Department of Justice

STATEMENT

OF

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CONCERNING

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

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Testimony of
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"The *Thompson* Memorandum's Effect on the Right to Counsel in Corporate Investigations"
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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.