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## The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy

Andrew Gilman

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**THE ATTORNEY-CLIENT PRIVILEGE  
PROTECTION ACT: THE PROSPECT OF  
CONGRESSIONAL INTERVENTION INTO THE  
DEPARTMENT OF JUSTICE’S CORPORATE  
CHARGING POLICY**

*Andrew Gilman\**

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## INTRODUCTION

Cooperation in a criminal investigation often involves a degree of coercion. Severe consequences might befall the subject of an investigation who refuses to cooperate or strike a deal with prosecutors. The subject may have little strategic choice in the matter, but nevertheless, such cooperation remains voluntary, assuming that the state actor abides by constitutional restraints. With the waiver of rights cooperation entails—notably the Fifth Amendment right against self-incrimination and the Sixth Amendment right to trial by jury—comes the age-old carrot of prosecutorial and judicial leniency.<sup>1</sup> The criminal justice system mass-produces this trade-off on a daily basis. When a corporation becomes the cooperator, some things do change; however, many stay the same. Corporate liability changes the format of a prosecution inasmuch as the entity exists as an amalgam of its agents' actions, but retains its rights just as an "individual" defendant.<sup>2</sup> As its interest demands, a corporation may waive its rights, including its attorney-client privilege, just as millions of other criminal defendants do to secure leniency. Corporate privilege waivers, however, have generated exceptional controversy despite the widespread nature of analogous waivers in the justice system.<sup>3</sup> This controversy stems in large part from recent Department of Justice ("DOJ") corporate charging policies that directed prosecutors to consider privilege waivers in evaluating corporate cooperation. These policies, some argue, leave corporations little choice but to waive their attorney-client privilege.<sup>4</sup> Those who oppose waiver practices are powerful and loud enough that Congress is now contemplating the passage of the Attorney-Client Privilege Protection Act: a bill that would prohibit

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1. See Michael L. Siegel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 23-24 (2008); Michael A. Simons, *Vicarious Snitching: Crime, Cooperation and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 979 (2002) ("Judicial leniency for cooperators traces its roots back hundreds of years to the common law practice of approvement, and American prosecutors have been striking deals with cooperators since at least the nineteenth century.").

2. See *infra* notes 42-43 and accompanying text. It remains important to note that the Fifth Amendment does not protect corporations, and thus, corporations may have even fewer rights than individual defendants.

3. See Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 898 (2006) (quoting articles criticizing compelled corporate privilege waivers).

4. See George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 159-60 (2007), available at <http://www.virginialawreview.org/inbrief/2007/07/23/cohen.pdf>.

prosecutors from requesting or considering waiver of the corporate attorney-client and work-product protections as a measure of cooperation.<sup>5</sup> Despite the DOJ's revision of its corporate charging policy in an effort to appease critics and prevent congressional intervention, supporters of the Privilege Protection Act continue to argue for the Act's passage into law. Against the backdrop of this struggle between Congress and the DOJ, this Note critically examines the Privilege Protection Act, and provides reasonable alternatives to the Act's implementation.

Corporate fraud has and will continue to capture national attention. Following the turn of the millennium, billion-dollar frauds at Enron, Adelphia, and WorldCom shocked the markets, wiped out pensions, and sparked a focus at the highest levels of government on prosecuting white-collar crime.<sup>6</sup> In the wake of these startling crimes, President Bush created the Department of Justice's Corporate Fraud Task Force ("Task Force") on July 9, 2002.<sup>7</sup> More of an affiliation of existing prosecutorial and investigative bodies than a new governmental organization,<sup>8</sup> the Task Force focused on aggressively rooting out corporate fraud throughout the country.<sup>9</sup> At the Task Force's fifth year anniversary event on July 17, 2007, former Attorney General Alberto Gonzales extolled the Task Force for "obtain[ing] more than 1,200 convictions, including 214 corporate chief executives or presidents," and "hundreds of millions of dollars in fines and restitution to investors."<sup>10</sup> In that same speech, however, the former Attorney General failed to mention any of the

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5. See Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007). Senate approval remains the only barrier to the Act's implementation. See also *infra* notes 24-25 and accompanying text. Some of the groups who oppose the current DOJ corporate charging regime are the American Bar Association ("ABA"), the Association of Corporate Counsel ("ACC"), and the National Association of Criminal Defense Lawyers ("NACDL").

6. See Daphne Eviatar, *What's Behind the Drop in Corporate Fraud Indictments?*, AM. LAW. LITIG. SUPPLEMENT, Nov. 1, 2007, at 19, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1193821429242>.

7. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002); see also Eviatar, *supra* note 6, at 19.

8. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002).

9. Paul McNulty, Former Deputy Att'y Gen., Prepared Remarks at the Corporate Fraud Task Force Fifth Anniversary (July 17, 2007) (noting that "aggressive enforcement of corporate fraud is a high priority of the Department of Justice").

10. Alberto Gonzalez, Former Att'y Gen., Prepared Remarks of Attorney General Alberto R. Gonzalez at the Corporate Fraud Task Force Fifth Anniversary (July 17, 2007). In response to a request from THE AMERICAN LAWYER, Joan Meyer, Senior Counsel to the Deputy Attorney General, could not provide a complete list of cases that were the basis of the victories Gonzalez cited. See Eviatar, *supra* note 6, at 19 (conducting its own study of white-collar investigations, gathering "data on 124

Task Force's significant setbacks, namely a number of acquittals, mistrials, and convictions overturned on appeal.<sup>11</sup> From the perspective of some scholars, bar organizations, and former prosecutors, the Department of Justice ("DOJ") arrived at these high conviction numbers through legally and ethically questionable means.<sup>12</sup> By contrast, the former Attorney General and the DOJ would maintain that these numbers signify the effectiveness of the DOJ corporate charging policy in reigning in corporate criminal conduct in a time of vast indiscretion.

Much of the debate surrounding recent white-collar prosecutions centers on the practice of government-compelled waivers of the corporate attorney-client privilege and work-product protections. Beginning with the Holder Memorandum ("the Holder Memo") in 1999 and through the McNulty Memorandum ("the McNulty Memo") in 2006, the DOJ could request and consider a corporation's willingness to waive its attorney-client privilege in determining whether a corporation sufficiently cooperated in an investigation and should be spared a criminal charge.<sup>13</sup> On August 28, 2008, the DOJ issued new corporate charging guidelines that deemphasized the role of privilege waivers in evaluating cooperation, but nevertheless directed prosecutors to consider a corporation's disclosure of the relevant facts (privileged or not) in their consideration of corporate liability.<sup>14</sup> Since corporate indictments carry tremendous costs, corporations are understandably eager to cooperate by any means possible.<sup>15</sup> Thus, corporations often are compelled to waive their privilege in order to receive cooperation

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investigations (resulting in 440 indicted defendants) identified by the Justice Department as major Corporate Fraud Task Force prosecutions").

11. Eviatar, *supra* note 6, at 20 ("The Corporate Fraud Task Force suffered important failures as well . . . . In all, 27 of the defendants whose cases we examined, including executives from Adelphia, America Online Inc., PurchasePro.com Inc., and Qwest Communications International Inc., were acquitted at trial. Another 28 cases were dismissed. There were 22 mistrials. And nine convictions were overturned on appeal, including those of such high profile defendants as Credit Suisse First Boston Corp. banker Frank Quattrone and the Enron 'Nigerian Barge' defendants from Merrill Lynch & Co."); *see also* United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (holding unconstitutional the DOJ practice of pressuring KPMG to terminate its advancement of attorney fees to employees); United States v. Stein, 435 F. Supp. 2d 330, 365 (S.D.N.Y. 2006) *aff'd* 541 F.3d 130 (2d Cir. 2008); *see generally* Stein, *infra* note 77.

12. *See* discussion *infra* Part II.

13. *See infra* Part I.C, notes 73-101, and accompanying text.

14. *See infra* Part I.C.3, notes 102-16, and accompanying text.

15. *See infra* note 72 and accompanying text.

credit from the government, or rather simply to dissuade the government from prosecuting the corporate entity.<sup>16</sup>

Critics of such practices cite a “culture of waiver” and the erosion of the attorney-client privilege these memoranda engendered, and that likely will continue even under the DOJ’s revised corporate charging guidelines.<sup>17</sup> In particular, critics claim that the erosion of the privilege hampers employees’ willingness to consult with corporate counsel, and thus eliminates an early restraint on illegal conduct.<sup>18</sup> Additionally, the prevalence of privilege waivers likely increases the potential for increased civil liability, since it provides discoverable fodder for civil plaintiffs.<sup>19</sup>

In contrast, those who favor current DOJ corporate charging policies that permit prosecutors to consider waiver of the corporate attorney-client privilege cite the increased efficiency and effectiveness of white-collar prosecutions following such waivers.<sup>20</sup> They further argue that aggressive enforcement deters corporate fraud, and thus protects market integrity for private and public investors.<sup>21</sup> Moreover, the nature of the corporate privilege causes the very infirmities that critics claim the DOJ memos create.<sup>22</sup> A corporation may still waive privileges as it deems fit, particularly where waiver might permit the corporation to weather a criminal investigation. Thus, the corporate privilege, as the Supreme Court formalized in *Upjohn v. United States*,<sup>23</sup> provides little protection to

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16. See *infra* Part I.C.1-2, notes 73-101, and accompanying text.

17. See ASS’N OF CORP. COUNSEL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT, SURVEY RESULTS PRESENTATION 3 (2006), available at <http://www.acc.com/resource/v6877> (“Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that ‘a ‘culture of wavier’ has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.’ Only 1% of inside counsel and 2.5% of outside counsel disagreed with the statement.”). It remains important to note the unscientific nature of this study, which did not adhere to reliable, objective data gathering, instead employing an informal and anecdotal methodology. See also Press Release, H. Thomas Wells, Jr., President, Am. Bar Ass’n, Re: New U.S. Department of Justice Corporate Charging Guidelines, (Aug. 28, 2008), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=437>.

18. See *infra* note 203 and accompanying text.

19. See *infra* note 205 and accompanying text.

20. See *infra* notes 152-58 and accompanying text.

21. See *infra* notes 168-69 and accompanying text.

22. See Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 313 (2008).

23. 449 U.S. 383 (1981).

employees in the first place. Any expectations otherwise might very well lack a reasonable basis.

Despite the DOJ's issuance of revised guidelines, Congress remains on the brink of further altering the current corporate charging policy. Senator Arlen Specter originally introduced the Attorney-Client Privilege Protection Act ("Privilege Protection Act") on December 8, 2006, to end the practice of privilege waiver under recent DOJ regimes.<sup>24</sup> On November 13, 2007, the House passed its version of the Privilege Protection Act with only slight modification to the version pending before the Senate.<sup>25</sup> Recently, Senator Specter introduced a slightly revised version of the Attorney-Client Privilege Protection Act on June 26, 2008.<sup>26</sup> On July 9, 2008, Attorney General Michael Mukasey appeared before the Senate Judiciary Committee and announced that the DOJ planned to make adjustments to the McNulty Memo, specifically stating "[we] will no longer measure cooperation by waiver of the attorney-client privilege."<sup>27</sup> Following the meeting, Deputy Attorney General Mark Filip sent a letter to Senate Judiciary Committee members outlining proposed changes to the McNulty Memo.<sup>28</sup> The letter also requested that the Senate Judiciary Committee allow the DOJ to alter and implement over a reasonable time a revised corporate charging policy.<sup>29</sup> Shortly thereafter, on August 28, 2008,

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24. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006).

25. Compare Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007), with Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

26. Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008). This time Specter was not alone in introducing the Act. Senators Biden, Carper, Cochran, Cornyn, Dole, Feinstein, Graham, Kerry, Landriue, McCaskill, and Pyror all joined as co-sponsors. Senator Webb signed on as a co-sponsor a day later.

27. See *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Senate Judiciary Committee Hearing July 9, 2008*]; Pedro Ruz Gutierrez, *AG Mukasey Hints at Revision of McNulty Memo, Spars with Senators at Hearing*, LEGAL TIMES, July 10, 2008, <http://www.law.com/jsp/article.jsp?id=1202422864034>. Following the meeting, Deputy Attorney General Mark Filip sent a letter to Senate Judiciary Committee members laying out proposed changes to the McNulty Memo. The letter requested that the Senate Judiciary Committee allow the DOJ to alter and implement over a reasonable time a revised corporate charging policy. See Letter from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Patrick J. Leahy, Chairman, and Arlen Specter, Ranking Member, U.S. Senate Comm. on the Judiciary (July 9, 2008), available at <http://www.acc.com/resource/v9892>; see also Evan Perez, *U.S. is Revising Rules on White-Collar Crime*, WALL ST. J., July 10, 2008, at A12.

28. See Letter from Mark Filip to Patrick J. Leahy and Arlen Specter, *supra* note 27; see also Perez, *supra* note 27.

29. See Letter from Mark Filip to Patrick J. Leahy and Arlen Specter, *supra* note 27.



the DOJ issued its revised corporate charging guidelines in an attempt to placate critics.<sup>30</sup> While the new guidelines received praise from Senator Specter and the ABA as a step in the right direction, both the Senator and the ABA insist that the revised guidelines do not go far enough to protect the attorney-client privilege.<sup>31</sup> Thus, a new round of Capitol Hill brinksmanship has begun, with the Senate Judiciary Committee pursuing a legislative solution and the DOJ working to retain its authority over its corporate charging policy under the revised guidelines.

As the battle continues over revising the corporate charging policy, legal scholars, practitioners, and bar associations have weighed in on the Privilege Protection Act's potential effectiveness. This Note analyzes the Privilege Protection Act, focusing on how it might change corporate white-collar prosecutions. Part I of this Note explores the mechanics of the corporate privilege, the development of the DOJ's waiver policy, and the structure of the Privilege Protection Act. Part II addresses the conflicting views on whether the Privilege Protection Act will bolster corporate attorney-client privilege, provide for the effective and efficient prosecution of white-collar crime, and promote ethical prosecutorial practices. Finally, Part III argues that the Privilege Protection Act is a misguided attempt to correct a greater systemic problem with the corporate attorney-client privilege and the nature of corporate cooperation. If Congress is to act, it should recognize the essential role privilege waiver plays in prosecuting white-collar crime, and should move to limit the deleterious ramifications to corporations of routine privilege waivers. Thus, the doctrine of selective waiver would be a preferable remedy: it would protect the confidentiality of privileged documents that the corporation discloses to the government, and would provide an effective means to balance the corporation's interest in cooperating with the government and avoiding unwarranted civil liability.

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30. See Press Release, U.S. Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), available at <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>; see also U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, chs. 9-28.000 to -28.1300 (2008) [hereinafter REVISED DOJ GUIDELINES], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm).

31. See Press Release, H. Thomas Wells, Jr., *supra* note 17; Press Release, U.S. Senator Arlen Specter, Specter Responds to DOJ's Revisions of Attorney-Client Privilege Guidelines (Aug. 28, 2008), available at [http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord\\_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9](http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9).

## I. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND WHITE-COLLAR INVESTIGATIONS

### A. The Origin and Mechanics of the Corporate Attorney-Client Privilege

Upon discovery of potential misconduct or a governmental investigation of its actions, corporations often undertake the strategic step of initiating an internal investigation to gather information to respond to the conflict.<sup>32</sup> An internal investigation comprises “information-gathering activities that a company engages in upon learning of possible wrongdoing.”<sup>33</sup> These investigations are usually tailored to the scope of the potential wrongdoing, at times involving a comprehensive document search and interviews of employee witnesses.<sup>34</sup> Outside counsel is often the key actor in conducting an internal investigation and presenting legal advice to guide the corporation through the conflict.<sup>35</sup> The fruits of the internal investigation and subsequent legal analysis allow the corporation to review the potential misconduct. Thus, the corporation is better able to gauge if and what type of liability it may face, and the necessary corrective actions to take in order to resolve the conflict.<sup>36</sup>

The doctrines of attorney-client privilege and work-product protection provide an essential shield to the corporation and the inter-

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32. Gregory S. Bruch & Michael P. Matthews, *Conducting Internal Investigations*, in PRACTICING L. INST., CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2007 COURSE HANDBOOK 559, 561-62 (2007); see also Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 884 (2003) (“The circumstances that prompt internal investigations are myriad: evidence of irregular stock trades, allegations of illegal employment discrimination, the results of an internal audit, an anonymous tip about billing irregularities, a civil suit, the sudden departure of a key employee . . .”).

33. Bruch & Matthews, *supra* note 32, at 561-62.

34. See *id.*; see also Duggin, *supra* note 32, at 891-92 (“While documents may provide the clearest record of key events or transactions, the most revealing information comes from employees. Thus, the pivotal element of almost every internal investigation—and the most informative and stressful part for all concerned—is the employee interview.”); see, e.g., *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179, 1193 (10th Cir. 2006) (noting that an extensive internal investigation yielded 220,000 pages of privileged documents).

35. Bruch & Matthews, *supra* note 32, at 564-65 (citing, as reasons to retain outside counsel, the investigatory skills of former prosecutors that often comprise internal investigation teams, the independence of outside counsel over internal counsel, specialized knowledge of the applicable law, and the “increase in likelihood that the results of the internal investigation will be protected by the attorney-client privilege and the work-product doctrine”).

