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Cover Page Footnote

Associate Professor of Law, University of Oklahoma College of Law. The author wishes to thank Professor Daniel J. Capra for his invaluable comments on a prior draft of this Article, as well as colleagues Kimberly Brown, Steven Gensler, Katheleen Guzman, and Murray Tabb for their insightful assistance and support.

CORPORATE SALVATION OR DAMNATION? PROPOSED NEW FEDERAL LEGISLATION ON SELECTIVE WAIVER

*Liesa L. Richter**

Recently, critics have attacked federal law enforcement policies that encourage corporate targets to disclose sensitive information protected by the corporate attorney-client privilege and work-product doctrine, arguing that the policies are coercive, fundamentally unfair, and destined to chill the free flow of information to corporate counsel. The most readily apparent collateral consequence of these policies, however, has been corporations' loss of privilege protection in subsequent litigation. Good corporate citizens that have chosen to cooperate with the government in this manner have been punished with broad findings of waiver and the dissemination of protected information to companies' civil adversaries. To protect companies from this punitive result and to encourage cooperation with law enforcement, the Advisory Committee on the Federal Rules of Evidence drafted and published proposed Federal Rule of Evidence 502(c) to allow "selective waiver" of the attorney-client privilege and work-product protection to federal entities without a waiver as to any other party. On the verge of obtaining this protection, corporate counsel performed a surprising about-face and argued against the proposal, complaining that it would exacerbate the existing "culture of waiver" in federal investigations. In the face of vocal opposition, the Advisory Committee declined to recommend a selective waiver rule, leaving it to Congress to decide the fate of selective waiver legislation.

This Article opines that selective waiver legislation would represent a valuable palliative measure that would serve corporate clients and their stakeholders, as well as the public interest, in effective corporate oversight. It examines the federal policies that create corporate waivers, concluding that waivers reflect a legitimate prosecutorial technique that is indispensable in light of the mounting expense and complexity of corporate investigations in the twenty-first century. The Article also demonstrates that judicial rejection of selective waiver ignores the evolution of privilege doctrine from a paradigm of rigid absolutism to one of fairness and flexible

* Associate Professor of Law, University of Oklahoma College of Law. The author wishes to thank Professor Daniel J. Capra for his invaluable comments on a prior draft of this Article, as well as colleagues Kimberly Brown, Steven Gensler, Katheleen Guzman, and Murray Tabb for their insightful assistance and support.

party autonomy over protected information, concluding that selective waiver can fit comfortably into this modern vision of privilege. Finally, it examines the contours of appropriate selective waiver legislation.

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INTRODUCTION

In the 1970s, allegations of corporate slush funds and overseas bribery rocked corporate America.¹ In the mid-1980s, the Boesky affair and insider trading represented the corporate scandal of the decade.² At the turn of the twenty-first century, fraudulent schemes at companies like Enron, WorldCom, and Adelphia shocked the American market.³ Now, in 2007, the illegal backdating of stock options for the benefit of executives at publicly traded corporations “has rapidly become one of the broadest corporate scandals in decades” with “more than 130 companies under federal scrutiny.”⁴ In short, complex and illegal corporate schemes are nothing new and will be a recurring part of our legal landscape so long as fallible human beings steer the corporate enterprise. Throughout all of these scandals, the cooperation of the corporate entity has proven critical to the successful and efficient investigation of the primary wrongdoers.⁵ In connection with the ongoing investigation of options backdating, *The Wall Street Journal* has noted that “federal authorities can’t possibly do thorough examinations of every company” and that they “outsource a big chunk of the job.”⁶ “Regulators and prosecutors are relying on suspect companies to investigate themselves by hiring outside law firms. The firms are supposed to hand over their findings to the Securities and Exchange Commission . . .

1. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 n.7 (6th Cir. 2002) (noting that many of the largest American corporations paid bribes to foreign officials in the mid-1970s to obtain overseas business).

2. See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,”* 76 St. John’s L. Rev. 979, 999–1006 (2002) (discussing the Boesky trading scandal and other corporate scandals of the mid-1980s and early 1990s).

3. See Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587, 587 (2004) (noting that “the most prominent scandals . . . involve[d] Enron, Arthur Andersen, WorldCom, Tyco International, and Adelphia Communications”).

4. James Bandler & Kara Scannell, *In Options Probes, Private Law Firms Play Crucial Role*, Wall St. J., Oct. 28, 2006, at A1; see also Press Release, U.S. Dep’t of Justice, Statement of Deputy Attorney General Paul J. McNulty, Former General Counsel of Monster Pleads Guilty to Securities Fraud in Connection with Backdating of Stock Options (Feb. 15, 2007), [available at](http://www.usdoj.gov/usao/nys/pressreleases/February07/olesnyckyjpleapr.pdf) <http://www.usdoj.gov/usao/nys/pressreleases/February07/olesnyckyjpleapr.pdf>.

5. See *In re Columbia/HCA*, 293 F.3d at 295 n.7 (explaining the Security and Exchange Commission’s (SEC) voluntary disclosure program, which encouraged corporate America to “com[e] clean” in exchange for lenient treatment); Simons, *supra* note 2, at 999 (noting aggressive efforts by General Electric to cooperate with the investigation of the Boesky insider trading scandal that led to punishment of the individual perpetrators of the scheme); *Interview with U.S. Attorney James B. Comey Regarding Department of Justice Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney-Client Privilege and Work-Product Protection*, U.S. Att’ys’ Bull., Nov. 2003, at 1, 5 [hereinafter *Comey Interview*] (discussing the importance of cooperation in resolving corporate scandals of the twenty-first century).

6. Bandler & Scannell, *supra* note 4.

or federal prosecutors” in exchange for lenient treatment of the entity.⁷ In feeding federal investigators the results of such internal investigations, entities often turn over information protected by the sacrosanct corporate attorney-client privilege and work-product doctrine. Should responsible corporate entities that cooperate with federal law enforcement in this manner be punished with compelled disclosure of the same potentially damaging information to the company’s civil adversaries? Traditional waiver doctrine requires just such a punitive result.

Due to concerns over maintaining corporate cooperation with federal investigations, the chair of the House Judiciary Committee asked the Advisory Committee on Evidence Rules to consider a rule to protect cooperating corporations from the harsh consequences of traditional waiver doctrine.⁸ In June 2006, the Standing Committee on Rules of Practice and Procedure approved for notice and comment proposed Federal Rule of Evidence 502 governing waiver of the attorney-client privilege and work-product protection.⁹ One provision of the proposed rule would have allowed corporations that disclose privileged information to federal government entities to maintain the corporation’s attorney-client privilege and work-product protection against the corporation’s civil adversaries.¹⁰ Due to the increasing pressure for corporations to cooperate with federal regulators and law enforcement agencies, corporations have been fighting for such “selective waiver” of privilege in the courts for over thirty years,

7. *Id.*

8. See Letter from F. James Sensenbrenner, Jr., Chairman, House Comm. on the Judiciary, to Leonidas Ralph Mecham, Sec’y to the Judicial Conference of the U.S. (Jan. 23, 2006) (on file with author) (requesting that the U.S. Judicial Conference “initiate a rule-making on forfeiture of privileges”).

9. See Admin. Office of the U.S. Courts, Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure (2006), available at http://www.uscourts.gov/rules/Brochure_2006.pdf. Because rules of privilege cannot take effect through the ordinary rule-making process without the approval of Congress and because the rule would control state court determinations of waiver, it is “anticipated that Congress must enact this rule directly.” See Judicial Conference of the U.S., Report of the Advisory Committee on Evidence Rules, at Fed. R. Evid. 502 (Proposed 2006), at 5 [hereinafter May 15, 2006, Report of the Evidence Advisory Committee], available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>; see also 28 U.S.C. § 2074(b) (2000). The Advisory Committee’s May 15, 2006, report attached the draft of proposed Federal Rule of Evidence 502 and the draft Advisory Committee Note as an exhibit. See May 15, 2006, Report of the Evidence Advisory Committee, *supra*, at Fed. R. Evid. 502 (Proposed 2006), at 1–11. The proposed rule would control state court waiver decisions regarding disclosures originally made in a federal proceeding only. See *id.*; see also *infra* Part I.D and accompanying notes.

10. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 2. Although the language of the proposed rule would not have restricted this protection to “corporate” entities cooperating with the federal government, the protection would almost always benefit such parties, as individuals are rarely asked to cooperate by waiving the attorney-client or work-product privilege. See *infra* Part II.A and accompanying notes.

but with little success.¹¹ The doctrine has been almost uniformly rejected by the federal courts that have visited the issue as inconsistent with bedrock privilege principles.¹² As a result, companies that have turned over privileged information generated in corporate internal investigations conducted under the supervision of counsel to federal investigators have been punished by having to provide their civil adversaries with the same sensitive information.¹³

On the verge of obtaining the protection they have long sought through this proposed evidence rule, corporate counsel did a surprising about-face and formed a broad coalition opposing the proposal.¹⁴ This coalition claims that selective waiver would perpetuate and endorse a “culture of waiver” that has evolved in connection with federal investigations.¹⁵ Such critics fear that adoption of selective waiver protection would legitimize the government’s allegedly aggressive investigative policies that give rise to the initial corporate disclosures, thus impeding the progress the corporate defense bar has been making to derail those policies.¹⁶ In the face of vocal opposition to the proposal, the Advisory Committee on Evidence Rules found selective waiver to be essentially a political question and deleted the selective waiver provision from the proposed rule sent to the Standing

11. See *infra* Part I.C and accompanying notes.

12. See *infra* Part I.C and accompanying notes.

13. See, e.g., *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179 (10th Cir. 2006).

14. See, e.g., *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) [hereinafter *Coalition Submission*] (statement of the Coalition to Preserve the Attorney-Client Privilege). Members of the Coalition include the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the U.S. Chamber of Commerce. *Id.*

15. Letter from Susan Hackett, Senior Vice President & Gen. Counsel, Ass’n of Corp. Counsel, to David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. (June 20, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-002.pdf> (opining that adoption of proposed Rule 502 could “creat[e] a presumption on the part of the government that it is appropriate to demand waiver in all circumstances”); see also Memo from William McGuinness & Michael S. Russ, Chairs, Am. Coll. of Trial Lawyers, to Peter G. McCabe, Sec’y, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. (Feb. 13, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-052.pdf> (expressing concern that “selective waiver would advance the trend toward a ‘culture of waiver’ where requests for waiver in return for charging credit will become all too common”).

16. See, e.g., *Hearing of the Advisory Comm. on Evidence Rules 209* (2007), available at <http://www.uscourts.gov/rules/2007-01-29-Evidence-Minutes-Transcript.pdf> (testimony of Susan Hackett, Senior Vice President & Gen. Counsel, Association of Corporate Counsel) (“We need to take care of the underlying problems we have in the prosecutorial enforcement community before we are able to deal with selective waiver in the government proceedings aspects.”); *Mini-Hearing of the Advisory Comm. on Evidence Rules 19* (2006), available at http://www.uscourts.gov/rules/EV_Hearing_April_2006.pdf (testimony of David Brodsky, ABA Presidential Task Force on the Attorney-Client Privilege).

Committee for approval.¹⁷ The committee did approve a report to Congress on selective waiver, including draft language for federal legislation granting cooperating corporations selective waiver protection.¹⁸ Therefore, selective waiver has been kicked back to the legislature by the rule-making process and awaits resolution there.

This Article voices a view on selective waiver protection that is contrary to much of the current public discourse 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 the effective oversight of business entities. The Article examines the objections and fears raised by critics of selective waiver and concludes that they largely rest upon the unrealistic premise that federal law enforcement can and should operate in the twenty-first century without seeking privileged and protected information from corporate targets. The corporate disclosure of privileged and protected information in cooperation with federal prosecutors and regulators is a time-honored practice that will and should remain as the legitimate legacy of the Enron era. In light of this reality, selective waiver legislation would represent a valuable and overdue change in current waiver doctrine for corporate clients that is consistent with the evolving and flexible treatment of privilege waiver.

This Article discusses the need for selective waiver in three parts. Part I explores the evolution of the current selective waiver controversy. It examines the federal law enforcement policies that have developed over the past three decades to combat corruption at the corporate level and captures the heated political debate surrounding those policies and the “culture of waiver” many claim they have fostered. In addition, Part I elucidates the various government responses to the hue and cry over these policies. Part I concludes by describing the federal courts’ overwhelming refusal to provide common law selective waiver protection to companies caught in the crosshairs of such government policies that inevitably led to the selective waiver provision drafted by the Advisory Committee on Evidence Rules.

17. See Judicial Conference of the U.S., Report of the Advisory Committee on Evidence Rules, at Draft of Cover Letter to Congress on Selective Waiver, at 3 (2007) [hereinafter May 15, 2007, Report of the Evidence Advisory Committee], available at <http://www.uscourts.gov/rules/Reports/EV05-2007.pdf>.

18. *Id.* at Draft of Cover Letter to Congress on Selective Waiver, at 3–4. At its June 11–12, 2007, meeting, the Standing Committee on Rules of Practice and Procedure approved the Advisory Committee recommendation on Federal Rule of Evidence 502 and its report on selective waiver. See Press Release, Comm. on Rules of Practice and Procedure, Standing Rules Committee Approved Proposed Rules and Forms Amendments and New Rules; Approved Proposed Amendments and New Rules for Publication (June 2007), available at <http://www.uscourts.gov/rules/index2.html#standing0607>. Rather than sending the selective waiver report directly to Congress with proposed Federal Rule of Evidence 502, the Standing Committee elected to alert Congress to its existence in the cover letter on Rule 502 and to make the selective waiver report available to Congress upon request. *Id.*

Part II carefully analyzes the opposition to the current federal approach to corporate targets and concludes that exchanging leniency for corporate cooperation represents a legitimate prosecutorial technique that has long been accepted in the context of individual prosecution. Part II further explains that corporate waivers have become an indispensable part of the fabric of federal corporate investigations which will and should continue to play an important role in ensuring effective corporate oversight. Part II discusses how selective waiver protection will provide an additional incentive for companies to cooperate in this way by eliminating the unnecessary collateral costs of cooperation on the civil side. Finally, Part II emphasizes that selective waiver protection will not undermine the integrity of internal corporate investigations and will, instead, give corporations crucial control over the ultimate destination of the information provided to federal entities.

Part III examines the compatibility of selective waiver protection with modern privilege doctrine. It demonstrates that selective waiver fits into the paradigmatic shift that has taken place in contemporary privilege and waiver doctrine where rigid insistence on complete confidentiality has gradually been replaced with considerations of fairness and party control over information. In addition, Part III examines the statutory language drafted by the Advisory Committee on Evidence Rules and suggests drafting choices that will provide the most predictable and complete protection possible for corporations currently caught between the “rock” of federal investigation and the “hard place” of massive civil exposure.

I. THE ORIGINS OF SELECTIVE WAIVER

The current selective waiver controversy arises from the application of federal law enforcement policies to corporate targets. While corporate crime is not new, federal law enforcement has recently adopted an increasingly aggressive approach to the investigation and prosecution of wrongdoing in American corporations.¹⁹ In order to keep markets and

19. In 2002, President George W. Bush created the “Corporate Fraud Task Force.” Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002). The Corporate Fraud Task Force was designed to coordinate and oversee all corporate fraud matters being investigated by the U.S. Department of Justice (DOJ) and to enhance the interagency coordination of regulatory and criminal investigations. *Id.* In addition to establishing the Corporate Fraud Task Force, the President asked that Congress provide the administration new tools to utilize in the battle to enforce corporate responsibility and to eradicate corporate corruption. On July 30, 1992, Congress passed the Sarbanes-Oxley Act of 2002. Pub. L. No. 107-204, 116 Stat. 745, 784 (codified as amended in scattered sections of 11, 15, 18, 28, 29 U.S.C.). The legislation modified existing enforcement of corporate responsibility in many ways. Among other things, the act increased accountability of corporate officers and directors by requiring them to personally certify financial reports submitted to the SEC and by criminalizing willful certification of false financial reports, increased availability of corporate documents for use in government investigations by mandating retention of such documents and by criminalizing any alteration or falsification of such documents, created criminal culpability for securities fraud with a twenty-five-year maximum term of imprisonment, prohibited the

corporate stakeholders safe from the damaging effects of corporate malfeasance, prosecutors have implemented policies designed to engage business organizations as partners with federal law enforcement in discovering, disclosing, and punishing individual corporate wrongdoers.²⁰ These policies generate disclosures of privileged corporate information to government investigators which result in judicial findings of waiver. For this reason, many commentators contend that the chief casualty of these prosecutorial tactics is not the corporate wrongdoer, but the attorney-client privilege of good corporate citizens.²¹

A. *The Exercise of Prosecutorial Discretion in
Charging Business Organizations*

Corporate entities in this country are subject to criminal liability for the misconduct of individual officers and employees.²² Corporations bear broad responsibility for all of the illegal acts of their agents (a) committed within the scope of the agents' employment and (b) intended to benefit the corporation, at least in part.²³ Despite such a broad standard of liability that

sale of stock by corporate insiders during blackout periods, and criminalized retaliation against corporate whistleblowers. *Id.*

20. See Memo from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Dec. 12, 2006) [hereinafter McNulty Memo], available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf ("[O]ur corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals.").

21. See *supra* notes 14–15 and accompanying text.

22. See *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (adopting a respondeat superior theory of corporate liability for criminal misconduct of its employees). Prior to the decision in *New York Central*, American courts had declined to hold corporate entities accountable for criminal wrongdoing on the basis that corporations were artificial entities incapable of forming the necessary mens rea. See Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Wash. U. L.Q. 393, 396, 413 (1982) (explaining that "[t]he corporation was recognized in law not as a natural person, but as an artificial entity. As an abstraction, it lacked physical, mental, and moral capacity to engage in wrongful conduct, or to suffer punishment. It could neither commit criminal acts, entertain criminal intent, nor suffer imprisonment. It had no soul, and so could not be blamed").

