in ever increasing numbers. Following the precepts of the Thompson Memorandum is mandatory for federal prosecutors. And while no "one" of the 9 elements of cooperation outlined in the Memorandum purports to be dispositive of cooperation, in practice, each is mandatory. In the current climate few, if any, public companies can afford the risk of possible indictment and the myriad of collateral consequences, not the least of which is the diminution of shareholder value. Indeed, the words from the front lines are frightening, as one attorney recently noted:

> The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out

3 Thompson Memorandum, *supra* note 1, at 5.

for harsh treatment... . [4]

The results of a recent survey of attorneys from around the country composed of the private criminal defense bar and in-house corporate counsel completed by *inter alia*, the Association of Corporate Counsel, the American Bar Association and National Association of Criminal Defense Lawyer bear this out. Among its findings:

- 52 percent of in-house respondents and 59 percent outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation.;
- Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30 percent of in-house respondents and 51 percent of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment. [5]

Even before Sarbanes-Oxley, internal corporate investigations were standard operating procedure whenever a potential compliance issue came to light. Incident to these investigations, internal and confidential documents are reviewed and all employees who may have knowledge of the particular incident are interviewed. The reports generated by these investigations, including analysis by the company's counsel and statements of employees who may not choose to speak with prosecutors are a veritable road map. As such, they are simply too tempting a source of information for prosecutors to ignore.

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[4] The Decline Of the Attorney-Client Privilege in the Corporate Context–Survey Results, *http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf* , at p. 18

[5] *Id.*

It is my experience that occasionally – although not routinely – federal prosecutors can be convinced to conduct their investigations without these privileged "roadmaps." Indeed, law enforcement needs can surely be met with non-privileged documents, access to witnesses, and plenty of assistance from the company in understanding the chain of events in question. However, the Thompson Memo itself makes clear that these standard elements of cooperation are not always enough. Prosecutors are now empowered to expect corporate counsel to act as their deputies. Counsel is expected to encourage employees to give statements without asserting their Fifth Amendment rights and without obtaining independent counsel, despite the potential conflict of interest it poses for both the attorney and the employee. If the employee refuses, he or she faces termination with no apparent recognition of the inherent unfairness of meting out punishment for the mere invocation of a constitutional right. To make matters worse, in two recent cases, the employees of separate cooperating corporations were indicted for allegedly provided misleading information *to the cooperating corporation* and its outside law firm. [6] Thus, the employee may be "damned if he does and damned if he doesn't." Internal investigations that yield accurate, reliable results are severely diminished in this coercive environment.

[6] *United States v. Kumar and Richards*, 2004Cr.02094 (E.D.N.Y. 2004); *United States v. Singleton*, Crim. 4:06CR080 (S.D.Tex., Houston Div.) (March 8, 2006).

Too often, employees must face this Hobson's Choice with out the benefit of separate counsel. That is because individual employees also face the prospect that the corporation will refuse to advance or reimburse the employee's legal fees if they refuse to cooperate with the government. Representation by experienced counsel in corporate fraud cases could bankrupt an individual. For those that I have represented, advancement of fees was essential to having any representation, let alone effective representation of counsel. Further, most white collar practitioners recognize that their cases are often won or lost pre-indictment. Effective assistance of counsel in the investigatory stage is essential. The government knows this. I fear that under the guise of cooperation, prosecutors are seeking to deprive employees of counsel of their choosing, in the hope that counsel chosen by the corporation may be more inclined to tow the party line. Indeed, this thinking has spread to other areas of white collar enforcement. For example, in a political corruption investigation, prosecutors have challenged the Senate of Pennsylvania's decision to advance legal fees to two Pennsylvania Senate employees, claiming that the payment of fees may constitute a conflict of interest for their counsel.[7]

All of this is done at the behest of prosecutors and in the name of authentic cooperation in the laudable effort to combat corporate fraud. Lost in the stampede to the prosecutor's door however, is the employee's right to counsel and her right not to be a witness against herself.