36. *Id.* at 561-62.

nal investigation.<sup>37</sup> The Supreme Court, addressing what protection the Court should provide to the results of a corporate internal investigation in *Upjohn*, concluded that the attorney-client privilege and the work-product doctrines apply to corporations, and thus where applicable, to the fruits of an internal investigation.<sup>38</sup> As the Court noted of the attorney-client privilege in *Upjohn*, “[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.”<sup>39</sup> In order to facilitate effective legal service, “the privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.”<sup>40</sup>

Toward the similar end of protecting the attorney-client relationship, the doctrine of work-product protection is designed to protect an attorney’s mental impressions in preparing for litigation.<sup>41</sup> An

37. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002) (noting that the attorney-client privilege should not be “used as a sword rather than a shield”).

38. See 449 U.S. 383, 397 (1981) (“Our decision that the communications by *Upjohn* employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned.”); *infra* note 41 for a discussion of the work-product doctrine.

39. *Upjohn*, 449 U.S. at 389. In a frequently quoted refrain, the Court added that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Id.* at 393.

40. *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2007) (forbidding an attorney from disclosing any information relating to the client’s case, with certain exceptions).

41. *Upjohn*, 449 U.S. at 401. The Court in *Upjohn* recognized that the work-product protections also apply to counsel during the internal investigation:

[t]he notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental process in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

*Id.* at 401. The Court remanded the case for further determinations on the work-product protection. *Id.* at 402; see also *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (establishing the work-product doctrine). In *Hickman*, the Court determined that

[i]n performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurispru-

internal investigation should gain the protection of both the attorney-client privilege (protecting communications between counsel and employees<sup>42</sup>) and the work-product doctrine (protecting attorney notes, memoranda, and legal conclusions<sup>43</sup>).<sup>44</sup> While the corporate privilege exists as an amalgam of its agents' statements and attorneys' knowledge,<sup>45</sup> the privilege belongs to the corporation and may be preserved or waived as the corporate entity deems fit.<sup>46</sup>

The corporate attorney-client privilege exists as something of a contradiction. The privilege belongs to the corporate entity, but at the same time, the corporate entity can only speak and act through the many officers and employees who comprise the entity. Nevertheless, the corporate counsel does not represent those individuals. Rather, counsel must act in the corporation's best interests, which at times may be adverse to the employees' interest.<sup>47</sup> In order to

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dence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the “Work product of the lawyer.”

*Id.* (citation omitted).

42. *Upjohn*, 449 U.S. at 397; see Duggin, *supra* note 32, at 895 (“Corporations have a right to assert the attorney-client and work-product privileges to protect the confidentiality of corporate attorneys' communications with client representatives, as well as notes and memoranda prepared by counsel in the context of an internal investigation.”); see also PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 5.1 (West Group 2d ed. 2007).

43. *Hickman*, 329 U.S. at 510-11; see also Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 484-85 (2003) (addressing the attorney-client privilege and the work-product doctrine in the corporate context).

44. See, e.g., *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185-87 (10th Cir. 2006) (discussing the attorney-client privilege and work-product doctrine in the context of an SEC and DOJ investigation into Qwest).

45. See Liesa Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 142-43 (2007) (“When the ‘client’ to be protected by the privilege is a corporate entity that derives its very existence from the law and is operated only through the joint efforts of a group of individuals acting on its behalf, the difficulties in applying privilege doctrine become even more complex.”), available at <http://law.fordham.edu/publications/articles/500fl-sp8853.pdf>; see also *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (“As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.”).

46. *Weintraub*, 471 U.S. at 348 (“The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.”).

47. See Duggin, *supra* note 32, at 936 (citations omitted) (“In the corporate arena, the lawyer lives in an ‘Alice in Wonderland’ world. The client to whom he owes

avoid ethical conflicts when conducting an investigation, “corporate counsel are duty bound to advise employees with regard to both the scope of the legal representation and the attorney-client privilege prior to conducting any sort of interview in connection with a corporate investigation.”<sup>48</sup> Typically referred to as “*Upjohn* warnings,” these instructions from corporate counsel should make the employee aware of the nature of counsel’s representation and that while the corporate privilege protects information discussed, the corporation may later decide to disclose this information to others.<sup>49</sup> Corporate counsel’s failure to provide sufficient *Upjohn* warnings “poses the risk of inadvertently creating a lawyer-client relationship with the officer or employee.”<sup>50</sup> Accordingly, *Upjohn* warnings are crucial for a corporate counsel to avoid unethical and misleading practices, an error likely to harm both the corporation and counsel. Although corporate counsel advising employees on a daily basis presents a different situation than outside counsel conducting an internal investigation, both should provide *Upjohn* warnings in their contact with employees. Theoretically then, employees should be well aware of what little protection the corporate attorney-client privilege may provide for their communications with counsel.<sup>51</sup> In practice, however, there remains some question as to the adequacy of *Upjohn* warnings and the potential remedies should corporate counsel fail to provide the warnings to those it interviews. The quickest solution to that problem would be to strengthen *Upjohn* warning practices.<sup>52</sup> As some would argue, the larger problem of erosion of the corporate attorney-client privilege remains, but this discussion of the nature of the privilege

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undivided loyalty . . . cannot speak to him except through [employees’] voices . . . . He is hired and fired by people who may or may not have interests diametrically opposed to those of his client [the corporation]. . . . [F]inally, his client itself is an illusion—a fictional person . . . . Understanding these difficulties helps, but it does not resolve the underlying problem. In conducting an internal investigation, counsel must serve the interests of the entity itself—the corporation as a distinct legal person—even in instances where this recognition creates a conflict with the interests of the officer director or employee who hired the attorney to represent the company in the first place.”); see also Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1013-19 (1997).

48. Brown, *supra* note 3, at 938.

49. *Id.* at 939-40 (listing examples of potential warnings corporate counsel might read an employee before conducting an interview).

50. Bruce A. Green, *Interviewing Client Officers and Employees: Ethical Considerations*, PROF’L LIAB. LITIG. ALERT, Winter 2005, at 1, 3.

51. See Richman, *supra* note 22, at 16-17 (“[T]here is some reason to believe that *Upjohn* warnings have become standard practice.”).

52. See *id.* at 17.

should recast the debate in a different light. If the government charging policies favoring privilege waiver chill communications between corporate counsel and employees, the nature of the corporate privilege may hold the greater blame.

### **B. The Mechanics and Implications of Waiving the Attorney-Client Privilege and Work-product Protections**

After conducting an internal investigation, a corporation might provide privileged information or attorney work-product to the government as an efficient means to reveal wrongdoing and seek cooperation credit.<sup>53</sup> The frequency of internal investigations uncovering any existing wrongdoing has led the government to focus on obtaining the fruits of such investigations.<sup>54</sup> In the corporation's attempt to cooperate with the government, handing over privileged or work-product protected material may constitute a broad waiver of those privileges and protections to third parties.<sup>55</sup> Generally, "[b]ecause confidentiality is the key to the privilege, '[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.'"<sup>56</sup> Thus, most forms of cooperation involving disclosures from an internal investigation likely will result in a waiver of the attorney-client privilege and work-product protection.<sup>57</sup> This waiver may extend not just to the material disclosed, but also to the entire subject matter of the disclosure.<sup>58</sup>

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53. See *infra* Part I.C.1-2 for a discussion of the DOJ corporate prosecution Memos (Holder, Thompson, McCallum, and McNulty Memos); see *infra* Part II.A.1.a for a discussion of Congressional testimony about the effectiveness of waiving the privilege and work-product protections.

54. See Duggin, *supra* note 32, at 892 (explaining the development of internal investigations and the government's interest in obtaining the fruits of the investigation).

55. Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 123-25 (2003) ("Since confidentiality is the predominant policy underlying the rationale for the attorney-client privilege, '[a]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.'" (quoting *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981))).

56. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006).

57. See Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 227 (2006) (discussing the development of subject matter waiver in relation to the work-product doctrine in *United States v. Nobles*, 422 U.S. 225 (1975)); *id.* at 229-30 (discussing disclosures to the government that may waive privilege and work-product protections). However, Part II.2.b *infra* discusses ways in which a corporation may sufficiently cooperate without waiving its privilege.

58. Broun & Capra, *supra* note 57, at 227 ("More recent cases from the courts of appeal and district courts reflect a view that subject matter waiver may be more lim-

Courts, however, have developed conflicting interpretations over what may constitute waiver, and the scope of waiver remains contested ground.<sup>59</sup> Six circuits have found that disclosure of privileged material to a federal agency waives the attorney-client privilege, or possibly even the work-product protection depending on the submission for the entire subject matter of the material.<sup>60</sup> Even in the face of a confidentiality agreement between a corporation and a federal agency, the Third, Sixth, and Tenth Circuits have held that disclosure of privileged or work-product protected documents destroys those protections as to third parties.<sup>61</sup> Currently, “only the Eighth Circuit and district courts in other circuits have held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency.”<sup>62</sup> Thus, as a whole, courts do not seem comfortable with the Eighth’s Circuit flexible notion of the privilege. Instead, courts favor the traditional, absolutist approach.<sup>63</sup>

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ited than suggested in *Nobles*, and that the limitation will depend upon consideration of fairness under the circumstances.”).

59. *See id.* at 220-30 (discussing inadvertent waiver and the scope of waiver). Congress recently intervened to quell a split among courts as to whether an inadvertent breach of the attorney-client privilege may constitute a waiver. On February 27, 2008, the Senate passed Senate Bill 2450, which provides that inadvertent disclosure of privileged material to a Federal office or agency in a Federal proceeding does not constitute waiver if: “1) the disclosure is inadvertent; 2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and 3) the holder promptly took reasonable steps to rectify the error . . . .” S. 2450, 110th Cong. (2008) (amending Rule 502 of the Federal Rules of Evidence).

60. *See Broun & Capra, supra* note 57, at 229-30 (“The First, Third, Fourth, Sixth, Tenth, and District of Columbia Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney-client privilege is lost.”). In *Permian Corp. v. United States*, the D.C. Circuit held that disclosure of documents to the SEC led to a waiver of the attorney-client privilege, “[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship.” 665 F.2d 1214, 1221 (D.C. Cir. 1981).

61. *See Broun & Capra, supra* note 57, at 230. Some courts, however, have held to the contrary, “[o]ther courts have suggested that a selective waiver may apply if the client has clearly communicated her intent to retain the privilege, such as by entering a confidentiality agreement.” *Id.* at 238 (discussing the Second Circuit’s opinion in *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), in which the court left open the possibility of upholding “an explicit agreement that the SEC [or other federal agency] will maintain the confidentiality of the disclosed materials”).

62. Broun & Capra, *supra* note 57, at 229.

63. *Id.* Discussing the more flexible interpretation of the attorney client privilege, Broun & Capra note that, “although courts have different views with regard to scope of waiver, there is authority, both in case law and in scholarly writing, for the position that the scope of waiver should be governed by considerations of fairness.” *Id.*

A growing movement had developed in support of amending the Federal Rules of Evidence to include Proposed Rule 502, which would have enacted a “selective waiver” provision to maintain the attorney-client privilege and work-product protections despite disclosure to the government.<sup>64</sup> This coalition, however, appears to have fizzled.<sup>65</sup> The ABA seems to have placed its support behind the Attorney-Client Privilege Protection Act, and the Senate and Rules Committee seemed to respond to this shift when they eliminated the selective waiver portions from Rule 502. Congress and the President since passed Proposed Rule 502 without the selective waiver provisions.<sup>66</sup> Apart from its recent exodus from Proposed Rule 502, the doctrine of selective waiver would keep intact a corporation’s privilege and work-product protection to private parties, even though the corporation might have “waived” both in its disclosure to the government.<sup>67</sup> Selective waiver would allow the government to receive the benefit of a waiver to effectuate its investigation and the corporation to retain its privilege and work-product protections as to third parties.<sup>68</sup> The doctrine would thus facilitate the process of privilege waivers by providing greater protection to corporations from civil suits that often follow fraud investigations. In certain respects, selective waiver permits a

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64. Broun & Capra, *supra* note 57, at 247 (discussing the language of the rule and arguing in favor of the proposed rule).

65. See *In re* Initial Pub. Offering Sec. Litig., No. 21-MC-92, 2008 WL 400933, at \*5-6 (S.D.N.Y. Feb. 14, 2008) (discussing the Association of Corporate Counsel, Federation of Defense and Corporate Counsel, Corporations Committee of the California State Bar, and in general, the defense bar’s opposition to selective waiver in Proposed Rule 502, because of those groups’ belief that selective waiver would only further increase the “forced sacrifice of protected materials and communication”); see also Cohen, *supra* note 4, at 159-60 (discussing the government and corporations’ original support for the doctrine of selective waiver, and corporations’ subsequent retraction of their support because of their stated concern “that selective waiver will just encourage the government to seek waiver more often”). Cohen’s article further notes that “[t]he reality behind corporations’ collective change of heart may be instead that, as a result of ‘class action reform,’ the consequences of private litigation are less drastic than they used to be.” *Id.*

66. See S. 2450, 110th Cong. (2008). On September 19, 2008, after the Senate and the House approved the proposed Rule, President Bush signed Rule 502 into law. See FED. R. EVID. 502.

67. See Broun & Capra, *supra* note 57, at 246-48.

68. *Id.* at 255 (“The [proposed rule of selective waiver] rectifies [the conflict over ‘whether disclosure of privileged information . . . to a government agency . . . constitutes a general waiver of the information disclosed’] by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work-product protection as to non-governmental persons or entities, whether in federal or state court.”).



corporation to “have its cake and eat it too,” gaining both the benefit of cooperating with the government, while also avoiding exposure to litigants waiting in the wings.<sup>69</sup> Additionally, policies favoring waiver generally provide the government with helpful, timesaving information that expedites white-collar investigations.<sup>70</sup> Nevertheless, opponents of the doctrine claim that its enactment would place greater pressure on a corporation to waive its privilege and work-product protections and might add a disincentive for corporate counsel conducting an investigation to record findings in writing, a step that might harm legal representation.<sup>71</sup>

Under the current DOJ corporate charging guidelines (without selective waiver) a corporation that is cooperating with the government must walk a delicate line to prevent waiver of the attorney-client privilege and work-product protections. Considering the potential death sentence a criminal prosecution might entail—for instance, the fate of Arthur Andersen—a corporation is likely inclined to err on the side of cooperation, even if it means risking increased third party liability.<sup>72</sup>

### **C. The Department of Justice Corporate Charging Policies: From the Holder to McNulty Memos and Beyond**

#### *1. An Overview of the DOJ Corporate Charging Policies*

Beginning in 1999 with the Holder Memorandum (“Holder Memo”) and continuing today with the revised corporate charging

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69. Finder, *supra* note 55, at 124.

70. See *infra* notes 152-58 and accompanying text.

71. See *In re* Initial Pub. Offering Sec. Litig., No. 21-MC-92, 2008 WL 400933, at \*5-6 (S.D.N.Y. Feb. 14, 2008). A rebuttal of this argument is at the end of this Note. See *infra* Part III.C.

72. See Christopher Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097-98 (2006) (“The most notable recent example of ‘deterrence on a massive scale’ is the indictment and conviction of Arthur Andersen.”). In 2002, a Southern District of Texas jury convicted Arthur Anderson for obstruction of justice in an investigation stemming out of the firm’s work for Enron. The Supreme Court overturned the conviction for an improper jury charge. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); see also Eviatar, *supra* note 6 (discussing convictions, mistrials, acquittals, and reversals of white-collar cases since 2002). But see Siegel, *supra* note 1, at 18-19 (2008) (“The collapse of [Arthur Andersen] as a result of being indicted was the exception, not the rule . . . Andersen’s situation was unique because . . . it was subject to the loss of its ability to conduct public audits upon conviction. . . . In addition, Andersen suffered because it was a multiple recidivist: it had recently settled with the government in connection with numerous other claims of wrongdoing.”).

guidelines,<sup>73</sup> the Department of Justice has recognized the value of prosecuting the corporate entity in white-collar investigations.<sup>74</sup> The DOJ has issued five corporate charging policies (Holder, Thompson, McCallum, and McNulty Memos in addition to the Revised DOJ Guidelines) over the course of nearly ten years to implement a unified prosecutorial strategy to reduce corporate fraud.<sup>75</sup> Prior to the Revised DOJ Guidelines, the four Memos placed the emphasis in charging decisions on evaluating the quality of corporate cooperation, in particular, by considering privilege waivers and even advancement of attorneys' fees to certain degrees.<sup>76</sup> After outrage at and even unconstitutionality of some provisions in the Holder and Thompson Memos, the McCallum and McNulty Memos provided changes intended to maximize prosecutorial effectiveness in white-collar investigations, while protecting constitutional rights.<sup>77</sup> After further criticism of the provi-

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73. See Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>; Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Oct. 21, 2005), available at <http://www.acc.com/public/attyclntprvlg/mccallumwaivermemo.pdf>; Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf); Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm); REVISED DOJ GUIDELINES, *supra* note 30.

