U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 13, 2007

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

This letter represents the views of the Department of Justice on H.R. 3013, "the Attorney Client Privilege Protection Act of 2007." We believe that if enacted, the legislation would impede the Department's efforts to bring corporate criminals to justice, protect investors, shareholders and our nation's retirees from the devastating effects of corporate fraud, and return assets to victims of crime. For these and the reasons that follow, the Department of Justice strongly opposes this legislation.

If enacted into law, H.R. 3013 would: (1) undermine the Department's ability to conduct fact-finding and uncover fraud in investigations involving corporations and other organizations; (2) create a separate set of rules for corporations and their executives that are more protective than those for other defendants in our criminal justice system; (3) eliminate incentives for voluntary disclosure by corporations; (4) produce unintended, wide-ranging consequences beyond protecting a corporation's privilege by extending special protections to any association or group of individuals, legitimate or illegitimate, as well as the individuals affiliated with it; (5) undermine the regulatory, civil, and administrative efforts of other Federal law enforcement agencies; and (6) erode the core prosecutorial discretion the Constitution entrusts to the Executive Branch to enforce our nation's laws.

In addition, we believe that this legislation is not necessary. In December 2006, the Department implemented the McNulty Memorandum which establishes a rigorous approval process for requests of waivers of attorney-client privilege for cooperating corporations. The McNulty Memorandum also explicitly states that waiver of privilege is not a prerequisite to a finding that a corporation is cooperating. The Memorandum has worked well so far. In fact, since it was issued, only four waiver requests to obtain factual information have been approved by the Department.

In the aftermath of corporate scandals such as Enron, WorldCom, and Adelphia, the Administration and Congress recognized the need for the government's strong and forceful

leadership to right the wrongs done to the investing public. Since 2002, the Corporate Fraud Task Force -- a multi-agency Task Force charged with restoring investor confidence in America's corporations by investigating and prosecuting those who violate the trust of employees and investors – has utilized the enhanced statutory tools provided by Congress to pursue corporate wrongdoing. The dedicated and professional efforts of agents and prosecutors have resulted in more than 1200 corporate fraud convictions and the recovery of billions of dollars for investors and shareholders in criminal and civil proceedings.

H.R. 3013 now threatens to undermine that success. The proposed legislation would hinder the government's efforts by undermining its ability to learn the facts in all kinds of investigations of criminal, civil, and regulatory matters nationwide (including corporate fraud, antitrust, healthcare, environmental, tax, money laundering, and theft of intellectual property). By unduly weakening the government's ability to combat corporate fraud, H.R. 3013 will, in the long run, harm the interests of shareholders, investors, and the public at large.

1. H.R. 3013 Unreasonably Restricts the Department's Fact-Finding to Uncover Fraud Schemes Within Companies That Have Offered to Cooperate With the Government.

H.R. 3013 imposes an unreasonable restriction on, and impediment to, government fact-finding by imposing a blanket prohibition on government requests for information. The creation of these restrictions is based on a fundamental misinterpretation of how the Department considers requesting waiver of privilege when a corporation is cooperating in the government's investigation. When the government begins an investigation, it needs to know what the *facts* are Contrary to the arguments made by proponents of this legislation, the Department does not seek information regarding an attorney's litigation strategy or legal tactics when requesting waiver of privilege. Indeed, an attorney's strategy, tactics, and legal advice regarding the government's investigation will rarely have a bearing on the outcome of any corporate fraud investigation unless the attorney is providing advice in furtherance of the fraud or to impede the government's investigation.

Waiver of privilege is <u>not</u> requested because the Department seeks to shift its investigatory burden onto companies. Rather, federal prosecutors have an independent obligation to investigate every case and, even if prosecutors are given the results of the corporation's internal investigation, they have to verify those facts. Waiver can streamline an investigation, but prosecutors cannot simply rely on waiver to prove their case.

Moreover, prosecutors do not request waiver in every case. It is sought on a limited basis from cooperating corporations. In fact, the McNulty Memorandum requires that prosecutors both initiate an investigation and show a legitimate need for potentially privileged materials before asking for permission to request a waiver.

In certain circumstances, where a prosecutor seeks approval from a senior Department official and establishes a legitimate need, it is appropriate to seek waiver. Waiver is sought when speed in a complex investigation is important because the statute of limitations may

expire, evidence may disappear, assets may dissipate, targets may flee, and victims may have to wait too long to obtain restitution. In these cases, replicating a lengthy and expensive investigation that has already been performed by a cooperating company would burden taxpayers and do significant harm to the interests of the victims of a corporate fraud.

