Department of Justice

STATEMENT OF

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BEFORE THE

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UNITED STATES SENATE

FOR A HEARING TITLED

THE ADEQUACY OF CRIMINAL INTENT STANDARDS IN FEDERAL PROSECUTIONS

PRESENTED

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Statement of Assistant Attorney General Leslie R. Caldwell
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Chairman Grassley, Ranking Member Leahy, and Members of the Committee – thank you for inviting the Department of Justice to testify at this hearing on potential reforms to the federal criminal code concerning *mens rea* requirements. This issue and today's hearing are extremely important to the Department and our prosecutors. If enacted, a default *mens rea* will cause extreme and very harmful disruptions to essential federal criminal law enforcement operations.

The Department previously testified before this Committee in October on the urgent need to recalibrate some of our sentencing laws. This Committee has reported out the Sentencing Reform and Corrections Act of 2015 – a bipartisan bill that would help ensure that the Department has the capabilities it needs to protect society from the most serious criminals, while also ensuring that our criminal justice system operates in a manner that is fair, effective, and worthy of the public's trust. The Department supports this sentencing reform bill and strongly encourages this Congress to pass it. The Sentencing Reform and Corrections Act would represent an important step toward making our sentencing laws more carefully tailored, so that we can better distinguish between those who pose a more serious threat to our society and those who do not. And it would do so in a way that would enhance our ability to keep the American people safe. The bill does not reduce statutory maximums. Drug offenders still will receive significant sentences. Moreover, kingpins, drug organization leaders, and violent criminals, as well as those who possess a firearm or dangerous weapon, will still be eligible to receive enhanced penalties.

In contrast to the carefully tailored approach of the Sentencing Reform and Corrections Act, the establishment of a default "state of mind," or *mens rea*, standard for all existing federal criminal laws would unleash sweeping changes across the *entire* United States Code. It would create massive uncertainty in the law, undermine the enforcement of a multitude of criminal laws, and allow defendants charged with serious crimes – including terrorism, violent crime, sexual offenses, immigration violations, and corporate fraud – to embroil federal courts in extensive litigation and potentially escape liability for egregious and very harmful conduct. The Department strongly urges this Committee to reject such a radical change to our criminal law.

Instead, the Department is committed to working with this Committee to bring greater clarity, consistency, and fairness to specific federal statutes. As a first step, we support the more targeted approach embodied in Section 109(b)(c) of the Sentencing Reform and Corrections Act of 2015, which was reported out of this Committee on a bipartisan basis last year. That bill would require an inventory of federal criminal laws and the identification of laws that lack an explicit *mens rea* requirement. Reviewing the results of this report will better enable everyone to understand the universe of statutes, offenses, and elements that are at issue. It will allow those who believe there are potential problems with specific statutes to address those deficiencies after a careful examination of each statute's purpose, including the particular conduct it penalizes, the harm it is meant to prevent, and the deterrence goals it is intended to achieve.

There is no need for a sweeping, one-size-fits-all, default *mens rea*. The federal criminal law includes a variety of statutory provisions and judicial decisions, and unlike the Model Penal Code, the United States Code does not contain a limited number of generally applicable definitions of *mens rea* requirements. Crimes consist of elements, and those elements should clearly define the prohibited conduct. The vast majority of federal criminal statutes already require the government to prove beyond a reasonable doubt some level of *mens rea* for at least one or more elements of the crime – whether expressly, or as a matter of binding judicial precedent.

Indeed, the Supreme Court has made clear that when the text of a criminal statute does not specify a required mental state on its face, courts will interpret such a statute by reference to "the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). As the Court reminded us just a few months ago, "[a]lthough there are exceptions," the "general rule" is that to be convicted of a criminal offense, a person must have acted with a guilty mind regardless of whether the statute explicitly requires such a state of mind. *Id.* This does not mean that a defendant must know that his conduct is illegal – because it is also a basic criminal law principle that "ignorance of the law is no excuse" – but rather that the defendant must "know the facts that make his conduct fit the definition of the offense." *Id*. (quotation omitted). In other words, courts will interpret a statute that may lack an explicit *mens rea* requirement to include "that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 2010 (quotation omitted). In this way judicial decisions have ensured the necessary limits to safeguard individual liberty.

The legislative proposals in both the House and Senate would apply a default *mens rea* standard to a wide array of existing federal criminal laws, impacting a broad swath of statutes that do not contain an express *mens rea* for each and every element. It is entirely unclear whether a default *mens rea* would apply to all elements of a criminal offense or only to certain (as-yet unspecified) elements. In either case, the consequences for criminal prosecutions could be disastrous. These proposals would create a number of serious unintended consequences.