74. See Duggin, *supra* note 32, at 868 ("The DOJ currently espouses the view that 'certain crimes that carry with them a substantial risk of great public harm . . . are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.'" (citing the DOJ Memos)). For a discussion of the development of the DOJ Memos from Holder through McCallum, see Wray & Hur, *supra* note 72. For an analysis of the McNulty Memo and its ethical implications, see Stein, *infra* note 77. For a discussion of the development of corporate charging criteria prior to and through the Holder Memo, see Finder, *supra* note 55, at 112-20.

75. See Holder Memo, *supra* note 73; McCallum Memo, *supra* note 73; McNulty Memo, *supra* note 73; Thompson Memo, *supra* note 73; see also REVISED DOJ GUIDELINES, *supra* note 30.

76. See *id.*; Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 350-364 (2008) [hereinafter Duggin, *Corporate Cooperation*] (explaining the evolution of the four DOJ Memos).

77. Duggin, *Corporate Cooperation*, *supra* note 76, at 350-364; see Noah D. Stein, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of its Employees' Attorneys' Fees?*, 75 FORDHAM L. REV. 3245, 3253-56 (2007), available at <http://law.fordham.edu/publications/articles/500fl-sp8305.pdf> (discussing the constitutionality of the Thompson Memo); see also *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (holding unconstitutional

sions directing prosecutors to consider waiver of the attorney-client privilege in their corporate charging decisions, the DOJ again altered its charging policy, attempting to replace the focus on waiver with a focus on the disclosure of relevant facts.<sup>78</sup> The Revised DOJ Guidelines, however, do not forbid prosecutors from considering waiver of the privilege in the corporation's favor and continue to encourage corporate prosecution on many of the same factors as the previous Memos.<sup>79</sup> In this sense, the DOJ corporate charging policies were and remain a precarious balancing act of prosecutorial vigor and restraint.

In the simplest terms, the DOJ corporate charging policies tailor traditional prosecutorial strategies for prosecuting individuals to corporations.<sup>80</sup> As all of the Memos and the Revised DOJ Guidelines recognize, "indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white-collar crime."<sup>81</sup> Moreover, the Holder Memo and its successors encourage cooperation as the means to avoid indictment; all of the DOJ charging policies explicitly direct prosecutors to consider the value of a corporation's voluntary disclosure in determining corporate liability.<sup>82</sup> While the four Memos cast this

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the DOJ practice of pressuring KPMG to terminate its advancement of attorney fees to employees); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd* 541 F.3d 130 (2d Cir. 2008).

78. See REVISED DOJ GUIDELINES, *supra* note 30, at 9-28.710 ("In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive the privilege or work-product protection in the process.").

79. See *id.* at 9-28.200 ("Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes."); see also Holder Memo, *supra* note 73; McNulty Memo *supra* note 73 (containing the same language).

80. See Holder Memo, *supra* note 73; McNulty Memo *supra* note 73; Thompson Memo, *supra* note 73; see also Wray & Hur, *supra* note 72, at 1099-1100 (discussing the Thompson Memo's premises).

81. See Holder Memo, *supra* note 73; McCallum Memo, *supra* note 73; McNulty Memo, *supra* note 73; Thompson Memo, *supra* note 73; see also REVISED DOJ GUIDELINES, *supra* note 30.

82. See Holder Memo, *supra* note 73; Thompson Memo, *supra* note 73, § II.A.4 ("II. Charging a Corporation: Factors to be Considered . . . 4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product protection"); McNulty Memo, *supra* note 73, §§ III.A.4, VII.2 ("2. Waiving the Attorney-Client and Work-product Protections . . . a corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation."); see also Stein, *supra* note 77, at 3252 (2007) ("[The revi-

evaluation partially in terms of privilege waiver, the Revised DOJ Guidelines address the same considerations from a “disclosure of facts” approach, which frequently may involve waiver of the privilege.<sup>83</sup> Cooperation is often essential to the success of a white-collar prosecution, since it significantly accelerates the investigation of complex business records and may allow the government to obtain all or part of the corporation’s internal investigation results.<sup>84</sup> Yet, despite encouraging cooperation, the DOJ charging policies provide no guarantee that with cooperation the corporation will avoid indictment.<sup>85</sup> All the DOJ charging policies, however, recognize “the important public benefits that may flow from indicting a corporation in appropriate cases,” most significantly “deterrence on a massive [or as the Revised DOJ Guidelines put it, ‘broad’] scale.”<sup>86</sup> This Note now directs its attention to the previous charging policy to the Revised DOJ Guidelines: the McNulty Memo.

## 2. *The McNulty Memo*

The McNulty Memo stood as the DOJ policy on the prosecution of business organizations from December 12, 2006 to the introduction of the Revised DOJ Guidelines on August 28, 2008. Like the Thompson Memo before it, the McNulty Memo recognized that “waiver . . . is not . . . a prerequisite to a finding that a company has cooperated in the government’s investigation.”<sup>87</sup> Additionally, both Memos recognize that waivers will significantly facilitate the

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sions in the Thompson Memo] stressed that an organization’s cooperation with an investigation was the key driver of the government’s decision whether to seek damages.”).

83. See *infra* Part I.C.3 for a discussion of the REVISED DOJ GUIDELINES.

84. Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work-product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 319 (2003) (“Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements.” (internal citations omitted)).

85. See Holder Memo, *supra* note 73; McNulty Memo, *supra* note 73; Thompson Memo, *supra* note 73; see also REVISED DOJ GUIDELINES, *supra* note 30.

86. McNulty Memo, *supra* note 73, § II.B (“[P]rosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale.”). See also Holder Memo, *supra* note 73; McCallum Memo, *supra* note 73; Thompson Memo, *supra* note 73; see also REVISED DOJ GUIDELINES, *supra* note 30.

87. McNulty Memo, *supra* note 73, § VII.B.2; see Thompson Memo, *supra* note 73, § VI.B (“The Department does not, however, consider waiver of a corporation’s attorney-client and work-product protection an absolute requirement [of cooperation].”).

investigation<sup>88</sup> and “may be critical in enabling the government to evaluate the accuracy and completeness of the company’s voluntary disclosure.”<sup>89</sup> While the McNulty Memo retained the Thompson Memo’s nine-factor analysis to guide prosecutors’ corporate charging decisions, the McNulty Memo implemented noteworthy adjustments in regards to the attorney-client privilege and work-product protections that set it apart from its predecessors.

Unlike the Thompson Memo, the McNulty Memo required prosecutors to demonstrate a legitimate need for privileged information to fulfill their law enforcement obligations. To do so, prosecutors needed to go beyond demonstrating that a waiver is “desirable or convenient,” and meet a four factor balancing test:

Whether there is a legitimate need depends upon: (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.<sup>90</sup>

If a legitimate need existed, the McNulty Memo then instructed prosecutors to “seek the least intrusive waiver necessary to conduct a complete and thorough investigation . . . .”<sup>91</sup> The McNulty Memo directed prosecutors first to request “purely factual information, which may or may not be privileged, relating to the underlying misconduct.”<sup>92</sup> This factual material, to which the Memo refers as Category I information, consists of items that likely implicate both the privilege and work-product protections, like “witness statements” or “factual chronologies.”<sup>93</sup> Before requesting Category I information, prosecutors needed to obtain “written authorization

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88. McNulty Memo, *supra* note 73, § VII.B.2 (“[A] company’s disclosure of privileged information may permit the government to expedite its investigation.”); Thompson Memo, *supra* note 73, § VI.B (“Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.”).

89. McNulty Memo, *supra* note 73, § VII.B.2; *see* Thompson Memo, *supra* note 73, § VI.B.

90. McNulty Memo, *supra* note 73, § VII.B.2.

91. *Id.*

92. *Id.*

93. *Id.* (“Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regulating the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.”); *see supra* Part I.A-B, notes 25-65, and accompanying text.

from the United States Attorney,” who must forward the request to and “consult with” the Assistant Attorney General for the Criminal Division before acting on the request.<sup>94</sup> In determining whether a corporation has sufficiently cooperated in the investigation, the McNulty Memo allowed the Government to consider the corporation’s response to the request “for waiver of the privilege for Category I information.”<sup>95</sup>

The McNulty Memo further directed that if “purely factual information provides an incomplete basis to conduct a thorough investigation,” prosecutors could seek “attorney-client communications or non-factual attorney work-product,” termed “Category II” information.<sup>96</sup> Category II information largely consisted of items the work-product doctrine would protect, such as “attorney notes . . . containing counsel’s mental impressions . . . or legal advice given to the corporation.”<sup>97</sup> To obtain Category II information, “the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney’s request for authorization to seek a waiver must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought.”<sup>98</sup> However, Category II information according to the McNulty Memo “should only be sought in rare circumstances.”<sup>99</sup> Here, the McNulty Memo also allowed prosecutors to “favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”<sup>100</sup> Yet, if a corporation refused to provide Category II information after a formal re-

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94. McNulty Memo, *supra* note 73, § VII.B.2. Additionally, a prosecutor’s request needs to establish the legitimate need and “identify the scope of the waiver sought.” If the request is granted, the United States Attorney “must communicate the request in writing to the corporation.” *Id.*

95. *Id.*

96. *Id.* Category II information is also loosely termed opinion work-product, in contrast to non-opinion work-product, which might consist of facts as opposed to legal advice or opinions. See *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988) (dividing the work-product protection into “opinion” and “non-opinion” categories and reserving the most protection for “opinion work product”).

97. McNulty Memo, *supra* note 73, § VII.B.2 (Category II information “might include the production of attorney notes, memoranda, or reports (or portions thereof) containing counsel’s mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.”); see also Broun & Capra, *supra* note 57, at 226-27.

98. McNulty Memo, *supra* note 73, § VII.B.2. Also, “if the request is authorized, the United States Attorney must communicate the request in writing to the corporation.” *Id.*

99. *Id.*

100. *Id.*

quest, “prosecutors must not consider this declination against the corporation in making a charging decision.”<sup>101</sup>

### 3. *The Revised DOJ Guidelines*

Amid heated criticism and the possibility of legislative intervention, the DOJ fought to maintain control over its corporate charging policy by altering its policies in a way that would both appease critics and provide for effective prosecution. During an oversight hearing of the DOJ before the Senate Judiciary Committee on July 9, 2008, Attorney General Mukasey informed the Committee that the DOJ would embark upon adjusting the McNulty Memo. Following the Oversight Hearing, Deputy Attorney General Mark Filip foreshadowed the changes in a letter to the Senate Judiciary Committee and further requested that Congress stay legislative action to allow the DOJ to revise its policy and benefit from a “reasonable amount of time” to review the revisions’ effectiveness.<sup>102</sup> On August 28, 2008, the DOJ issued its revisions to the Department’s Principles of Federal Prosecution of Business Organizations as a portion of its United States Attorneys’ Manual.<sup>103</sup>

The Revised DOJ Guidelines present the most significant revision to the corporate charging policies to date.<sup>104</sup> While the Revised DOJ Guidelines retain much of the language from the McNulty Memo in recognizing the utility of efficient and ethical corporate prosecutions, the revisions alter the previous memo’s approach to attorney-client privilege considerations. The Revised DOJ Guidelines prohibit prosecutors from requesting waivers of the attorney-client privilege or the work-product protections.<sup>105</sup> Indeed, the Revised DOJ Guidelines emphasize that the “critical factor” in evaluating corporate cooperation “is whether the corporation has provided the facts about the events,” not whether the

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101. *Id.*

102. Letter from Mark Filip to Patrick J. Leahy and Arlen Specter, *supra* note 27. In his letter dated the same day as the Committee hearing, Deputy Attorney General Filip offered two proposed changes to the McNulty Memo: (1) “Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges”; and (2) “Federal prosecutors will not demand the disclosure of ‘Category II’ information—[namely, non-factual attorney work-product and core attorney-client privileged communications]—as a condition for cooperation credit.” *Id.*

103. See Press Release, U.S. Dep’t of Justice, *supra* note 30; see also REVISED DOJ GUIDELINES, *supra* note 30.

104. See REVISED DOJ GUIDELINES, *supra* note 30.

105. *Id.* ch. 9-28.710 (“[P]rosecutors should not ask for such waivers [of the attorney-client privilege and work-product protections] and are not directed to do so.”).

corporation has waived its privilege.<sup>106</sup> The Revised DOJ Guidelines, nevertheless, recognize that “a corporation remains free to convey non-factual or (core) attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so . . . .”<sup>107</sup> Thus, the Revised Guidelines conclude, “so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work-product protection in the process.”<sup>108</sup> Accordingly, the DOJ believes that its focus on the disclosure of facts over the waiver of privilege will downplay the role of such waivers in corporate prosecutions. Yet, in the circumstances of a suspected corporate crime, the relevant facts and the attorney-client privilege are often inextricably linked in the product of an internal investigation report.<sup>109</sup> Sharing of the internal investigation would likely be the most efficient means of factual disclosure, but would also likely waive privilege protections.<sup>110</sup> Moreover, the Revised DOJ Guidelines do not expressly prohibit prosecutors from giving cooperation credit to corporations for waiver of the privilege; the Guidelines simply maintain that cooperation must be measured in terms of facts, not waiver.<sup>111</sup> In short, privilege waiver concerns will continue under the Revised Guidelines.

Although the Revised DOJ Guidelines recast evaluation of corporate cooperation in terms of factual disclosure instead of privilege waiver, the revisions try to walk the near non-existent line between substantive cooperation and waiver of the attorney-client privilege. For instance, the Revised Guidelines note,

[t]o receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request protected notes and memoranda generated by the lawyers’ interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-

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106. *Id.*

107. *Id.*

108. *Id.* ch. 9-28.720.

109. See *supra* Part I.B (discussing the attorney-client privilege as it relates to internal investigation reports and disclosure of the report to the government).

110. See *id.*

111. See REVISED DOJ GUIDELINES, *supra* note 30, ch. 9-28.710.



privileged evidence such as accounting and business records and emails between non-attorney employees or agents.<sup>112</sup>

Here, the disclosure by an attorney of “relevant factual information acquired through those interviews,” would likely constitute a waiver of the privilege.<sup>113</sup> Moreover, the non-privileged evidence the Revised DOJ Guidelines mention, though likely helpful, could be obtained through a grand jury subpoena, and thus would not constitute much cooperation beyond the corporation’s impending legal duty should a subpoena issue. Despite the Revised DOJ Guidelines’ commendable focus on cooperation involving non-privileged material and giving equal cooperation credit to the sharing of non-privileged and privileged materials, the Guidelines’ emphasis on the disclosure of relevant facts about the misconduct likely will continue to involve waiver of the privilege and work-product protections in federal corporate prosecutions.<sup>114</sup>

In addition to the concerns about factual disclosure continuing to implicate privilege waiver, others have criticized the Revised Guidelines for its inability to regulate other federal departments’ waiver practices or to reverse the powerful norms the previous DOJ memos instilled.<sup>115</sup> Since the issuance of the Revised DOJ Guidelines, both Senator Specter and ABA President H. Thomas Wells Jr. have voiced their support for a legislative remedy that would control across the board the federal government’s consideration of privilege waiver in corporate charging decisions. Along these lines, legislation would presumably be enforceable by a court should the government violate it, whereas a guidance document in

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112. *Id.* ch. 9-28.720.

113. *See supra* Part I.B.

114. An attorney revealing the facts culled from an internal investigation report to the DOJ would likely result in waiver of the privilege, but there may be alternative avenues of cooperation. In accordance with the Court’s formulation of the privilege in *Upjohn*, however, certain communications with counsel are privileged, not the underlying facts themselves. *See Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”). Theoretically the corporation could bring in a slew of employees to speak with the government about the misconduct without waiving the privilege. Nevertheless, the corporation might run up against employees’ Fifth Amendment rights in this instance, and the exercise could be frustrated.

115. *See* Press Release, H. Thomas Wells, Jr., *supra* note 17 (noting the need for regulation that restrains the federal government across the board and Revised DOJ Guidelines’ perpetuation of the “culture of waiver”); Press Release, U.S. Senator Arlen Specter, *supra* note 31 (calling for legislation to bind all federal agencies, like the SEC and EPA and noting “there is no change in the benefit to corporations to waive the privilege by giving facts obtained by the corporate attorneys from the individuals in order to escape prosecution or to have a deferred prosecution agreement”).

the United States Attorneys' Manual would not be enforceable by the judiciary. Moreover, as ABA President Wells points out, "the Department's new policy . . . cannot, standing alone, reverse the widespread 'culture of wavier' created by all these federal policies."<sup>116</sup> Thus, support remains for Congress to push forward with the Privilege Protection Act. Whether this support is enough to bring about the enactment of the Privilege Protection Act is an open and pressing question.

#### D. The Privilege Protection Act

Four days before the DOJ announced and implemented the McNulty Memo, Senator Arlen Specter introduced the Privilege Protection Act of 2006 (S.30) to curb the same practices the McNulty Memo aimed to restrict. At the beginning of the 110th Congress, Specter reintroduced an identical 2007 version of the Bill (S.186). On June 26, 2008, Specter introduced a restyled—though substantially similar—version of the Bill (S. 3217). And even after the issuance of the Revised DOJ Guidelines, Senator Specter has insisted that legislation is necessary to protect the attorney-client relationship.<sup>117</sup>

##### 1. *The Privilege Protection Act of 2007*

Senator Specter introduced the Privilege Protection Act to "protect the sanctity of the attorney-client relationship by forcing the Department of Justice to revise its corporate charging policies."<sup>118</sup> In its "Findings" section, the Privilege Protection Act recognizes that "protecting attorney-client privileged communications from compelled disclosure" increases corporate compliance programs' effectiveness, and thus, "fosters voluntary compliance with the law."<sup>119</sup> The Act also recognizes that "prosecutors . . . have been able to, and can continue to, conduct their work while respecting

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116. Press Release, H. Thomas Wells, Jr., *supra* note 17.