Cooperation by a corporation is inherently different than cooperation by individuals. When a corporation approaches the government claiming that it wants to cooperate in an investigation, it makes different decisions to effectuate that cooperation than the individual defendant. With an individual, such as a drug trafficker who wants to cooperate with the government, the prosecutor requests an interview. The individual defendant then sits down with his own attorney, government agents, and typically a federal prosecutor, and explains his role in a drug trafficking organization, the players, how the drugs moved, the quantities of drugs, and the distribution scheme. Unlike an individual defendant, a corporate entity is an artificial construct that does not have personal knowledge of criminal violations. A corporation seeking to cooperate usually conducts fact gathering about the crime through its lawyers. The information that the lawyers gather is the functional equivalent of a person's memory, but since it was collected by lawyers, it is arguably protected by the attorney-client privilege or work product doctrine.

To obtain the truth regarding the misconduct, the government must ask the corporation what it knows. The corporation may then convey its knowledge through the production of reports, interviews, and key documents that explain the scheme. It provides this information *voluntarily*, as does every other criminal defendant who seeks to cooperate with the government. Occasionally, in order to provide facts about how a fraud occurred, when it occurred, and who was responsible, the corporation may waive attorney-client or work product protections by producing a report of its own internal investigation. On the other hand, where a corporation can provide facts without waiving privilege, *e.g.* by identifying documents or making employees available for interviews, waiver may not be necessary. A corporation may still receive a cooperation benefit by providing facts without waiving privilege.

By hindering government fact-finding in cases where there is a legitimate need for waiver, this legislation will substantially impede corporate fraud prosecutions and produce protracted litigation injurious to shareholders and the investing public. The bill will lengthen investigations when speed is critical to preserve assets and allow for restitution. Without waiver in these cases, the government will proceed by formal process, including grand jury subpoenas of witnesses, document subpoenas, and search warrants directed to the corporation. This is expensive and time-consuming for the government and not needed where the corporation has represented it wants to cooperate with the government's investigation. Moreover, by limiting the government's ability to detect fraud quickly, this legislation will be directly harmful to shareholders, pension holders, and the investing public.

The Department's requests for waivers of privilege from cooperating companies enhanced the ability of the government to obtain justice for the victims of corporate fraud. Waivers of privilege were critical: (1) to convict numerous culpable company executives, *United States v. Stuart Wolff* (disclosure of privileged documents led to convictions of eleven

former Homestore executives and employees in a revenue inflation scheme); (2) to prosecute corporate wrongdoers, *United States v. The University of Medicine and Dentistry of New Jersey* (disclosure of privileged documents resulted in deferred prosecution agreement and installation of corporate monitor with one of the largest public health institutions in the nation); (3) to freeze $80 million for victims of a Ponzi scheme before the defendant could move the money, *United States v. Martin Armstrong* (HSBC/Republic Securities waived privilege and disclosed forensic accounting analysis); (4) to investigate advice of counsel defenses, *United States v. Richard Anders, et al.* (Helvetia Pharmaceuticals waived privilege so that prosecutors could investigate the legitimacy of an advice of counsel defense raised by corporate executives who were being investigated for defrauding investors); (5) to expedite the government's investigation so that individual corporate executives were brought to justice within a shorter period of time, *United States v. Bernard Ebbers* (waiver of work product protection by WorldCom streamlined the government's investigation by many months); and (6) to expedite the government's investigation by providing it with sufficient information to convince it that further investigation was unwarranted.

Waiver benefits the cooperating company as well as the public. A lengthy investigation injects a degree of uncertainty that will, in some cases, have an adverse impact on a publicly-traded company's stock price. It is in the interest of the corporation's shareholders to resolve the uncertainty associated with an investigation quickly and effectively. Thus, a corporation has a powerful interest to disclose information to the government, but it typically makes that disclosure through its attorneys. Thus, the most efficient way to identify, investigate, and deter corporate wrongdoing is through discussions between prosecutors and defense attorneys, which will be largely curtailed through this legislation. While proponents of this legislation may argue that the company may make a voluntary disclosure of this information whenever it wishes, the practical effect of this legislation is to prohibit full and frank discussions between government attorneys and counsel for corporations under investigation. The legislation may cause government attorneys to hesitate in asking the most basic questions regarding whether materials sought are, in fact, privileged. This will severely impair the government's ability to seek the truth and uncover fraud schemes.