[7] *United States v. Luchko*, Government Motion For Hearing Regarding Potential Conflict of Interest, filed August 10, 2006. CR No. 06-0319 (E.D. Pa. 2006)

The recent KPMG decisions are indeed encouraging. [8] Unfortunately, the violence to the right to counsel in corporate investigations occurs in the earliest stages of the investigation, where little or no judicial review of these practices is possible.

I can still vividly recall a conversation that I had as a young associate with one of the recognized deans of the Philadelphia federal defense bar. He told me, much to my dismay at the time, that much of white collar criminal practice is "done on bended knee." The statement was a recognition of the awesome power and resources that the federal government may bring to bear upon an individual or entity it believes may have violated the law. It was possible, however, to effectively represent your client and by so doing assure that the government followed the rules and respected constitutional and well settled legal protections. That is the essence of our adversarial system of justice. In today's corporate environment, I and many of my fellow white collar practitioners feel that may no longer be possible.

Finally, the Thompson memorandum and like pronouncements are simply bad policy. Encouraging employees to be proactive in seeking legal counsel is a key component of any corporate compliance strategy. Corporations and the people they act through must feel free to discuss difficult issues in an ever increasing regulatory environment. Rather than encourage this, these policies will inevitably chill communications with corporate counsel impugning meaningful corporate governance practices. Thus rather than achieving the salutary effects sought, the Thompson Memorandum will increase the likelihood of potentially illegal conduct

[8] *United States v. Stein, et al.*, No. S1 05 Crim. 0888 (LAK),2006 WL 1735260 (S.D.N.Y. June 26,. 5. 2006), 2006 WL 2060430, (S.D.N.Y. July 25, 2006).

by undermining meaningful corporate compliance. Prosecutorial expediency is simply not worth it.

Again, I thank the Chairman and the Committee for this opportunity and I look forward to responding to any questions you may have.

Testimony of Dick Thornburgh
Kirkpatrick & Lockhart Nicholson Graham LLP
Former Attorney General of the United States
before the
Senate Committee on the Judiciary
regarding
"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
Tuesday, September 12, 2006

Good morning, Chairman Specter, Ranking Member Leahy and members of the Committee, and thank you for the invitation to speak to you today about the grave dangers posed to the right to counsel by the Justice Department's Thompson Memorandum. This is an issue of Constitutional dimensions, and I commend you for holding this hearing.

As you know, the Thompson Memo establishes a number of criteria for federal prosecutors to use in assessing whether a business organization has been "cooperative."[1] Cooperating status is important since, under the Thompson Memo, it may lead to lesser charges or no charges at all. It is certainly reasonable for prosecutors to expect cooperation from a business seeking favorable treatment. But several of the Thompson Memo's cooperation criteria overstep the bounds of fairness and good public policy, and implicate rights secured by the Constitution. In my view, they are not necessary for effective law enforcement and they can actually undermine corporate compliance. Accordingly, these criteria should be dropped or substantially revised.

Let me focus first on the provision of the Thompson Memo that says cooperation credit may depend on a corporation's willingness to waive attorney-client privilege and work product protections. The Washington Legal Foundation has just published a monograph that I wrote on

[1] Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys re *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at www.usdoj.gov/dag/cftf/business_organizations.pdf.

the topic, which, Mr. Chairman, I would ask to be included in the record of this hearing.[2] As my monograph explains, the privilege is a fundamental element of the American system of justice.[3] In the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[4] The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

My monograph also discusses the negative effect that a policy of waiver has on corporate compliance programs, corporate efforts to investigate possible noncompliance, and individual employees.[5] No matter how conditionally it is couched or how reasonably Department of Justice officials may promise to implement it, a waiver policy poses overwhelming temptations to prosecutors seeking to save time and resources and to organizations desperate to save their very existence. And each waiver has a "ripple effect" that creates more demands for greater disclosures, both in individual cases, and as a matter of general practice. What's worse, the Thompson Memo's focus on waivers as a measure of cooperation has led to the adoption of policies or practices by the Securities and Exchange Commission,[6] the U.S. Sentencing Commission,[7] state law enforcement officials, self-regulatory organizations and the auditing profession.[8]