117. Press Release, U.S. Senator Arlen Specter, *supra* note 31.

118. Press Release, U.S. Senator Arlen Specter, Specter Introduces "Attorney-Client Privilege Protection Act of 2006" (Dec. 7, 2006) ("In his floor statement, Specter stated . . . 'I see no need for the Justice Department to publicly express a policy that encourages waiver of attorney-client privilege, especially where the policy is backed by the heavy hammer of possible criminal charges. Cases should be prosecuted on their merits, not based on how well an organization works with the prosecutor.'" [hereinafter Specter, 2006 Press Release] (on file with author).

119. Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. § 2(a)(2) (2008).

attorney-client and work product protections.”<sup>120</sup> With these principles in mind, the Privilege Protection Act aims “to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization.”<sup>121</sup> Toward that end, the Act prohibits federal lawyers and investigators from demanding or requesting that an organization waive its attorney-client privilege or work-product protections.<sup>122</sup> The Act also prohibits “conditioning any charging decision or cooperation credit on waiver or non-waiver of privilege.”<sup>123</sup> Nevertheless, the Act preserves an organization’s ability to voluntarily waive its privilege and work-product protections, and allows a federal agent or attorney to accept such a “voluntary and unsolicited offer.”<sup>124</sup> Lastly, the Act permits an agent or attorney of the United States to request “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.”<sup>125</sup> Thus, the Privilege Protection Act places a total prohibition on requesting or considering waivers of the corporate privilege and work-product protection, while at the same time it allows voluntary waivers.<sup>126</sup> The prospective effect of this simultaneous prohibition and allowance remains unclear.

## 2. *The Privilege Protection Act of 2008*

The Privilege Protection Act of 2008 is nearly identical to its predecessor.<sup>127</sup> Nevertheless, the Privilege Protection Act of 2008

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120. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 2(a)(5) (2007); *see also* S. 3217, 110th Cong. § 2(a)(5) (2008).

121. *Compare* S. 186, § 2(b), *with* S. 3217, § 2(b).

122. *Compare* S. 186, § 3014(b)(1), *with* S. 3217, § 3014(b)(1). The Act provides a brief definition for both, but largely relies on common law understandings of the attorney-client privilege and work-product doctrine. *See* S. 3217, §§ 3014(a)(1)-(2); S. 186, §§ 3014(a)(1)-(2).

123. Press Release, U.S. Senator Arlen Specter, *supra* note 31; *see* S. 3217, §§ 3014(b)(2)(A)(i)-(ii), (B)(i); S. 186, § 3014(b)(2)(A). *See* Part I.D.2 *infra* for a discussion of the Attorney-Client Privilege Protection Act of 2008’s essential alteration to an inconsistency in the Attorney-Client Privilege Protection Act of 2007.

124. S. 186, § 3014(d); *see also* S. 3217, § 3014(d)(1).

125. S. 186, § 3014(c); *see also* S. 3217, § 3014(c) (qualifying in greater detail what an agent or attorney of the government may request).

126. The Act also prohibits prosecutors from considering advancement of attorney fees by the corporation to the employee, the use of a joint defense agreement between employees and the corporation, sharing of information relevant to the investigation with an employee, and failure to terminate or sanction an employee for exercising the employee’s constitutional rights. *See* S. 186, 110th Cong. §§ 3014(b)(2)(B)-(E); *see also* S. 3217, §§ 3014(b)(2)(A)-(B).

127. *Compare* S. 186, *with* S. 3217.

adds important nuance to certain provisions. In terms of similarities, the Privilege Protection Acts of 2007 and 2008 share nearly identical “Findings,” “Purpose,” and “Definitions” sections.<sup>128</sup> Additionally, the two Acts’ prohibitions on prosecutorial conduct and allowance for voluntary waivers remain largely identical, although at times the 2008 Act implements a more detailed and expanded structure.<sup>129</sup> Specifically, while the 2008 Act’s prohibitions remain identical in their substance, the 2008 Act divides the provision prohibiting prosecutors from demanding waivers of the attorney-client privilege and conditioning treatment on such waivers into three sections.<sup>130</sup> The three sections in the 2008 Act state that a government attorney or agent shall not “(A) demand or request . . . (B) offer to reward or actually reward an organization . . . for waiving . . . the attorney client privilege or the attorney work product doctrine; or (C) threaten adverse treatment or penalize an organization . . . for declining to waive . . . the attorney-client privilege and work product protections.”<sup>131</sup> Thus, despite the stylistic differences, the 2008 Act presents the same prohibitions as the 2007 Act, but with greater specificity. Similarly, the 2008 Act and 2007 Act share the same substantive restrictions that direct government attorneys not to consider assertion of the privilege in either their charging decision or evaluation of the corporation’s cooperation.<sup>132</sup> But here again, the 2008 Act adds nuance through more detailed language and expanded structure.<sup>133</sup> Thus, despite slight stylistic differences, the Privilege Protection Act’s core restrictions remain relatively unchanged.

The differences between the 2007 and 2008 Acts largely result from the 2008 Act’s more generous and detailed provisions to protect government attorneys or agents’ ability to request information they “reasonably believe” not to be privileged.<sup>134</sup> While the 2007 Act directs that “[n]othing in this act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such [attorney] reasonably believes is not [privileged],” the 2008 Act allows government attorneys poten-

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128. Compare S. 186, with S. 3217.

129. See, e.g., S. 3217, §§ 3014(b)(1)(A)-(C); S. 186, § 3014(b)(1).

130. S. 3217, §§ 3014(b)(1)(A)-(C).

131. *Id.*

132. See S. 3217, §§ 3014(b)(2)(A)-(B); S. 186, § 3014(b)(2).

133. See *supra* notes 123-27 and accompanying text.

134. Compare S. 186, § 3014(c), with S. 3217, §§ 3014(c)(1)-(3).

tially greater flexibility in requesting information from corporations.<sup>135</sup> The 2008 Act reads,

Nothing in this section shall be construed to prohibit a [government attorney or agent] from requesting or seeking any communication or material that—(1) a [government attorney or agent] of ordinary sense and understanding would not know is subject to a [privilege] claim . . . ; (2) a [government attorney or agent] of ordinary sense and understanding would reasonably believe is not entitled to protection under the attorney-client privilege or attorney work-product doctrine; or (3) would not be privileged from disclosure if demanded by subpoena duces tecum issues by a court of the United States in aid of a grand jury investigation.<sup>136</sup>

The third clause, in particular, presents a significant stylistic departure from the 2007 Act; the clause likely aims to make clear that the Act should not interfere with the government's quest for factual information that would be responsive to a grand jury subpoena.<sup>137</sup> The overall thrust of these provisions, however, remains substantially similar to the corresponding section in the 2007 Act.

Additionally, the 2008 Act provides an essential alteration, which clarifies that the Act restricts the government from considering in its charging decision a corporation's waiver of the privilege.<sup>138</sup> An inconsistency exists in the 2007 Act's two central prohibitions on government conduct. While one section 3014(b)(1) directs government attorneys not to demand, request or condition treatment on the waiver of the privilege, section 3014(b)(2) directs the government not to condition charging decisions on the "valid assertion" of the attorney client privilege, and leaves out any explicit prohibition on the government favorably considering waiver of the privilege in its charging decision.<sup>139</sup> Although the former section 3014(b)(1) may be sufficiently broad and the Act's purpose may be clear enough to read into section 3014(b)(2) a prohibition on favorably considering waiver in a charging decision, the effect this off-kilter statutory structure would have remains somewhat unclear.<sup>140</sup> The 2008 Act's prohibitions mirror this structure for the most part, but the 2008 Act adds a clause preventing the government from favorably considering privilege waiver in its charging

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135. Compare S. 186, § 3014(c), with S. 3217, §§ 3014(c)(1)-(3).

136. S. 3217, §§ 3014(c)(1)-(3).

137. See *id.* § 3014(c)(3).

138. Compare S. 186, § 3014(b)(2), with S. 3217, §§ 3014(b)(2), (d)(2).

139. See S. 186, §§ 3014(b)(1)-(2).

140. See *id.*

decision to close the 2007 Act's potential loophole.<sup>141</sup> Specifically, the 2008 Act requires that a government attorney or agent must not consider that any corporation's "voluntary disclosure" "had been subject to a non-frivolous claim of attorney-client privilege or work-product protection." In other words, the government should not consider that the privilege once protected any material voluntarily submitted, and that submission of such material likely constitutes a waiver of the privilege. Thus, the 2008 Act corrects a potential pitfall in the 2007 Act.<sup>142</sup>

Despite the noted differences between the Privilege Protection Act's 2007 and 2008 versions, the Acts remain substantially similar in their ultimate restriction on government action. The main function of the Act—to prevent the government from considering in any way assertion or waiver of the privilege in its corporate charging policy—remains intact. Thus, analysis of the 2007 Act still directly applies to the 2008 Act. Along those lines, a number of notable omissions in the Privilege Protection Act raise questions about the Act's potential effectiveness. The Act fails to provide any means or process to determine if prosecutors have in fact requested, demanded, or conditioned treatment on a waiver of the privilege and work-product protections.<sup>143</sup> Moreover, the Act omits any sanction should prosecutors request information "reasonably believed" to fall within privilege protections.<sup>144</sup> Thus, although the Act takes decisive action to prohibit prosecutors from directly compelling waiver, it leaves out any repercussion should the practice of requesting waivers continue. This omission might stem from the ethical duty of prosecutors to comply with the law

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141. See S. 3217, §§ 3014(b)(1)-(2), (d)(1)-(2).

142. Notably, the 2008 Act includes a series of caveats that prevents the Act from interfering with existing federal statutes authorizing any of the conduct the Act prohibits or allowing the government to consider conduct the Act requires the government to ignore. See S. 3217, §§ 3014(e)-(f).

143. See Posting of Peter J. Henning to White Collar Crime Prof Blog, [http://law-professors.typepad.com/whitecollarcrime\\_blog/privileges/index.html](http://law-professors.typepad.com/whitecollarcrime_blog/privileges/index.html) (Dec. 9, 2006).

144. See *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 44 (2007) [hereinafter *H. Judiciary Subcomm. Hearing March 8, 2007*] (testimony of William Sullivan, Partner, Winston & Strawn, Former Assistant United States Attorney, District of Columbia) ("While the idea encompassed by the bill is sound, it lacks an enforcement mechanism to ensure meaningful prosecutorial restraint, and I encourage the consideration of a sanctions provision to deter the willful government violator."); see *infra* Part II.B.2 for a discussion of the Privilege Protection Act's lack of a sanction; see *infra* Part II.A.1.c for a discussion of the potential for increased prosecutorial liability and litigation that the Act might engender.

and “do justice,”<sup>145</sup> but the lack of a sanction remains troubling to some. Additionally, whether the allowance for voluntary waivers will swallow the prohibition to protect against compelled waivers is a pressing concern.

As the Senate Judiciary Committee awaited Deputy Attorney General Filip’s detailed proposal for revising the DOJ’s corporate charging principles, Senator Specter and others continued to advocate for the Privilege Protection Act’s passage into law.<sup>146</sup> Senator Specter, in his response to the Deputy Attorney General, remarked that:

[i]n the context of these lengthy delays and the potential prejudice which is involved in these matters, I think it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a reasonable “amount of time” which could be very long.<sup>147</sup>

Thus, there remains a strong prospect that legislative action may preempt a DOJ revision. Despite testimony in favor of and against the Act before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, the House passed its nearly identical version of the Privilege Protection Act on November 13, 2007.<sup>148</sup> The Senate Judiciary Committee heard similarly conflicted

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145. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 614 (1999) (“Prosecutors and others have also invoked this concept [‘the duty to ‘seek justice’] to suggest why prosecutors should be trusted more than other lawyers, why their conduct should be scrutinized less closely, or why they can be counted on to act disinterestedly.”); see also ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (1992) (“Standard 3-1.2 The Function of a Prosecutor . . . (c) the duty of the prosecutor is to seek justice, not merely to convict.”).

146. See Letter from Arlen Specter, Ranking Member, U.S. Senate Comm. on the Judiciary, to Mark Filip, Deputy Att’y. Gen. (July 10, 2008) (“My recommendation to Chairman Leahy is that we move ahead in the Judiciary Committee to either come to some accommodation with the Administration on legislation or have Congress move ahead on its own.”) (on file with author); Letter from Thirty-Three Former U.S. Att’y’s to Patrick Leahy, Chair, U.S. Senate. Comm. on the Judiciary (June 20, 2008) (“As former representatives of the Department of Justice, we respectfully request your support of S.186, the Attorney Client Privilege Protection Act of 2007.”), available at <http://www.acc.com/resource/v9833>; see also Lynnley Browning, *Bill to Protect Companies in Inquiries Adds Support*, N.Y. TIMES, June 23, 2008, at C1, available at [http://www.nytimes.com/2008/06/23/business/23law.html?\\_r=1&scp=1&sq=susan+hackett&st=nyt&oref=slogin](http://www.nytimes.com/2008/06/23/business/23law.html?_r=1&scp=1&sq=susan+hackett&st=nyt&oref=slogin); Posting of Dan Slater to Wall St. J. Law Blog, <http://blogs.wsj.com/law/2008/06/23/former-dojers-urge-congress-to-shore-up-attorney-client-privilege> (Jun. 23, 2008, 9:19 am EST).

147. See Letter from Arlen Specter to Mark Filip, *supra* note 146.

148. See Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

testimony over the potential ramifications of enacting the Privilege Protection Act, but support has only widened for the Privilege Protection Act in the interim.<sup>149</sup> Going forward, Congress likely will have to scrutinize the Privilege Protection Act's measures, and continue to weigh the Act's potential effectiveness against the Revised DOJ Guidelines. The following section of this Note explores the testimony for and against the Privilege Protection Act, and addresses differing views on the Act's potential effect on white-collar prosecutions.

## II. EVALUATING WHITE-COLLAR INVESTIGATIONS UNDER THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT: WHAT MIGHT SPECTER'S BILL ACCOMPLISH?

This Part will address conflicting views of how the Privilege Protection Act ("Privilege Protection Act") might alter corporate prosecutions. Specifically, Part II addresses the multiple viewpoints on two fundamental issues: how the Privilege Protection Act will affect white-collar investigations, and whether the Act will bolster the attorney-client privilege and work-product protections. Some view the Act as a needless legislative restriction on prosecutorial discretion that will decrease the efficacy of investigations and leave the current condition of privilege unimproved.<sup>150</sup> In contrast, others view the Privilege Protection Act as a necessary measure to balance coercive corporate investigations and prevent the continued erosion of privilege under the DOJ's corporate charging policies.<sup>151</sup> Part II relies largely on statements before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary as well as statements before the Senate Committee on the Judiciary regarding the pending Act and the former prosecutorial practices under the McNulty Memo. Despite its focus on disclosing the facts of the corporate misconduct, the Revised Guidelines likely will perpetuate privilege waiver prac-

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149. The addition of eleven Senate members as co-sponsors also indicates the widening support for the Privilege Protection Act. See *supra* note 26 and accompanying text.

150. See, e.g., *Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *S. Judiciary Comm. Hearing Sept. 18, 2007*] (statement of Karin Immergut, United States Attorney, District of Oregon).

151. See, e.g., *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 45, 53 (statement of Karen Mathis, Former President, American Bar Association) (because companies will continue to feel extreme pressure to waive in virtually every case, the "culture of waiver" created by the Thompson Memorandum will continue under the McNulty Memorandum).



tices, and thus arguments regarding privilege waiver under the McNulty Memo remain pertinent to today's Guidelines.

### **A. How the Privilege Protection Act Might Affect the Logistics of White-Collar Investigations**

#### *1. The Argument Against the Act's Implementation*

##### *a. The Privilege Protection Act May Increase Inefficiency in White-Collar Prosecutions*

Some current and former prosecutors criticize the Privilege Protection Act for the undue burden it might place on investigating complex, white-collar conspiracies. By their nature, such crimes are difficult to uncover, and possibly even harder to prove in court. Obtaining a waiver, and thus the fruits of an internal investigation, "can streamline a [ ] [governmental] investigation."<sup>152</sup> Under the McNulty Memo, prosecutors could request a waiver upon showing a "legitimate need," but under the Privilege Protection Act, prosecutors could not request or consider privilege waiver in their investigation and charging decisions regarding a corporation.<sup>153</sup> While the Revised DOJ Guidelines prohibit prosecutors from requesting waivers, the Guidelines do not prohibit prosecutors from considering waiver in their charging decisions. Moreover, the Guidelines' focus on factual disclosure as the benchmark of cooperation likely entails waiver of the privilege in many cases.<sup>154</sup> Although prosecutors still must fulfill their duty of verifying the facts received from a corporate investigation,<sup>155</sup> DOJ officials insist that a waiver can be crucial to the effectiveness of an investigation. Specifically, Karin Immergut, U.S. Attorney of the District of Oregon and the Chair of the White-Collar Subcommittee for the Attorney General's Advisory Committee of the DOJ, submitted in her written testimony to the Senate Judiciary Committee:

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152. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Karin Immergut, United States Attorney, District of Oregon).