Fast action matters. With the most egregious of fraud schemes, waiver of privilege facilitates asset recovery. For instance, in the Southern District of New York, in *United States v. Martin Armstrong*, obtaining a waiver of privilege from the company HSBC/Republic Securities enabled the government to freeze $80 million before the defendant, who had a history of hiding assets, could move it. The case involved a billion dollar Ponzi scheme perpetrated by an American investment adviser on a host of major Japanese corporate victims. At the time of discovery, the government received a waiver of work product privilege for forensic accounting analysis tracing the flow of money associated with securities trades. The waiver enabled the government to follow the money quickly enough to freeze approximately $80 million within two weeks of the onset of the investigation. The government was able to secure an arrest warrant for Armstrong (based in part on the privileged work product information) the following week. Absent this waiver, it would likely have taken at least six weeks to conduct the same analysis. In the interim, Armstrong would have been able to flee and/or transfer abroad the $80 million in cash. In

fact, Armstrong would likely have done so because he was held in contempt, after his arrest, for secreting another $10 million in gold bullion.

2. H.R. 3013 Creates Two Sets of Rules and Elevates Corporate Rights Above Those of Other Defendants

The proposed legislation creates two sets of rules, one more favorable set of rules for corporations and their employees and another set of rules for everybody else. Acceptance of responsibility and cooperation have been considerations in sentencing individuals for hundreds of years and are vital components of effective law enforcement implemented by both the executive and judicial branches of Government. An individual who pleads guilty may reduce the sentence he would otherwise have received because he has demonstrated acceptance of responsibility. An individual who pleads guilty and also cooperates may reduce his sentence even further when the Government advises the court of his cooperation. In these instances the judicial system recognizes that rewarding guilty pleas and cooperation do not unconstitutionally coerce individuals to give up their constitutional rights to trial or their constitutional rights not to incriminate themselves. The appearance that the proposed legislation is favoring companies is especially striking given the lack of supporting data of systemic abuse offered by proponents of the bill, the small number of waivers actually sought, and the procedures implemented by the Department to make sure waivers are requested only when necessary.

The legislation also creates the appearance of favoring corporate privileges -- *not* a constitutional right -- over the constitutional rights of the individual. On a daily basis throughout this country, individuals who are not represented by counsel are asked by law enforcement officers – consistent with longstanding Supreme Court precedent – to waive their constitutional rights, such as the right to remain silent, the right to counsel, and the right not to have their homes searched without a court-authorized warrant. But unlike an individual defendant in the garden-variety criminal case who, without counsel present, may waive the privilege against self-incrimination and confess to police officers. It is our experience that a corporate defendant will waive its attorney-client privilege only after consulting with counsel, who often have specialized expertise in accounting, business, and corporate governance. It is difficult to understand how the more sophisticated corporate defendant could claim that its will is overborne when the government asks it to waive a non-constitutional privilege, when unsophisticated, individual defendants waive their right to counsel and right against self incrimination to cooperate with police officers every day.

As a matter of fairness, a corporation – just like any individual defendant – should be rewarded for a voluntary and truthful disclosure. H.R. 3013 conflicts with this fundamental principle by providing corporate defendants with greater protections than those accorded to individual defendants.

3. H.R. 3013 Would Eliminate Any Incentive for Unsolicited And Voluntary Disclosures of Potentially-Protected Information.

Section 3 of the legislation creates a new section 3014 in Chapter 201 of title 18, United State Code. The legislation specifically prohibits government attorneys from "conditioning treatment" on an organization's disclosure of privileged materials or from the "use [of that disclosure] as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government." The bill makes no distinction in "conditioning treatment" between disclosures that are "voluntary and unsolicited" and those that are requested by the government. It prohibits the government from using disclosure of privileged materials as a factor in determining cooperation. Thus, the legislation creates a substantial disincentive for a company to make a voluntary disclosure because it cannot expect more favorable treatment from the government in charging.

The result is that the company that turns over privileged documents, including its internal investigation, thereby saving the government months or years of investigation, must be treated identically to a company that refuses to produce arguably privileged materials. Under the provisions of this bill, a corporation would have a substantially smaller incentive to disclose information voluntarily to the government. A legitimate avenue of rewarding cooperation, and furthering the government's investigation of corporate misconduct, would now be foreclosed.