23. See, e.g., *United States v. Automated Med. Lab., Inc.*, 770 F.2d 399, 406 (4th Cir. 1985); *New York Cent.*, 212 U.S. at 493; *United States v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982). This rule of vicarious criminal culpability is "considerably broader than in most other countries." V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 Am. Crim. L. Rev. 1239, 1243 (2000); see also Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 Managerial & Decision Econ. 381, 382 (1996) (explaining that "the United States virtually stands alone in the world on its approach" to criminal responsibility for corporations). In order to satisfy the "scope of employment" requirement for corporate culpability, a corporate agent must be performing acts of the kind which he is authorized to perform on behalf of the corporation in engaging in criminal wrongdoing. See *Cincotta*, 689 F.2d at 242 (upholding liability of a corporation where an employee passed money associated with a fraudulent transaction through the corporate treasury as part of employment duties). In addition, an agent need not act solely for the corporation's benefit in committing the criminal act, so long as one motivation of the agent was to benefit the entity.

permits prosecution of a corporate entity for almost any transgression by an employee, prosecution of the corporate entity itself historically has been the exception rather than the rule.²⁴ Prosecutors enjoy broad charging discretion in this country and, in the federal system, prosecutors have traditionally exercised this discretion to avoid indicting corporate entities due to the potentially disastrous consequences for innocent corporate stakeholders.²⁵ For many years, this traditional corporate exemption from criminal liability encouraged and allowed corporate entities to engage in a circle the wagons approach when faced with federal investigations, aggressively defending employee misconduct, and making law enforcement do its own costly and time-consuming legwork.²⁶ Until recently, that is. After several high-profile scandals ravaged publicly traded American corporations, federal prosecutors recognized that “sometimes, bringing

See *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (using a test that requires determining whether an agent’s acts are motivated, at least in part, by an intent to benefit the corporation); *Cincotta*, 689 F.2d at 242 (finding corporate culpability appropriate where a company “was making money by selling oil that it had not paid for” despite the fact that the agent was also motivated by self-interest); Memo from Eric H. Holder, Jr., Deputy Att’y Gen., to Dep’t Component Heads & U.S. Att’ys, *Bringing Criminal Charges Against Corporations* (June 16, 1999) [hereinafter *Holder Memo*], available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (noting that “[a]gents . . . may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation”). Further, no actual profit or other benefit to the corporation is necessary to hold the entity accountable for the criminal misconduct of its agents so long as the agent intended, at least in part, to benefit the entity. See *Automated Med. Lab.*, 770 F.2d at 407 (noting that “whether the agent’s actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation”).

24. See *Simons*, *supra* note 2, at 986 (noting that vicarious organizational prosecution is not applied as broadly as the standard permits and that “corporations—particularly large public corporations—are prosecuted quite infrequently”). *Simons* cites 2001 sentencing data for “white collar offenses” and notes the increase in organizational prosecutions from 1995 to 2001. *Id.*

25. See *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) [hereinafter *McNulty Statement*] (statement of Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice) (“Federal prosecutors could lawfully exercise their discretion to charge a corporation in many instances where we have stayed our hand[] . . . [b]ecause a corporation, while legally a person, also represents a unique entity in which many have a stake—shareholders, employees and customers to name but three.”); Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, U.S. Att’ys’ Bull., Mar. 2002, at 19, 20 (stating that “[i]n most cases, the liability of the corporation for the acts of a corporate agent is not a matter of law but of prosecutorial discretion” and emphasizing that “the fact that a corporation is technically subject to strict *respondereat superior* for the acts of its employees, even if contrary to the corporation’s policies and interests, requires a prosecutor to examine carefully the equities of charging a corporation under the specific circumstances presented by a particular case”).

26. See *McNulty Statement*, *supra* note 25 (noting concerns raised by the “circling the wagons” approach to corporate defense, which seeks to “prevent the communication of truthful information from current and former employees to the government, in order to protect either the employees or the corporation itself”).

criminal charges against a corporation is the only fair and effective way to deal with a corporate culture that has been corrupted to the point that it tolerates and even encourages criminal activity.”²⁷ The indictment of business organizations like Arthur Andersen served to increase law enforcement leverage in corporate investigations and improve the efficacy and speed of government investigations.²⁸

While charging decisions historically have remained hidden from public view, the U.S. Department of Justice (DOJ) revealed the factors driving corporate indictment decisions in a memorandum published in 1999 by then-Deputy Attorney General Eric Holder entitled “Bringing Criminal Charges Against Corporations,” also known as the “Holder Memo.”²⁹ The Holder Memo recognized some special considerations to be analyzed in deciding whether to charge a corporation criminally in light of the unique “nature of the corporate ‘person.’”³⁰ The memo listed eight factors to be evaluated, including the nature and severity of the alleged misconduct, the pervasiveness of wrongdoing throughout the entity, the history of similar misconduct by the entity, and the compliance mechanisms in place

27. Christopher A. Wray & Robert K. Hurr, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1099 (2006) (describing the philosophy of the memo issued by Deputy Attorney General Larry Thompson); see also McNulty Memo, *supra* note 20 (emphasizing the important massive deterrent effect of the corporate indictment).

28. In probably the most well-known recent example of criminal liability for a business organization, the accounting firm of Arthur Andersen, LLP, was indicted in March 2002 for obstruction of justice. See *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 702 (2005). Although the firm’s conviction was ultimately overturned by the U.S. Supreme Court, the indictment led to the demise of the firm, turning the Big Six in the accounting industry into the Big Five. See *Simons*, *supra* note 2, at 1010–16 (detailing the demise of the accounting firm and the massive document shredding that generated the obstruction charges). In another recent example, prosecutors indicted Reliant Energy Services in April 2004 for fraudulent trading practices during the 2000–01 California energy crisis. Press Release, U.S. Dep’t of Justice, *Reliant Energy Services, Inc. and Four of Its Officers Charged with Criminal Manipulation of California Electricity Market* (Apr. 8, 2004), available at http://www.usdoj.gov/opa/pr/2004/April/04_crm_223.htm (explaining that the indictment accused the company of intentionally driving up the price of electricity in California by shutting off the company’s power generators); see also *McNulty Statement*, *supra* note 25 (noting that the DOJ responded to corporate scandals with “vigor and action,” obtaining more than 1000 corporate fraud convictions since 2002).

29. Holder Memo, *supra* note 23. Despite recognized dangers inherent in the publication of factors governing prosecutorial discretion, commentators have noted the benefits to be gained through such structuring of discretion. See Wayne R. LaFave et al., *Criminal Procedure* § 13.2, at 684 (4th ed. 2004) (“What is needed is for each prosecutor’s office to develop a statement of general policies to guide the exercise of prosecutorial discretion, particularizing such matters as the circumstances that properly can be considered mitigating or aggravating.”); see also *McNulty Statement*, *supra* note 25 (noting that the charging memo promoted “transparency in the one area that a prosecutor can exercise the most individual choice and judgment—the charging process”).

30. Holder Memo, *supra* note 23, at 3. The memo provided that these considerations were designed to offer guidance to individual prosecutors in determining whether corporate indictment was appropriate and were not intended to mandate the outcome in any given case. See *id.* at 4.

internally to detect and prevent such misconduct.³¹ The memo also emphasized the importance of corporate cooperation with the government investigation as a mitigating factor, directing prosecutors to consider “[t]he 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 privileges.*”³² The memo explained the potential importance of corporate privilege and work-product waivers in giving the government access to corporate internal investigation materials and communications between corporate directors, officers, employees, and counsel as follows: “Such waivers permit the government to obtain statements of possible witnesses, subjects and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”³³

The memo provided that such waivers should ordinarily be limited to factual internal investigation and contemporaneous advice to the corporation and should not include waivers of information concerning the criminal investigation, except in “unusual circumstances.”³⁴ The memo explicitly stated that waiver of the attorney-client and work-product protections was not required to avoid indictment or to be considered cooperative and that such waivers should be used as only one possible factor in evaluating the ultimate charging decision.³⁵

31. *See id.* at 3–4.

32. *Id.* (emphasis added).

33. *Id.* at 7.

34. *Id.* at 7 n.2.

35. *Id.* at 7; *see also* Urofsky, *supra* note 25, at 22 (noting that “the Principles do not require, or even encourage, a prosecutor to seek a waiver in all circumstances, and they make it absolutely clear that such waivers are not absolute requirements for cooperation”). Although the Holder Memo represented the first official appearance of privilege waiver as a factor affecting DOJ charging decisions, favorable treatment by government investigators in exchange for voluntary corporate disclosures was nothing new in 1999. The SEC launched its voluntary disclosure program in the mid-1970s—more than two decades prior to the Holder Memo. Due to insufficient investigative resources to devote to concerns of political “slush fund” practices and bribery of foreign officials by several corporations, the SEC developed the program to encourage companies to appoint special committees advised by outside counsel to investigate the corporation’s practices and to share their results with the commission. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 n.7 (6th Cir. 2002). The SEC currently includes a company’s willingness to provide information, including some privileged information, as one criterion for evaluating corporate cooperation, noting that the purpose of such a waiver is solely to provide critical information to the commission: “In this regard, the Commission does not view a company’s waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.” Report of Investigation and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001) [hereinafter Seaboard Report], available at http://www.sec.gov/litigation/_investreport/34-44969.htm.

In the years immediately following the release of the Holder Memo, federal law enforcement and regulatory agencies intensified their focus on corporate fraud as a result of several high profile scandals involving publicly traded companies, including Enron, Adelphia, and WorldCom.³⁶ As a result of these scandals and the extensive public harm they caused, the executive branch made investigation and prosecution of corporate fraud a top priority.³⁷ To further the effective prosecution of corporate fraud, then-Deputy Attorney General Larry Thompson released a revised set of corporate charging principles on January 20, 2003, also known as the "Thompson Memo."³⁸ The Thompson Memo emphasized the twin considerations most important in a corporate charging decision: (1) "authentic" corporate cooperation with the government and (2) effective corporate compliance programs designed to bring corporate malfeasance to light.³⁹ In describing "authentic" corporate cooperation, the Thompson Memo noted concerns over corporate targets paying lip service to the concept of cooperation, while at the same time acting to impede the government investigation by counseling employees to withhold information.⁴⁰ The memo cautioned that such conduct by a corporation

36. See Buchanan, *supra* note 3 (noting that "the subject of organizational accountability has been brought to the fore by a series of high-profile corporate scandals that have shaken the public's confidence in the way that some of our largest companies conduct business"). Although these corporate scandals sparked heightened concern over market stability and investor confidence, crime in the organizational context was not new. See Simons, *supra* note 2, at 999-1008 (discussing Boesky insider trading scandal and other corporate investigations of the 1980s and 1990s).

37. See *supra* note 19 and accompanying text.

38. Memo from Deputy Att'y Gen. Larry Thompson to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; see also DOJ Revises Memorandum on Principles for Prosecution of Business Organizations, 72 Crim. L. Rep. (BNA) 468 (2003).

39. See Thompson Memo, *supra* note 38, at 1 (noting "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" and "the efficacy of the corporate governance mechanisms in place within a corporation"). Companies cooperate with federal investigations in a number of ways depending upon the issues raised, including by (1) making witnesses available for prosecutors to interview without subpoenas, (2) replacing managers accountable for underlying wrongdoing, (3) terminating employees who refuse to cooperate with the investigation, (4) sharing interview memos and other internal investigation materials, (5) directing professionals retained by the company to meet with prosecutors and share working papers, and (6) postponing or adjusting internal investigations to meet the government's needs. See Wray & Hurr, *supra* note 27, at 1136. The Thompson Memo also added an instruction to prosecutors to consider alternative resolutions to corporate criminality through the use of pretrial diversion mechanisms traditionally applied against juvenile and drug offenders. See *id.* at 1103. This drastically increased the use of deferred prosecution and non-prosecution agreements with corporate entities. See *id.* at 1135. Such agreements serve to place the company on a probation of sorts while monitors and other creative measures are employed to improve corporate compliance. *Id.* at 1104.

40. See Thompson Memo, *supra* note 38, at 6 (explaining that "[a]nother factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation Examples of such conduct include:

would counsel in favor of organizational prosecution.⁴¹ Although the memo discussed the importance of cooperation in this respect, the Thompson revision did not alter the department position with respect to corporate privilege waivers, maintaining their status as only one non-mandatory factor in evaluating corporate cooperation.⁴²

Although the Thompson Memo has drawn the most vocal criticism from the corporate bar, the DOJ is not the only federal department to place a premium on corporate cooperation with government investigations and to count waiver of privileges as one method of cooperation. Indeed, the department's charging policy constitutes "the Justice Department's embrace of a distinct philosophy of corporate enforcement that has steadily gained favor throughout the government."⁴³ The Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission, the Environmental Protection Agency, the Department of Defense, the Department of Health and Human Services, and others have similar

overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation"). The other change in the Thompson Memo related to the evaluation of a corporation's existing compliance program to help prosecutors determine whether a program provided meaningful and effective oversight or whether it was merely a "paper program." *Id.* at 7. Relying upon the decision of the Delaware Chancery Court in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), the revision provided prosecutors with several factors to assist in evaluating corporate compliance programs. See Thompson Memo, *supra* note 38, at 7 (including whether a corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations, whether directors are provided with information sufficient to enable the exercise of independent judgment, whether internal audit functions are conducted at a level sufficient to ensure their independence and accuracy, and whether directors have established reasonable information gathering and reporting systems within the organization). The Thompson Memo also added an eighth factor to be considered in evaluating organizational prosecution: "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance." *Id.* at 3.

41. See Thompson Memo, *supra* note 38.

42. A comparison of the two memoranda suggests one minor change in the language regarding waiver of the attorney-client privilege. Where the Holder Memo stated that the waiver by the corporation would be considered as "only one factor" in evaluating the corporation's cooperation, the Thompson Memo deleted the modifier "only" and provided that waiver would be considered as "one factor" in evaluating corporate cooperation. There is no other suggestion in the memo that the deletion of this modifier was intended to increase the importance of waiver as a factor in assessing cooperation, although one could certainly argue that the deletion of the word "only" accomplishes just that. Compare Holder Memo, *supra* note 23, at 7, with Thompson Memo, *supra* note 38, at 5. The emphasis on gauging the "authenticity" of a corporation's cooperation may also explain why the Thompson Memo has been interpreted as more encouraging of waivers than the Holder Memo. See Wray & Hurr, *supra* note 27, at 1175.

43. Wray & Hurr, *supra* note 27, at 1107-08.

cooperation policies that contemplate the sharing of protected information by corporate entities.⁴⁴

B. *The “Sound and Fury”⁴⁵ Regarding Corporate Waivers of the Attorney-Client Privilege*

The relationship between an attorney and his client historically has enjoyed privileged status.⁴⁶ Although a lawyer’s code of ethics has long demanded confidentiality of client communications, the modern justification for the evidentiary privilege stems from the instrumental goal of encouraging parties to seek effective legal counsel to govern their affairs in a complex society of laws.⁴⁷ The application of the attorney-client privilege in the context of an individual client who is a natural person can raise many interpretative problems, but when the “client” to be protected by

44. See, e.g., Seaboard Report, *supra* note 35; 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 (2003); Wray & Hurr, *supra* note 27, at 1107–33 (discussing in detail the various policies in place across the federal government to encourage cooperative partnership between the federal government and those business organizations and industries it regulates). Indeed, some of the policies adopted by other agencies place an even greater emphasis on waiver than does the DOJ policy. For example, an enforcement advisory issued by the Commodity Futures Trading Commission creates a greater expectation for waiver, asking, “Did the company willingly waive corporate attorney-client and work product protection for internal investigation reports and other corporate documents? [Or] waive corporate attorney-client privilege for employee testimony?” Press Release, U.S. Commodity Futures Trading Comm., Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations 2 (n.d.), available at <http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf>.

45. James B. Comey, Deputy Att’y Gen., Remarks Before the American Bar Association 14th Annual Institute on Health Care Fraud (May 13, 2004), in U.S. Att’ys’ Bull., Sept. 2005, at 1, 3 (noting the “sound and fury” generated by the DOJ corporate charging policy).

46. See Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1457–58 (1985).

47. See Kenneth S. Broun et al., McCormick on Evidence § 72.1, at 131 (Thomson West 6th ed. 2006); C.B. Mueller & Laird C. Kirkpatrick, Evidence § 5.8 (2d ed. 1999); 8 John Henry Wigmore, Wigmore on Evidence § 2291 (3d ed. 1940); see also *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961) (explaining that “[i]n the eighteenth century, when the desire for truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained, on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter properly to advise the clients. This is the basis of the privilege today”), *aff’d*, 306 F.2d 633 (2d Cir. 1963), *cert. denied*, 371 U.S. 951 (1962). Due to the traditional sanctity of the attorney-client relationship, privilege doctrine is not its only protector. An attorney’s ethical obligations provide even broader protection to the client than does privilege doctrine. The American Bar Association (ABA) Rules of Professional Conduct forbid a lawyer to disclose confidential client communications even outside the context of legal proceedings where the attorney-client privilege applies. See Model Rules of Prof’l Conduct R. 1.6(a) (2003) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”). Where a lawyer’s ethical obligations are broader than the protection of the evidentiary privilege, however, a lawyer may be compelled to testify despite the demands of his ethical code of conduct. As a result, most ethical rules allow for disclosure compelled by court order. See *id.* R. 1.6(b)(6).

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.⁴⁸ Nonetheless, the U.S. Supreme Court has long recognized that a corporate entity is entitled to the protection of the attorney-client privilege when its officers and employees seek legal advice on behalf of the company.⁴⁹ Likewise, a corporation's adversaries may not compel production of the work-product material of corporate counsel prepared in anticipation of litigation.⁵⁰

Because the DOJ policy evaluates a potential target's cooperation, in part, through its willingness to waive the historically sacred protection of the attorney-client privilege and the work-product doctrine, it has proven to be a source of persistent controversy. Both the Holder and Thompson memos sent shock waves through the corporate legal community.⁵¹ Although the stated policy regarding privilege waivers did not change substantively with the Thompson Memo, the outcry intensified after the 2003 revision.⁵² A number of vocal critics have argued that the policy has

48. See *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) (“Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law . . .”).

49. *Id.* at 390–92; see also *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915) (assuming that the attorney-client privilege protects a corporate entity in its efforts to seek legal advice).

50. *Upjohn*, 449 U.S. at 397–98. While the attorney-client privilege protects only the confidential communications between a client and his attorney, the work-product doctrine provides additional protection for the work product of an attorney made in anticipation of litigation. See *Hickman v. Taylor*, 329 U.S. 495 (1947); see also Fed. R. Civ. P. 26(b)(3); Fed. R. Crim. P. 16(b)(2)(a). In recognizing the work-product doctrine, the Supreme Court noted the need for a lawyer to “work with a certain degree of privacy.” *Hickman*, 329 U.S. at 510. As with attorney-client privilege, the Court adopted a partly instrumental justification for protecting attorney work product. The Court noted the importance of competent legal representation to society as a whole and expressed concern that counsel would decline to record work product in an effort to conceal it from his adversary in the absence of any protection from disclosure, which would result in inefficiency and less competent representation. *Id.* at 511 (“Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”). Further, the Court found overtones of “unfairness” in allowing an adversary to free ride off of the strategic efforts of his opponent. *Id.* at 516.

51. See, e.g., *Conference Report on 15th Annual National Institute on White Collar Crime: DOJ Guidelines on Corporate Waivers of Attorney Client Privilege Draws Criticism*, 68 Crim. L. Rep. (BNA) 563 (2001); Tamara Loomis, *Privilege Waivers: Prosecutors Step Up Use of Bargaining Chips*, N.Y.L.J., Sept. 7, 2000, at 5; Breckinridge L. Willcox, *Attorney/Client Privilege Waivers: Wrongheaded Practice?*, 6 Bus. Crimes Bull., Jan. 2000, at 1; Letter on Behalf of Am. Corp. Counsel Ass’n to Eric Holder, Deputy Att’y Gen., Dep’t of Justice (May 12, 2000), available at <http://www.acc.com/public/accpolicy/holder.html>.