153. *See* Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. §§ 3014(b)(1)-(2) (2008); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. §§ 3014(b)(1)-(2) (2007).

154. *See* REVISED DOJ GUIDELINES, *supra* note 30; *see also supra* Part I.C.3

155. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 3 (statement of Karin Immergut, United States Attorney, District of Oregon) ("Waiver of privilege is not 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, and do not, simply rely on waiver to prove their case.").

In these types of 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. In a survey of United States Attorneys' Offices, federal prosecutors have told us that waiver of privilege 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. Waiver allows the government to act quickly and effectively—a goal that should be encouraged, not thwarted.<sup>156</sup>

In her testimony, U.S. Attorney Karin Immergut claimed that the Privilege Protection Act would sacrifice these efficiencies and make it “far more difficult to bring corrupt organizations and their executives to justice.”<sup>157</sup> As she viewed it, the McNulty Memo had reached “the proper balance between the protection of the attorney-client privilege and the legitimate need of law enforcement to prosecute corporate misconduct.”<sup>158</sup> Thus, the Privilege Protection Act could frustrate an investigation.

In addition to the potential ineffectiveness of investigations without privilege waiver, an extended investigation combined with a reported lack of resources in U.S. Attorney's offices might deter prosecutors from prosecuting white-collar crime.<sup>159</sup> Prosecutors are bound by an ethical duty to achieve just outcomes,<sup>160</sup> yet the limits of manpower and under-funding might seriously hamper

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156. *Id.*

157. *Id.* In his written testimony submitted to the House Judiciary Subcommittee Hearing, Deputy Assistant Attorney General Barry M. Sabin argued that efficiency and speed are not only in the prosecutor's interests, but also in the corporation's interest. *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 16 (“[I]n our discussions with corporate counsel, they have acknowledged the benefits of proceeding quickly. Rather than facing additional delay while the government duplicates its efforts, the company will often offer the results of its internal investigation so that the government's investigation can move faster. This allows the government to make a charging decision within months, rather than years, which saves the company money and employee time and protects the value of its stock.”).

158. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Karin Immergut, United States Attorney, District of Oregon).

159. *See S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Daniel Richman, Professor, Columbia Law School).

160. *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1578 (2003) (noting the “distinctive disciplinary rule for prosecutors” to “see that justice is done”).

prosecutors' ability to administer justice.<sup>161</sup> Thus, as Columbia Law School Professor Daniel Richman argued to the Senate Judiciary Committee, if Congress passes the Privilege Protection Act, it is likely that an increase in funding for U.S. Attorney's Offices should accompany the bill, particularly considering potential increases in expenditures during investigations.<sup>162</sup> If the Privilege Protection Act were to relax prosecutorial scrutiny on corporate fraud, then the Act might achieve its goal of protecting the privilege but only at the expense of effective and just prosecution.

*b. The Privilege Protection Act May Decrease a Corporation's Willingness to Cooperate with the Government and Minimize the Deterrent Effect of White-Collar Prosecutions*

The Privilege Protection Act may provide a disincentive for corporations to cooperate in white-collar investigations.<sup>163</sup> In accordance with the Revised DOJ Guidelines, a corporation may take advantage of the ability to gain cooperation points for disclosing the relevant facts of the suspected misconduct, and thereby avoid criminal sanction.<sup>164</sup> As the Privilege Protection Act would modify it, corporations may still voluntarily waive their privilege, but will no longer receive cooperation credit for privilege waivers.<sup>165</sup> As Deputy Assistant Attorney General Barry Sabin submitted to the Senate Judiciary Committee, "[i]t would not make sense for the

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161. See *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150, at 2 (statement of Daniel Richman, Professor, Columbia Law School) ("Even as the Justice Department has trumpeted its commitment to enforcement in this area, there have been regular reports of under funding and open slots in U.S. Attorney's offices, and of the toll that counterterrorism, violent crime, and immigration programs have taken on white collar [sic] enforcement generally.").

162. See *id.* ("[S]uch a commitment of resources [to U.S. Attorney Offices] ought to occur immediately. It would be regrettable indeed if we simply waited until the next spate of headlines about corporate fraud and then played catch-up. And even worse, if we waited until the next Enron, and then just created a few more federal crimes or hiked up the sentences of those who do get prosecuted and convicted.").

163. See *H. Judiciary Subcomm. Hearing March 8, 2007*, *supra* note 144, at 20 (statement of Barry M. Sabin, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice); see also *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150 (statement of Karin Immergut, United States Attorney, District of Oregon) (noting that the Bill would also prohibit the government from conferring any benefit on individuals who have retained counsel and have decided to waive their privilege in an attempt to cooperate with the government).

164. See REVISED DOJ GUIDELINES, *supra* note 30.

165. See Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. §§ 3014(b)(1)-(3), (d)(1)-(2) (2008); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. §§ 3014(b)(1)-(2), (d) (2007); see also *supra* notes 138-142 and accompanying text.

corporation to voluntarily provide information to the government and not receive some credit for it. There would be no incentive to cooperation if that were the case.”<sup>166</sup> Thus, some argue that the government will likely have to engage in lengthier investigations without a waiver, and in addition, will have less leverage to compel the corporation to cooperate in the investigation.<sup>167</sup> Undermining some of the tools for white-collar investigations will lead to less aggressive prosecution, and in turn, lessen the deterrent effect of such investigations.<sup>168</sup> As a result of less effective prosecution, corporations are better able to conceal corporate fraud. DOJ officials believe that any increases in corporate fraud will endanger investors and the integrity of the market.<sup>169</sup>

*c. The Privilege Protection Act May Chill Communications Between Prosecutors and Defense Counsels, and Open the Door to Prosecutorial Liability*

Detractors also claim that the Privilege Protection Act may greatly expand prosecutorial liability for certain conduct during a white-collar investigation. The Privilege Protection Act forbids government attorneys from demanding, requesting, or conditioning treatment on the disclosure of any privileged communication or

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166. *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 4 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice).

167. *See id.* at 23 (“Taking away the Department’s ability to request a waiver and our ability to make the right charging decisions by severely restricting what we can consider in determining whether a corporation is cooperating, not only hamstringing federal prosecutors, it will ultimately discourage corporate self-policing.”).

168. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 3 (statement of Michael Siegel, Professor, University of Florida, Fredric G. Levin College of Law) (“With corporate cooperation, the successful completion of a complex white collar [sic] prosecution, including resolution of corporate as well as all individual charges, can very well be reduced from a matter of years to a matter of months. This huge efficiency gain represents a significant public good. Far more white-collar criminal behavior can be attacked with the same amount of resources devoted to the effort. The efficiency argument is equally strong even when prosecutors erroneously target an innocent company. The fastest way a company can convince government agents of its innocence is to share all pertinent information with them so that they can draw this conclusion themselves.”).

169. *See H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 23 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice); *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 9 (statement of Karin Immergut, United States Attorney, District of Oregon) (“If history is our guide, in the next decade, the impact of this legislation will fall on American retirees and pension holders. We should not turn back the clock. Having learned the lesson of Enron all too well, we need to maintain our vigilance so that it does not happen again.”).

work-product.<sup>170</sup> This provision provides the essential restraint on prosecutorial conduct to achieve the Act's stated purpose of preserving attorney-client privilege, because it supposedly forecloses the potential for compelled waiver. At the same time, this provision might lead to "considerable and extraordinary pre-trial litigation, with regular claims that the government's decision to charge was illegally influenced by the defendant corporation's refusal to waive its privilege."<sup>171</sup> In certain circumstances, corporate counsel might even claim that the charges against "an individual defendant were supported by privileged materials that the government illegally obtained through an illegal threat to prosecute."<sup>172</sup> Prosecutors will not be held liable if courts hold that the Privilege Protection Act does not provide a legal remedy for such prosecutorial conduct or that the defendant lacks standing to make that claim; however, prosecutors will still have to battle this type of litigation—wasting time and resources—in the midst of their investigation into an already complex conspiracy.<sup>173</sup> Moreover, if this type of litigation were successful, then "each claim of abuse could offer defense counsel the opportunity to put a prosecutor or two on the stand to testify about the charging decision."<sup>174</sup> By initiating such an action, a defense counsel could gain valuable insight into the government's case. Also, the potential for "an intrusive inquiry into prosecutorial motivation might itself lead prosecutors to shy away from a worthy case."<sup>175</sup>

Another section of the Privilege Protection Act may extend prosecutorial liability, and thus further deter white-collar prosecutions. The Privilege Protection Act carves out an exception to its prohibition on requesting privileged material that permits "an agent or attorney of the United States" to request "any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or

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170. See Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. § 3014(b)(1) (2008); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(b)(1) (2007).

171. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 100 (statement of Daniel Richman, Professor, Columbia Law School).

172. *Id.*

173. See *id.* at 2 ("Maybe the individual defendant would be held to lack standing to raise the . . . claim. But this Committee needs to confront the cottage industry of prosecutorial abuse claims that the proposed legislation would generate.").

174. *Id.*

175. *Id.*

attorney work-product doctrine.”<sup>176</sup> The simultaneous prohibition on requesting privileged material and exception for information “reasonably believed” to fall outside such protections illustrates the nuances prosecutors must contemplate when they request information from a defense counsel.<sup>177</sup> Essentially, the Act requires that prosecutors have “reasonable belief” that the information falls outside of the privilege. This standard may frustrate communication between prosecutors and defense counsels.<sup>178</sup> For instance, when a prosecutor knows that defense counsel gained information regarding the alleged conduct from an internal investigation, each question a prosecutor asks of counsel may implicate, at least partially, attorney-client protections.<sup>179</sup> Thus, these provisions may compromise prosecutorial communications, or even lead to litigation over certain statements to defense counsel in the course of an investigation.<sup>180</sup>

*d. A Legislative Solution Might Unduly Hamper  
Prosecutorial Discretion*

Since stepping down from government service, Paul McNulty continues to defend the policy he established in his memo.<sup>181</sup> Citing the low occurrence of formal Category II privilege waiver re-

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176. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(c) (2007) (“(c) INAPPLICABILITY—Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such an agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work-product doctrine.”); see also Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. § 3014(c) (2008) (adding three provisions to clarify what a government attorney or agent may and may not request); *supra* note 136 and accompanying text.

177. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 2 (statement of Karin Immergut, U.S. Attorney, District of Oregon) (“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? . . . Whenever questions must be answered with information obtained by counsel in the internal investigation, i.e., protected by attorney-client privilege or work product, [sic] the legislation would prohibit asking these questions.”).

178. See *id.* (“[I]n 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 ‘reasonable belief’ that the materials are not entitled to protection.”).

179. See *id.* This will also likely decrease the efficiency of such investigations.

180. See *id.* (“The potential inability to broach vital topics with counsel prevents the United States from making an assessment of whether opposing counsel’s assertion of privilege is even valid.”).

181. Paul J. McNulty, Partner, Baker & McKenzie, & Former Deputy Att’y Gen., U.S. Dep’t of Justice, Speech at the American Bar Association’s National Institute on

quests (four over a period of ten months during the Memo's implementation), McNulty argued at an ABA Securities Conference that "[t]he Department should police itself rather than the legislative branch telling the executive branch how it should conduct its investigations."<sup>182</sup> In McNulty's view, the low number of requested Category II privilege waivers suggested that the memo had worked to restrain prosecutors from pressuring corporate counsel to waive the privilege.<sup>183</sup> With the implementation of the Revised DOJ Guidelines, an argument exists for allowing the DOJ to proceed under its new policy before deciding that a legislative intervention remains necessary. Deputy Attorney General Mark Filip asked for that much in his letter to the Senate Judiciary Committee prior to the implementation of the Revised DOJ Guidelines.<sup>184</sup> Moreover, DOJ guidance documents may be amended more easily and quickly to the needs of law enforcement than legislation.

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Securities Fraud (Oct. 25, 2007) [hereinafter McNulty Speech at the ABA] (transcript available in 21 CORP. CRIM. REPORTER 43, 4 (2007) (print edition only)).

182. *Id.*

183. Earlier in his speech McNulty acknowledged that there "have been dozens of voluntary waivers in the past ten months," but counters that these voluntary waivers would likely continue under the Privilege Protection Act, since they "are often advantageous to the corporation," and "[the act] specifically provides that voluntary waivers will continue to occur." *Id.* Notably, McNulty does not address the frequency with which corporations waive Category I information over that period, or how often the Department has considered a privilege waiver in determining sufficient cooperation to avoid prosecution. *Id.* See Part II.B.2. *infra* for a discussion of the Privilege Protection's Act possible effect on preserving attorney-client privilege. While McNulty acknowledged that he had heard stories of prosecutors requesting waivers in defiance of the McNulty Memo's procedures, he believed this problem was an internal "prosecutorial compliance issue." This is a challenge inherent in having ninety-three independent U.S. Attorney's Offices, and a practice, McNulty believes, that may be curbed with further training and oversight. See McNulty Speech at the ABA, *supra* note 181 ("And then a lawyer will say to me—that's all well and good Paul, but last week, I was in a meeting, and before the air was out of the cushion of my chair when I sat down, the government hit me with a demand for a waiver. If that happened, that would be an acute violation of the Department's policy. And there we have a prosecutorial compliance issue. The fact that we have [ninety-three] different offices is a challenge that you can't just overcome. You have to hope that there is some standard that tries to pull things together. We are better off with a kind of structure or regime. Prosecutors are being trained in this process. They are having to follow these rules.").

184. See Letter from Mark Filip to Patrick J Leahy and Arlen Specter, *supra* note 27 ("I respectfully ask that you give us an opportunity to implement these changes and then review their operation after a reasonable amount of time before pursuing legislation in this area.").

## 2. *The Argument for the Act's Implementation*

### a. *The Government May Conduct Effective White-Collar Investigations Without the Aid of Privilege Waiver*

Supporters of the Privilege Protection Act argue that the government has and may continue to conduct effective white-collar investigations without a corporation waiving its privilege. Many former prosecutors, including former Attorneys General, submitted testimony to Congress and letters to the Department of Justice expressing the conviction from their experience: a waiver is not essential to white-collar prosecutions.<sup>185</sup> Federal prosecutors have numerous tools at their disposal to conduct investigations without relying on waivers to receive information. For instance, the government might utilize the power of the grand jury to issue subpoenas, obtain warrants for the search and seizure of evidence, conduct government proffers, and engage in cooperation deals with co-defendants.<sup>186</sup> If Congress passed the Privilege Protection Act, federal prosecutors would still have ready use of these tools; the Act would simply prohibit them from requesting or conditioning treatment on privilege waiver.<sup>187</sup> Where a corporation should see fit, however, under the Act it may always waive its privilege in its efforts to co-

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185. See, e.g., *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150, at 110 (statement of Dick Thornburgh, Former Att'y Gen., U.S. Department of Justice); see also Letter from Former Senior Dep't of Justice Officials to Alberto Gonzalez, Att'y Gen., Dep't of Justice (Sept. 5, 2006) [hereinafter Letter From Former Senior Dep't of Justice Officials], available at <http://www.abanet.org/buslaw/attorneyclient/materials/065/065.pdf>.

186. See *White-Collar Enforcement: Attorney-Client Privilege and Corporate Waivers*, *Hearing before the H. Comm. on the Judiciary*, 109th Cong., at 50 (2006) [hereinafter *H. Judiciary Subcomm. Hearing March 7, 2006*] (testimony of William Sullivan, Partner, Winston & Strawn, & Former Assistant United States Attorney, District of Columbia) ("Mr. Chabot (R-OH): What alternative techniques are available to prosecutors to obtain the needed information from a corporation without requiring a waiver of the attorney-client privilege? Mr. Sullivan: There are all types of investigative techniques. There is cooperation undertaken by individuals within the corporation. There is the grand jury process, with subpoenas. There are wires . . .").

187. *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150 (statement of Dick Thornburgh, Former Att'y Gen., U.S. Department of Justice) ("As you know, for a large part of my professional career I either served as a federal prosecutor myself or supervised other federal prosecutors. S. 186 does not in any way impair federal prosecutors from doing their proper jobs. They would remain free to prosecute—or refrain from prosecuting—as warranted by the evidence and the law. In support of such determinations, they could seek any communication or material they reasonably believe is not privileged, and they could accept voluntary submissions by companies of the results of internal investigations. They could also continue to seek other information through Grand Jury subpoenas, immunity agreements, and all the other tools that prosecutors have historically used. They simply could not seek, directly or indirectly, waivers of privileged information.").



operate.<sup>188</sup> While the sharing of an internal investigation report and the waiver of privilege it likely entails would speed-up an investigation, prosecutors still have a duty to investigate the charges included in and beyond the reports of corporate counsel.<sup>189</sup> Thus, the time and resources devoted to investigations may remain comparable. Moreover, as explored further in the next section, prosecutors may obtain significant amounts of information regarding potential illegal conduct through interactions with corporate counsel that do not constitute privilege waiver.