In certain cases, voluntary disclosure can be indispensable to the government's investigation. For example, obtaining records from foreign countries in a multi-national investigation is often extremely difficult, if not impossible, without the cooperation of the company. Numerous prosecutions under the Foreign Corrupt Practices Act (FCPA) have resulted from voluntary disclosure of wrongdoing (kickbacks, bribery) by corporations. Due to the expansive scope of such wrongdoing and the international nature of these corporations, it is critical that the Department continue to receive such information, which may be protected by attorney-client privilege or work product doctrine. Voluntary disclosure becomes even more important in light of the difficulty in uncovering these crimes within the applicable statute of limitations. The record demonstrates that the Department has been consistent and fair in its efforts to give a benefit to corporations that voluntarily disclose this wrongdoing.

This bill would not only undermine the Department's recent, increased efforts to encourage corporations to cooperate in FCPA investigations, it would also harm other government programs. For example, several government agencies, departments and divisions have explicit programs in place regarding voluntary disclosure by corporations. The National Reconnaissance Office (NRO) includes voluntary disclosure provisions with its contractors because the government needs the private sector to be a partner in the detection and prevention of waste, fraud, and abuse. While it is in the best interest of the United States when contractors ferret out and report misconduct (often in very sensitive programs), the contractor also benefits from this program because it permits the contractor to remove rogue employees before they commit major fraud, avoid civil and criminal liability, and maintain its reputation for good business practices within the community. These and other programs would be directly impacted by this legislation, which prohibits any treatment to be conditioned upon disclosure of privileged information or using a corporation's disclosure as a factor in assessing its cooperation.

Voluntary disclosures and waivers of privilege have had an extremely positive impact on the ability of the government to obtain justice for corporate fraud victims in a fair and efficient manner. An internal Departmental survey of recent cases shows that waiver has expedited prosecution, avoided the necessity for extensive pre-trial litigation, resulted in the production of critical evidence that undermined the credibility of the targets of an investigation, proved a target's defenses were not viable, and, in certain cases, allowed the government to conclude an investigation quickly without bringing charges. Voluntary disclosure and waiver allow the government to act quickly and effectively -- a goal that should be encouraged, not thwarted.

During negotiations, the parties often have preliminary discussions about whether or not documents are privileged. In instances where, despite the lack of incentive, a corporation may still be willing to make a voluntary disclosure, some prosecutors might feel restrained from discussing the privilege status of documents with corporations that are under investigation for fear that a subsequent offer to waive privilege would not be construed by a court to be "voluntary and unsolicited." Moreover, if a corporation is still willing to make a voluntary disclosure, new subsection (d) may have unintended consequences in practice. New subsection (d) states "Nothing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization." Although the Department of Justice would not advocate such a narrow interpretation, others may argue that this provision, because it expressly refers only to the disclosure of internal investigatory materials, should be construed to limit the ability of a corporation from making – and a government agent or attorney from accepting – a voluntary disclosure of anything other than internal investigatory materials. The corporation may not have done an internal investigation but may have other types of privileged documents that tell the story of how the fraud occurred. Or attorney-client communications may exist that establish that the corporation relied upon advice of counsel at the time the misconduct occurred. These documents would be very relevant to determining whether a corporation and its employees are culpable for the fraud.

4. H.R. 3013 Rests Upon a Deeply Flawed Understanding of the Department of Justice's Corporate Charging Policy, the McNulty Memorandum.

The proposed legislation misunderstands why the Department's corporate charging policy, most recently renamed the "McNulty Memorandum," was first issued in 1999. It is well settled that a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents when those acts: (i) were within the scope of the employee's or agent's duties and (ii) were intended, at least in part, to benefit the corporation. This doctrine of *respondeat superior* exists to hold corporations accountable for their negligent, reckless, and intentional actions that inflict harm on individuals and society. The legal standard does not take into account any other factors in making a charging decision, including any potential collateral consequences to the corporation. Consequently, the McNulty Memorandum provides guidance to a prosecutor on how to exercise discretion in corporate

charging decisions where there is a legal basis supporting the criminal charge against the corporation, but where other factors may weight against that action.

The Memorandum guides 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. The charging analysis in the McNulty Memorandum presents no new concepts; the analysis memorializes what common sense leads a prosecutor to consider and what prosecutors have been considering for decades.

With respect to one of the nine factors listed in the McNulty Memorandum – cooperation – one factor or element a prosecutor weighs 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 simply one sub-factor or element that might come into play in evaluating one of the nine factors in the McNulty analysis.