52. Criticisms of DOJ policy did not begin with the Thompson Memo. The Holder Memo was criticized as “a requiem marking the death of privilege in corporate criminal

been applied more frequently and more aggressively since the Thompson Memo, making waiver requests routine and resulting in a “culture of waiver” in federal organizational prosecutions and investigations.⁵³ The

investigations.” 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, 147–48 (2000). Since the Thompson Memo, the outrage over the policy has only grown. The ABA, the American College of Trial Lawyers, the U.S. Chamber of Commerce, the Association of Corporate Counsel, and the American Civil Liberties Union have been among the most vocal critics of the policy. See *Coalition Submission*, *supra* note 14; see also 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 (2003). In 2004, the ABA created a task force dealing solely with the issue of corporate waiver of attorney-client privilege and issued a report criticizing the DOJ charging policy. ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029 (2005). In 2006, several former high-ranking DOJ officials sent a letter to Attorney General Alberto Gonzales objecting to the Thompson Memo’s treatment of waiver, stating that it was “seriously flawed.” See Letter from Griffin B. Bell, Former Att’y Gen. (1977–79) et al., to Alberto Gonzales, Att’y Gen., Dep’t of Justice (Sept. 5, 2006) [hereinafter Former DOJ Officials’ Letter], available at <http://www.acca.com/public/attyclientpriv/agsept52006.pdf>; see also Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, Legal Backgrounder, Apr. 4, 2003, at 4, available at <http://www.wlf.org/upload/040403LBBenveniste.pdf> (expressing concern over corporate privilege waivers that precede internal corporate investigations, but conceding that corporate privilege waivers following internal investigations may be appropriate and reasonable); Cole, *supra* note 44. Corporate privilege waivers have also created concern in Congress. See *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006). See generally *The Thompson Memo’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *September 12, 2006, Senate Judiciary Comm. Hearing*]. Although the waiver of the attorney-client privilege in connection with corporate fraud investigations has drawn the most public criticism, other aspects of the charging policy have also come under fire. See, e.g., Am. Coll. of Trial Lawyers, *supra*, at 324–39 (expressing concern over government suspicion of joint-defense agreements and disincentives to front attorneys’ fees); Ben-Veniste & Rubin, *supra*, at 4 (lamenting that the policy discourages joint-defense agreements and punishes “overly broad” assertions of employee representation). Indeed, a U.S. District Court for the Southern District of New York recently found that government pressure under the policy to deny payment of legal fees for individual targets of the government investigation was unconstitutional. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). In addition to the attacks on the DOJ policy, the ABA and others opposed certain language in Application Note 12 to U.S. Sentencing Guidelines § 8C2.5 because it conditioned credit for cooperation at sentencing, in part, upon privilege waiver. ABA Task Force on the Attorney-Client Privilege, Task Force Mission Statement, <http://www.abanet.org/buslaw/attorneyclient/> (last visited Sept. 17, 2007). In response to the criticism, the Sentencing Commission deleted the language complained of, effective November 1, 2006, because “the sentence at issue could be misinterpreted to encourage waivers.” Sentencing Guidelines for United States Courts, 71 Fed. Reg. 28,063, 28,073 (May 15, 2006).

53. See ABA Task Force on the Attorney-Client Privilege, *supra* note 52 (discussing “culture of waiver”). The existing survey data regarding the frequency of corporate waivers of attorney-client and work-product protections is in conflict. According to an ABA survey of over 1200 corporate counsel, almost seventy-five percent of respondents believe that waiver requests are routine. See Am. Chemistry Council et al., *The Decline of the Attorney-Client Privilege in the Corporate Context Survey Results 3* (2006), available at

focus on authentic corporate cooperation and compliance has undoubtedly altered the manner in which companies respond to alleged wrongdoing within their ranks and has resulted in increased cooperation with the government and attention to internal compliance programs.⁵⁴ The critics of the policy contend that it goes too far, however, and that it creates a “culture of waiver” that has numerous deleterious effects on effective and fair representation of corporations and on law enforcement’s ultimate goal of eradicating corporate fraud.

First, critics of the policy argue that government requests for waiver of the attorney-client privilege and work-product protection represent an inappropriate intrusion into the sanctity of the time-honored lawyer-client relationship that is inherently unfair. Several groups suggest that corporate clients are unable to resist the pressure for waivers from the behemoth power that is the DOJ, making waivers by cooperating companies coerced and involuntary.⁵⁵ Furthermore, critics complain that the very policy designed to encourage good corporate citizenship ultimately will decrease corporate oversight and compliance inconsistent with legitimate law enforcement and public interests.⁵⁶ Specifically, critics argue that routine waivers of corporate protections will discourage individual employees from sharing information with corporate counsel crucial to the exposure of corporate criminal wrongdoing.⁵⁷ These groups contend that the government policies drive a damaging wedge between corporate counsel and individual employees who must work jointly to ensure the healthy operation of a business entity. Critics also express concern that corporate counsel will reduce oversight activities and will refrain from documenting the results of any internal investigations that are performed for fear of eventual exposure to government officials.⁵⁸ Finally, critics complain about the punitive consequences visited upon cooperating corporations when their protected information is turned over to their adversaries in later civil

<http://www.acca.com/Surveys/attyclient2.pdf>. In 2002, the U.S. Sentencing Commission’s Ad Hoc Advisory Group on the Organizational Sentencing Guidelines conducted a survey to ascertain the frequency of assistant U.S. attorney requests for waivers from organizational defendants. See Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, U.S. Sentencing Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines 98 (2003), available at http://www.ussc.gov/corp/advgrprpt/AG_Final.pdf. This survey suggested infrequent waiver requests by prosecutors. *Id.*; see also *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179, 1199 (10th Cir. 2006) (acknowledging the commentary decrying a “culture of waiver,” but finding the existence of such a culture not supported by the record. “Aside from the anecdotal material serving as the foundation for the purported ‘culture of waiver,’ the record is silent regarding its existence, significance, and longevity”); Buchanan, *supra* note 3, at 597–98 (discussing the survey results).

54. Wray & Hurr, *supra* note 27, at 1097, 1149.

55. See *supra* note 52 and accompanying text.

56. See *supra* note 52 and accompanying text.

57. See *supra* note 52 and accompanying text.

58. See *supra* note 52 and accompanying text.

litigation.⁵⁹ The American Bar Association (ABA) and other groups have urged the DOJ to abandon its policy of using waivers as a part of corporate cooperation altogether and have suggested a revision to the department's policy that flatly forbids consideration of waiver in evaluating corporate cooperation.⁶⁰

The frequent and highly publicized attacks on the federal cooperation policy have captured the attention of the senior leadership within the DOJ, as well as members of Congress. The result has been a delicate dance designed to address the mounting concerns of the corporate defense bar without compromising department goals with respect to criminal enforcement in the corporate arena. With the controversy over corporate privilege waiver at a fever pitch, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006 on December 7, 2006.⁶¹ Consistent with the ABA proposal, the legislation would prohibit government lawyers from considering waiver of the attorney-client privilege or work-product protection in assessing cooperation in connection with any federal investigation or criminal or civil enforcement matter.⁶²

Then-Deputy Attorney General Paul J. McNulty responded on December 12, 2006, by superseding the long-criticized Thompson Memo with yet another revision to the DOJ charging policy, also known as the "McNulty Memo."⁶³ The McNulty Memo stood firm on the importance of corporate

59. See, e.g., Former DOJ Officials' Letter, *supra* note 52, at 2 (expressing concern over "follow-on" civil litigation where "sensitive—and sometimes confidential—information" disclosed to the government can be "used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders").

60. See John Gibeaut, *Hearings Target Thompson Memo: Former Prosecutors, Defenders Criticize Policy on Waiver of Attorney-Client Privilege*, ABA J. & Rep., Sept. 15, 2006 (on file with author) (listing proposed changes to the existing DOJ charging policy, including "[e]limination of waiver and payment of employee legal fees as considerations when deciding whether to charge a company"); see also *September 12, 2006, Senate Judiciary Comm. Hearing*, *supra* note 52, at 123 (testimony of Edwin Meese III, Ronald Reagan Distinguished Fellow in Pub. Policy, Chairman, Ctr. for Legal and Judicial Studies, The Heritage Found.).

61. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2d Sess. 2006). The bill was reintroduced in the 110th Congress and awaits action. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (1st Sess. 2007).

62. See *supra* note 61. The bill is not solely concerned with privilege waivers, but also prohibits government consideration of a company's decision to pay the attorneys' fees of an employee under investigation, to enter into a joint-defense agreement with an employee, or to refuse to terminate a person's employment for lack of cooperation. See *id.* The bill largely adopts the recommendations of the ABA in connection with the DOJ charging policies. See *id.*

63. McNulty Memo, *supra* note 20. This was not the DOJ's first attempt to allay concerns over the corporate charging policy. On October 21, 2005, then-Acting Deputy Attorney General Robert D. McCallum, Jr., issued a memo entitled "Waiver of Corporate Attorney-Client and Work-Product Protection." Memo from Robert McCallum, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (Oct. 21, 2005) [hereinafter McCallum Memo] (on file with author). While the McCallum Memo did not change DOJ policy regarding corporate cooperation, it directed each federal district and component to establish a "written waiver review process" to help ensure that

cooperation with government investigations and maintained that privilege and work-product waivers can be important tools in corporate prosecutions. It sought to allay concerns about overly aggressive prosecutorial demands for privilege waivers, however, by requiring a “legitimate need” for privileged corporate information and the “least intrusive waiver necessary to conduct a complete and thorough investigation.”⁶⁴ The revision also required consultation with Main Justice and approval by the United States Attorney prior to a prosecutor’s request for privileged corporate information.⁶⁵ Thus, while the revised charging criteria impose a stringent standard on prosecutors seeking to request waivers and add some procedural hurdles to overcome, they continue to utilize privilege waiver as a potential avenue of corporate cooperation. The harshest critics of the DOJ charging policy have declared the McNulty Memo to be “but a modest improvement,” finding that the new policy “fall[s] far short of what is needed to prevent further erosion of fundamental attorney-client privilege,

“federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*.” *Id.* The memo provided that the written waiver-review processes could vary from district to district to protect the prosecutorial discretion of each component head to conduct investigations and seek cooperation of business organizations effectively. *Id.* The ABA and other opponents of the policy accused the McCallum Memo of exacerbating the existing problem for corporate clients by allowing and even encouraging “numerous different waiver policies throughout the country.” Letter from Michael S. Greco, President, Am. Bar Ass’n, to Alberto Gonzales, Att’y Gen., U.S. Dep’t of Justice 2 (May 2, 2006), available at http://www.abanet.org/poladv/letters/attyclient/060502letter_acprivgonz.pdf.

64. McNulty Memo, *supra* note 20, at 8, 9. The memo outlines a balancing test to be used in determining the existence of a “legitimate need” for protected information, including (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 alternate means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of waiver.

Id. at 9. In addition, the memo created a “step-by-step approach” to department requests for privileged information, dividing corporate information into “Category I” and “Category II” information. *Id.* The memo describes “Category I” information as “purely factual information, which may or may not be privileged, relating to the underlying misconduct” such as interview memos, organizational charts created by corporate counsel, factual chronologies, factual summaries, or reports containing investigative facts documented by counsel. *Id.* “Category I” information should be requested first if there is a legitimate need for it. *Id.* Only in “rare circumstances should prosecutors seek ‘Category II’ information, including attorney notes, memo[s] or reports containing counsel’s mental impressions and conclusions, legal determinations reached as a result of internal investigations, or legal advice given to the corporation.” *Id.* at 10.

65. *Id.* at 10–11. The U.S. attorney must consult with the assistant attorney general for the criminal division prior to granting or denying a prosecutor’s request to seek “Category I” information, while the U.S. attorney must receive written authorization from the deputy attorney general prior to approving a request for “Category II” information. Interestingly, the memo further provides that a corporate refusal to provide “Category II” information shall not be held against a corporation in the charging decision, but that prosecutors “may always favorably consider a corporation’s acquiescence.” *Id.* at 10. The revised policy requires no specialized showing or prior authorization for a company’s voluntary disclosure of protected information in the absence of any government request. *Id.* at 11. Voluntary waivers must be reported, however, to the U.S. attorney and maintained in the office files. *Id.*

work product and employee protections during government investigations.”⁶⁶ These groups continue to push for legislation like the Attorney-Client Privilege Protection Act that would eliminate government cooperation policies that include privilege waivers altogether.⁶⁷

While many of the asserted deleterious collateral consequences of the government policy are difficult to document other than anecdotally,⁶⁸ the most readily identifiable victim of the cooperation policy to date has been the corporation’s privilege protection in civil litigation. As government pressure to share information has intensified in recent years, corporate targets have repeatedly and unsuccessfully sought to prevent waivers to third parties following government disclosures in both federal and state courts.⁶⁹

C. Judicial Rejection of Selective Waiver Protection

Many corporate defendants have argued that their voluntary disclosure of privileged information in cooperation with federal government investigations should not constitute a waiver in related civil litigation. However, the circuit courts that have addressed such selective waiver have almost unanimously rejected it, leaving cooperating corporate defendants exposed to increased liability as a result of their disclosures to the government.⁷⁰ Most federal circuits have held that a party may not

66. Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, ABA J. eReport, Dec. 15, 2006, <http://www.abanet.org/abanet/common/print/printview.cfm?Ref=http://www.abanet.org/journal/ereport/D12Sepecter.html> (quoting ABA President Karen J. Mathis). The ABA continues to urge passage of the Attorney-Client Privilege Protection Act of 2006, which is basically an echo of the ABA position on the issue. *Id.*

67. *Id.*

68. *See supra* note 53.

69. *See infra* Part I.C and accompanying notes.

70. *See, e.g., In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (refusing to vacate district court order compelling production of 220,000 pages of privileged company documents to civil class action plaintiffs based upon Qwest’s prior disclosure to the DOJ and SEC); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2003) (stating that “after due consideration, we reject the concept of selective waiver, in any of its various forms”); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (declining to adopt any form of protection for a party “who chooses to disclose a privileged document to a third party”); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 233–34 (2d Cir. 1993) (reaffirming rejection of selective waiver); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425–26 (3d Cir. 1991) (same); *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988) (“The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege.”); *Permian Corp. v. United States*, 665 F.2d 1214, 1219–20 (D.C. Cir. 1981) (holding that a corporate defendant had “destroyed the confidential status of the . . . attorney-client communications by permitting their disclosure to the SEC staff” and stating that the concept of selective waiver was “wholly unpersuasive”). Although the majority of cases addressing selective waiver have declined to apply the doctrine, the circumstances and rationales present in the cases have varied, leading one court to note that “the case law addressing the issue of limited waiver [is] in a state of ‘hopeless confusion.’” *In re Columbia/HCA*, 293 F.3d at 294–95 (quoting *In re*

selectively waive the attorney-client privilege and work-product protection under any circumstances and that disclosure to government agencies destroys the privilege for all purposes.⁷¹ A few circuits have held that the existence of a confidentiality agreement between the government and the disclosing party may prevent a total waiver under some circumstances.⁷² Only the U.S. Court of Appeals for the Eighth Circuit has allowed a business entity to disclose privileged information to government investigators voluntarily without any promise of confidentiality and maintain privilege protection against a third-party litigant.⁷³

During the heart of the overseas corporate bribery scandal of the 1970s, the Eighth Circuit permitted such a selective waiver in *Diversified Industries v. Meredith*.⁷⁴ *Diversified Industries* was sued by a customer arising out of allegations that it maintained a slush fund to bribe customers' purchasing agents.⁷⁵ The plaintiff sought production of reports and memos prepared by *Diversified's* outside counsel in connection with an internal investigation of the slush fund allegations.⁷⁶ *Diversified* opposed discovery of the reports on the basis of the attorney-client privilege and work-product doctrine, but plaintiffs argued that *Diversified* had waived privilege by voluntarily disclosing counsels' reports to the SEC in connection with its investigation of *Diversified*.⁷⁷

The court refused to find a waiver of the privilege based upon *Diversified's* disclosures to the SEC, emphasizing the benefits of corporate self-analysis through counsel.⁷⁸ The court reasoned that a waiver for all

M&L Bus. Mach. Co., 161 B.R. 689, 696 (D. Colo. 1993) (citations and internal quotation marks omitted)).

71. See *supra* note 70 and accompanying text.

72. See *infra* note 83 and accompanying text.

73. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

74. *Id.*

75. *Id.* at 607.

76. *Id.* at 599. Plaintiffs also sought production of certain minutes of meetings of *Diversified's* board of directors. *Id.*

77. *Id.*

78. *Id.* at 611. Although the Eighth Circuit sitting en banc could not agree that the reports from the outside counsel had the protection of privilege in the first place, all of the judges concurred in finding that *Diversified's* production of the reports to the SEC would not constitute a waiver in the instant litigation if the reports were privileged prior to that disclosure. *Id.* at 611-12 (Henley, J., concurring in part and dissenting in part) ("I agree with the majority of the court that . . . the privileges claimed by *Diversified*, if originally extant, were not waived by the voluntary disclosures made by *Diversified* to the [SEC]."). Although adopting selective waiver of the attorney-client privilege for disclosures to the SEC, a later panel of the Eighth Circuit rejected the notion of selective waiver of the work-product doctrine in *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) ("Chrysler waived any work-product protection by voluntarily disclosing the computer tape to its adversaries, the class action plaintiffs, during the due diligence phase of the settlement negotiations."). The initial *In re Chrysler* disclosures that led to the waiver were very different from those made in *Diversified* and the other selective waiver cases because they were made to an adversary in civil litigation and not to a government agency in cooperation with an investigation. *Id.* Further, it was the government seeking the benefit of

purposes after disclosure to a government agency could “thwart[] the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”⁷⁹ The court also noted that the disclosure to the SEC occurred in a “separate and nonpublic” investigation.⁸⁰ Although corporations have been advocating for acceptance of the Eighth Circuit’s selective waiver doctrine since 1977, only a few federal district courts have followed suit.⁸¹ More recently, the Delaware Chancery Court has accepted the doctrine of corporate selective waiver to government entities as the “more prudent policy.”⁸²

While a few federal decisions have expressed willingness to consider allowing selective waiver where corporate privilege holders execute appropriate confidentiality agreements with the government, the U.S. Courts of Appeals for the First, Third, Fourth, Sixth, Tenth, and D.C. Circuits have rejected the notion of selective waiver under any circumstances.⁸³ These courts have found selective waiver inconsistent

the waiver after disclosure in *In re Chrysler*, thus furthering effective corporate law enforcement. *Id.*

79. *Diversified*, 572 F.2d at 611.

80. *Id.* This focus on the separate and nonpublic nature of the prior disclosure suggests that the absence of any harm to *Diversified*’s adversary in the instant litigation from the protection of the privileged information drove the court’s decision, at least in part. In a prior panel opinion in this case, Judge Gerald Heaney, who drafted the en banc opinion, wrote a separate opinion concurring in part and dissenting in part. In that opinion, Judge Heaney discussed the lack of waiver from the disclosure to the SEC, focusing on the fact that the alleged waiver had not occurred in the litigation with the party now seeking the privileged information. *Id.* at 604–05.