*b. A Corporation May Sufficiently Cooperate Without Waiving Its Privilege*

Both supporters and opponents of the Act agree that sufficient cooperation may be achieved without a waiver of privileged material. Under the Privilege Protection Act, corporations may waive their attorney-client privilege to cooperate with the government, but at the same time, the Act prohibits the government from considering such a waiver in evaluating the corporation's cooperation.<sup>190</sup> Nonetheless, supporters of the Act argue that it leaves enough avenues of cooperation open so that a corporation may both expedite an investigation and receive cooperation credit for its action. As Andrew Weissmann, former Assistant United States Attorney and Director of the Department of Justice's Enron Task Force, submitted to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, without waiving its attorney-client privilege "a company can give the government documents that will further its investigation and steer investigators to company employees with critical information. It can also give the government an attorney proffer of salient information. None of that requires the company to waive the attorney-client privilege."<sup>191</sup> As

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188. See Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. § 3014(d) (2008); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(d) (2007).

189. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150, at 3 (statement of Karin Immergut, United States Attorney, District of Oregon) ("Waiver of privilege is not 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, and do not, simply rely on waiver to prove their case.").

190. See S. 3217, §§ 3014(d), (b); S. 186, §§ 3014(d), (b).

191. See *H. Judiciary Subcom. Hearing March 8, 2007, supra* note 144, at 50 (written statement of Andrew Weissmann, Partner, Jenner & Block, & Former Assistant United States Attorney, Eastern District of New York, and Director of the Depart-

others argue, corporate counsel may assist the government to understand these disclosed items, and even share some of the “results of internal investigations in ways that do not implicate privileged material.”<sup>192</sup> These traditional forms of cooperation might allow corporations to provide a factual roadmap of the illegal conduct to prosecutors without having to divulge privileged employee interviews and related legal analysis.<sup>193</sup> Thus, supporters of the Privilege Protection Act argue that a corporation, if it so desires, will likely be able to cooperate with the government in white-collar investigations, without impacting its attorney-client privilege and work-product protections.

*c. The Privilege Protection Act Is Consonant with Other Legislative Restraints on Prosecutorial Conduct*

Supporters of the Privilege Protection Act argue that a legislative restriction on prosecutorial action remains a properly tailored solution to protect the privilege. Previous legislative acts have implemented restrictions on prosecutorial conduct, and the Act at hand is no different.<sup>194</sup> Notably, the McDade-Murtha Act (requiring federal prosecutors to abide by state ethics rules), the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence limit how a prosecutor may investigate and prosecute a case.<sup>195</sup> Under the Privilege Protection Act, prosecutors retain their discretion to determine whether to charge and what charges to lodge against a corporation. The Act “merely restricts the ability to exact

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ment of Justice’s Enron Task Force); *but see* Broun & Capra, *supra* note 57, at 232 (stating that certain courts may not uphold certain confidentiality agreements).

192. Letter from Former Senior Dep’t of Justice Officials, *supra* note 185.

193. *See H. Judiciary Subcomm. Hearing March 7, 2006, supra* note 186, at 50-51 (testimony of William M. Sullivan, Winston & Strawn, & Former Assistant United States Attorney, District of Columbia) (“[W]e will assist the Government to the extent that it is in our best interests to provide them with the roadmap, with the factual outline, who you should talk to, what this document means. But we shouldn’t have to and we don’t want to provide them with our mental impressions, our specific interview notes, our opinion work-product, and our sensitive discussions with employees because we want to preserve the ability to talk to them again about another problem so that we can continue to observe the law.”).

194. *See S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (written statement of Andrew Weissmann, Partner, Jenner & Block, & Former Assistant United States Attorney, Eastern District of New York, and Director of the Department of Justice’s Enron Task Force) (“The Senate bill would not be unprecedented or onerous. Federal prosecutors have numerous strictures on their conduct imposed by statute and rules, from the McDade bill requiring them to adhere to state ethics rules in conducting investigations, to the Federal Rules of Criminal Procedure and Federal Rules of Evidence, which limit how they can investigate and prosecute a case.”).

195. *See id.*

waivers of a sacrosanct privilege as a sign of a company's bona fides that it is cooperating with law enforcement."<sup>196</sup> It does not, therefore, unduly impinge on prosecutorial discretion.

## **B. How the Privilege Protection Act Will Affect Waivers in White-Collar Investigations**

### *1. Supporters of the Privilege Protection Act Claim that the Act Will Bolster the Privilege and Remedy the "Culture of Waiver" that Pervades White-Collar Investigations*

The Privilege Protection Act has garnered support from the American Bar Association, local Bar organizations, the Association of Corporate Counsels, and a wide-ranging group of legal organizations that formed "The Coalition to Protect the Attorney-Client Privilege."<sup>197</sup> These organizations lobbied Senator Specter to introduce the Privilege Protection Act, and they have endorsed the Act because they believed it would end the practice of coerced waiver under the McNulty Memo.<sup>198</sup> Although the McNulty Memo implemented stricter controls on privilege waiver requests,

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196. *Id.*

197. Press Release, Karen J. Mathis, Former President, ABA, Regarding the Attorney-Client Privilege Protection Act of 2006 (Dec. 7, 2006) ("The Attorney-Client Privilege Protection Act of 2006 . . . is critically important to our nation's economic and legal health, and warrants prompt approval by Congress.") (on file with author); see *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 77-87 (written statement of Richard T. White, Chairman, Board of Directors of the Association of Corporate Counsel) (supporting legislation and criticizing the McNulty Memo); *id.* at 88 (Attachment 1: Why Congress Should Act to Protect the Attorney Client Privilege, Offered by the Coalition to Preserve the Attorney-Client Privilege) (The Coalition "strongly supports S. 186, the Attorney-Client Privilege Protection Act of 2007"). The following member organizations comprise "The Coalition to Protect the Attorney-Client Privilege": American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, National Association of Criminal Defense Lawyers, National Association of Manufacturers, and the U.S. Chamber of Commerce.

198. Letter from Karen J. Mathis, Former President, ABA, to Patrick J. Leahy, Chair, U.S. Senate Comm. on the Judiciary (Nov. 21, 2006), available at <http://www.abanet.org/buslaw/attorneyclient/materials/073/073.pdf>; see also *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 59 (written statement of Karen J. Mathis, Former President, American Bar Association) ("Because the McNulty Memorandum fails to solve the problem of government coerced waiver, the ABA urges members of the subcommittee to introduce or support legislation, like S.186, that would: (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work-product protections during investigations; (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation; and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.").

its focus on waiver as a factor of cooperation continued to pressure companies to waive their privilege.<sup>199</sup> Supporters of the Act argued that there was an immediate need to end this practice, and that the Privilege Protection Act was the proper vehicle to achieve these means.<sup>200</sup> Even after the McNulty Memo's demise, initial responses to the Revised DOJ Guidelines indicate that the Privilege Protection Act's strongest supporters still argue for the Act's necessity, because the Guidelines "leave many problems unresolved."<sup>201</sup> Supporters, thus, argue that the Act would apply across the federal government and reverse the "culture of waiver" by eliminating any consideration of privilege waiver in corporate charging decisions.<sup>202</sup> Moreover, the Act still would provide sufficient means to cooperate in allowing voluntary waiver and focusing on the exchange of non-privileged information.

Additionally, supporters of the Privilege Protection Act point out that an uncertain privilege "actually diminishes compliance with the law," since it would deter employees from consulting with in-house counsel out of fear that their statements will be disclosed to the government.<sup>203</sup> As a result, corporations likely will have a

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199. See *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150 (written statement of Andrew Weissmann, Partner, Jenner & Block, Former Assistant United States Attorney, Eastern District of New York, and Director of the Department of Justice's Enron Task Force) ("Yet another problem under the McNulty Memorandum—which the Senate bill would remedy—is that companies will continue to feel undue pressure to waive the privilege because the memorandum still permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives 'credit' to those companies for waiver.").

200. See *id.* (statement of Dick Thornburgh, Former Att'y Gen., U.S. Department of Justice) ("Congress should enact legislation such as S. 186 promptly to restore the attorney-client privilege, the work-product doctrine and the Constitutional rights of individuals to their proper places in our system of justice.").

201. See Press Release, U.S. Senator Arlen Specter, *supra* note 31; Press Release, H. Thomas Wells, Jr., *supra* note 17.

202. See *House Judiciary Subcommittee Hearing March 8, 2007*, *supra* note 144, at 90 (Attachment 1: Why Congress Should Act to Protect the Attorney Client Privilege, Offered by the Coalition to Preserve the Attorney-Client Privilege) (advocating that "S.186 prevents both direct coercion (e.g., demanding or requesting [disclosure of privileged information]) and indirect coercion (e.g., measuring cooperation or otherwise conditioning treatment on such an action)").

203. *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 21 (2007) [hereinafter *S. Judiciary Comm. Hearing Sept. 12, 2007*] (statement of Thomas J. Donohue, President & Chief Executive Officer, U.S. Chamber of Commerce) ("If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, many will simply choose not to talk to their attorneys. The result is that the company may fall out of compliance—not intentionally—but because of a lack of communication and trust between the company's employees and its attorneys."); see also *Upjohn Co. v. United*

difficult time running effective compliance programs; therefore increasing the likelihood of fraud. The Privilege Protection Act recognizes the usefulness of compliance programs in serving as a preventative measure against corporate fraud, and seeks to reinvigorate such programs through a secured privilege.<sup>204</sup> Also, limiting waivers of the attorney-client privilege and work-product protections would reduce third-party liability due to corporate misconduct, and the “massive settlements” that usually accompany such cases.<sup>205</sup> Thus, the former President of the ABA, Karen Mathis, has hailed the Privilege Protection Act as “strik[ing] the proper balance between the legitimate needs of prosecutors and regulators and the constitutional and fundamental legal rights of individuals and organizations.”<sup>206</sup>

2. *Detractors Argue that the Privilege Protection Act Will not Prevent Privilege Waivers from Serving as a Mainstay of White-Collar Investigations*

Detractors argue that the Privilege Protection Act will fail to achieve its main objective. The attorney-client privilege would be no more protected under the Act than under the current regime. The risk of a corporate indictment in white-collar investigation remains so great that corporations likely will remain compelled to

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States, 449 U.S. 383, 392 (1981) (noting the importance of the privilege to protect compliance programs).

204. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. §§ 2(a)(2), (4) (2007) (“(2) Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law . . . (4) The ability of an organization to have effective compliance programs . . . is enhanced when there is clarity and consistency regarding the attorney-client privilege.”). But note, if the practice of voluntary waivers permitted by the Privilege Protection Act becomes widespread, the privilege and work-product protections’ integrity would remain in question. See Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. §§ 2(a)(2), (4) (2008).

205. See *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 17 (statement of Thomas J. Donohue, President & Chief Executive Officer, U.S. Chamber of Commerce) (“Once the privilege is waived, third-party private plaintiff lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.”).

206. Press Release, Karen Mathis, Former President, ABA, Regarding the Attorney-Client Privilege Protection Act of 2006 (Dec. 7, 2006).

cooperate with the government.<sup>207</sup> And, possibly the quickest and most efficient form of cooperation involves privilege waiver.<sup>208</sup>

Although the Act would prohibit the government from requesting a privilege waiver, the pressure to waive the privilege likely will remain in place for a variety of reasons. First, as Paul McNulty acknowledged in a speech before the ABA's National Institute on Securities Fraud, "[i]t doesn't matter therefore, if prosecutors are prohibited from ever asking or severely restricted from asking [for privilege waiver]—as they are under my Memo . . . . Companies will continue to voluntarily waive, because they want to be cooperative." Second, as McNulty pointed out, in cases of "extensive wrongdoing," "other forms of cooperation may not be sufficient to overcome a strong possibility of indictment."<sup>209</sup> Third, corporations made aware of the possibility of indictment want to quickly dissuade the government from pursuing such a path. As Professor Daniel Richman stated before the Senate Judiciary Committee, "[t]he faster and more convincingly corporate counsel can either assure enforcers of the limited nature and scope of any improprieties or demonstrate that no improprieties occurred, the better for the company. This dynamic would continue even after legislative intervention . . . ."<sup>210</sup> Thus, with these factors in mind, a corporation—though acting voluntarily under the Act—would still feel inclined to implement the most complete form of disclosure to the government: privilege waiver.

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207. See McNulty Speech at the ABA, *supra* note 181 ("The reality is that companies are going to cooperate out of principle, or because they are simply worried about being indicted . . . . They have a compelling story to tell that will necessitate disclosure. I have seen this in just two months of private practice. Whatever the reason, corporations will continue to waive the privilege because it is in their best interest to do so.").

208. See *id.* ("It is hard to be cooperative without crossing the waiver line."); see also Part II.A.1.a.

209. McNulty Speech at the ABA, *supra* note 181 ("Supporters of the legislation to prohibit the government from seeking waivers seem to think that if the government is not allowed to ask, the pressure to waive will go away. The problem with that view is that other forms of cooperation may not be sufficient to overcome a strong possibility of indictment in cases involving extensive wrongdoing. There is only so much you can do to cooperate without providing information.").

210. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Daniel Richman, Professor, Columbia Law School) ("In a broad range of cases, legislative intervention would change little. Companies currently have very strong incentives both to pursue internal investigations and to voluntarily offer up otherwise privileged information obtained in the course of those investigations. Where a federal enforcer—prosecutor or agency official—has expressed an interest in a matter (or there is a risk that such an interest will develop), corporate interests will frequently be served by providing an oral report or handing over a written one, and perhaps disclosing the underlying factual materials.").

Now a common practice in corporate investigations, voluntary privilege waivers have long held a significant role in the American criminal justice system. Assuming that the government, through aggressive white-collar prosecutions has fostered a “culture of waiver,” Professor Richman points out that such a state

[h]ardly advances the argument for extraordinary legislative intervention . . . [t]he fact is that the entire federal criminal justice system is based on a culture of waiver: most federal criminal defendants plead guilty, and a very large percentage of them waive their Fifth and Sixth Amendment rights and provide information and testimony against others in order to avoid harsher sentences.<sup>211</sup>

While individual defendants cooperating with the government in exchange for leniency usually do not have to waive their attorney-client privilege, “the distinction between individuals and corporations arises less from any governmental bias against capital formation than from the special relationship between corporate counsel and corporate ‘knowledge.’”<sup>212</sup> Thus, in some ways, the prevalence of deferred prosecution agreements, proffers, and other cooperation deals favors a “culture of waiver,” apart from the DOJ corporate charging policy.<sup>213</sup>

Finally, without the means to enforce its prohibition on requesting privilege waiver or conditioning treatment on such a waiver, some criticize the Privilege Protection Act for “lack[ing] an enforcement mechanism to ensure meaningful prosecutorial restraint.”<sup>214</sup> While the Privilege Protection Act forbids the government from demanding, requesting, or conditioning treatment on waiver of the attorney-client privilege, the Act fails to pro-

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211. *Id.*

212. *Id.* (“When an individual seeks to cooperate with the government, he is expected to tell all he knows about the matters being investigated and many peripheral matters (like unrelated personal misconduct), with grave consequences often attending his failure to be completely forthcoming. If one expects analogous disclosure from artificial entities like corporations, there may be no one to turn to other than the lawyers—the only corporate agents charged with gathering all the information within the entity’s collective knowledge.”).

213. Here, supporters of the Act might point out that the legislation does not aim to protect privilege waivers. Rather, supporters would argue that forced privilege waivers are the impetus for the Act. A likely response to this argument is that systemic features of the criminal justice system favoring plea agreements to a jury trial compel corporations to cooperate, not the government strong-arming the corporation to waive its privilege.

214. See *H. Judiciary Subcomm. Hearing March 8, 2007, supra* note 144, at 44 (testimony of William Sullivan, Partner, Winston & Strawn, Former Assistant United States Attorney, District of Columbia).

vide any penalty or remedy should the Government take such action.<sup>215</sup> This omission leaves the Act without teeth to enforce its central provision. Towards this end, William Sullivan, a former Assistant U.S. Attorney in the District of Columbia, encouraged the Senate Judiciary Committee to consider “a sanctions provision to deter the willful government violator.”<sup>216</sup> In light of these arguments for and against the Privilege Protection Act, the next section will discuss whether the Act merits Congressional approval.

### **III. THE POTENTIAL RAMIFICATIONS OF THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT WEIGH AGAINST ITS PASSAGE INTO LAW**

In light of the criticism discussed in Part II and the principles set forth in Part I, Part III recommends a course of action for the Senate regarding the Privilege Protection Act. Part III.A addresses the factors that weigh against passing the Act. Part III.B presents an argument for a “wait and see” approach to evaluate how corporate prosecution will proceed under the Revised DOJ Guidelines. Finally, Part III.C suggests that the Senate should not intervene at this time, and should reconsider the doctrine of selective waiver.