First, they would make it much more difficult, if not impossible in many circumstances, to enforce critical criminal statutes that ensure public safety. One example is 18 U.S.C. § 924(c), which makes it a federal crime for "any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm." This statute is used to prosecute some of the most violent and dangerous federal offenders, and it does not have an explicit *mens rea* requirement. Application of a default *mens rea* standard could mean that the government would have to prove not only that a defendant knowingly used a gun in a crime, but also that the defendant knew that the underlying crime could be prosecuted federally. This requirement would make the statute unusable in many circumstances. Instead of protecting the innocent, it would create a loophole that would shield the plainly guilty from federal prosecution.

There are many other federal statutes for which such a default *mens rea* requirement would frustrate law enforcement, including –

- National Security: 18 U.S.C. § 2332 criminalizes murder of U.S. nationals outside of the United States. If default mens rea legislation is enacted, prosecutors would be required to prove that the perpetrator knew that the victim was a national of the United States, which could be extremely difficult to establish in some cases. Likewise, Section 2332a criminalizes the use of weapons of mass destruction against a U.S. national outside the United States, and Section 2332f criminalizes bombings of places of public use and state or government facilities. It could significantly hinder prosecutions of these offenses to add a new requirement of proof in order to establish the defendant's knowledge about the identity of his or her victim or the type of place he or she targeted.

- Assaulting and Killing Federal Officers: 18 U.S.C. § 111 bans assaulting, resisting, or impeding federal officers or employees, and § 1114 prohibits killing federal officers engaged in their duties. There is no explicit *mens rea* requirement in either statute. If a default *mens rea* standard were applied, prosecutors would have to prove that a defendant knew that the officer he or she assaulted, resisted, impeded, or killed was a *federal* officer.

- Sexual Exploitation of Children and Production of Child Pornography: Every federal appellate court to have considered this issue has held that for prosecutions under 18 U.S.C § 2251(a), the statute criminalizing the sexual exploitation of children and the production of child pornography, the defendant's knowledge of the age of the minor is not a required element of the offense. *See, e.g.*, *United States v. Fletcher*, 634 F.3d 395, 400–01 (7th Cir. 2011). Likewise, every court to consider § 2423(a), which prohibits transportation of a minor in interstate or foreign commerce with the intent that the minor engage in illegal sexual activity, has held that the government need not prove that the defendant knew that the victim was a minor. Contrary to that well-settled precedent, a default *mens rea* standard could force the government to prove in every prosecution that the defendant knew the victim's age. In addition, in prosecutions under § 2250(a), which prohibits anyone who is required to register as a sex offender under SORNA from knowingly failing to do so, the government need not prove the defendant knew that federal law specifically required him or her to do so. A default *mens rea* would make it nearly impossible to bring a successful prosecution under this statute.

- Re-Entry of Illegal Immigrants: The federal statute prohibiting re-entry to the United States of removed aliens, 8 U.S.C. § 1326, is silent with respect to *mens rea*. A default *mens rea* standard could place the burden on the government to prove not only that defendants knew they had crossed into the United States illegally, but also that they knew the details of their immigration history and their criminal history.

- Corporate Fraud and White Collar Crimes: Federal statutes prohibiting a wide range of white collar crimes protect the public from fraudulent conduct by corporations and their officers, directors, and employees. Applying a default *mens rea* to these statutes might insulate culpable individuals, especially senior corporate executives, who deliberately close their eyes to what otherwise would be obvious to them. In particular, certain formulations of a "knowing" standard could undermine the effectiveness of alternative methods of proving

knowledge. Where supported by the facts, the law has permitted prosecutors to prove guilt by establishing such "conscious avoidance" or "willful blindness" on the part of a defendant. For example, WorldCom CEO Bernard J. Ebbers was convicted in 2005 of conspiracy to commit securities fraud and related crimes. Ebbers testified at trial that he did not have any "knowledge" of the wrongful acts, but the Second Circuit upheld the district court's determination that such knowledge was not required, and that the jury could have found that Ebbers consciously avoided knowledge that his company's financial statements were inaccurate. *United States v. Ebbers*, 458 F.3d 110, 124 (2d Cir.), *cert. denied*, 549 U.S. 1274 (2007).

Second, proposals to establish a default *mens rea* could undermine criminal law enforcement by requiring prosecutors to prove that the defendant knew or had reason to believe that his or her conduct was unlawful. It is black letter law that ignorance of the law is no excuse for breaking the law. As a result, even with respect to crimes that have a *mens rea* requirement for one or more elements, prosecutors are not required to prove beyond a reasonable doubt that the defendant knew his or her conduct was unlawful. For instance, prosecutors have to prove a defendant intended to commit fraud, but they do not have to prove the defendant knew fraud was illegal. Similarly, the government has to prove that a gang member was part of a racketeering enterprise, not that the defendant was familiar with the RICO statute and knew that it made participation in such an enterprise a federal offense.