81. See *Enron Corp. v. Borget*, No. 88 CIV. 2828 (DNE), 1990 WL 144879, at *2 (S.D.N.Y. Sept. 22, 1990) (“[T]he public policy concern of encouraging cooperation with law enforcement militates in favor of a no waiver finding.”); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981) (“LTV’s disclosure of the additional materials to the SEC does not justify the class’ discovery of the identity of those documents believed by LTV to be most important.”); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (E.D. Wis. 1979) (“I believe that such cooperation should be encouraged, and therefore I will not treat the release of [counsel’s] report to the Securities & Exchange Commission, Internal Revenue Service, or the New York grand jury as a waiver of the corporation’s attorney-client privilege . . .”).

82. *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *7 (Del. Ch. Nov. 13, 2002) (holding that disclosure to SEC pursuant to confidentiality agreement did not constitute waiver of work-product protection).

83. See *supra* note 70. Although most federal courts have rejected the concept of selective waiver to government agencies regardless of the existence of a confidentiality agreement, a few have indicated that the negotiation of a pre-disclosure confidentiality agreement could protect the holder against production to third parties. In *Teachers Insurance & Annuity Ass’n of America v. Shamrock Broadcasting Co.*, a district court held that a complete waiver of the attorney-client privilege occurs upon disclosure to a federal agency “only if the documents were produced without reservation; no waiver if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party’s claim of privilege as to the material disclosed.” 521 F. Supp. 638, 646 (S.D.N.Y. 1981); see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (finding a waiver of work-product protection due to disclosures of documents to

with established privilege doctrine because it encourages the sharing of protected information with the government, but in no way serves the fundamental goal of the privilege to foster communications between corporate counsel and the client.⁸⁴ These courts have found that the purposeful breach of confidentiality to a potential adversary implicated by cooperative disclosures to the government is inconsistent with traditional privilege doctrine's insistence on jealous protection of attorney-client communications.⁸⁵ According to these courts, the attorney-client privilege should be available only at the traditional price—complete confidentiality.⁸⁶ Some courts have expressed concerns regarding the fairness of selective disclosure to some parties but not others, emphasizing that the privilege is to be used as a shield but not as a sword bent to the strategic goals of the holder.⁸⁷ Many opinions have also questioned the need for a doctrine of selective waiver to encourage cooperation with law enforcement in light of the number of companies that voluntarily disclose protected information to the government without any guarantee of protection.⁸⁸

Most recently, the Sixth and Tenth Circuits have issued comprehensive opinions rejecting selective waiver of privileged information to government entities.⁸⁹ In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, a panel of the Sixth Circuit rejected a corporation's attempt to shield privileged documents from a civil adversary following production of

the SEC, but declining to adopt a rigid per se rule of waiver as failing to “anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials”).

84. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (3d Cir. 1991); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (D.C. Cir. 1991).

85. *See, e.g., Permian*, 665 F.2d at 1222. Furthermore, courts have classified the government as a cooperating corporation's “adversary,” thus finding a waiver of work-product protection through voluntary disclosure to government authorities. *See, e.g., In re Columbia/HCA*, 293 F.3d at 306; *Westinghouse*, 951 F.2d at 1428.

86. *Permian*, 665 F.2d at 1222.

87. *In re Columbia/HCA*, 293 F.3d at 303–04; *Permian*, 665 F.2d at 1221. *But see Westinghouse*, 951 F.2d at 1426 (stating that rejection of selective waiver did not depend upon the “fairness doctrine” discussed by the *Permian* court).

88. *See In re Qwest*, 450 F.3d at 1193 (“The record . . . does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine. Most telling is Qwest's disclosure of 220,000 pages of protected materials knowing the Securities case was pending, in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent.”); *In re Steinhart Partners*, 9 F.3d at 236 (“The SEC has continued to receive voluntary cooperation from subjects of investigation, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible.”); *Westinghouse*, 951 F.2d at 1426 (“[W]e do not think that a new privilege is necessary to encourage voluntary cooperation with government investigations. . . . We find it significant that Westinghouse chose to cooperate despite the absence of an established privileged [sic] protecting disclosures to government agencies.”).

89. *See In re Qwest*, 450 F.3d at 1192; *In re Columbia/HCA*, 293 F.3d at 302.

the materials to the DOJ pursuant to “stringent confidentiality provisions.”⁹⁰ The court cited many of the traditional reasons used to reject selective waiver.⁹¹ In addition, the court perceived no justification for singling out government actors for increased access to information and expressed a preference for the “bright line” rule of complete waiver upon voluntary disclosure to any third-party over a selective waiver rule, which would involve the courts in “a new set of difficult line-drawing exercises that would consume time and increase uncertainty.”⁹²

Judge Danny Julian Boggs dissented and made a compelling case for selective waiver to government entities.⁹³ Judge Boggs found no need to tie selective waiver to the underlying purpose of the attorney-client privilege: “It is not clear why an exception to the *third-party waiver rule* need be moored to the justifications of the *attorney-client privilege*.”⁹⁴ Rather,

90. *In re Columbia/HCA*, 293 F.3d at 292. The panel opinion in *In re Columbia/HCA* was penned by the Honorable Thomas B. Russell, a district court judge sitting with the U.S. Court of Appeals for the Sixth Circuit by designation. Because Judge Danny Julian Boggs dissented from the opinion, only one sitting member of the Sixth Circuit officially endorsed the opinion. *Id.* at 291. The confidentiality provisions agreed to by *Columbia/HCA* and the DOJ provided in pertinent part that

[t]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work-product doctrine. Both parties to the agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work-product doctrine claim.

Id. at 292.

91. *See id.* at 302–03.

92. *Id.* at 304. The majority saw no need to encourage disclosures to the government where it could obtain the information through its own investigatory powers. *Id.* at 303 (stating that “[g]overnmental agencies ‘have means to secure the information they need’ other than through voluntary cooperation achieved via selective waiver (albeit at a higher cost in time and money)” (quoting *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1991))). Further, the court saw something unseemly in a rule of selective waiver which involved the government in “obfuscating the ‘truth-finding process’ The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain.” *In re Columbia/HCA*, 293 F.3d at 303. Where the initial disclosure of protected information was to an “adversary,” the Sixth Circuit found “no compelling reason for differentiating waiver of work-product from waiver of attorney-client privilege.” *Id.* at 306. Accordingly, the court found that *Columbia/HCA* had also waived any work-product protections through its disclosure to the DOJ. *Id.* at 306–07.

93. *In re Columbia/HCA*, 293 F.3d at 308 (Boggs, J., dissenting). Although acknowledging that privileges are to be narrowly construed to further the truth-seeking process, Judge Boggs noted that waivers of established attorney-client privilege are also to be viewed narrowly with a presumption that favors privilege protection. *Id.* (“When the question is whether the attorney-client privilege is waived by certain actions, the presumption shifts in favor of preserving the privilege.” (citing *In re Perrigo Co.*, 128 F.3d 430, 440 (6th Cir. 1997))).

94. *In re Columbia/HCA*, 293 F.3d at 308 (Boggs, J., dissenting). Rather, the judge stated that the court ought to examine the basis for the third-party waiver rule in evaluating selective waiver, noting its traditional basis that the privilege must not have been necessary to produce the initial communication by the client to the lawyer if the client later discloses

Judge Boggs advocated a “more pragmatic approach,” focusing on the incentives for corporate privilege holders under the third-party waiver rule and the public policy underlying cooperation with government agencies.⁹⁵ Judge Boggs noted that “questions of ‘policy’ . . . are at the heart of the privilege inquiry” and that “federal courts have regularly analyzed whether [the] rules [regarding privilege] are ‘in the public interest’ or whether [they] would have undesirable side effects.”⁹⁶ Judge Boggs found significant benefits in a government investigation exception to the third-party waiver rule, emphasizing the importance of efficacy in government investigations and the need to create incentives to permit voluntary disclosures to the government where “the government has no other means to secure otherwise privileged information.”⁹⁷ He noted that the incentives created under the majority view of third-party waiver would rationally result in “neither the government nor any private party” obtaining the privileged information.⁹⁸ Therefore, Judge Boggs concluded that selective waiver furthered the truth-seeking process by increasing total access to information despite prohibiting disclosure to third-party litigants.⁹⁹ Judge Boggs concluded that “[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.”¹⁰⁰

the confidential information to a third-party. *Id.* at 308–09. The judge found this principle’s underlying premise flawed. *Id.* at 309 (“That a client is willing to disclose privileged information to the government at time T2 indicates very little indeed about whether she would have communicated with her attorney, absent the promise of the privilege, at time T1.”). Judge Boggs also commented on the majority’s survey of existing circuit court precedent regarding selective waiver, pointing out the distinct circumstances present in several of the opinions rejecting an application of selective waiver and noting that “the authority arrayed in favor of the court’s rule is not overwhelming.” *Id.* at 307.

95. *Id.* at 309–10.

96. *Id.* at 310 (noting an “extensive ‘policy’ inquiry” undertaken to formulate a psychotherapist-patient privilege under federal law (citing *Jaffee v. Redmond*, 518 U.S. 1 (1996))). Judge Boggs stated, “I can find no rule narrowly constraining the considerations that courts may take into account in developing rules regarding a common law privilege or requiring that courts turn a blind eye to the practical effect of the privilege rules that they are charged to create.” *Id.*

97. *Id.* at 311–12. Judge Boggs rejected the majority’s notion that the government could discover the same information without access to privileged corporate information with increased expenditure of investigative resources, “The court’s argument about the adequacy of other means, suggesting that the only difference between them and voluntary disclosure is cost, requires the premise that all privileged information has a non-privileged analogue that is discoverable with enough effort. That premise, however, does not hold.” *Id.* at 311. Judge Boggs further found that placing the interests of government access to information over those of private litigants was entirely rational because government investigations are “generally more important” and “more likely to be in the public interest” than private suits. *Id.* at 312.

98. *Id.*

99. *Id.* at 307 (“I am convinced that a government investigation exception to the third-party waiver rule would increase the information available over that produced by the court’s rule and would aid the truth-seeking process . . .”).

100. *Id.* at 311. Judge Boggs was unpersuaded by the majority’s concerns over administrative difficulties and line-drawing exercises. The judge opined that the court could

Most recently, the lead plaintiffs in a federal securities class action successfully compelled production of 220,000 pages of defendant Qwest Communications' protected documents.¹⁰¹ Plaintiffs claimed that Qwest had waived any applicable privileges protecting the documents by voluntarily producing them to the SEC and the DOJ despite confidentiality agreements negotiated with both government agencies.¹⁰² Echoing the concerns of other circuits, the court found that selective waiver did not advance the underlying purpose of the attorney-client privilege to encourage frank communications between counsel and client.¹⁰³ In addition, the court questioned the need for selective waiver to encourage corporate cooperation with government investigations. Based upon Qwest's production of 220,000 pages to the government in the absence of any controlling selective waiver protection, the court rejected "the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine."¹⁰⁴ Unlike the other courts to reject selective waiver, the Tenth Circuit also emphasized the gradual modification process of the common law that "goes inch by inch."¹⁰⁵ The court equated Qwest's request for continued protection to a request for an entirely new "government investigation privilege," which would represent "a leap, not a natural, incremental next step in the common

craft a "rule-like" doctrine of selective waiver to government agencies that would operate as a bright line much as the general rule of third-party waiver does. *Id.* at 313.

101. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1193 (10th Cir. 2006).

102. *See id.* at 1182. Before turning the documents over to the government, Qwest negotiated confidentiality agreements with the SEC and the DOJ by which the government agreed not to disclose them to nongovernment third parties. *Id.* at 1181. Although Qwest produced the documents pursuant to subpoena, Qwest disclaimed any argument that its production of the documents was involuntary. *Id.* at 1181 n.1.

103. *Id.* at 1195. The court further suggested that selective waiver could potentially undermine the purpose of the attorney-client privilege by discouraging corporate employees from talking freely with corporate counsel if they are aware that the corporation can waive the privilege to the government only without risking a further waiver. *Id.*

104. *Id.* at 1193. The court held that Qwest's negotiation of confidentiality agreements did not warrant protection of the documents from production to the civil litigants. Although the agreements contained some limitations on the government's disclosure of the documents, they allowed the agencies significant leeway in the use of the documents for law enforcement purposes. Many of the documents had been used in a manner that had caused them to be widely disseminated, and Qwest essentially conceded that such widely disseminated information had lost the protection of privilege despite selective waiver or the confidentiality agreements. *Id.* at 1194. The court envisioned an administrative nightmare created by application of selective waiver where the court would have to analyze all 220,000 pages to ascertain which had been kept private by the government. *Id.* In refusing to hold that the confidentiality agreements negotiated between Qwest and the government justified selective waiver, the Tenth Circuit was careful to avoid stating any general rule regarding the effect of confidentiality agreements on waivers that could be applied in a future case. *Id.* (finding that "[t]he record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver" and that "[i]n short, *Qwest's confidentiality agreements* do not support adoption of selective waiver" (emphasis added)).

105. *Id.* at 1192 (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 24 (1921)).

law development of privileges and protections.”¹⁰⁶ In sum, the Tenth Circuit found common law development ill-suited to the task of protecting cooperating corporations from privilege waivers.

Therefore, as federal authorities have increasingly emphasized “authentic cooperation” by corporate targets that may involve some privileged disclosures, circuit courts have gradually lined up to reject waiver protection for those companies in third-party civil litigation. Companies are increasingly finding themselves caught between the “rock” of federal investigation and the “hard place” of massive civil exposure.¹⁰⁷

D. Federal Selective Waiver Legislation

In response to mounting concerns in Congress over the negative effects of corporate privilege waivers following disclosure to government entities, the Standing Committee on Rules of Practice and Procedure published proposed Federal Rule of Evidence 502 for notice and comment in August 2006.¹⁰⁸ The published rule governed waiver of the attorney-client privilege and work-product doctrine generally and addressed inefficiencies created by common law waiver doctrine in the context of complex contemporary civil discovery.¹⁰⁹ In addition, subsection (c) of the proposed

106. *Id.*

107. The case law in the state courts regarding selective waiver is inconsistent. *Compare* McKesson Corp. v. Green, 610 S.E.2d 54, 56 (Ga. 2005) (denying selective waiver of attorney-client and work-product protections in connection with government investigations), *and* McKesson HBOC, Inc. v. Superior Court, 9 Cal. Rptr. 3d 812, 820–21 (App. Dep’t Super. Ct. 2004), *with* Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002) (permitting the selective waiver of protected materials to government officials as “the more prudent policy”). *See also* Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts*, 86 B.U. L. Rev. 691, 722 (2006) (“That the same facts can produce contrary results, and that the validity of selective waiver agreements now depends on the jurisdiction in which third-party claims are brought, demonstrates that variant state selective waiver rules provide corporations with little certainty, and undercut the law in states like Delaware where such agreements may be upheld.”).

108. *See* Admin. Office of the U.S. Courts, *supra* note 9. Although the proposed amendment is currently being reviewed through the rule-making process, the concerns that led to the proposal originated in Congress. *See* Letter from F. James Sensenbrenner, Jr., to Leonidas Ralph Mecham, *supra* note 8 (requesting that the U.S. Judicial Conference “initiate a rule-making on forfeiture of privileges”).

109. The proposed rule was not limited to treating the problem of selective waiver to government entities and was designed to bring predictability to the common law principles of waiver applicable to both the attorney-client privilege and the work-product doctrine. May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid 502 (Proposed 2006), at 5. The proposal covers waiver of the attorney-client privilege and work-product doctrine generally and also addresses perceived inefficiencies created by common law waiver doctrine in the context of complex contemporary civil litigation. *Id.*; *see also id.* at Fed. R. Evid. 502 (Proposed 2006), at 4 (noting that the rule published for comment had “two major purposes,” to “resolve some longstanding disputes in the courts about the effect of certain disclosures” and to respond to “the widespread complaint that litigation costs for review and protection of material that is privileged or work-product have become prohibitive”). It would protect civil litigants from broad subject matter waivers except in

rule represented the first attempt to provide comprehensive waiver protection for corporations making disclosures to the federal government.¹¹⁰ The selective waiver provision of proposed Federal Rule of

cases of intentional and misleading disclosures. *See id.* at Fed. R. Evid. 502 (Proposed 2006), at 11 (“[A] subject matter waiver . . . is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary.”). The proposal would also protect litigants from waivers associated with inadvertent disclosures where the disclosing party has taken reasonable precautions against disclosure and has promptly made reasonable efforts to rectify the disclosure. *See id.* at Fed. R. Evid. 502 (Proposed 2006), at 7. The proposal, thus, adopts the middle ground approach to inadvertent disclosure in the federal case law and rejects a rule of strict liability for an inadvertent disclosure which “threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.” *See id.* at Fed. R. Evid. 502 (Proposed 2006), at 8. Further, proposed Rule 502 would allow litigants to have complete control over the effects of privileged disclosures to their civil adversaries by allowing them to negotiate binding agreements regarding the return of privileged information regardless of the caution exercised in producing them during discovery. *See id.* at Fed. R. Evid. 502 (Proposed 2006), at 10–11 (allowing parties to continue the established practice of negotiating confidentiality and non-waiver agreements which will bind the parties thereto). The rule provides assurances of protection not available under current federal precedent, however, by allowing federal courts to issue non-waiver orders enforceable against nonparties in any federal or state proceeding. *Id.* at Fed. R. Evid. 502 (Proposed 2006), at 10. “[T]he rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.” *Id.* This provision allows parties maximum flexibility to negotiate the return of privileged information regardless of the caution exercised in producing it during discovery. Under an appropriate court order, litigants can voluntarily exchange information in discovery with little or no preproduction privilege review of the disclosed information while maintaining the protection of the attorney-client privilege and work-product doctrine against the adversary to whom they are disclosing, as well as against all other adversaries in other federal or state proceedings. *See id.* Unlike the mixed response to the concept of selective waiver, the response to these proposed provisions has been quite favorable: Counsel, judges, and clients uniformly support this protection that eliminates waiver under common law as a result of lost confidentiality. *See* May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at 3–4. These provisions have been recommended by the Advisory Committee on Evidence Rules and appear likely to take effect. *Id.* at 4; *see generally* 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 (2006) (providing a comprehensive discussion of the operation of the proposed rule and its goals).

