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.