The result, documented in a survey to which over 1,200 in-house and outside counsel responded, is the emergence of a "culture of waiver" in which governmental agencies believe it

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[2] Dick Thornburgh, WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE: A BALANCED APPROACH (2006).
[3] *Id.* at 6-10.
[4] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[5] *Waiver of the Attorney-Client Privilege*, *supra* note 2, at 22-25, 28-29.
[6] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the Seaboard Report), available at http://www.sec.gov/litigation/investreport/34-44969.htm.
[7] United States Sentencing Commission, GUIDELINES MANUAL, § 8C2.5(g), comment 12 (Nov. 2004).
[8] *See* NYSE Information Memorandum No. 05-65, *Cooperation* (Sept. 14, 2005).

is reasonable and appropriate for them to expect a company under investigation to provide broad waivers of both the attorney-client privilege and work product protections. I practice at a major law firm with significant practices representing clients in government investigations. My colleagues in the firm, and at other law firms, report that they now commonly encounter waiver requests when an organization is under scrutiny.

Opposition to the Thompson Memo's waiver policy has been strong and impassioned. Last summer, the American Bar Association unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege . . . ."[9] This March, a House Judiciary subcommittee heard testimony strongly opposing government waiver policies. Those of us who testified were impressed by the complete, bipartisan agreement among subcommittee members that the Thompson Memo needed to be changed, by legislation if necessary. I was also one of ten former senior Justice Department officials, from both Republican and Democratic administrations, who sent a letter to the Attorney General on September 5 asking him to revise the Thompson Memo. Even the Conference of state Chief Justices has endorsed the creation of state and local bar committees devoted to preserving the privilege.

As you know, I served as a federal prosecutor for many years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the

[9] This resolution, drafted by the ABA s Task Force on the Attorney-Client Privilege, is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf. The supporting report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf.

government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not be required to reveal privileged communications or attorney work product in order to establish its good faith. This balance is one I found workable in my years of federal service, and it should be restored.

Until recently, the Thompson Memo's waiver requirement has received most of the attention. But there is another problematic "cooperation criterion" in the Memo that instructs prosecutors to consider whether an organization "appears to be protecting its culpable employees and agents." While this sounds reasonable in theory, in practice, this provision has led to government pressure on companies to refuse to pay the legal expenses of employees or former employees, to withdraw from joint defense agreements with them, to refuse to share even historical information with them, and to fire employees who assert their Fifth Amendment rights in government interviews. While a company might justifiably take any of these actions in appropriate circumstances, it is improper for the government, using the enormous leverage it has through its charging power, to coerce companies to take these steps.

Opposition to this practice is also widespread. In a decision rendered this June involving former employees of KPMG, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York declared that the Thompson Memo's provisions concerning legal fees violated the rights to due process and effective assistance of counsel guaranteed, respectively, by the Fifth and Sixth Amendments.[10] Just last month, the ABA again adopted a unanimous policy opposing the practices I've just noted.[11] Fundamentally, the ABA noted that

[10] *See United States v. Klein*, 435 F. Supp. 2d 330, 356-73 (S.D.N.Y. 2006).
[11] This recommendation is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_recommendation_adopted.pdf. The

"culpability" is something to be proven by the government beyond a reasonable doubt, not determined prematurely by it or by an employer.[12]

In May, Ms. Mathis's predecessor sent Attorney General Gonzales a revision of the Thompson Memo that would meet the legitimate needs of prosecutors and yet protect the attorney-client privilege. I have seen the Department's reply, and I was frankly disappointed by its non-responsive tone. This spring, the Sentencing Commission, after considering the views expressed by numerous commentators, practitioners and former government officials, voted – over the objection of the Justice Department – to delete the reference to waiver from its commentary on cooperation. I would hope the Justice Department will display a similar willingness to do so as well.

Thank you, and I look forward to your questions.

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supporting report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

[12] ABA report, *supra* note 11, at 12.