Testimony of

Mr. George J. Terwilliger III

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Mr. Chairman, Senator Grassley, members of the Subcommittee. I was a federal prosecutor for 15 years. Today, I am in the private practice of law at an international firm, regularly representing corporations and other institutions involved in government investigations, enforcement proceedings and, sometimes, prosecutions. While today I have the privilege of helping clients understand and address business enforcement issues, I also cherished my role as an Assistant U.S. Attorney, as a United States Attorney and finally as Deputy Attorney General, the number two official at the Department of Justice. I vigorously prosecuted white-collar criminals, including leading the team that secured the guilty plea and record forfeiture in the BCCI case. While U.S. Attorney in Vermont I tried a case against two local bank presidents, one very popular. They abused positions of trust and went to jail. I accepted your invitation to be here today because I believe it essential that the loss of faith in business be remedied, but I fear that we are in danger of overreacting in response.

A crisis is emerging in connection with one of the most fundamental prerequisites to our economic well-being: investor confidence in the capital markets. Extensive securities laws, regulations and a well-respected government agency all are dedicated to securing investor confidence, and for good reason. Without such confidence, our economic engine will be starved for fuel. Because the matter of confidence in financial reporting is so fundamental and sensitive, steps taken to address it should be carefully considered and measured. In considering new laws, procedures and increased penalties, we should seek, first, to do no harm. Also, with all due respect for the value of public discussion, I do not think it helpful for the discourse to generally vilify corporations and their leadership because some of their number have not observed sound financial and legal compliance practices. This may apply to more companies than any of us would wish, but we should bear in mind that they remain a minority whose impact can be dangerously overblown. Most business leaders are honest, law abiding and faithful to their duties to secure the interests of their stockholders. Many are aggressive, and rightly so. A few are crooks. Now, however, the many bear the burdens created by those few.

Financial accounting and reporting is not always an exact science. Experts can and do disagree about how items should be treated. These disagreements and uncertainties, though, are different than the intentional exploitation of fuzzy lines to perpetrate a fraud. In the context of financial reporting, a fraud means that investors and regulators are intentionally deceived about a company's financial performance, not simply that experts disagree about how that performance should be reported. Truly corrupt business practices deserve sanctions. But I believe that we need to be very careful about whom, and more importantly what, we sanction. Corporations and other business entities provide the jobs that give Americans an unparalleled standard of living and that fuel the crucial consumer sector of our economy.

Individuals who engage in intentionally corrupt financial practices or reporting betray their duty to the entity that employs them, their responsibilities to shareholders and their obligations under the law. Unlike these real persons, corporations and other business entities can neither think nor act for themselves. Thus, while individuals can and do form the corrupt intent that defines

criminal behavior, to ascribe criminal intent to a corporation is a judicially created legal fiction endorsed by the Supreme Court in 1909. Even though legally permissible, sanctioning a corporation for a crime may be less effective than some alternatives in influencing positive corporate behavior.

As to defining new crimes or providing greater sanctions, I would simply observe that just four offenses, the crimes of False Statement to a government agency (18 U.S.C. 1001), Conspiracy to Defraud the United States (18 U.S.C. 371), Fraud by Mail and Wire (18 U.S.C. 1341, 1343) and Money Laundering (18 U.S.C. 1956) provide by themselves ample tools with which prosecutors can address commercial crime. Under the Sentencing Guidelines, the penalties for these offenses can be quite severe where the economic impact of the criminal activity is substantial. I really do not believe that either new crimes or increased penalties will solve our problems. In fact, in the real world, excessive exposure to draconian sanctions in economic crime cases has the potential to discourage meaningful corporate critical self-examination, as well as disclosure, cooperation and guilty pleas by individuals and companies.