110. Selective waiver legislation has been explored previously, however. Because of its importance to its enforcement mission, the SEC has long fought to overcome the judicial rejection of selective waiver protection through legislation and regulation. For example, in 1984, the SEC proposed a selective waiver amendment to the Securities Exchange Act of 1934 to Congress, which would have allowed parties to disclose privileged materials to the SEC without waiving privilege protection for the same materials in other proceedings. *See* SEC Statement in Support of Proposed § 24(d) of the Securities Exchange Act of 1934, 16 Sec. Reg. & L. Rep. (BNA) 461 (Feb. 23, 1984). The House committee to which the SEC submitted the proposal took no action on it. *See SEC Oversight and Technical Amendments: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy & Commerce*, 98th Cong. 34, 51 (1984). More recently, in 2004, the SEC unsuccessfully supported selective waiver as part of the Securities Fraud Deterrence and Investor Restitution Act. *See* H.R. 2179, 108th Cong. § 4 (2d Sess. 2004). In 2002, the SEC proposed a selective waiver regulation pursuant to the Sarbanes-Oxley Act. *Implementation of Standards of Professional Conduct for Attorneys*, 67 Fed. Reg. 71,670

Evidence 502 provided that disclosure of protected information to a federal government agency would not constitute a waiver of the attorney-client privilege or the work-product doctrine as to any other persons or entities.¹¹¹ Thus, the proposed evidence rule would have permitted corporate and individual litigants to share their protected information with federal officials in connection with agency investigations or enforcement actions of any kind without waiving privilege as to third-party litigants seeking to pursue them civilly.¹¹² Importantly, this proposed rule of selective waiver would have protected litigants cooperating with federal investigations from third-party requests for similar disclosures, whether in state or federal proceedings.¹¹³ The published rule adopted the *Diversified* approach to selective waiver by foreclosing third-party access to protected information previously disclosed to federal government agencies even in the absence of

(proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205). Like the proposed legislation, the regulation would have protected parties making voluntary disclosures to the SEC from findings of waiver in other proceedings. Despite noting an important public interest in selective waiver due to “expeditious and efficient investigations” that “obtain appropriate remedies for investors more quickly,” the SEC ultimately withdrew the regulation due to concerns over its authority to adopt selective waiver via regulation. *Id.* at 71,694. Unwilling to adopt a regulation that might lead cooperating companies into a false sense of protection in making disclosures to the SEC, the SEC withdrew the proposed regulation but vowed to “continue to follow its policy of entering into confidentiality agreements” and to “vigorously argue in defense of those confidentiality agreements where litigants argue that disclosure of information pursuant to such agreements waives any privilege or protection.” Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312–13 (Feb. 6, 2003). Recently, Congress has accepted a broader form of selective waiver, but in a more limited context. The Financial Services Regulatory Relief Act of 2006 provides that disclosures to federal and state banking regulators do not waive privileges as to other parties. 12 U.S.C.A. § 1828(x)(1) (2006).

111. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 2. The language of the rule published for comment read:

Selective Waiver. In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work-product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

Id. The rule specifically provided that state law would control the effect of disclosures to state agencies or officers. *Id.* Further, the rule would not have limited or expanded the authority of a government agency to disclose protected information. *Id.*

112. Although the controversy surrounding selective waiver has arisen primarily in the context of corporate cooperation with government investigations where waiver of privilege and work-product protection covering internal corporate investigations is most likely to advance a government investigation, the proposed amendment would treat corporate privilege holders and individual privilege holders similarly. Both would be insulated from waivers to third-party nongovernment litigants when sharing protected information with a federal agency. See *id.*

113. Because a privilege rule enacted through the federal rule-making process cannot bind state courts and because rules of privilege must be passed by Congress, the Advisory Committee to the Federal Rules of Evidence contemplates that Congress must directly enact Rule 502. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 5; see also 28 U.S.C. § 2074(b) (2000).

a confidentiality agreement.¹¹⁴ The Advisory Committee Note accompanying the proposal expressed concern that requiring a confidentiality agreement would destroy the predictability the selective waiver rule was designed to create by generating disputes over the degree of protection afforded by particular agreements negotiated with the government.¹¹⁵ Finding that the entry of a confidentiality agreement with the government “has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule,” the Advisory Committee published a selective waiver rule that would have provided protection without such an agreement.¹¹⁶

The selective waiver provision of proposed 502 generated much controversy and the public comment from the legal community “was almost uniformly negative.”¹¹⁷ Ironically, corporate counsel who have long sought selective waiver protection in the courts opposed the proposed evidence rule because it would eliminate the most readily identifiable punitive consequence for corporations cooperating with the government. They claimed that selective waiver would further damage the relationship between corporate counsel and individual employees by emboldening the government and encouraging more waivers. In addition, opponents of the proposal acknowledged concern that palliative selective waiver legislation for cooperating corporations could impede ongoing efforts to derail the government policies that generate waivers, such as the Attorney-Client Privilege Protection Act. In response to the hue and cry, the Advisory Committee found the question of selective waiver to be “essentially political” and deleted the selective waiver provision from the proposed waiver rule submitted to the Standing Committee.¹¹⁸

Although opponents of federal law enforcement policies and selective waiver legislation won the battle in the rule-making arena, the war over federal policy and the need for selective waiver continues to rage. The

114. See *Diversified Indus., Inc., v. Meredith*, 572 F.2d 596 (8th Cir. 1978); see also May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 9 (noting that the committee “rejected” the confidentiality agreement condition “for a number of reasons”).

115. Specifically, the Advisory Committee found that “[i]f a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work-product immunity.” *Id.*

116. *Id.*

117. See May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 1.

118. *Id.* at Draft of Cover Letter to Congress on Selective Waiver, at 3. Although apparently persuaded to eliminate selective waiver by the negative public comment, the Advisory Committee was aware of the controversial nature of the proposal from the outset and placed subsection (c) of the rule originally published in brackets to indicate that the committee had not reached agreement as to the advisability of the provision. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 2.

Advisory Committee on Evidence Rules recommended a letter to Congress on its study of selective waiver and included proposed language for federal selective waiver legislation should Congress wish to enact it.¹¹⁹ The draft language provides in pertinent part:

(a) Selective Waiver.—In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney-client privilege or as work-product—when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process—does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal office or agency.¹²⁰

Unlike the proposed evidence rule, the draft language reserves judgment on the enforceability of selective waiver protection in state courts. Like the proposed rule, however, the draft statutory language does not require confidentiality agreements as a precondition for protection.

Therefore, Congress will provide the next venue for debate over selective waiver. Because the concerns that led to rule making on the issue originated in Congress, there is likely to be some legislative support for the concept. Furthermore, Congress adopted selective waiver protection on a narrow basis for disclosures to banking and regulatory institutions in 2006, signaling acceptance of the concept.¹²¹ Still, the powerful corporate forces that opposed the concept in rule-making proceedings are certain to appear in vocal opposition to any proposed legislation.

II. THE PARTNERSHIP MODEL FOR FEDERAL OVERSIGHT OF CORPORATE ENTITIES

The stated purpose of selective waiver is to “further[] the important policy of cooperation with government agencies, and [to] maximize[] the effectiveness and efficiency of government investigations.”¹²² There is little debate about the legitimate public interest in effective corporate oversight in light of the recent wave of costly corporate scandals.¹²³

119. See May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 1–5. The Standing Committee on Rules of Practice and Procedure has decided to make the Advisory Committee report on selective waiver available to Congress upon request. See *supra* note 18 and accompanying text.

120. May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 4 (alteration in original).

121. The Financial Services Regulatory Relief Act of 2006 provides that disclosures to federal and state banking regulators do not waive privileges as to private parties. 12 U.S.C.A. § 1828(x)(1) (2006).

122. May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 9.

123. In recent years, government investigations of corporate fraud at entities such as WorldCom, Enron, Adelphia Communications, HealthSouth, and Arthur Andersen LLC have generated charges and headlines. See Buchanan, *supra* note 3, at 1 (noting that “the subject of organizational accountability has been brought to the fore by a series of high-profile corporate scandals that have shaken the public’s confidence in the way that some of

Similarly, there is little disagreement over the importance of corporate cooperation with law enforcement to ensure timely and effective oversight. Federal departments and agencies have limited resources available to investigate often intricate schemes spanning complex corporate structures.¹²⁴ It is well accepted that corporations play an important part in uncovering potential wrongdoing and in pointing government investigators in the right direction.¹²⁵ The recent allegations of widespread stock-option backdating at public companies serve as a reminder of the importance of corporate cooperation. The options backdating scandal has been characterized as “one of the broadest corporate scandals” since the “overseas bribery scandal of the 1970’s.”¹²⁶ Commentators have noted that

our largest companies conduct business”); *McNulty Statement*, *supra* note 25 (noting that “[t]he public’s trust in corporate America was deeply shaken by the large-scale bankruptcies of companies like Enron”). Although emphasizing that the “overwhelming majority of corporations . . . operate morally and productively in the best and highest interest of their shareholders and the country,” members of the Corporate Fraud Task Force have stated the need for “a comprehensive response” to these recent “intolerable legal and ethical misdeeds.” See Larry D. Thompson, Deputy Att’y Gen., A Day with Justice (Oct. 28, 2002) (on file with author).

124. In one recent internal company probe of a stock-option backdating scheme conducted by United Health Group, Inc., outside corporate counsel looked at “almost four million documents” and conducted “more than 80 interviews of employees and other witnesses.” Bandler & Scannell, *supra* note 4. Another company reported that the cost of a similar internal investigation amounted to approximately \$70 million. *Id.*

125. *Id.* In particular, corporate cooperation allows for a speedy government response to instances of illegality, which is a critical component of arresting corporate fraud before it causes significant additional damage to employees, investors, and the market generally. *Id.* (noting that “the outsourcing approach has allowed the government to move unusually swiftly” and that federal prosecutors were able to charge a high-level executive in connection with illegal option backdating and slush fund practices based solely on interviews and investigation by outside company counsel). Prosecutors also contend that timely responses serve an important deterrent purpose. See Thompson Memo, *supra* note 38, at pt. VI (“In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. . . . Accordingly, a corporation’s cooperation may be critical in identifying the culprits and locating relevant evidence.”); see also Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6926, 6312 (Feb. 6, 2003) (“Although the Commission must verify that internal reports are accurate and complete and must conduct its own investigation, doing so is far less time consuming and less difficult than starting and conducting investigations without the internal reports.”); Comey, *supra* note 45, at 4 (“Cooperation enables the government to gather the facts before they’re stale. Cooperation assists the government in fully investigating the wrongdoing and figuring out who the wrongdoers are. It also assists us in minimizing victims’ losses and husbanding resources so we can give folks money back through restitution. Rewarding cooperation facilitates all of these important things.”). Even representatives of the corporate bar who criticize the current DOJ policy agree that internal investigations and corporate cooperation with government investigators are in the best interests of companies, the vast majority of which strive to maintain the highest standards of legality. See, e.g., Ben-Veniste & Rubin, *supra* note 52, at 4 (“The government has every right to expect corporations to be good citizens by voluntarily disclosing corporate misconduct and by taking prompt, effective steps to punish wrongdoers.”).

126. Bandler & Scannell, *supra* note 4. Indeed, former Deputy Attorney General Paul McNulty has stated that the current backdating investigations represent “the next chapter in

“federal authorities can’t possibly do thorough examinations of every company” without “outsourcing” to corporate counsel.¹²⁷

The real debate rages over whether it is appropriate to encourage such cooperation in the form of waivers of the sacrosanct corporate attorney-client privilege and work-product protection.¹²⁸ The recent opposition to selective waiver largely rests upon the unrealistic premise that federal law enforcement can and should operate in the twenty-first century without seeking privileged and protected information from corporate targets of investigation. Many opponents of selective waiver present a false choice between (1) a federal enforcement universe with no governmental requests for corporate waivers (and no selective waiver protection, either) and (2) a universe that wholeheartedly embraces current government policies that generate corporate waivers, but with the protection of selective waiver.

When all the heated rhetoric surrounding the corporate charging policy is swept aside and the policy is compared to well-accepted prosecutorial techniques utilized in the individual context, it becomes clear that corporate privilege waivers, in some circumstances, are a necessary and appropriate component of corporate cooperation. For that reason, government policies that in some way reward waivers are likely to and should remain. While this undoubtedly will affect the way in which corporate targets and their employees approach internal investigations, the potentially dangerous collateral consequences of corporate waivers will in no way be exacerbated by federal selective waiver legislation and can be minimized through the protection it would offer.

A. *Privilege Waivers as a Legitimate Form of Cooperation*

How can privilege waivers constitute an appropriate form of cooperation? It 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.¹²⁹ Targets of criminal investigations are often asked to come clean and reveal the details of their crime in exchange for more lenient treatment.¹³⁰ No one would argue that it is inappropriate to ask an individual to waive his Fifth Amendment right against self-incrimination and share all pertinent information about a crime in order to obtain a reduced charge or a lighter sentence.¹³¹ The DOJ policy that conditions corporate charging decisions,

the Justice Department’s fight against corporate corruption.” Press Release, U.S. Dep’t of Justice, *supra* note 4 (internal quotation marks omitted).

127. Bandler & Scannell, *supra* note 4.

128. See *supra* notes 55–60 and accompanying text.

129. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); see also LaFave, *supra* note 29, § 21.1(a).

130. LaFave, *supra* note 29, § 21.1(a).

131. See *Bordenkircher*, 434 U.S. at 363 (noting that individual plea agreements are often induced “by promises of a recommendation of a lenient sentence or a reduction of charges,

in part, on corporate disclosures merely reflects this time-honored tradition as it applies to the corporate defendant.

It is true that waivers of the attorney-client privilege as a component of cooperation are unique to corporate defendants. This is entirely due to the unique nature of the corporate person. Rarely, if ever, would an individual target be asked to waive the attorney-client privilege in order to cooperate with the government. Once an individual waives his Fifth Amendment rights, he has provided all the information needed to obtain favorable treatment from the prosecuting authority without any reference to attorney-client privileged information: "Tell us what you know about the scheme, Mr. Smith." Because corporations can act only through the numerous individuals who run them, uncovering the "knowledge" of the corporate entity is a different task. The institutional knowledge of a corporate target derives from the collective knowledge of the group of individuals acting on the company's behalf. Due to corporate practices of using counsel to oversee corporate compliance and internal investigations, the collection of information that comprises the corporate "knowledge" regarding a procedure or transaction often exists in the form of documents protected by the attorney-client privilege or work-product doctrine. Although it is possible for a corporation to cooperate with the government by providing some unprivileged information, it is often difficult for a corporate target to come clean and share what it knows in the way that individuals routinely do without providing otherwise protected information. Therefore, both individual and corporate targets waive privileges to obtain benefits from the prosecuting authority: The individual waives his Fifth Amendment privilege to give the government all it needs, and the corporation waives its attorney-client privilege to accomplish the same objective.

B. *Corporate Waivers and Coercion*

Even if waiver can serve a legitimate law enforcement function, current government policy would still be inappropriate if such waivers by corporate targets were truly involuntary or coerced as some critics have suggested. Many commentators argue that waivers generated by the DOJ policy are not voluntarily made because disclosing companies are desperate to be deemed "cooperating" in order to avoid the death penalty often represented by a corporate indictment.¹³² In light of existing practice and precedent regarding the voluntariness of cooperation with government investigations, this argument appears overblown.

As settled law makes clear, federal investigators lack the power to compel a corporation's production of privileged and protected materials.¹³³

and thus by fear of the possibility of greater penalty upon conviction after a trial" (citations omitted).

132. See *supra* note 51.

133. *Upjohn v. United States*, 449 U.S. 383 (1981).

The disclosure of such protected materials must be made with the consent of the corporation acting through senior management and counsel. While the pressure to disclose protected information to federal agencies is undoubtedly powerful and difficult to resist, that is not the same thing as an involuntary or compelled disclosure. Corporations, well represented by the best trained, experienced, and most highly paid counsel, choose to disclose after rationally weighing the costs and benefits of such waivers.¹³⁴ A corporation may always insist upon the government's obligation to prove its case beyond a reasonable doubt without the benefit of protected internal corporate information. The Delaware Chancery Court, arguably the most respected court in the country on corporate matters, acknowledged as much in upholding selective waiver for a corporation cooperating with an SEC investigation: "There is a balance in place already—whether the corporation should air its dirty laundry in exchange for mercy or whether to force the law enforcement agency to do its own legwork (and possibly overlook or fail to discover some of the incriminating evidence) at the cost of more stringent treatment."¹³⁵ While the sharing of protected corporate information may often appear to be the most prudent course in light of potential exposure to criminal and other liability, such corporate disclosures are the product of a rational weighing of alternatives and not of any involuntary compulsion.¹³⁶

Furthermore, the failure to waive corporate privileges in connection with a federal investigation does not automatically result in a corporate indictment or even "uncooperative" status under DOJ policy even when the government has sufficient evidence to prosecute. First, the policy itself, in all of its various forms, emphasizes that no one factor alone drives the charging decision.¹³⁷ In addition, the department's track record demonstrates the accuracy of the stated policy. In 2003, the DOJ entered

134. See Wray & Hurr, *supra* note 27, at 1187 (explaining that "[c]orporations are perhaps the most rational targets in the criminal justice system and adjust their behavior accordingly").

135. Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002).

136. Corporate targets have unsuccessfully played the "coercion" card in other contexts. In *In re John Doe Corp. v. United States*, the U.S. Court of Appeals for the Second Circuit reviewed a district court order holding that any attorney-client privilege applicable to an internal corporate document had been waived by the company's production of that document to counsel for an underwriter in connection with a public offering of the company's securities. 675 F.2d 482, 485–87 (2d Cir. 1982). The company argued that a waiver could not stem from that disclosure because it was not voluntary and was "coerced by the legal duty of due diligence and the millions of dollars riding on the public offering of registered securities." *Id.* at 489. The Second Circuit bluntly stated that it viewed this argument "with no sympathy whatsoever," acknowledging the corporate decision to make such disclosures in order to gain "access to interstate capital markets." *Id.* Corporate targets that provide privileged information to federal investigators and prosecutors similarly make a business judgment that such disclosures are necessary to advance the best interests of the company faced with criminal culpability.

137. See *supra* Part I.A and accompanying notes.

non-prosecution agreements with both Merrill Lynch and Canadian Bank CIBC for facilitating fraudulent transactions involving Enron. These companies received this treatment due to the “speedy nature and full extent of [their] cooperation, their agreement to very substantial remedial measures, and public admission of misconduct . . .”¹³⁸ Neither entity waived its attorney-client or work-product privilege.¹³⁹

The outrage over “coerced” corporate waivers seems particularly exaggerated given that federal and state prosecutors routinely insist that individual defendants waive constitutional and other important rights such as the Fifth Amendment right against self-incrimination, the Sixth Amendment right to a trial by jury, and the right to appeal a conviction and sentence in exchange for favorable treatment.¹⁴⁰ Although the pressure on individuals to waive such rights can be intense indeed, the pressure arising out of legitimate fear of conviction as opposed to coercive government tactics does not make such waivers “involuntary” under the law.¹⁴¹ Further,

138. Wray & Hurr, *supra* note 27, at 1142 (describing Enron’s “Nigerian barge transactions” and noting that “Merrill Lynch admitted buying barges from Enron with the understanding that Enron would buy them back after its earnings had been inflated” (internal quotation marks omitted)).

139. *Id.*

140. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also LaFave, *supra* note 29, § 27.5(c) (noting that most jurisdictions uphold individual defendants’ waiver of important constitutional rights, as well as the statutory right to appeal, due to “the importance of plea bargaining, the value of saving appellate resources, and the advantages gained by the defendant in entering the agreement”).