The guidance specifically states that waiver is not a prerequisite to a finding of cooperation. 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. Put simply, no business entity is indicted for failing to cooperate; rather, they are indicted for criminal conduct. Cooperation is simply one way that corporations, just like individuals, may merit consideration short of full prosecution of criminal charges, *e.g.* a deferred prosecution agreement, or may merit sentencing consideration. Cooperation is an essential tool for prosecutors in all types of prosecutions, whether they are prosecutions of mob activities, drug trafficking organizations, or economic enterprises. In certain cases, it may be next to impossible to prove criminal violations without the testimony of insiders and other cooperating witnesses.

The notion that a prosecutor may extend leniency in charging or punishment in exchange for cooperation is a concept fundamental to our criminal justice system. *See United States* v. *Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (*en banc*); *see also* United States Sentencing Guidelines §§ 5K1, 8C2.5; 18 U.S.C. § 3553(e). It did not originate in the Department's corporate charging policy. In fact, Congress has long recognized that cooperation should be rewarded in its enactment of statutes authorizing immunity for witnesses and allowing the court to impose a sentence below the mandatory minimum to reflect a defendant's substantial assistance in an investigation or prosecution. *See* 18 U.S.C. § 6003 and 18 U.S.C. § 3553(e). Nor is the prospect of giving a corporation a charging benefit for cooperation in any sense improper or unconstitutionally coercive. The fact that cooperation is only one factor in the analysis is borne out by the fact that many corporations who have chosen not to disclose privileged information have not been charged and some that have made such disclosures have been charged. For decades before any corporate charging policy was issued, companies volunteered and prosecutors sought waivers. Then, as now, waivers were not prerequisites for a charging benefit.

5. The Specific Provisions of H.R. 3013 Have Broad, Unintended and Detrimental Consequences That Will Stymie Federal Efforts to Detect and Deter Corporate Criminal Misconduct.

H.R. 3013 goes far beyond the Department's corporate charging policy which applies only to business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.[1] And, this bill extends well beyond an attempt to protect a corporation's attorney-client privilege or work product protection by extending its protections to: (1) mere requests for information involving the disclosure of privileged or protected facts; and (2) organizations and "person[s] affiliated with [those] organization[s]," potentially shielding specific categories of individuals, namely corporate executives, for whom there should be no basis under the law to receive special treatment.

In addition to the extraordinarily broad reach of this legislation, the following subsections highlight other major flaws:

a. H.R. 3013's Legislative Findings Are Not Based in Fact.

The "Finding and Purpose" section of the legislation states that the Department of Justice and other agencies have "increasingly employed tactics that undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment and other sanctions" and that "waiver demands and other tactics of Government agencies are encroaching on the constitutional rights and other legal protections of employees." There are no empirical or factual bases to make these findings.

Proponents of this legislation have offered no evidence other than the results of a 2006 survey of anonymous respondents who asserted that a "culture of waiver" has evolved and that prosecutors are routinely coercing waiver.[2] In fact, when revising the Department's corporate charging policies, the Department repeatedly requested specific instances of

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[1] H.R. 3013 does not provide a definition of "organization." Because an "organization" is simply an association or group of individuals, this legislation could apply to any type of group or association, including blue chip companies, fly-by-night corporate entities operating from a post office box, violent street gangs, drug trafficking organizations, or fringe groups espousing racial, religious, or ethnic bigotry and violence.

Indeed, the legislation suffers from numerous definitional deficiencies: it fails to define what is a "federal investigation" and who is "an agent or attorney of the United States." Without definition, these concepts could be quite broad and include non-law enforcement individuals.

[2] See http://www.acca.com/Surveys/attnyclient2.pdf.

prosecutorial abuse from the associations and groups making these allegations. No such information has been forthcoming. In contrast, the information that the Department collected from United States Attorneys' Offices in the past nine months demonstrates that these findings are not based in fact. The new approval requirements, which are described below, and the empirical evidence collected from December 2006 forward establish that no widespread or abusive practice of requesting waiver exists.

b. Because H.R. 3013 Extends to Mere Requests for Information, It Will Stifle Discussions Between Corporate Entities and Federal Investigators.

HR 3013 prohibits, in any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States from requesting information that is covered by an individual or corporation's attorney client or work product privilege. This broad prohibition would have an immediate and certain chilling effect on the ability of Federal agents or attorneys to request factual and other information that is *not* privileged.

The practical impact of this broad prohibition ignores fundamental, practical aspects of corporate wrongdoing investigations and the ordinary exchange of information between corporations and federal agents and attorneys.