#### **A. Why the Senate Should not Pass the Privilege Protection Act in Its Current Form**

As it is currently drafted, the Privilege Protection Act is unlikely to curb the practice of privilege and work-product protection waivers in white-collar investigations. Essentially, the Privilege Protection Act aims to remove a corporation’s incentive to waive its privilege. Thus, the Act forbids prosecutors from considering the waiver or assertion of the privilege and work-product protections in their charging decisions.<sup>217</sup> At the same time, the Act still permits corporations to voluntarily waive their privilege and work-product protections.<sup>218</sup> Despite the Act’s prohibition of providing

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215. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(b) (2007) (prohibiting the government from conditioning charging decisions or evaluating a corporation’s cooperation on the assertion of the privilege); see also Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. §§ 3014(b), (d)(2) (2008).

216. See *H. Judiciary Comm. Hearing March 8, 2007*, supra note 144, at 34 (testimony of William Sullivan, Partner, Winston & Strawn, Former Assistant United States Attorney, District of Columbia).

217. See supra note 122 and accompanying text; see also S. 3217, § 3014(b)(2); S. 186, § 3014(b)(2).

218. See S. 3217, § 3014(d); S. 186, § 3014(d).



cooperation credit for a corporation's waiver of the privilege and work-product protections, the consequences of an indictment will continue to pressure corporations to cooperate with the government.<sup>219</sup> Since privilege and work-product waivers remain one of the most effective forms of cooperation, corporations will likely continue to waive their rights as permitted by the Privilege Protection Act.<sup>220</sup>

Additionally, unlike those corporations who wish to cooperate and will likely waive their privileges to do so, corporations dead-set on evading corporate charges may rely on the Privilege Protection Act to frustrate a government investigation. To the extent that it forbids prosecutors from considering the waiver or assertion of the privilege and work-product protections, the Act lends greater leeway for corporations to engage in conduct that may shield criminal conduct from the government.<sup>221</sup>

Although the Act would prohibit the government from requesting or conditioning any treatment on waiver or an assertion of the privilege, most forms of cooperation likely lead to a waiver of the privilege.<sup>222</sup> Confidentiality is the key to the attorney-client privilege and work-product protections.<sup>223</sup> When a corporation discloses to the government its communications from employees to counsel or attorney-produced factual reports of misconduct, the attorney-client privilege and work-product protections are likely waived as to the entire subject matter of those communications.<sup>224</sup> While many experts have testified before the Senate that corporations may sufficiently cooperate without a waiver, most of the means proposed likely would result in waiver of the privilege and work-product protections.<sup>225</sup> For instance, William Sullivan's proposal to the House Judiciary Subcommittee of producing a factual roadmap would likely implicate the work-product doctrine and possibly waive it for the subject matter of the disclosure.<sup>226</sup> In fact, Sullivan's proposed cooperation method mirrors the Revised DOJ

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219. See McNulty Speech at the ABA, *supra* note 181; *supra* notes 96-100 and accompanying text; see also *supra* notes 207-10 and accompanying text.

220. See *S. Judiciary Comm. Hearing Sept. 18, 2007*, *supra* note 150 (statement of Daniel Richman, Professor, Columbia Law School); McNulty Speech at the ABA, *supra* note 181.

221. See Posting of Peter J. Henning to White Collar Crime Prof Blog, [http://law-professors.typepad.com/whitecollarcrime\\_blog/privileges/index.html](http://law-professors.typepad.com/whitecollarcrime_blog/privileges/index.html) (Dec. 9, 2006).

222. See *supra* Parts I.B, II.B.1. But see *supra* notes 191-93 and accompanying text.

223. See *supra* notes 55-63 and accompanying text.

224. See *id.*; see generally *supra* Part I.B.

225. See *supra* Part II.A.2.b.

226. See *supra* note 193.

Guidelines' emphasis on the corporation disclosing the facts relevant to the misconduct obtained during an internal investigation, which in many ways may also lead to a waiver of the privilege. Andrew Weissman's testimony before the same Subcommittee, however, more closely approximates what corporate cooperation may look like without a waiver. Weissman suggests that a corporation may hand over pertinent, non-privileged documents and direct the government to the key employees involved in potential misconduct.<sup>227</sup> Yet, this level of cooperation may not sufficiently aid the government's case. The government could obtain much of this information through the typical grand jury subpoena process it relies on to investigate corporate wrongdoing. Thus, under the Act, the corporation would have to strike a precarious balance between cooperating with the government and simultaneously preserving the privilege and work-product protections. Too much tilting in either direction might lead to insufficient cooperation and thus a pending indictment, or waiver of the privilege and work-product protections and an increased likelihood of third party liability.

While the Act aims to prevent government-compelled waivers, a perverse result ensues if the Privilege Protection Act's rubric is stretched to its limit. The Privilege Protection Act only allows the government to consider the disclosure of non-privileged or non-work-product protected material towards a charging decision. Thus, Company A might obtain greater cooperation credit for not having waived its privilege but still cooperating (for example, by handing over non-privileged emails or documents) as compared to Company B, who waived the privilege entirely (for example, by handing over privileged communications and a factual roadmap of the corporate misconduct) and whose cooperation largely consists of privileged or work-product protected material. Presumably, corporate counsels would recognize this potential pitfall and ensure that any disclosure to the government contains sufficient non-privileged material to gain cooperation credit.<sup>228</sup> The House Report to H.R. 3013 tries to protect against this absurd result by stating that "there should be no differentials in assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by the attor-

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227. See *supra* note 191 and accompanying text.

228. Additionally, the Act requires prosecutors to refrain from feeling obliged to give the corporation waiving its privilege, such as Company B in the example above, greater cooperation credit.

ney-client privilege or attorney work-product.”<sup>229</sup> But if all materials are considered equally, it follows that the corporation with the most helpful and sizeable voluntary disclosure would be considered the ideal cooperator. This type of disclosure often entails corporate counsel presenting the findings of the internal investigation to the government, which likely entails waiver of the attorney-client privilege. Thus, in practice, the dangers of corporate indictment provides a strong incentive to cooperate, and to do so at the expense of the attorney-client privilege and work-product doctrine. Despite the Privilege Protection Act’s design, the consequences of a criminal investigation likely will continue to compel corporations to roll-over as quickly and effectively as possible through voluntarily waiving its privilege.<sup>230</sup>

Similarly, the notable omission of a sanction should a prosecutor fail to adhere to the Act’s terms raises questions about the Act’s potential effectiveness. The Act fails to provide any means or processes to determine if prosecutors have in fact, requested, demanded, or conditioned treatment on a waiver of the privilege and work-product protections.<sup>231</sup> Moreover, the Act omits any sanction should prosecutors fail to adhere to the prescribed conduct involving waivers<sup>232</sup> or requesting information “reasonably believed” to fall outside privilege protections.<sup>233</sup> Thus, although the Act takes decisive action to prohibit prosecutors from directly compelling waiver, it leaves out any repercussions should the practice of requesting waivers continue. Despite prosecutors’ ethical duty to comply with the law and “do justice,”<sup>234</sup> the lack of a sanc-

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229. H.R. REP. NO. 110-445, at 4 (2007).

230. Here, the normative effects of a continued “culture of waiver” might continue to push companies to match each other’s cooperation, particularly when it comes to privilege and work-product protection waivers.

231. See Posting of Peter J. Henning to White Collar Crime Prof Blog, [http://law-professors.typepad.com/whitecollarcrime\\_blog/privileges/index.html](http://law-professors.typepad.com/whitecollarcrime_blog/privileges/index.html) (Dec. 9, 2006).

232. See *supra* notes 214-216 and accompanying text.

233. See Part II.B.2 *supra* for a discussion of the Privilege Protection Act’s lack of a sanction; see also *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Karin Immergut, United States Attorney, District of Oregon) (“[I]n 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 ‘reasonable belief’ that the materials are not entitled to protection.”). Part II.A.1.c *supra* discusses the potential for increased prosecutorial liability and litigation that the Act might engender.

234. Green, *supra* note 145, at 614 (“Prosecutors and others have also invoked this concept [the duty to ‘seek justice’] to suggest why prosecutors should be trusted more than other lawyers, why their conduct should be scrutinized less closely, or why they can be counted on to act disinterestedly.”).

tion remains troubling to some white-collar defense attorneys. The inclusion of a sanctions provision, therefore, might increase confidence in the Act's ability to regulate prosecutors. For instance, the McDade-Murtha Bill (requiring prosecutors to follow State ethics codes) included potential sanctions and an enforcement means in its text.<sup>235</sup>

Concerns over chilled communications between defense counsels and prosecutors as well as extraneous litigation involving prosecutorial discretion remain the most serious threats presented by the Privilege Protection Act's passage. Before the Senate Judiciary Committee, Professor Daniel Richman directly addressed these issues.<sup>236</sup> Specifically, the Act's prohibition of requesting or "conditioning treatment" on waiver or assertion of the privilege and work-product protections might lead to additional litigation, where the corporate defendant claims that "the government's decision to charge was illegally influenced by defendant corporation's refusal to waive its privilege."<sup>237</sup> Every such claim might lead to the defendant corporation being able to place the prosecutor on the witness stand, and thus, provide the defense with insight into the government's case.<sup>238</sup> Such an "intrusive inquiry" could lead to complex litigation involving prosecutorial discretion. Defense counsel could then use the provision as an offensive sword rather than the shield Senator Specter might have intended for the Act to provide.<sup>239</sup> Courts, however, may find that the Act fails to provide for any standing to assert these claims, but without further amendment to the Act, these concerns remain open questions.

The Act provides another foothold for extraneous litigation in already complex white-collar prosecutions. Section 3014(c) permits a prosecutor to request disclosure of information the prosecutor "reasonably believes is not entitled to protection under the attorney-client privilege or attorney work-product doctrine."<sup>240</sup> As U.S. Attorney Karin Immergut pointed out to the Senate Judiciary

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235. See Citizens Protection Act of 1998, H.R. 3396, 105th Cong. (1998).

236. See *supra* notes 171-75 and accompanying text.

237. *Id.*

238. See *id.*

239. See *id.*

240. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(c) (2007) ("(c) INAPPLICABILITY—Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such an agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work-product doctrine."); see also Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. § 3014(c) (2008) (slightly revised).

Committee, this provision would likely chill, or at least complicate, communications between prosecutors and corporate counsel.<sup>241</sup> Even though the 2008 Act attempts to provide the government with a greater ability to ask questions about potentially privileged material without violating the Act, the Act's "Inapplicability" section still might prevent the prosecutor from asking simple questions if the answers might reasonably involve privileged material.<sup>242</sup> Moreover, any questions prosecutors do ask may subject the government to liability should a court decide to enforce the "reasonable belief" standard.<sup>243</sup> Thus, this section of the Act contains another mechanism at once restricting prosecutorial action and potentially expanding prosecutorial liability.

Viewed in their totality, these problems counsel against Senate approval of the Privilege Protection Act. The Act leaves corporations with the same predicaments they face under the DOJ corporate charging policy and would likely unnecessarily burden prosecutors conducting white-collar investigations. Under the Act, corporations likely would continue to waive their privilege and work-product protections. Accordingly, corporations might continue to face increased third party liability. Since after the implementation of the Privilege Protection Act corporations in all likelihood would continue their privilege waiver practices, the Revised DOJ Guidelines merit further analysis

### **B. The Revised DOJ Guidelines: Corporate Cooperation as a Best Practice**

Considering the consequences of corporate indictment or conviction, cooperation likely serves as the corporation's best strategy to avoid tangling with prosecutors. As is often the case with individual defendants, where a corporation might be convinced of its own and its employees' innocence, it seems waiving corporate privilege to convince the government of this belief provides a safer and more effective strategy than digging in its heels and fighting the investigation. Often a corporate indictment and the resulting collateral effects for shareholders and innocent employees are not in the government's best interest either.<sup>244</sup> Rather, both the corporation and

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241. See *supra* notes 177-80 and accompanying text.

242. See *id.*; see also S. 3217, § 3014(c).

243. See S. 3217, § 3014(c).

244. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 330 (2007) ("Prosecutors are justifiably reluctant to cause such extensive economic harm [that results from a corporate indictment]. When the DOJ announced the DPA [Deferred Prosecution Agreement] for AOL, for

the government have a mutual interest in routing out the criminal actors and restoring legal compliance within the corporation. In this light, the Revised DOJ Guidelines provide a workable corporate charging policy. The Guidelines' favorable consideration of a corporation's disclosure of the relevant facts, though it would often entail privilege waiver, at least serves as an essential and clearly-marked avenue for the corporation to avoid indictment. The Revised DOJ Guidelines are the latest formalization of the longstanding cooperative practices that corporations have utilized to avoid indictment. A few examples of this practice will illuminate the benefits of keeping the Revised DOJ Guidelines in place.

Before the recent spate of DOJ Memos revising corporate charging policies, corporations looking to survive fraud investigations would waive their attorney-client privilege in order to cooperate with the government. As Michael A. Simons chronicles in his article evaluating white-collar investigations of the mid-Eighties and early Nineties as well as those of today:

Indeed, prosecutors put such great weight on cooperation that it can often save a corporation from indictment even if the corporation lacked a meaningful compliance program, even if top management knew about the criminal activity, and even if top management was involved in the criminal activity. To do this, however, the corporation must cooperate so fully that it convinces prosecutors that it is a "good corporate citizen."<sup>245</sup>

Simons provides the examples of Salomon Brothers in June 1991 as the "gold standard of what prosecutors expect from corporations under investigation."<sup>246</sup> In response to SEC and DOJ investigations into illegal bidding practices over government bonds and the disclosure that Salomon's top officers both knew and permitted the misconduct, Warren Buffet, as Salomon's largest shareholder, intervened.<sup>247</sup> Under Buffet's direction, Salomon's top three officers resigned, Buffet became interim chairman and Salomon began cooperating with the authorities:

Salomon not only provided documents and made employees available for interviews, it also waived its attorney-client privilege, provided detailed information about the firm's own inter-

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example, it stated that the agreement was designed to 'achieve[ ] a result that minimizes collateral damage to shareholders and employees while imposing an appropriate punishment and protecting the rights of victims.')

245. Simons, *supra* note 1, at 995.

246. *Id.* at 1002.

247. *Id.* at 1001.

nal investigation, and, as described by federal prosecutors, took “decisive and extraordinary actions to restructure its management to avoid future misconduct.” Nine months later, when federal prosecutors announced that Salomon would not be prosecuted, the United States Attorney specifically credited Salomon’s “exemplary” and “unprecedented” cooperation.<sup>248</sup>

Simons also provides examples of white-collar investigations in stark contrast with Salomon paradigm.

Corporations who refused to cooperate with prosecutors faced corporate indictment, which likely entailed the corporation’s demise. Simons puts forth the examples of Drexel Burnham Lambert in 1987 and Daiwa Bank in 1995 as examples of corporations that denied any wrongdoing and decided to fight the government charges. After “vigorously den[ying] any wrongdoing [and] steadfastly defend[ing] its employees,” Drexel faced the potential of a RICO indictment and then plead guilty to “six counts of fraud and paid a \$300 million fine.”<sup>249</sup> Just months later, “Drexel had ceased to exist, filing for bankruptcy, liquidating its assets and laying off over 3,000 employees.”<sup>250</sup>

Daiwa Bank’s prosecution provides a similar cautionary tale. The bank discovered a \$1.1 billion fraud conducted by one of its employees, did not report the discovery for two months, and then resisted cooperating as prosecutors demanded.<sup>251</sup> The government indicted the bank “within weeks on multiple charges of conspiracy, fraud, obstruction, falsification of bank records and misprision of felony. When Daiwa pled guilty four months later, it was ordered to pay a \$340 million fine.”<sup>252</sup> Before then, bank regulators had already forced Daiwa to cease operating in the United States. At Daiwa’s sentencing, the government scolded Daiwa, explaining that if the employees’ crimes were the sole misconduct and the Bank had provided meaningful cooperation, it would be unlikely that Daiwa would have been charged at all.<sup>253</sup>

This pattern of cooperation continues in white-collar investigations today, with many corporations entering Deferred Prosecution Agreements (“DPAs”) as a means of cooperating with the govern-

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248. *Id.* at 1001-02 (citations omitted).

249. *Id.* at 1000.

250. *Id.*

251. *See id.* at 1005.

252. *Id.* at 1005-06.

253. *See id.* at 1006.

ment.<sup>254</sup> For instance, in a turbulent prosecution over illegal tax shelters, KPMG entered into an extensive DPA with the DOJ that would permit the DOJ to regulate and oversee significant aspects of its business operations for at least three years.<sup>255</sup> After much negotiation and dispute, KPMG waived much of its attorney-client privilege and submitted the results of its internal investigation to the government.<sup>256</sup> The corporate entity avoided indictment, which likely would have been fatal for an accounting firm, while its employees faced criminal charges. The McNulty Memo allowed the government to recognize privilege waivers as a form of cooperation in its analysis of whether to indict the corporation.<sup>257</sup> The Revised DOJ Guidelines further the same ideal, but direct the government to gauge cooperation by factual disclosure instead of privilege waiver. As Professor Daniel Richman notes, “[t]hreatening to prosecute the [corporate] entity is a means to [prosecuting individuals], for without this threat the entity would be far more tempted to protect the individuals . . . .”<sup>258</sup> Thus, corporations are able to utilize the DOJ charging policies’ structure to guide their cooperation, and ultimately to survive criminal charges, while also assisting in the prosecution of alleged wrongdoers.<sup>259</sup> This mutually beneficial agreement is at the crux of all criminal cooperation.