141. *Bordenkircher*, 434 U.S. at 364 (“While confronting a defendant with the risk of more severe punishment clearly may have a ‘discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’” (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973))). Although corporate targets claim that fear of the corporate “death penalty” makes waivers of privilege involuntary, the Supreme Court has rejected arguments that individual waivers of constitutional rights were coerced by fear of the actual death penalty. In *Brady v. United States*, 397 U.S. 742 (1970), and *North Carolina v. Alford*, 400 U.S. 25 (1970), defendants pled guilty to avoid the potential imposition of the death penalty by a jury. Although these defendants were undeniably strongly discouraged from insisting upon their constitutional rights to a trial by jury due to the specter of the death penalty, the Court found no constitutional problem or coercion. See *Chaffin*, 412 U.S. at 30–31 (discussing *Brady* and *Alford*); see also *Brady*, 397 U.S. at 751 (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.”). Instead, the Supreme Court found such waivers to be the product of difficult “choices” by criminal defendants inevitable in a system that tolerates and encourages plea bargaining. *Chaffin*, 412 U.S. at 31; see also *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 286–87 (1998) (rejecting state death row inmate’s claim that conditioning clemency proceedings on an inmate interview “compelled” a waiver of the inmate’s Fifth Amendment rights: respondent “merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment”). Corporations similarly make the difficult, but rational, choice to waive the attorney-client privilege to obtain

the leverage on the defense side of the table is undeniably greater in the context of corporate waivers—where investigations are routinely complex, costly, and time-consuming—than in individual settings where waivers are routinely made and upheld.¹⁴² While individual defendants are often bargaining for more lenient treatment at sentencing in waiving important rights, corporate entities are capable of avoiding indictment altogether through cooperation with government investigators.¹⁴³ Therefore, corporate waivers would appear to be even more “freely given” than the individual waivers routinely permitted.

Finally, much of the criticism of the government cooperation policy assumes that waiver represents a negative for a corporate target of investigation. These critics suggest that opening an internal investigation up to federal investigators will somehow damage the corporation. In fact, the policy gives corporations a unique bargaining chip pre-indictment that lacks a parallel in the context of individual prosecutions.¹⁴⁴ It can be used to exonerate the corporation, as well as to incriminate. Indeed, several companies have obtained favorable treatment from the federal government due to their excellent cooperation where other policy factors may have counseled in favor of prosecution.¹⁴⁵ In sum, corporate waivers under the

leniency. See *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002).

142. See *Bordenkircher*, 434 U.S. at 363 (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.” (citing *Brady*, 397 U.S. at 758)).

143. See *supra* Part I.A and accompanying notes.

144. See Comment of Gregory P. Joseph to the Standing Committee on Rules of Practice and Procedure on Proposed FRE 502, at 12 (Oct. 13, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-003.pdf> (“To the extent that selective waiver facilitates exoneration as well as inculcation, permitting persons under investigation to disclose privileged material gives them a freer choice.”); *Comey Interview*, *supra* note 5, at 3 (noting that “[c]orporations self-report and waive the privilege all the time without being requested to do so by the Government. When corporations are victimized by employees, they conduct an internal investigation and frequently decide to voluntarily furnish the evidence to the authorities and seek prosecution”). Furthermore, it is important to note that corporate defendants enjoy far greater consistency and transparency in charging under the Thompson Memo than individual defendants have in other contexts. Although there is no obligation to do so, the DOJ policy defines and exposes the factors governing the broad discretion that prosecutors enjoy in charging decisions. See *Ashe v. Swenson*, 397 U.S. 436, 452 (1970) (Brennan, J., concurring) (noting the “tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of criminal prosecution” (citation omitted)). By defining and publishing these factors to potential corporate targets rather than keeping them hidden, the DOJ follows best practices. See *McNulty Statement*, *supra* note 25.

145. In a recent article regarding the application of the Thompson Memo, former Assistant Attorney General of the Criminal Division of the Department of Justice Chris Wray noted the “opportunities” it presents to a corporation under investigation. Wray & Hurr, *supra* note 27, at 1171. He noted that many of the more traditionally accepted Thompson factors such as the nature of corporate misconduct and preexisting compliance measures are out of the company’s control by the time the investigation arises: A company’s commitment to cooperation can dramatically enhance its chances of weathering such a crisis

DOJ policy appear no more “coerced” than the waivers given in the individual context and often serve to benefit the company.

C. *Selective Waiver and the Flow of Information to Corporate Counsel*

Critics of selective waiver also predict that individual corporate employees will stop communicating crucial information to corporate counsel once those employees realize the increased likelihood of exposure to the government through a corporate privilege waiver.¹⁴⁶ Thus, according to these groups, the information necessary to correct corporate crime will disappear as a result of the pressures created by the combination of government policies and selective waiver protection.¹⁴⁷

This concern over the willingness of corporate employees to tell corporate counsel what they know is not a new one and is not created by the DOJ policy that has been under fire in the past few years or the prospect of selective waiver legislation. Rather, this risk is the direct result of the Supreme Court’s formulation of the attorney-client privilege in *Upjohn Co. v. United States*, which potentially protects communications between corporate counsel and employees at all levels of the corporate hierarchy, but makes the corporation the holder of the privilege at whose sole discretion the privilege can be waived.¹⁴⁸ This formulation of the privilege is unique

unscathed.” *Id.* Homestore.com received an outright declination from the DOJ despite an alleged conspiracy among its executives to commit securities fraud due to the company’s extraordinary cooperation. *Id.* at 1136 & n.214. In addition, Royal Dutch Shell received similar treatment in an investigation of its overstatement of its oil reserves in 2002 through its “full cooperation” with the government investigation. *Id.* at 1137 & n.215. These are but two examples of companies that benefited from the opportunities provided by the federal approach to corporate enforcement.

146. See *supra* note 52. Contradicting the argument that selective waiver will cause further harm, these critics contend that individual employees are afraid to talk to corporate counsel under existing law where no selective waiver protection exists due to the pervasive “culture of waiver.” See, e.g., *Hearing of the Advisory Comm. on Evidence Rules*, *supra* note 16, at 220 (testimony of Susan Hackett).

147. This argument that waivers will ultimately chill communication of needed information is not a new one and highlights the anomaly that is the attorney-client privilege in the corporate context. In *Commodity Futures Trading Commission v. Weintraub*, former high-ranking officers of an insolvent corporation opposed the waiver of the corporate attorney-client privilege by the trustee in bankruptcy, as the successor in interest to the debtor corporation. 471 U.S. 343 (1985). The former officers argued that the possible waiver of the privilege by such successors in interest would chill attorney-client communications by corporate officials and thus should not be permitted. The Supreme Court rejected the argument, stating that “the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation’s attorney-client privilege with respect to prior management’s communications with counsel.” *Id.* at 357.

148. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); see, e.g., *United States v. Int’l Brotherhood of Teamsters*, 119 F.3d 210, 215–16 (2d Cir. 1997) (explaining that individual employees cannot prevent a corporation from waiving the privilege and disclosing the otherwise confidential communications); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (“Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of

in that it does not give the individual communicating to counsel any control over the ultimate use or disclosure of the information provided.¹⁴⁹ Scholars have criticized the *Upjohn* formulation of the corporate attorney-client privilege as insufficiently protective of individual employees for this reason.¹⁵⁰ Nonetheless, the Supreme Court has refused to alter the corporate privilege on this basis and has rejected arguments that communications to counsel will be chilled in light of potential waiver by successors in interest to the corporation.¹⁵¹

The common wisdom supporting the Supreme Court interpretation of the corporate privilege is that giving individual employees control over their communications to counsel would be unworkable and inconsistent with the interests of the corporate client.¹⁵² In addition, commentators have noted that individual employees do not need control over their communications in order to provide them with an incentive to communicate openly and accurately: An employee's natural incentive to foster favorable relations with the company in order to protect his livelihood serves as sufficient incentive to protect the free flow of information to counsel.¹⁵³ Despite this fundamental feature of corporate privilege, corporate counsel have long relied upon the full disclosures of individual employees to gather data and complete investigations.

While the DOJ policies and selective waiver may create increased wariness on the part of individual employees who have knowledge of wrongdoing, there is no reason to expect that the vast majority of corporate employees will ignore their employment interests and suddenly refuse to communicate with corporate counsel.¹⁵⁴ Nor is there any inherent unfairness to individual employees when the corporation discloses their

communications between himself and the corporation's counsel if the corporation has waived the privilege."); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47 (S.D.N.Y. 1989); see also Model Code of Prof'l Responsibility EC 5-18 (2003) ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.").

149. See, e.g., *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (noting that individual corporate employees could not assert attorney-client privilege for communications to outside corporate counsel during an internal company investigation); *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (same).

150. See Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 Hofstra L. Rev. 279, 306 (1984) ("Only where control over the use of the communication is provided to the employee who speaks with counsel is it possible to make one of the assumptions necessary to justify an attorney-client privilege: namely, that the client might not be forthright without a privilege.").

151. *Weintraub*, 471 U.S. at 357.

152. *Id.* at 349 (noting that corporate managers must have power to waive corporate privilege consistent with their fiduciary obligations).

153. *Comey Interview*, *supra* note 5, at 3.

154. See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191, 381, 415 (1989) (concluding that a free flow of information would continue between corporate executives and corporate counsel absent an absolute corporate attorney-client privilege).

communications with corporate counsel to the government. So long as corporate counsel preface interviews of individual employees with appropriate disclosures regarding the corporate control over the communications and the possibility of waiver, there is nothing improper about a company expecting its employees to assist in providing relevant information for the benefit of the company.¹⁵⁵ Even with such disclosures, many corporate employees, particularly those with marginal, if any, personal connection to the alleged wrongdoing, will continue to share information with corporate counsel out of a desire to maintain the important connection with their employer.¹⁵⁶ Other employees who may have more personal involvement with the issues at the center of the corporate investigation may refuse to be interviewed after being informed of the possibility that the company will turn information over to the government. These employees may retain individual counsel and insist upon formal

155. Cautionary disclosures from corporate counsel are routinely given in interviews with individual employees. See Wray & Hurr, *supra* note 27, at 1183 (“It is not a new practice for a corporation’s lawyers to advise employees in the context of a criminal investigation that they represent only the corporation and not the employee, and that this has implications for the confidentiality of any communications with the employee.” (quoting Buchanan, *supra* note 3, at 600)); see also *In re Grand Jury Subpoena*, 415 F.3d 333, 336 (4th Cir. 2005) (describing outside counsel’s statement to an AOL manager during an internal investigation that “the privilege belongs to the company and the company decides whether to waive it”); Ass’n of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2004-2 (2004) (noting that “it is typical for the [corporate] attorney to advise the employee that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties”). Some commentators have suggested that “assurances” and “understandings” of confidentiality of communications to corporate counsel have played a part in fostering those disclosures despite the lack of protection actually provided by privilege law. See, e.g., Am. Coll. of Trial Lawyers, *supra* note 52, at 318 (“[C]orporate employees and officers are generally more willing to cooperate where they receive a measure of assurance that their conversations with counsel will not be divulged to government investigators or prosecutors.”). Tacit promises of confidentiality by corporate counsel would create serious ethical concerns. See Ass’n of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2004-2 (2004).

156. See *Comey Interview*, *supra* note 5, at 5 (explaining that “[a] corporation must explain to its employees the premium it puts on obtaining full information about misconduct of any kind and that reporting wrongdoing to the authorities, including the regulators and where appropriate criminal investigators, is a good thing to do, and is part and parcel of good corporate citizenship. The message has to be sent that disclosure of misconduct will be rewarded, and failure to disclose will be punished. Employees who have only made mistakes will understand; employees who have information about others will also understand, especially when the corporation protects them from retaliation; employees who have committed crimes . . . have no trust to undermine”). Individual employees will also have a strong disincentive to lie to corporate counsel after receiving such warnings. In a recent investigation of Computer Associates conducted by outside counsel in cooperation with the government, individual employees were charged with obstruction of justice for lying to corporate counsel knowing that their lies would be passed on to the government. Wray & Hurr, *supra* note 27, at 1147–48. The employees pled guilty to the obstruction charges. *Id.*

interviews with the government in which Fifth Amendment protections apply.¹⁵⁷

In sum, any risk that employees will not talk to counsel emanates from the Supreme Court's formulation of the corporate attorney-client privilege and not from the DOJ policy designed to obtain waivers consistent with that formulation of privilege or from the promise of selective waiver protection. Any change needed to address that risk can be made only by changing the corporate privilege itself to give individual employees some control over corporate waivers. It would be inappropriate to attempt to circumvent the accepted operation of the corporate attorney-client privilege by disturbing the exercise of prosecutorial charging discretion in the DOJ policy or by denying selective waiver protection that will serve the public interest. Even with the threat of disclosure to the government, information will continue to come to corporate counsel through the vast majority of individual employees eager to assist their employer in investigating corporate

157. Contradicting the argument that cooperation through disclosure will "chill" speech by wary individual employees, critics also complain that government policies undermine important Fifth Amendment protections by forcing companies to interrogate individual employees in a context where such protections do not apply. *See, e.g.,* Zornow & Krakaur, *supra* note 52, at 157. According to this argument, individual employees will spill all they know to the corporate counsel with whom they are comfortable, only to have their unprotected disclosures served up to the government down the line. If, as critics suggest, the individual employees cease making disclosures to corporate counsel in light of the Miranda-like warnings now necessary for internal investigations, it is difficult to imagine how Fifth Amendment rights will be compromised in such discussions. If employees choose to talk to corporate counsel despite the Miranda-like warnings described by critics of the DOJ policy, it is hard to see how the government has made an end run around Fifth Amendment protections and tricked corporate employees into making concessions they would not have made to government officials. A corollary of this concern is the allegation that companies will cooperate under the charging policy by scapegoating employees in an effort to obtain leniency for the company. *See, e.g.,* William S. Laufer, *Legal Issues and Sociolegal Consequences of the Federal Sentencing Guidelines: Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 Iowa L. Rev. 643, 663-68 (2002); Dean Starkman, *Pollution Case Highlights Trend to Let Employees Take the Rap*, Wall St. J., Oct. 9, 1997, at B10. It is true that the policy is designed to encourage companies to turn in culpable individuals. But, it is important to recognize that business organizations obtain no guarantee of leniency simply because the culpable individuals can be identified. Indeed, the whole purpose of the corporate indictment and the charging guidelines is to avoid this consequence and to ensure that the entity pays along with the employees where it is appropriate. Larry Thompson, author of the Thompson Memo, quipped that without corporate criminal liability, a company could simply "appoint a Vice-President in Charge of Going to Jail." Larry D. Thompson, Deputy Att'y Gen., Remarks at the Corporate Fraud Task Force Conference (Sept. 26, 2002). Under the nine factors to be assessed in deciding whether to charge a corporation, serving up individual corporate wrongdoers will not insulate the entity: "Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation . . . or was condoned by upper management." McNulty Memo, *supra* note 20, at 6; *see also* Wray & Hurr, *supra* note 27, at 1145 (noting that "despite the Thompson Memo's emphasis on cooperation, the weight of the Memo's other factors may warrant corporate prosecution no matter how fully the company cooperates with the authorities" and citing examples).

malfeasance. So long as interviews of such employees are accompanied by appropriate disclosures regarding the potential use of such information, there is no inappropriate burden on the cooperating individual employee.¹⁵⁸

D. *Selective Waiver and the Integrity of Internal Investigations*

The second related concern expressed by critics of the policy and selective waiver is that corporations will decrease oversight and thorough documentation of the efforts that are undertaken in order to shield potentially damaging information from government investigators.¹⁵⁹ If it materialized, such a trend away from careful corporate controls and internal evaluation would clearly undermine the objectives of law enforcement to produce law-abiding corporations and healthy markets. Most commentators agree, however, that an overall decrease in internal corporate oversight of this sort would be cutting off the corporate nose to spite its face and that it is unlikely that responsible corporations will respond in this way.¹⁶⁰

First, any effort by a corporation to reduce the effectiveness of corporate compliance programs would be irrational because it would hurt the company under the DOJ policy. The existence of effective corporate compliance programs is a separate factor that drives charging decisions under the McNulty Memo.¹⁶¹ Downsizing compliance to limit the damaging information disclosed through “cooperation” would militate in favor of prosecution on another important factor of the charging policy. Indeed, the “rise in prosecutors’ interest” in “the strength of companies’ compliance programs and corporate governance measures” has “led predictably to an increase in the attention that companies themselves pay to compliance-related matters.”¹⁶²

158. To the extent that government policies may have some chilling effect on the communications of some employees, there is no reason to expect that selective waiver protection will exacerbate that problem. If we accept the suggestions of corporate counsel that employees are currently aware of the “culture of waiver” that pervades federal investigations, it is difficult to imagine how selective waiver protection will alter the behavior of these employees.

159. See *supra* note 52 and accompanying text.

160. See Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 Hofstra L. Rev. 897, 901 (2006) (describing the “parade of horrors envisaged,” including that “lawyers’ internal investigations will become ‘paperless’” and that “lawyers and clients will cease to conduct internal investigations altogether”).

161. McNulty Memo, *supra* note 20. The Thompson Memo first emphasized the importance of reviewing corporate internal compliance programs as part of the charging decision, providing that only authentic programs (as opposed to mere “paper programs”) would weigh against corporate prosecution. Thompson Memo, *supra* note 38, at 1.

162. See, e.g., Stephen M. Cutler, Dir. of Enforcement, U.S. Sec. and Exch. Comm’n, Remarks Before the Directors’ Education Institute at Duke University: Staying the Course (Mar. 18, 2005), available at <http://www.sec.gov/news/speech/spch031805smc.html> (“Throughout corporate America there are signs of fundamental change—a profound shift to a corporate culture of cooperation and compliance Boards of directors are becoming stronger and more independent. They are starting to take decisive action in response to

Furthermore, corporate criminal liability is far from the only risk that corporate actors weigh when designing and operating compliance programs. Complex regulatory obligations mandate internal mechanisms of review, and fiduciary obligations of directors and officers obligate those corporate actors to act in the best interests of the corporation in designing and implementing corporate compliance programs.¹⁶³ Therefore, the cost of eliminating thorough and effective compliance programs would be too dear despite any perceived potential benefit to be gained under the DOJ policy.¹⁶⁴

Even if such an alarming trend develops, adoption of selective waiver protection should curb it, not exacerbate it. As many privilege scholars have noted, an effective privilege turns on a party's ability to predict and control the distribution of its protected information.¹⁶⁵ It is the guarantee of control over information that fosters open communications and documentation of those communications. Because the government charging policy in no way deprives corporate clients of control over their privileged information, the policy should not stifle the documentation of privileged corporate information. Where the corporation, as the holder of the attorney-client privilege and work-product doctrine, retains the power to accept or reject waiver to the government, potential government disclosure does not discourage thorough investigation or record keeping.¹⁶⁶ Indeed,

ethics and compliance failures.”); see also Alan Murray, *Emboldened Boards Tackle Imperial CEOs*, Wall St. J., Mar. 16, 2005, at A2 (commenting that “[t]here seems to be a sea change going on here—a kind of maturation of American corporate governance”).