To illustrate, imagine a publicly held corporation has identified a fraud within the corporation committed by the Chief Financial Officer (CFO). The public company has obligations to the Securities and Exchange Commission (SEC) and to the investing public to disclose that there is a problem with its financial statements. If this bill is passed, the following simple questions by the SEC or the Department of Justice could be stymied if the corporation retained counsel to look into the matter: How did you learn of the fraud? What remedial actions did you take? Can you disclose what happened? What were the processes put in place to prevent this? What is the breadth of the fraud? What did the officers know about the fraud? Whenever questions must be answered with information obtained by counsel in the internal investigation, i.*e.*, protected by attorney-client privilege or work product, the legislation would prohibit asking these questions.

Subsection (c) of the bill entitled "Inapplicability" does not remedy this problem. That section provides that "Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine." To invoke this provision, a federal prosecutor would have to hold a "reasonable belief" that the information is not privileged. In cases where a prosecutor can establish that the legal advice was communicated in furtherance of a crime or fraud ("the crime-fraud exception"), the prosecutor will be entitled to ask for that information. However, in most investigations, the prosecutor will be hesitant to take advantage of this section because of the potential for adverse rulings from a court if the matter is later litigated and the court sets an unexpectedly high threshold for finding a "reasonable belief" that the materials are not entitled to protection. Certainly, when the attorney is providing information directly from the internal investigation that he or she

conducted, a federal prosecutor would be reluctant to argue that attorney-client and work product productions are not implicated. As a result, a prosecutor investigating corporate fraud may not be able to ask the most basic questions of corporate counsel.

Basic fact-finding with corporate counsel routinely assists the government in determining whether to open an investigation. Given the broad prohibitions of H.R. 3013, however, prosecutors will hesitate to engage in such fact-finding because of the litigation risks that could occur in asking for that information. The potential inability to broach vital topics with counsel prevents the United States from making any assessment of whether opposing counsel's assertion of privilege is even valid. Furthermore, the prohibition on seeking privileged information lengthens the government's investigations, resulting in delayed justice for victims of corporate fraud. This result would not occur with the McNulty Memorandum because prosecutors are able to make the request, as long as they seek approval from Department officials and establish a legitimate need for the information before the request is made.

c. The Bill Applies to Individuals, Who Often Have Different Interests in Waiver Than the Corporation, and May Adversely Impact the Government's Treatment and Protection of Whistleblowers and Cooperators.

This bill states that the government cannot "condition treatment" on the disclosure of protected information of a "person affiliated with that organization," which arguably extends the prohibition regarding requests for information to individual employees, agents or affiliates of the organization and prohibits such individuals from receiving any benefit if they elect to waive their personal attorney client privilege (as opposed to the corporation's privilege). In the context of dealing with individuals who have retained counsel, such as whistleblowers or individuals who may be involved in criminal conduct, the legislation prohibits the United States from conferring any benefit on those individuals when they disclose wrongdoing inside the organization and waive their individual privilege. However, in every other criminal prosecution, the United States is free to confer, and usually does, a benefit upon individuals who waive certain rights, including a waiver of the attorney client privilege.

Critics claim that the Department's policies pit the individual's constitutional rights against the corporation's interests. The tension between a corporation's interests and an individual's interests exists, however, regardless of any governmental request for waiver of privilege. Due to the artificial nature of corporations, the discovery of wrongdoing by individual employees or officers will necessarily pit the interests of the corporation against the interests of that employee or officer. While a corporation has a duty to its shareholders to detect and disclose wrongdoing, a culpable employee often wants the corporation to maintain confidentiality about his misconduct. Because a corporation's attorney-client privilege does not extend to the individual employee, the employee cannot rely upon the corporation's privilege to maintain that confidentiality. Indeed, employees routinely receive *Upjohn* warnings by corporate counsel to that effect in internal investigations to ensure that there is no misunderstanding. This legislation, however, now alters that playing field. If the government can give no charging benefit, companies will be less likely to report wrongdoing,

effectively allowing individual corporate wrongdoers to shield their misconduct and elevating the interests of a culpable CEO over that of the shareholder.

d. The Specific Provisions of H.R. 3013 Extend Far Beyond Protecting Information that May Be Protected by the Attorney-Client Privilege.