As initiatives are considered, reviewing relevant and fundamental precepts of our constitutional system can provide invaluable guidance. It is, for example, helpful to recall that a core function of the federal establishment is to promote and secure the benefits of commerce to the people. In harmony with this purpose, for over two hundred years the federal criminal law applicable to commercial activity was aimed at protecting the means and instrumentalities of commerce. These instrumentalities evolved over time and the law evolved with them. Federal criminal law has traditionally protected the means of commerce, such as the mails, wires and today, the Internet, and the instrumentalities of commerce, such as financial institutions and transportation.

Capital and credit markets are obviously key means and instrumentalities of commerce and protecting them from corrupt practices is consistent with this core federal role. The question is how best to do that. It seems to me that the answer is not to reflexively create new offenses or impose greater sanctions. Rather, it may be more efficacious to seek a balance, including incentives for good corporate practices, correction and reform of questionable practices and effective sanctions for truly corrupt practices.

There are alternatives to corporate criminal prosecutions that can help to restore and maintain confidence in our companies and our financial systems.

First, corporations themselves need to do more to promote confidence in their performance and their financial reporting. Steps include more active internal oversight, including through board audit committees. Internal auditors and audit committees can be highly effective inside watchdogs that spot issues or concerns and see to it that they are resolved. It is better to have financial reporting that gets it right the first time. Likewise, corporate legal officers and auditors should be not merely empowered, but encouraged and provided the resources, to proactively investigate internal malfeasance. This is not only good public policy, but also has significant value in protecting a corporation from the considerable risks attendant to unaddressed and ongoing internal wrongdoing.

The government can do much to encourage critical self-examination by corporations and other business entities. Real incentives, rather than just rhetorical ones, should attach to voluntary correction and disclosure of wrongdoing. Most attorneys advising companies today are forced to conclude that the benefits of such disclosures are insufficient to outweigh the risks attendant to them. For example, even a limited waiver of attorney client privilege requested by prosecutors can result in a complete loss of privilege in related civil proceedings. Congress could consider a statute making limited waiver agreements enforceable against third parties. As a matter of

prosecutorial policy, business entities that make timely disclosure of wrongdoing might enjoy a presumption against criminal prosecution.

In regard to financial accounting and reporting, business, the accounting profession and government might work together to identify "best practices" and companies could be recognized and rewarded for using them. Such a program has the potential to identify companies that utilize sound and reliable financial reporting practices, in contrast to only singling out those who do otherwise.

There are also alternative sanctions for individuals that seem to me worth considering. For example, expanding the availability of discretionary debarment of individuals from serving in positions of trust, including high level corporate responsibility, may both serve as a powerful deterrent to individual wrongdoing and an assurance to investors and regulators that those who have abused a position of trust will be incapacitated from doing so again. Taking the profit out of white-collar offenses by disgorgement of all ill-gotten gains is also a worthwhile goal. Measures such as these can change the economic calculus for those tempted by opportunities for fraud or other conduct inconsistent with probity in business affairs.

I do not advocate going lightly on real cheats and crooks. A dishonest market is not a free market. But we also must work to discriminate between conduct that merits the harshest sanctions and that which can be addressed more effectively through alternate means. Because facilitating commerce is a core federal responsibility, we should police the marketplace judiciously, utilizing good judgment and discretion in establishing and assessing sanctions for commercial misconduct.

Thank you.

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George Terwilliger is a partner in the Washington, D.C. office of White & Case LLP, an international law firm. Mr. Terwilliger primarily represents institutional clients in dealings with the United States government. These include government investigations and enforcement proceedings, as well as trial and appellate litigation. He is a veteran litigator with over fifty jury trials and many appearances and arguments in appellate cases.

During fifteen years of public service, Mr. Terwilliger was the Deputy Attorney General of the United States (1991-92), the second ranking official in the Department of Justice. He also served as United States Attorney in Vermont (1986-91) and as Assistant United States Attorney in Washington, D.C. and Vermont (1978-86).

In private practice, Mr. Terwilliger has represented many international and other large companies facing government inquiries and in other public policy matters. He has also represented prominent individuals, including public officials and media personalities. He was a leader on the legal team that represented President Bush and Vice President Cheney in the Florida recount of the 2000 Presidential election.