163. Indeed, the emphasis on effective corporate compliance in the Thompson Memo comes from the seminal decision of the Delaware Chancery Court regarding the fiduciary duties of directors announced in *In re Caremark*, 698 A.2d 959, 970 (Del. Ch. 1996) (finding that a company's directors did not breach their duty of care in connection with alleged employee violations of federal and state health-care regulations, but holding that directors have “a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards”).

164. Any concern that companies will decline to get counsel involved in important oversight issues appears similarly unfounded. See Letter from Susan Hackett to David F. Levi, *supra* note 15 (expressing concern about continuing corporate willingness to include corporate lawyers “in even the most sensitive of decisions”). The failure to include counsel would make any such consultations unprivileged in the first place and subject to compelled disclosure by the government.

165. See, e.g., Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. J. 853, 860 (1998) (“It is the exclusionary effect of the privilege that is fundamental to the candor being sought, not the secret context of the communication being encouraged.”); see also *Upjohn v. United States*, 449 U.S. 383, 402 (1981) (Burger, C.J., concurring) (“[Participants in confidential communications] must be able to predict with some degree of certainty whether particular discussions will be protected.” (citations omitted)).

166. As discussed earlier, the government has no power to compel a corporation to waive its privilege. The more rigorous controls on prosecutors now in place as a result of the McNulty Memo will guarantee that demands for waiver will not be routine and that a refusal to provide nonfactual privileged material relating the impressions and work product of

the promise of leniency in exchange for thorough disclosures will encourage it. If the privileged information gathered by a thorough and well-documented investigation is too damaging, the corporation need not disclose it. Therefore, the operation of the government charging policy does not undermine a corporation's control over its information that could lead to decreased documentation.

Judicial application of traditional waiver doctrine following deliberate disclosures to the government, however, does deprive cooperating corporate entities of control over the ultimate destination of their protected information. Under traditional waiver doctrine, the government is incapable of giving disclosing entities any meaningful promise of confidentiality. Corporations may wish to perform internal investigations in order to eradicate wrongdoing and cooperate with government investigators but may fear the specter of third-party waiver to the plaintiffs' bar. Because corporations are unable to ascertain the costs and benefits of disclosures to civil adversaries that may occur down the line, disclosing companies may be more circumspect in what they document to avoid damaging revelations not worth the cost in civil liability.¹⁶⁷

Selective waiver protection would place control of protected information back into the hands of cooperating corporations. If corporations have some guarantee that their protected information will stop where they choose, there will be no incentive to sanitize or reduce reporting and documentation of internal activities. With the adoption of dependable selective waiver legislation, all disincentives to the corporation (as opposed to culpable individuals) to investigate and document should disappear. Therefore, contrary to much of the rhetoric surrounding this issue, disincentives to corporate information gathering, if any, derive from the application of traditional waiver doctrine and not from the operation of the DOJ charging policy itself or from the promise of selective waiver. As such, the traditional waiver doctrine ought to bend in response to legitimate societal interests in effective corporate law enforcement.¹⁶⁸

corporate counsel will not be used against the corporation. McNulty Memo, *supra* note 20, at 8–11.

167. See Wray & Hurr, *supra* note 27, at 1173 (noting the uncertainties facing corporations considering disclosures to the government: “Despite their efforts to limit the scope of any waiver, companies cannot know for certain what materials are no longer protected by the privilege and who may access them”) (emphasis omitted)).

168. It is worthy of note that one of the only state courts to recognize the validity and importance of selective waiver is the Delaware Chancery Court, a court long recognized for its specialty in adjudicating corporate issues. See *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *1 (Del. Ch. Nov. 13, 2002) (holding that disclosure to the SEC pursuant to a confidentiality agreement did not constitute waiver of the work-product privilege). It is hard to imagine that the Delaware court would have sanctioned the protection of selective waiver for corporations cooperating with government officials if the court had foreseen the parade of horrors for corporate management and investors such protection would invite.

Some may suggest that some corporate counsel will continue to sanitize corporate documentation even with the protection of selective waiver legislation. Any such tendency following adoption of selective waiver protection would be contrary to the ethical obligations of corporate counsel.¹⁶⁹ In this respect, it is important to emphasize that effective corporate oversight is in the best interests of a healthy thriving corporate entity. As such, conduct by lawyers that eliminates important documentation of compliance or decreases compliance efforts altogether would almost always undermine the best interests of the corporate entity that company counsel is retained to represent. While conflicting obligations to individual employees potentially compromised by effective internal investigations may discourage intense scrutiny in some circumstances, rarely will the obligations to the company itself favor less oversight. Indeed, if an internal investigation uncovered information truly damning to the corporate entity itself, such as pervasive and recurring fraud throughout numerous levels of the corporate structure, the company—as the sole holder of the privilege—would remain free to refuse to divulge the results of its investigation to the government. If, on the other hand, 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. Many courts and commentators have noted the conflict of interest that arises between corporate counsel and the individual employees of the company in such circumstances.¹⁷⁰ 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 with the protection of selective waiver in place.

E. Corporate Waivers Are Here to Stay

Some critics of selective waiver have suggested that current government policies that generate corporate waivers could be a passing phenomenon not

169. See Model Rules of Prof’l Conduct R. 1.13(a) (2003) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”); Model Rules of Prof’l Conduct R. 1.7(a) (2003) (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”).

170. The U.S. Court of Appeals for the Fourth Circuit noted this inherent conflict between the best interests of the corporation and those of its individual employees in the context of a corporate internal investigation in *In re Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir. 2005). The court stated that it “would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.” *Id.*; see also Simons, *supra* note 2, at 1010; Wray & Hurr, *supra* note 27, at 1182 (“At times, the interests of companies—who are eager to demonstrate genuine cooperation to prosecutors—are in tension with the interests of individual employees.”).

warranting the alteration of traditional waiver principles.¹⁷¹ To the contrary, these policies are no passing fancy. Federal law enforcement policies that encourage and reward corporate self-evaluation combined with disclosures to the government have a long tradition within numerous federal departments and agencies and have been used as tools to improve corporate oversight and the health of the American market for over three decades.¹⁷² The method that they employ has been long accepted in the context of individual prosecution, where leniency has routinely been exchanged for assistance that involves the waiver of important rights.

Because of their successful track record and the public interests imperiled by inefficient and ineffective corporate oversight, these policies have been implemented more broadly and, to some degree, more aggressively over time. Given the mounting expense and complexity of corporate investigation, such cooperation and voluntary disclosure programs have become an indispensable part of the fabric of federal corporate investigations.¹⁷³ The performance of such internal investigations provides no guarantee of eradicating ongoing wrongdoing committed by corporate insiders or of deterring future improprieties within the same or other institutions. It is the sharing of the results of those investigations with the government that serves as a powerful tool to stop the corporate fraud that damages markets and individuals alike.¹⁷⁴ For example, the ongoing widespread investigation of stock-option backdating schemes at publicly traded companies is being carried out primarily by outside corporate counsel who are “feeding” information to regulators and prosecutors in a “real-time” fashion.¹⁷⁵ Indeed, illegal backdating practices are so prevalent that many would escape the attention of federal authorities without this voluntary disclosure of damaging information.¹⁷⁶ Some of the important information disclosed will necessarily fall within the protections of the work-product doctrine or the attorney-client privilege. This type of collaboration between corporate entities and federal authorities cannot be eliminated if this country is to continue taking corporate oversight seriously. There would be little incentive for corporations to self-police in this manner without the expectation of leniency created by the government

171. See, e.g., *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1200 (10th Cir. 2002) (“Whether the pressures facing corporations in federal investigations present a hardened, entrenched problem suitable for common-law intervention or merely a passing phenomenon that may soon be addressed in other venues is unclear.”).

172. See *supra* notes 43–44 and accompanying text.

173. See, e.g., Bandler & Scannell, *supra* note 4 (explaining that federal regulators would be incapable of identifying and correcting the recent wave of improprieties connected to the backdating of stock options without the help of outside corporate counsel “feeding” the government information).

174. Indeed, the DOJ has had significant success in prosecuting corporate fraud since the adoption of the charging policy. See *McNulty Statement*, *supra* note 25, at 1–2 (detailing prosecutorial history under the policy).

175. Bandler & Scannell, *supra* note 4.

176. *Id.*

charging policy and other similar federal programs. In short, we neither can nor should turn back the clock to the “circle the wagons” days of corporate defense.¹⁷⁷ Thus, the preference of opponents of selective waiver—a universe in which corporations are never encouraged to share their privileged information—is unattainable if the public intends to continue taking white collar crime seriously.

Even if we accept that sharing of privileged corporate information in exchange for leniency is a valuable technique that serves the public interest, we need not embrace overly aggressive applications of the technique that could ultimately undermine the goal of effective corporate oversight. As noted by both critics and proponents of the Federal Principles of Prosecution, there are some methods of cooperation that stop short of disclosing privileged communications with corporate counsel. It is perfectly consistent with corporate law enforcement objectives to minimize intrusion into the sacred arena of corporate privilege where it is possible to do so while maintaining effective collaboration with corporate counsel. Indeed, the recent outcry against federal law enforcement practices has served an important purpose in ensuring that prosecutors execute their duties with caution and proper regard for the public interests they serve.¹⁷⁸ In response to the criticisms that federal practice under the Thompson Memo created a dangerous “culture of waiver,” the DOJ altered its stated policy to do just that. The new policy requires a “legitimate need” for a government waiver request and directs prosecutors to seek “the least intrusive waiver necessary to conduct a complete and thorough investigation.”¹⁷⁹ It creates a “step-by-step” approach to requests for disclosures that first seeks “purely factual information” that may or may not be protected and seeks the mental impressions or advice of counsel only in “rare circumstances.”¹⁸⁰ In addition, the new policy implements procedural protocols that mandate a central and senior review of government requests for privileged or protected information.¹⁸¹ This policy protects the law enforcement objectives crucial to the public interest without disregard for the corporate interest in maintaining privilege protection where possible. It

177. See *Mini-Hearing of the Advisory Comm. on Evidence Rules*, *supra* note 16, at 44 (testimony of James K. Robinson, former Assistant Att’y Gen. of the Criminal Division under President William J. Clinton) (“[T]he Justice Department and the SEC save enormous resources . . . by doing this, and . . . the cat is out of the bag here on this. I think the likelihood that that demon is going to be driven underground because we don’t have a selective waiver rule is ignoring the realities of life . . .”).

178. See McNulty Memo, *supra* note 20, at 8–10 (requiring a “legitimate need” for the request for privileged corporate information and developing a “step-by-step” approach to requests for such information that seeks the protected impressions of counsel only in “rare” cases).

179. *Id.* at 8–9.

180. *Id.* at 9–10.

181. *Id.* at 10.

appears that the SEC may follow the DOJ's lead in revising its current policy as well.¹⁸²

Although some legislators and members of the corporate defense bar support the passage of the Attorney-Client Privilege Protection Act, the existing enforceable limits on prosecutorial discretion in connection with charging and settlement decisions are few indeed.¹⁸³ Given the extended history of disclosures to government entities and the increasing need for effective regulation and prosecution of corporate actors, disclosure of otherwise privileged information to federal government investigators is destined to continue in some form with or without the protection of selective waiver. Even vocal critics of the government's current practices agree that "it may not be unreasonable to seek a limited waiver prior to declining prosecution" where "a company has conducted its own investigation and voluntarily reported wrongdoing."¹⁸⁴ In today's complex

182. See Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/qw/2007/02/09/waiver-will-the-sec-follow-deputy-ag-mcnultys-lead/> (Feb. 9, 2007, 15:06 EST) (describing comments of SEC Commissioner Paul Atkins that the SEC should consider "tightening its policies" to ensure that companies are not pressured into waiving basic legal privileges).

183. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that "[t]he Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed,'" subject only to constitutional restraints (citations omitted)); *United States v. Goodwin*, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (footnote omitted)); *Ashe v. Swenson*, 397 U.S. 436, 452 (1970) (Brennan, J., concurring) (noting "tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution" (footnote omitted)). In establishing and disclosing guidelines for cooperation and charging, the DOJ conforms to prosecutorial best practices that are not mandatory. See *LaFave et al.*, *supra* note 29, § 13.2(f)(ii), at 684 ("What is needed is for each prosecutor's office to develop a statement of general policies to guide the exercise of prosecutorial discretion.").

184. Ben-Veniste & Rubin, *supra* note 52, at 4. Even with the protection of legislation prohibiting prosecutors from requesting corporate waivers, corporate counsel suggest they would like to retain the option of "voluntarily" waiving privilege and obtaining leniency for it in appropriate cases where the company has been ravaged by a rogue employee. See, e.g., *Hearing of the Advisory Comm. on Evidence Rules*, *supra* note 16, at 222-23 (testimony of Susan Hackett, Senior Vice President & Gen. Counsel, Association of Corporate Counsel). Even in the absence of formal government "requests" for waivers, the availability of leniency in such cases will necessarily maintain the incentive to disclose. Thus waivers will be a continuing reality under any contemporary framework. Even under such a regime, therefore, selective waiver protection would be important to protect companies making such truly "voluntary" disclosures. See *Mini-Hearing of the Advisory Comm. on Evidence Rules*, *supra* note 16, at 27 (testimony of James K. Robinson, former Assistant Att'y Gen. of the Criminal Division under President William J. Clinton) ("[T]here will always be—whether there is an express request from an assistant U.S. attorney or an SEC lawyer or not—

world of corporate oversight that will continue to generate protected disclosures to government investigators, third-party waiver represents the most compelling and observable danger facing cooperating corporations and the integrity of their internal investigations. The impact of third-party waivers serves no legitimate function in connection with a government inquiry and, in fact, impedes it. Legislatively eliminating the existing punitive consequences of such disclosures in subsequent civil litigation will benefit good corporate citizens and enhance the detection and correction of damaging corporate corruption in the post-Enron era.

III. THE NEED FOR SELECTIVE WAIVER PROTECTION AND CONSISTENCY WITH CONTEMPORARY WAIVER DOCTRINE

Almost all of the courts that have rejected selective waiver have found it unnecessary to encourage corporate cooperation with law enforcement and inconsistent with core privilege principles.¹⁸⁵ Closely examining these judicial criticisms of selective waiver protection reveals an overly simplistic response to the doctrine that ignores the flexibility that has characterized the recent evolution of privilege and waiver doctrine in the courts and scholarship.

A. *The Need for Selective Waiver Protection*

Many of the courts that have rejected selective waiver acknowledge that corporate cooperation with law enforcement is a laudable objective that serves the public interest, but maintain that selective waiver protection is simply unnecessary to encourage cooperation in the form of corporate privilege waivers.¹⁸⁶ While companies routinely have been ordered to disclose privileged information to civil litigants following disclosures to the government, companies continue to provide protected materials to government investigators.¹⁸⁷ Observing this trend, courts conclude that companies do not need additional protections to encourage and maintain cooperation with government investigations because they are already willing to disclose protected information and pay the price of third-party waivers.

powerful incentive for full cooperation by corporations, including, in some instances, the waiver of the privilege . . .”).

185. See *supra* Part I.C and accompanying notes.

186. The majority in *In re Columbia/HCA* recognized that selective waiver would further the search for truth, realize considerable investigative efficiencies, and possibly increase corporate self-policing. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002). Most courts to visit the issue have emphasized that selective waiver is unnecessary to increase cooperation, however. See *supra* note 88 and accompanying text.

187. See Beth S. Dorris, Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 Stan. L. Rev. 789, 822 (1984) (noting that over 425 corporations participated in the SEC's voluntary disclosure program in 1979 when only one circuit had adopted a rule of selective waiver in connection with such cooperation).

As these courts note, it is clear that selective waiver is not necessary to achieve some level of corporate disclosure to the federal government. This does not signal the unimportance of waiver protection to such cooperating corporations, however.¹⁸⁸ Corporations are rational actors.¹⁸⁹ The waiver to third-party litigants is simply one factor in the corporate cost-benefit analysis that informs the decision of whether to waive the corporate privilege in cooperation with the government.¹⁹⁰ Companies that voluntarily disclose privileged information to government agencies under current precedent have determined that the benefits of disclosure and cooperation outweigh the likely costs of such cooperation in the form of third-party waivers in light of the potential outcome of the particular governmental inquiry and any threatened civil litigation. Therefore, the continued rejection of selective waiver will not foreclose corporate cooperation in investigations of this sort.

The rejection of selective waiver, however, necessarily means that the cost-benefit analysis performed by some corporate entities facing government investigations on varying subjects and of varying scope will come out against disclosure due solely to the specter of waiver in civil litigation.¹⁹¹ As noted by one commentator cautioning corporations regarding disclosures to the government:

When deciding whether to share privileged information with the government, therefore, companies must consider the substantial risk that such information could eventually be shared with and used against the

188. As noted by the Tenth Circuit in *In re Qwest*, the development of privilege doctrine by the common law is a process of slow "accretion[]" which takes significant time to develop. 450 F.3d 1179, 1192 (10th Cir. 2006). While the courts have increasingly rejected selective waiver, the status of selective waiver has been open to debate for the past several decades. See *supra* Part I.C and accompanying notes. Thus, disclosing companies may have held out some hope of cooperating without suffering the collateral cost of third-party waivers (as indicated by Qwest Communications' very recent bid for protection). Thus, it is not entirely accurate to assume that companies have disclosed to the government fully aware of the price to be paid in civil litigation. Furthermore, companies spend considerable time and money negotiating confidentiality agreements with government entities prior to making disclosures of protected information. This also indicates cooperating corporations' genuine concern over the release of their information to third parties.

189. See Wray & Hurr, *supra* note 27, at 1187 (noting that "[c]orporations are perhaps the most rational targets in the criminal justice system and adjust their behavior accordingly").

190. See *Permian Corp. v. United States*, 665 F.2d 1214, 1221 n.13 (D.C. Cir. 1981) ("[W]e cannot see how 'the developing procedure of corporations to employ independent outside counsel to investigate and advise them' would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.").