Advancement of Attorneys' Fees

Section 3 of the legislation is unnecessary. The Department's guidance already instructs prosecutors that they generally cannot consider a corporation's advancement of attorneys' fees to employees when making a decision whether to charge the corporation. A rare exception is created for those extraordinary instances where the advancement of fees, combined with other significant facts, shows that such a step was intended to impede the government's investigation. In those limited circumstances, fee advancement may be considered only if authorized by the Deputy Attorney General. The Deputy has not authorized consideration of fee advancement in any cases. When seeking this approval, federal prosecutors must follow the same authorization process established for seeking approval to request waiver of attorney-client communications from the Deputy Attorney General. Accordingly, it will be the rare occasion when prosecutors will consider the advancement of attorneys' fees, and then only when the advancement of fees, considered along with other factors, is specifically impeding a government investigation, *e.g.*, a corporation paying fees to buy an employee's silence.

Joint Defense, Information Sharing or Common Interest Agreements

The extension of section 3 of the legislation to joint defense, information sharing, and common interest agreements is unnecessary in light of the Department's charging guidance. This guidance allows prosecutors to consider the existence of a joint defense agreement and information-sharing in making a determination as to whether the company is cooperating. Joint or common defense agreements are used when litigants have interests in common in a matter or common goals, and where the communication and sharing of privileged information are part of an effort to set up a common strategy. The agreements themselves are not *per se* considered against companies. They are only considered when prosecutors are attempting to determine when a company is actually cooperating <u>and</u> when the actual sharing of information was intended or did, in fact, taint witnesses or obstruct the government's investigation.

Failure to Sanction or Terminate Culpable Employees

The Department does not penalize a corporation for an employee's exercise of a constitutional right, including invocation of the Fifth Amendment privilege in response to a government's request for an interview. H.R. 3013's provision purporting to make this point is confusing, however, and appears to conflates the corporation's internal investigation with the government's investigation. In so doing, the provision may embolden employees from providing critical information about corporate wrongdoing to their employers.

The corporation's internal investigation is separate and distinct from the government's investigation. The government does not ask or expect the corporation to act as an agent of the government in conducting the government's investigation. When a corporation is conducting its own internal investigation, an employee can decline to participate if requested to provide information, but, if that happens, the corporation can make the choice to sanction that employee. For example, if the Chief Financial Officer (CFO) of a corporation is implicated in an internal investigation involving falsely inflated revenues, the corporation is not only entitled to question him, it may be obligated to question him about what occurred. If the CFO declines to answer, the corporation can properly consider sanctioning or terminating him. That decision affects the private relationship between an employer and employee within the corporation, not the government, and it is governed by internal corporate policies and practice.

Separate and apart from whether the CFO cooperates in the internal investigation or exercises his constitutional rights in a government investigation, the corporation may have developed evidence in its own investigation about wrongdoing by the CFO. If the corporation fails to take remedial action against corporate wrongdoers, which failure would most probably be in conflict with its own internal policies, it is appropriate for the government to consider that fact in deciding whether the corporation should be charged. The guidance does not state in any way that the prosecutor will consider the fact that an employee is exercising a constitutional right as a factor against the corporation. It just allows a prosecutor to consider whether a corporation is properly policing itself. If the Department is to encourage good corporate governance, the way in which a corporation disciplines its wrongdoers must be considered.

6. H.R. 3013 Erodes Core Prosecutorial Discretion and Usurps Executive Authority.

H.R. 3013 improperly infringes on the broad discretion of the Attorney General and the United States Attorneys to enforce our Nation's criminal laws. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). Indeed, the stated purpose of the legislation is "to place on each agency clear and practical limits." The bill purports to dictate what information Executive Branch officials may consider in conducting enforcement investigations and making charging decisions.

Article II of the Constitution, however, places the power to enforce the laws solely in the Executive Branch. The decision to charge a particular offense is a core Executive function and legislative attempts to constrain prosecutorial discretion present a separation of powers concern. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (prosecutorial decision to indict "has long been regarded as the special province of the Executive Branch"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has the exclusive authority and absolute discretion to decide whether to prosecute a case."); *see also Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381-82 (2d Cir.1973); *Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841

(1967). H.R. 3013's infringement on the powers of the Executive Branch provide additional justification against legislative action.

Moreover, any defendant who believes that the government has committed misconduct has a remedy: judicial review. If a defendant has a good faith basis to argue that a waiver of attorney-client or work product protections was improperly obtained, a district or appeals court has always been the avenue for resolution of that dispute. A determination as to whether a constitutional violation occurred is typically made in individual cases in a court of law with an opportunity for both parties to present evidence. It should not by made wholesale, through legislative action, based on speculative and unsupported findings about the Department's charging practices.