Nevertheless, the Criminal Code Improvement Act of 2015, currently pending in the House, could allow defendants to escape liability by arguing that they did not know their conduct was illegal. *See* H.R. 4002, § 11. Similarly, the Mens Rea Reform Act of 2015, currently pending in the Senate, would apply a default *mens rea* requiring "that the person acted with knowledge that the person's conduct was unlawful." *See* S. 2298. This would cause a revolution in criminal law, rendering many offenses almost impossible to prosecute. Criminal defendants would be able to escape liability – or at a minimum waste the federal judiciary's time in attempts to do so – by arguing that they did not know their conduct was illegal.

Third, a default *mens rea* would certainly lead to protracted litigation that could divert the resources and focus of the department. For example, the Criminal Code Improvement Act of 2015 proposes a default *mens rea* requirement wherever "no state of mind is required by law." *See* H.R. 4002, § 11. If enacted, prosecutors would find themselves embroiled in litigation over whether an offense contains a "state of mind" requirement sufficient to avoid application of the default rule. It also is unclear whether the "required by law" language would codify existing judicial interpretations of federal statutes, or invalidate those precedents entirely. Even if the "required by law" phrasing would codify judicial interpretations, it is not clear whether that would include decisions by the Supreme Court, appellate courts, or district courts, or directives set forth in model jury instructions and endorsed by courts. Similar uncertainty would result from passage of the Mens Rea Reform Act of 2015, which would spawn numerous challenges to whether elements of federal statutes meet the ambiguous "exceptions" carved out by the legislation. On all of these issues, the resulting confusion will lead to additional litigation and make it considerably more difficult to effectively prosecute violent crimes, sexual offenses, corporate wrongdoing, and other serious misconduct.

Finally, proposals for a default *mens rea* rule would severely weaken important statutes that are critical to protecting public health and safety. In enacting the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, the Federal Mine Safety and Health Act, and the Occupational Safety and Health Act – to name just a few – Congress rightly determined that it is in our national interest to ensure that our families, our neighbors, and our communities can breathe clean air and drink clean water, our children consume safe food and medicine, and our workers are safe at their plants, mines, factories and offices. Indeed, the Department of Justice has used these provisions to prosecute some of the most egregious violators of our Nation's environmental, health, and safety laws. Criminal cases under such statutes have involved illegal pesticide applications that resulted in the deaths of innocent children, hazardous materials violations that caused explosions killing workers, and failures to comply with worker safety rules that caused employees to die from exposure to deadly gases. These laws also make it possible to determine responsibility for major disasters, like the BP oil spill and the Upper Big Branch Mine Disaster, and to hold accountable those who endanger the public and the environment through their illegal conduct.

These important provisions would be undermined by this legislation. A default *mens rea* standard would, in many instances, insulate from liability those who profit from activities that, if not carefully conducted, can kill or injure innocent citizens. For example, the Federal Food, Drug, and Cosmetic Act punishes as a *misdemeanor* the sale of food and drugs that are "adulterated." 21 U.S.C. § 333(a)(1). "Adulterated" foods include contaminated foods and non-sterile drugs or medical devices, which can – and do – sicken or kill people. By omitting a *mens rea* requirement for this offense, Congress placed the burden of compliance on those who are in the best position to ensure that their products and activities are safe and who are aware of the danger of adulteration – the manufacturers of these consumable products.

Recently, the Department used this statute to prosecute cases against a fruit distributor whose failure to adequately clean cantaloupes resulted in at least 33 deaths and 147 hospitalizations; an egg producer whose failure to abide by food safety standards was linked to a nation-wide outbreak of salmonellosis and approximately 2,000 reported consumer illnesses; and a medical device company that failed to report safety problems in its defibrillators, which led to failures in devices implanted in patients to monitor and re-start heartbeats. Congress should think very carefully before weakening these types of laws.

For all of these reasons, the Department strongly opposes legislation creating a default *mens rea* and urges this Committee to reject such efforts, which would weaken the criminal code and throw the federal criminal justice system into disarray.

Mr. Chairman, before concluding, I again want express the Department's gratitude to you and the Committee for your efforts and leadership in reporting sentencing reform legislation to the full Senate. Passage of that legislation is critical to make our criminal justice system more effective, more efficient, and more just. The Department hopes that the debate regarding *mens rea* does not prevent passage of that critical legislation.

We stand willing to work with this Committee on any concerns Members have regarding shortcomings in the Code or in specific federal statutes. However, an across-the-board, default *mens*

rea standard is not the right reform. It will be counterproductive and extremely harmful to federal law enforcement, creating even greater uncertainty rather than the intended clarity and consistency in criminal law. Moreover, it will allow many serious criminals – violent and white collar – to avoid accountability, and will pose a serious threat to public health and safety.

Thank you again for inviting the Department to this hearing. We appreciate the opportunity to discuss criminal code reform, and I would be happy to answer any questions you might have.