Inasmuch as the proliferation of corporate cooperation agreements might favor a “culture of waiver,” the benefits of waiving broad rights to accept responsibility for criminal action in exchange

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254. See Griffin, *supra* note 244, at 321-22 (“Deferred prosecution agreements are a form of probation, or ‘pretrial diversion,’ according to which the government agrees to suspend charges against a company so long as the company fulfills every obligation set forth in a detailed ‘contract.’ These agreements are a compromise intended to split the difference between declination of prosecution and a guilty plea.”).

255. See *id.* at 324.

256. See *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (holding unconstitutional the DOJ practice of pressuring KPMG to terminate its advancement of attorney fees to employees); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); see also Posting of Ellen S. Podgor to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2005/08/](http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/08/) (Aug. 30, 2005) (analyzing a portion of the confidentiality agreement between KPMG and the DOJ regarding attorney-client privilege); see generally Stein, *supra* note 77 (discussing the ethics and constitutionality of the Thompson Memo’s advancement policies).

257. See McNulty Memo, *supra* note 73.

258. Richman, *supra* note 22, at 322-30.

259. See Griffin, *supra* note 244, at 323-26 (citing DPAs involving America Online, Computer Associates, and Bristol Myers Squibb as the government’s preferred cooperation agreement tool, and noting the examples of Reliant Energy and Milberg Weiss as organizations refusing to enter into DPAs and waive attorney-client privileges).



for leniency is a hallmark of our justice system.<sup>260</sup> Corporations are interested in maximizing profitability, which favors avoidance of criminal charges. Thus, it is often in the corporation's best interest to waive certain rights and cooperate with the government, considering such a deal will likely allow them to turn a profit another day. Critics of waiver bemoan that corporations compromise their privileges and throw their own employees under the bus in turning statements to counsel over to the government.<sup>261</sup> This problem, however, stems more from the nature of the privilege, than the DOJ charging policy. The privilege belongs to the corporation for use as the corporation deems fit, and thus, hardly could be construed to protect employees when an employee's interests diverge from the corporation's.

Although the corporate privilege serves to protect communications and advice from corporate counsel to corporate employees, the corporation retains control of the privilege.<sup>262</sup> As the Supreme Court and current critics of privilege waiver correctly state, an employee's ability to consult in confidence with counsel is a compelling interest likely to enhance internal compliance with law.<sup>263</sup> In actuality, despite the Court's grandiose language in *Upjohn* seeking to protect communications between employees and corporate

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260. *S. Judiciary Comm. Hearing Sept. 18, 2007, supra* note 150 (statement of Daniel Richman, Professor, Columbia Law School) (“[T]he fact is the entire federal criminal justice system is based on a culture of waiver: most federal criminal defendants plead guilty, and a very large percentage of them waive their Fifth and Sixth Amendment rights . . . to avoid harsher sentences.”).

261. *See* David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 156-57 (2000) (“[C]ounsel and the employees of a corporation must consider that the questions asked, the answers received and the advice rendered may soon be in the hands of a prosecutor, competitors and civil litigants. This possibility has the effect of chilling the inquiry from the outset and often has an adverse impact on the relationship among senior management and lower-level employees.”). *But see* Richman, *supra* note 22, at 310-11 (noting that “there is some reason to believe that *Upjohn* warnings have become standard procedure,” and thus employees should be well aware of the potential risk that their communications to corporate counsel will be revealed to the government).

262. *See* Siegel, *supra* note 1, at 37 (“The Court made clear, however, that the privilege belongs to the corporation as an entity, not to any of its agents. Thus, when officers and employees reveal confidences to corporate counsel for the purpose of facilitating counsel's provision of legal advice to the corporation, these confidences are protected only as long as, and to the extent that, the corporation wishes to invoke the privilege.”).

263. *See* Cole, *supra* note 43, at 491 (“Significantly, the core rationale of the *Upjohn* decision is the belief that confidentiality is essential if the societal interest in fostering compliance with the law is to be served.”).

counsel,<sup>264</sup> the Court's construction of the corporate privilege affords little protection for the confidentiality of such communication.<sup>265</sup> After communicating with corporate counsel, employees essentially relinquish any ability to preserve their communications' confidentiality; instead, the corporation now controls the confidentiality of the statements. When the government presses a corporation to cooperate, the corporation, if it wishes to obtain the most favorable outcome, might have little choice but to waive its corporate attorney-client privilege. Though it may not be a pleasant option for a corporation, the path to a cooperation agreement is well worn by the many corporate and individual defendants before it: "[i]t is a time-honored and accepted practice to reward the target of a criminal investigation with favored treatment at charging or sentencing in exchange for making the job of the prosecuting authority easier."<sup>266</sup> Overall, privilege waivers serve both corporate and government interests in avoiding corporate indictment, while at the same time increasing the deterrent effect and efficiency of employee prosecutions. In light of this mutually beneficial exchange, it seems privilege waiver in white-collar investigations is a practice that will remain in place despite the Revised DOJ Guidelines.<sup>267</sup>

### C. A Second Look at Selective Waiver

Since privilege waivers will likely continue to serve as a mainstay of white-collar prosecutions under the current DOJ charging policy, Congress should take an additional step to protect corporations from the harmful ramifications of such waivers.<sup>268</sup> Although Congress and the Rules Committee recently passed on enacting the doctrine of selective waiver in Rule 502 and the courts have largely refused to extend the doctrine,<sup>269</sup> selective waiver remains at the forefront of many proposals to counteract the harmful effects of frequent privilege waivers.<sup>270</sup> "[S]elective waiver permits the vol-

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264. See *supra* notes 38-39 and accompanying text.

265. See *supra* note 43 and accompanying text.

266. Richter, *supra* note 45, at 161-62 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

267. See Letter from Mark Filip to Patrick J. Leahy and Arlen Specter, *supra* note 27.

268. Richter, *supra* note 45, at 173-76.

269. See *In re* Initial Pub. Offering Sec. Litig., No. 21-MC-92, 2008 WL 400933, \*5-6 (S.D.N.Y. Feb. 14, 2008); *supra* notes 64-66 and accompanying text.

270. See Richman, *supra* note 22, at 321 ("There are good arguments for legislative intervention to ensure that the entity forced to waive is not put at an unfair disadvantage vis-à-vis private plaintiffs. Currently, only the Eighth Circuit has held that a

untary and tactical sacrifice of confidentiality to a specified audience [a government agency or prosecutor's office], while permitting the holder of the privilege to maintain secrecy against all others."<sup>271</sup> Thus, a corporation would no longer have to evaluate its potential exposure to third party litigants in deciding initially whether to waive its privilege for the government investigation. As corporate cooperation in white-collar investigations makes for efficient and effective prosecutions, implementing the doctrine of selective waiver would provide further incentive for corporations to cooperate to an even greater extent.<sup>272</sup> Enacting the doctrine of selective waiver would provide much needed protection to corporate entities waiving their privilege to aid the government.<sup>273</sup>

In defending the merits of selective waiver, Michael Siegel identifies as critics' chief concern that the doctrine would likely increase the incidence of privilege waiver. Siegel enumerates an illustrative list of arguments that critics lodge against the doctrine of selective waiver, and the waiver of privilege it necessarily entails: "privilege waiver (1) deters corporate insiders from running ideas by corporate counsel; (2) deters corporations from instituting serious compliance programs; (3) deters corporations from conducting internal investigations; and (4) deters corporate employees from being forthcoming with counsel during the course of internal investigations."<sup>274</sup> Additionally, critics claim that selective waiver will encourage attorneys not to memorialize their findings in writ-

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company's disclosure of privileged materials in response to government investigative demands will not result in its complete waiver of privilege as to all other parties under federal law."); Richter, *supra* note 45, at 134 ("This Article voices a view on selective waiver protection that is contrary to much of the current public disclosure on the topic—that such protection would represent a salutary change to waiver doctrine that would protect cooperating corporations from the damaging effects of third party waivers, while at the same time serving the public interest in effective oversight of business entities."); Siegel, *supra* note 1, at 43 ("[Selective waiver] may very well strike the correct balance between competing goals.").

271. Richter, *supra* note 45, at 184.

272. Alternatively, holding plaintiffs to higher pleading standards, as the Supreme Court indicated in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), may have a similar, though less predictable effect. See also Cohen, *supra* note 4, at 160 (concluding as the result of "class action reform," the consequences of private litigation are less drastic than they used to be").

273. Although the frequent occurrence of waiver is evidence that the potential of a criminal charge already provides a strong incentive to cooperate, selective waiver would further enhance corporations' willingness to do so. See Richter, *supra* note 45, at 181-84.

274. Siegel, *supra* note 1, at 32.

ing to create less material that the government may encounter.<sup>275</sup> This Note will address these arguments in turn.

First, corporate employees curious about the legality of certain business practices should be more inclined to confer with corporate counsel under the current corporate charging regime.<sup>276</sup> The efficacy of current white-collar prosecutions and the likelihood that the corporation will perform a searching internal investigation should deter employees from engaging in illegal conduct. Employees less inclined to run ideas by counsel because they fear that those communications would be delivered to the government likely are trying to skirt the law. Therefore, their communications with counsel regarding planned or ongoing illegal activity likely would not receive the protection of the privilege due to the crime-fraud exception.<sup>277</sup>

Second, as Siegel succinctly argues, “[f]or most corporations, not having a strong compliance department is simply not an option.”<sup>278</sup> Complex regulatory regimes maintained by the SEC and the EPA require strict compliance and often provide steep penalties for indiscretion. The possibility of civil suits following such a breach is further motivation for the corporation to bolster its legal compliance program.<sup>279</sup> Moreover, corporations truly interested in avoiding illegal conduct realize that a healthy compliance program would likely keep their organization out of trouble in the first place. Taking preventative measures against crime protects the company to a much greater extent than solely relying on a complex criminal defense plan for when illegality actually occurs.

Third, corporations cannot afford to abstain from an internal investigation even though the results likely will be presented to the government. The current DOJ corporate charging regime strongly favors corporate cooperation. If a corporation fails to conduct a sufficient internal investigation, it would have little information to share with the government, and then presumably, would increase

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275. See *In re* Initial Pub. Offering Sec. Litig., No. 21-MC-92, 2008 WL 400933, \*5-6 (S.D.N.Y. Feb. 14, 2008).

276. See Siegel, *supra* note 1, at 33.

277. See *id.*; see also MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3) (2003); *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007) (“The Privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.” (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933))).

278. Siegel, *supra* note 1, at 33.

279. See *id.* at 33-34.

its likelihood of facing criminal charges.<sup>280</sup> Additionally, the risk of third party and regulatory liability would continue to threaten a corporation that did not adequately discover the extent of the alleged conduct so that it could defend itself in a civil suit.<sup>281</sup> Lastly, high-level corporate officers who decline to investigate allegations of their subordinates' criminal conduct, risk perceived acquiescence to the criminal conduct and possible liability if the government decides to investigate at a later date.<sup>282</sup>

Fourth, the infirmities of the corporate privilege as the Court constructed it in *Upjohn* likely provide the greatest deterrent to employees' willingness to disclose information to an internal investigation.<sup>283</sup> Proper *Upjohn* warnings are crucial to avoid ethical lapses on behalf of corporate counsel and should be standard practice in such a situation.<sup>284</sup> Nevertheless, employees may not have much choice but to speak with internal investigators if they want to keep their jobs.<sup>285</sup> Thus, unless employees have engaged in potentially criminal conduct that might lead them to assert their Fifth Amendment rights, their interests would direct them to be candid with internal investigators, particularly where lying would likely cost them their employment or hurt their defense should they later face criminal charges. If the government and internal investigators are already scrutinizing the corporation, a lie will not easily go un-

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280. See Richter, *supra* note 45, at 173 ("In sum, it is difficult to imagine competent counsel working to protect the best interests of their corporate client consistent with their ethical obligations by undercutting internal investigations or other compliance programs . . .").

281. See Siegel, *supra* note 1, at 35 ("A corporation that suspects criminality in its midst simply cannot afford to ignore it: the risks of regulatory and third-party liability are too high.").

282. See *id.*

283. Richter, *supra* note 45, at 173 ("If . . . an internal investigation revealed damning information about isolated actors only, it would be in the company's best interests to uncover the information and turn it over to the government even if it would harm the interests of the individual employees implicated by the investigation."); Siegel, *supra* note 1, at 38-39 ("[Employees cooperating in an internal investigation, find themselves in a situation] not dictated by the possibility that the DOJ might make a future request for privilege waiver. Rather, it rests on the mere ability of the corporation, post-*Upjohn*, to waive privilege voluntarily in any situation it sees fit. *Upjohn* puts the employee at risk.").

284. See *supra* notes 47-52 and accompanying text; see also Siegel, *supra* note 1, at 39 (discussing the requirement of MODEL RULE OF PROF'L CONDUCT 1.13(f), which requires a lawyer representing the organization to inform employees if the corporation's interest may be adverse to theirs).

285. See Siegel, *supra* note 1, at 38-39 ("A potentially guilty employee thus faces a dismal set of options: (1) silence, and likely termination; (2) cooperation, and likely sanctions; and (3) lying, perhaps avoiding liability in the short term, but running the risk of worse consequences in the future.").

detected. In light of the scant protection the corporate privilege provides employees, one solution is for employees to consult their own legal counsel from the beginning of the potential problem.<sup>286</sup>

Finally, internal investigators are unlikely to restrict their written records out of concern that those documents will later be revealed to the government. Such an argument is based on an illogical premise: “defense counsel’s argument that their duty of effective representation requires them to compromise the investigation sounds very much like an argument that a lawyer’s ethical duty to the entity requires—in light of the possibility of prospective privilege waiver requests—that lawyers commit malpractice while investigating.”<sup>287</sup> In these situations, cooperation is often the ultimate goal. Accordingly, internal investigators aim to present the government with the most detailed picture possible of corporate misdeeds in order to fulfill their end of a cooperation agreement. Failure to include pertinent information in disclosures to the government might lead the government to later revoke cooperation agreements after discovering the wrong.<sup>288</sup> Or even worse, in certain egregious circumstances such action could result in obstruction charges against the law firm doing the internal investigation and presenting its finding to the government.<sup>289</sup> Thus, the DOJ corporate charging regime continues to provide powerful incentives for the corporation to conduct a thorough internal investigation and share its results for cooperation credit. Any proposal to protect corporations from the harm privilege waiver may entail should begin with a recognition of this reality.

In this light, selective waiver could work hand-in-hand with the Revised DOJ Guidelines to protect corporations from certain deleterious ramifications of privilege waivers. The Guidelines’ emphasis on the disclosure of relevant facts as a measure of cooperation goes to the heart of what the government seeks from a corporation trying to avoid indictment. In any investigation the government wants to discover what happened and whether that conduct merits a criminal charge. The corporation generally is inclined to share that information, and more, with the government in order to avoid a criminal charge. If, however, in cooperating with the government the corporation waives its attorney-client privilege and work-prod-

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286. *See id.* at 41.

287. Richman, *supra* note 22, at 305 (internal quotations omitted).

288. *See id.* at 308 (“A savvy federal enforcer will not stay within the four-corners of an internal investigation report . . .”).

289. *See id.* at 305.

uct protections, the corporation might cripple its ability to fight the civil suits likely to follow the government action. Selective waiver would provide an essential shield to corporations as they disclose the factual information the Revised DOJ Guidelines seek. With legal fees and civil liability reduced, corporate counsel then would have even further incentive to turn over the essential factual information often crucial to a successful prosecution of white-collar individuals. With cooperation serving as the surest way to avoid indictment, adoption of selective waiver would square theoretical notions of the corporate attorney-client privilege with its role in practice. The corporate privilege is so often waived to gain leniency from the government that it rarely protects employees and functions more as an instrument to gain leverage during negotiations with the government. Thus, adopting selective waiver to accompany the Revised DOJ Guidelines would serve both the government and the corporation's best interest.

### CONCLUSION

The increased occurrence of corporate privilege waivers provides both significant benefits and concerns, a dialectic that plays out in the debate over whether to pass the Privilege Protection Act. This Note supports continuing the corporate charging policy the Revised DOJ Guidelines set forth, and enhancing the Guidelines' effectiveness by providing the additional protection of selective waiver to a cooperating corporation. Thus, this Note counsels against passage of the Privilege Protection Act. The Act would only frustrate the DOJ corporate charging policy, likely without altering the occurrence of waiver, but at the same time, rendering prosecutions needlessly complex. Furthermore, as Professor Daniel Richman notes, "the attorney-client waiver 'problem' ought to be toward the bottom of a long list of interrelated issues, including the scope of corporate liability, the scope of corporate privileges, and the funding of white collar enforcement units."<sup>290</sup> Barring any significant alterations to the white-collar landscape, Congress should consider enacting selective waiver provisions, which, in practice, would do much to ease the concerns of those who vehemently oppose the DOJ corporate charging policy. Finally, it is important to remember that the continued success of any

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290. Richman, *supra* note 22, at 320.

DOJ corporate charging policy will hinge on prosecutors adhering not just to the policy's terms, but also to the highest ethical standards.