7. The Approval Requirements Established in the McNulty Memorandum Make Legislative Action Unnecessary.

The McNulty Memorandum addresses the stated goals of H.R. 3013. As the Department of Justice has long recognized and the McNulty Memorandum affirms, the attorney-client privilege serves a crucial function in our legal system and is one of the oldest and most fundamental privileges under our laws. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). "[I]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The Department directs its prosecutors to recognize and respect the importance of the privilege.

There has been no empirical evidence to suggest that prosecutors were routinely coercing privilege waivers. Even so, threshold requirements and approvals now contained in the McNulty Memorandum prohibit federal prosecutors from requesting waivers of privilege in corporate fraud investigations absent a demonstrated legitimate need. The Memorandum adopts a tiered approach as to when prosecutors may request that a corporation provide protected materials. When prosecutors wish to seek privileged attorney-client communications, legal advice or non-fact attorney work product – those materials generally considered to be the most sensitive of all protected materials – the United States Attorney must now obtain written approval directly from the second highest official in the Department – the Deputy Attorney General – before making the request.

The request for approval must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. To establish a legitimate need for the information, federal prosecutors must address:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

This test places a substantial limitation on the ability of federal prosecutors to seek waiver. The guidance cautions prosecutors that attorney-client communications should be sought only in rare circumstances. Because prosecutors are required to establish a legitimate need before seeking the information, they are expected take preliminary investigative steps to determine whether a corporation and its employees have engaged in criminal activity before seeking such materials.

The Memorandum also provides new requirements when federal prosecutors are requesting a waiver of privilege to receive materials that disclose the facts a company has uncovered in a company's internal investigation of corporate misconduct. Before making a request for such materials, federal prosecutors must seek the approval of their United States Attorney, who must consult with the Assistant Attorney General of the Criminal Division before approving such a request. Examples of factual information of this type might include copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct.

In addition to the new approval requirements for making requests for materials, the new memorandum tightens a prosecutor's ability to consider the corporation's response to the request when the prosecutor makes a final decision whether to bring charges or not. A corporation's willingness to provide protected materials has traditionally been one aspect of how prosecutors assess whether a corporation has cooperated in the government's investigation. Under the new guidance, for the most sensitive information, which requires the Deputy Attorney General's approval before being requested, if a corporation chooses not to provide attorney-client communications after the government makes the request, prosecutors are directed not to consider that decision as a factor against the corporation in the charging decision. Prosecutors, however, may consider a corporation's decision to refuse to provide factual information. In addition, prosecutors may always consider favorably a corporation's decision to provide protected materials, whether at the government's request or if provided voluntarily without a government request.

Finally, the new memorandum establishes various internal Department record-keeping requirements to document occasions when protected materials are sought. The results of this record-keeping do not support the finding that privilege waiver requests are widespread or abusive. Since December 2006, the Criminal Division has received ten requests for factual information under Category I of the McNulty Memorandum, only five of which requested privileged documents actually covered by the Memorandum. Four of those five requests were approved in some form. The Office of the Deputy Attorney General has not processed any requests for attorney-client communications under Category II of the Memorandum. These statistics – from 94 United States Attorney's Offices in nine months – must be contrasted with the unidentified pervasive abuses alleged in support of this legislation. The facts simply do not support a finding of widespread coercion.

The McNulty Memorandum strikes the proper balance between the protection of the attorney-client privilege and the legitimate need of law enforcement to prosecute corporate misconduct by providing a clear and cogent process for determining when and how prosecutors should seek such waivers. It should be given time to work. H.R. 3013 is a hasty and unnecessary legislative initiative which, because of its breadth, will produce unintended consequences and prevent the Department from effectively enforcing laws against corporate crime.

Conclusion

When a corporation decides to cooperate, it should be required to provide information to the government about how a crime was committed, who did it, and when it happened. Sometimes disclosing that information may implicate work product or attorney client privilege protections, but providing the facts underlying corporate misconduct is not too much to ask from a corporation seeking a charging benefit. Moreover, it is entirely reasonable for the government to reward a corporation for these disclosures. If through this legislation, the Department loses the ability to ask for this information, privileged or not, culpable corporations and their officers walk away the victors. It is the victims of these crimes, the pension holders at Enron and the shareholders at WorldCom, who will be the ultimate losers.

For these reasons, the Department strongly opposes H.R. 3013. Thank you for the opportunity to present the Department's views on this legislation.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Steny Hoyer
The Honorable John Boehner
The Honorable Roy Blunt
The Honorable John Conyers
The Honorable Lamar Smith