191. See *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002) ("When courts amplify the risk of disclosure to include future private plaintiffs, the scales begin to tip further in favor of corporate noncompliance with investigative agencies. A rigid trend leading to such an unwholesome result seems unwise. Instead, a practical rule that would reduce the risk of secondary unintended disclosure to private plaintiffs from this initial balance would likely benefit both law enforcement agencies and the future private plaintiffs they were established to protect.").

company by third-party plaintiffs as well. Depending on the merit of the civil claims and the damages sought, disclosure of such information could result in breathtaking judgments or settlements, far in excess of any criminal penalties levied by the government.¹⁹²

By eliminating a large and almost certain cost of disclosure to government entities, selective waiver will necessarily encourage cooperation through disclosure where it otherwise would be rejected. Although courts and commentators are correct that companies will share some information with the government even in the absence of selective waiver protection, it cannot be contested that companies will share more information with the doctrine of selective waiver—thus increasing the total flow of information to the government.¹⁹³

In addition, courts have taken a “one-size-fits-all” approach to the need for selective waiver that largely ignores the variety of oversight mechanisms to which corporate actors may respond with protected disclosures and the different incentives that may govern corporate decision making in these different arenas. The DOJ is one of numerous federal departments that seeks voluntary disclosures from corporate entities. For example, the Department of Health and Human Services has a voluntary disclosure program that encourages health-care providers to report possible fraud in connection with Medicare and Medicaid programs.¹⁹⁴ A provider’s lack of cooperation and disclosure is treated as an aggravating factor for consideration by the department’s inspector general under this program.¹⁹⁵ Where exclusion from Medicare and Medicaid programs is a possible sanction for failure to cooperate, a provider is likely motivated to provide

192. Wray & Hurr, *supra* note 27, at 1174.

193. Indeed, Judge Boggs noted this “uncontroversial behavioral prediction” in his dissent in *In re Columbia/HCA*: “Faced with a waiver of the attorney-client privilege over the entire subject matter of a disclosure and *as to all persons*, the holder of privileged information would be more reluctant to disclose privileged information voluntarily to the government than if there were no waiver associated with the disclosure.” *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 309–10 (6th Cir. 2002) (Boggs, J., dissenting). Because the adoption of selective waiver necessarily will increase disclosures to the government by cooperating corporations, some critics of the government charging policy within the defense bar oppose it out of concern that adopting selective waiver will perpetuate the current “culture of waiver.” It is important to note that selective waiver in no way alters the existing balance of power between government investigators and a target corporation. Allowing selective waiver to government investigators will increase disclosures to the government of protected information, but only because it will decrease external costs of disclosure to corporations that are separate and apart from the criminal investigation. Adopting selective waiver does not give the government an additional bargaining chip or allow the prosecution to bring more pressure to bear. It merely makes disclosures less costly to companies that choose to cooperate in this way. Therefore, a doctrine of selective waiver benefits the corporate actors subject to the pressures of third-party civil suits, but does not exacerbate the “culture of waiver” by adding any tools to the government’s arsenal.

194. See Health and Human Services Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399, 58,399 (Oct. 30, 1998).

195. See *id.* at 58,403.

complete disclosures without serious consideration of the implications in terms of civil liability. Defense contractors regulated by the Department of Defense face similar concerns.¹⁹⁶ Therefore, selective waiver may be less important in creating cooperation with the government in these contexts. In other arenas such as securities fraud investigations, however, the threat of massive civil exposure may weigh more heavily on the scale and counsel against cooperative disclosures. In these situations, selective waiver protection would indeed encourage such disclosures. Thus, it is impossible to evaluate whether corporations “need” selective waiver to encourage cooperation in general terms as courts have tried to do because the need for the protection will depend heavily upon the context of the initial government disclosures.

In seeking public comment on proposed Federal Rule of Evidence 502(c), the Evidence Advisory Committee specifically sought empirical evidence demonstrating the amount of increased cooperation that would result from selective waiver protection.¹⁹⁷ Not surprisingly, the committee received nothing that would quantify the benefit of selective waiver.¹⁹⁸ It would be impossible to pin down *ex ante* how companies faced with unspecified government investigations and civil suits would behave with and without selective waiver protection. This inability to quantify the precise benefit to be gained by selective waiver should not serve to defeat it, however. Questions of privilege and waiver have never been driven by statistics, but have always been creatures of public policy. Indeed, to reject selective waiver because some companies are already making disclosures to the government without it, is to engage in a line of reasoning that would defeat the attorney-client privilege itself. Although the privilege is supported by an instrumental theory that its existence creates the disclosures to counsel that it protects, this theory has been widely criticized as lacking an empirical basis.¹⁹⁹ Commentators note that most clients

196. See also Debarment, Suspension and Ineligibility, 48 C.F.R. § 9.4 (2006); see also Wray & Hurr, *supra* note 27, at 1115–17 (discussing Department of Defense voluntary disclosure program that offers contractors leniency for self-monitoring and reporting).

197. See Judicial Conference of the U.S., Report of the Advisory Committee on Evidence Rules, Fed. R. Evid. 502 (Proposed and Revised 2006), at 6, available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4 (explaining that “[t]he Committee is especially interested in any statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions”).

198. See May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 1.

199. See, e.g., Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 31 (“Clients want the best legal advice. Most are therefore strongly motivated to tell lawyers the truth. . . . When seeking legal guidance, smart corporate actors come clean.”); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 112 (1956) (noting that the theory that the attorney-client privilege promotes disclosure to counsel rests on “sheer speculation”); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1619 (1986) (“There has never been empirical evidence that the

would have strong motivations to communicate openly and accurately with counsel to secure their legal rights even in the absence of any privilege protection.²⁰⁰ Yet the law readily accepts that, however unquantifiable, there is some valuable benefit in increased disclosure to lawyers as a result of the existence of the privilege. The same concept applies with equal force to encouraging cooperation with government investigations. Although many corporations will cooperate at some level without the protection of selective waiver doctrine, we can be sure that the fullness of disclosures to government agencies will be enhanced by recognition of selective waiver.²⁰¹

B. *Selective Waiver and Core Principles of Privilege and Waiver*

Courts have criticized selective waiver protection as inconsistent with core privilege principles on three main grounds: (1) that selective waiver fails to serve the underlying purpose of the attorney-client privilege to encourage open communications to counsel and, instead, encourages the sharing of information with an entity outside the confidential relationship; (2) that selective waiver affords protection for a party who has sacrificed the confidentiality of its protected information; and (3) that selective waiver unfairly allows a party to make strategic use of privilege, disclosing its protected information when it is advantageous and hiding it behind the cloak of privilege when it is not.²⁰²

First, it is not evident that all exceptions to settled waiver doctrine must emanate from the policy of encouraging confidential communications between client and lawyer.²⁰³ The attorney-client privilege itself is an exception to the fundamental policy of effective truth seeking in our adversary system through the presentation of all relevant and reliable

privilege's existence actually promotes disclosure by clients, and there are intuitive reasons for doubting that it often does so." (footnote omitted)); Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 Hofstra L. Rev. 817, 822 (1984) (noting that justification for the attorney-client privilege is based upon an "educated guess about behavior").

200. See *supra* note 199; see also Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. Pitt. L. Rev. 145 (2004).

201. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) (recognizing that selective waiver would further the search for truth, realize considerable investigative efficiencies, and possibly increase corporate self-policing).

202. See *supra* Part I.C and accompanying notes.

203. Many critics of selective waiver have argued that the doctrine is not necessary to encourage open communications with corporate counsel. As noted by the first U.S. court of appeals to reject selective waiver, "[T]he developing procedure of corporations to employ independent outside counsel to investigate and advise them' would [not] be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality." *Permian Corp. v. United States*, 665 F.2d 1214, 1221 n.13 (D.C. Cir. 1981); see also *supra* note 70 and accompanying text.

information.²⁰⁴ The necessary extrinsic public policy of encouraging effective relationships between client and counsel carries sufficient weight to trump that general policy. The law of privilege has always been driven by such notions of public policy. The public policy of enhancing the efficiency and effectiveness of corporate oversight to protect the American market and the multiple constituencies served by the contemporary corporation is the impetus behind the proposed change. It is difficult to imagine a public policy more in keeping with the traditional purpose of privilege protection.

Judge Boggs's dissent in *In re Columbia/HCA* disagreed with the federal courts' rigid insistence on tying all exceptions to established waiver doctrine to the justification for the existence of the privilege.²⁰⁵ Judge Boggs noted that "questions of 'policy'" are "at the heart of the privilege inquiry" and that federal courts exercising their powers, under Federal Rule of Evidence 501, have "regularly analyzed" whether the rules regarding privilege are "in the public interest" or whether they would have "undesirable side effects."²⁰⁶ Similarly, Professor Richard Marcus has opined that "reference to the purpose of the privilege does not provide a satisfactory guide in waiver decisions," noting that "the better focus would be on purposes for waiver."²⁰⁷ Therefore, deviations from traditional waiver doctrine need not encourage confidential communications between a client and his lawyer so long as they are justified by a public policy of sufficient social importance. As discussed above, the doctrine of selective waiver is supported by just such a socially desirable policy of encouraging corporate cooperation with government investigations.

204. See Broun et al., *supra* note 47, § 72 (explaining that privileges "are clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light").

205. See *In re Columbia/HCA*, 293 F.3d at 308–09 (Boggs, J., dissenting). Rather, the judge stated that the court ought to examine the basis for the third-party waiver rule in evaluating selective waiver. The judge noted the often-stated basis for third-party waiver that the attorney-client privilege must not have been necessary to produce the initial communication by the client to the lawyer if the client later discloses the confidential information to a third party. The judge found the underlying premise of this principle—that communications at one point in time are similarly motivated to the disclosure of those communications at a later point in time—flawed. *Id.* at 309 ("That a client is willing to disclose privileged information to the government at time T2 indicates very little indeed about whether she would have communicated with her attorney, absent the promise of the privilege, at time T1."). Judge Boggs also commented on the majority's survey of existing circuit court precedent regarding selective waiver, pointing out the distinct circumstances present in several of the opinions rejecting an application of selective waiver and noting that "the authority arrayed in favor of the court's rule is not overwhelming." *Id.* at 307.

206. *Id.* at 310 (noting that the *Jaffee* Court engaged in "a policy inquiry to formulate a psychotherapist-patient privilege under federal law" (citing *Jaffee v. Redmond*, 518 U.S. 1, 10–11 (1996))). Judge Boggs stated, "I can find no rule narrowly constraining the considerations that courts may take into account in developing rules regarding a common law privilege or requiring that courts turn a blind eye to the practical effect of the privilege rules that they are charged to create." *Id.*

207. See Marcus, *supra* note 199, at 1619 ("[T]he purpose analysis tends to lead to broad waiver rules without affording any leeway to cope with the resulting costs.").

Opponents of selective waiver also argue that it unfairly allows the confidentiality of protected communications to be resurrected after it is knowingly sacrificed for the tactical advantage of the privilege holder. As the D.C. Circuit put it, “[T]he attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.”²⁰⁸ Thus, critics claim that the doctrine of selective waiver violates the most basic tenets of privilege law that a party cannot willingly disclose protected information without effecting a waiver.

A review of modern privilege doctrine demonstrates that selective waiver would not be alone in these respects if adopted. A number of accepted doctrines are evolving in the context of contemporary litigation outside the arena of government investigation that allow for continuing privilege protection following a strategic breach of confidentiality. Like selective waiver these doctrines are not designed to encourage the free flow of information to counsel. The well-accepted joint-defense or common interest doctrine shares many of the attributes that have caused concern in the debate over selective waiver. This doctrine protects the confidential communications of separately represented parties who share some common legal interest.²⁰⁹ While the joint-defense doctrine constitutes a privilege separate and apart from the attorney-client privilege, its operation represents a departure from established third-party waiver doctrine in the arena of protected attorney-client communications. The joint-defense doctrine permits the voluntary sharing of protected attorney-client communications with third parties outside that protected relationship so long as those third parties share a common legal interest with the privilege holder.²¹⁰ Despite a voluntary breach in the genuine confidentiality of the information to someone outside the protected relationship, the holder is permitted to maintain the attorney-client privilege as against all others.²¹¹ Therefore, the

208. *See* *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981).

209. *Mueller & Kirkpatrick*, *supra* note 47, § 5.15.

210. *See* Restatement (Third) of the Law Governing Lawyers § 76 (2000) (covering communications between “a client, the client’s agent for communication, the client’s lawyer, and the lawyer’s agent” with those of another client sharing a “common interest” in a legal matter); Susan K. Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 *Tex. L. Rev.* 1273, 1274 (1990) (“The joint-defense privilege protects exchanges of information among parties who share common interests in defending against or attacking a common opponent but who are represented by separate lawyers.” (citations omitted)). One of the earliest cases to recognize the joint-defense doctrine was *Chahoon v. Commonwealth*, 62 *Va.* (21 *Gratt.*) 822, 836–39 (1871). *Mueller & Kirkpatrick*, *supra* note 47, § 5.15 n.2. Of course, the joint-defense privilege protects communications to third parties of information not originally protected by the attorney-client privilege, as well as privileged information later shared. *See* Rushing, *supra*, at 1284–85 (“The joint-defense privilege protects information that clients pass on to third parties who share common interests with the communicant whether or not the clients first conveyed the information to their own attorneys, thereby protecting it with the attorney-client privilege.”).

211. *See* *Mueller & Kirkpatrick*, *supra* note 47, § 5.15 (“Each participant may assert the privilege against outsiders, and all participants must consent to a general waiver of the

attorney-client privilege is not only available at the traditional price of complete confidentiality.

The joint-defense doctrine rests on policies independent of those that support the attorney-client privilege itself. Because this doctrine protects communications between even non-clients and counsel, it “hardly encourages ‘frank and thorough attorney-client communications.’”²¹² As one commentator has noted, the joint-defense privilege must have some “social value apart from that protected by the attorney-client privilege” since the “reasons for the attorney-client privilege . . . do not support extending the privilege to communications with third-party lawyers and their clients.”²¹³ Rather than promoting frank communication between clients and their counsel, the joint-defense or common interest doctrine encourages collaboration between separately represented parties “to encourage better case preparation and reduce time and expense.”²¹⁴ The maintenance of the attorney-client privilege despite the sacrifice of confidentiality serves the “general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others.”²¹⁵ Thus, existing privilege doctrine recognizes social policies apart from fostering the frank and thorough communications between counsel and client as sufficient to support exceptions to traditional waiver doctrine.

Like the common interest doctrine, selective waiver encourages cooperation and collaboration through the sharing of information with government investigators. In the interest of the important public policy of

privilege.” (citations omitted)); *see also* Rice, *supra* note 165, at 878–80 (noting the expanding circle of confidentiality permitted by the “‘common interest’ category” that has turned privilege protection “into little more than a right of privacy that the client can choose to share with others, while preserving its viability”); Rushing, *supra* note 210, at 1278 (noting courts’ tendencies to view the joint-defense doctrine as “an exception to the rule that divulging confidential information to third parties waives the attorney-client privilege”). This is an example of a disclosure exempted from waiver because it is separately privileged. *See* Fed. R. Evid. 511, 56 F.R.D. 183, 258 (1973) (proposed 1972, not enacted). One commentator has noted that the attorney-client privilege can be maintained despite revelations of confidential communications to the client’s spouse. Although such disclosures are made to one outside the confidential attorney-client relationship, the privilege remains intact because the spousal communications are separately privileged. *See* Marcus, *supra* note 199, at 1605, 1625.

212. Rushing, *supra* note 210, at 1280 (citations and internal quotation marks omitted).

213. *Id.*

214. Mueller & Kirkpatrick, *supra* note 47, § 5.15; *see also* Rushing, *supra* note 210, at 1280 (noting that “[t]he joint-defense privilege encourages arrangements by which parties may extract from other parties beneficial information or cooperation”).

215. Rushing, *supra* note 210, at 1280. The drafters of the Federal Rules of Evidence recognized this exception to confidentiality for a dual privilege holder by exempting disclosures from waiver if those disclosures were themselves privileged. *See* Fed. R. Evid. 511, 56 F.R.D. 183, 258 (1973) (proposed 1972, not enacted). As noted by Professor Richard Marcus, “[T]his explanation fails to take account of the fact that the attorney-client privilege has, under the strict view, lost its value because of revelation to another.” Marcus, *supra* note 199, at 1625.

effective corporate law enforcement, selective waiver permits the voluntary and tactical sacrifice of confidentiality to a specified audience, while permitting the holder of the privilege to maintain secrecy against all others. Indeed, selective waiver could be considered more protective of confidentiality than the common interest privilege because it is more narrowly tailored to permit disclosure only to a specified recipient—the federal government, whereas the common interest doctrine permits sharing with all parties with a rather loosely defined “common interest.”²¹⁶ At its core, the common interest privilege does what selective waiver does. It allows the holder of the privilege to disclose confidential communications to an outsider when such disclosure will afford some tactical advantage necessary to effective legal representation. Similarly, selective waiver allows a privilege holder the tactical advantage of sharing protected information in a context that will advance the holder’s effective legal representation, as well as the public interest in effective corporate oversight, while maintaining privilege protection as against other parties. Thus, the breach of confidentiality that accompanies selective waiver is not inherently inconsistent with the maintenance of privilege.

Critics of selective waiver might argue that the common interest doctrine provides little support for the voluntary breach of confidential information to the federal government because it does not permit such a breach to an adversary, but rather insists upon “common interests” for its justification.²¹⁷ While disclosure to a party with similar interests may not be inconsistent with the right to continued protection from compelled disclosure, voluntary disclosure to an adversary such as the federal government is fundamentally inconsistent with continued protection in any context. In analyzing such arguments, it is important to emphasize the unique nature of the relationship between government investigators and corporate targets. Unlike individual defendants for whom the government represents a true adversary, corporate

216. Although the joint-defense doctrine is only applicable when the communicating parties have a sufficient common interest, some courts have extended the common interest doctrine to third parties not party to any pending litigation, as well as to a party’s adversaries who share a “common interest.” *See, e.g., United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987); *Visual Scene v. Pilkington Bros.*, 508 So. 2d 437, 441–42 (Fla. Dist. Ct. App. 1987).

217. Despite the requirement of “common interests” between parties sharing information under the joint-defense doctrine, it is universally accepted that parties pooling protected information under a joint-defense agreement may, and often do, have conflicting interests as well. *See Mueller & Kirkpatrick, supra* note 47, § 5.15. Indeed, some commentators argue that parties to a joint-defense arrangement should be prohibited from using shared information against one another should subsequent litigation arise between the parties. *See Restatement (Third) of the Law Governing Lawyers* § 126(2) (1998); *Rushing, supra* note 210, at 1298 (“The effective application of the joint defense privilege requires that the privilege remain intact among the parties in a subsequent action.”). Thus, the joint-defense doctrine contemplates disclosures to a potential adversary accompanied by assurances that the information cannot be used by that potential adversary should litigation arise. *See also Marcus, supra* note 199, at 1638 (noting that “courts are fairly free in finding common interests sufficient to avoid a waiver”).

targets of government investigation are controlled by groups of individuals, many of whom may have little or no connection to the wrongdoing being investigated by the government. In fact, a corporate target is often controlled by new management untainted by prior malfeasance that “partners” with the government in cleaning up and saving the corporate entity.²¹⁸ Seen in this light, the government investigators and the corporate subjects of their investigation have a common interest in eradicating corporate fraud despite the existence of the conflicting interests of some individual employees and the sharing of information within this context remains somewhat analogous to the common defense privilege.²¹⁹

Assuming that the joint-defense doctrine should be distinguished from selective waiver because of the “common interest” requirement, courts have also upheld the privilege even after confidential communications have been disclosed to a true adversary. Under traditional privilege doctrine, even the unintentional disclosure of confidential attorney-client communications to an adversary constitutes a waiver of the privilege, at least with respect to the communications disclosed.²²⁰ Once lost, the requisite confidentiality of a confidential communication cannot be resurrected.²²¹ Over time, courts have moved away from such an unforgiving view of disclosure to one’s adversary, at least in the context of unintended disclosures. Rather than analyzing waiver solely on the basis of lost confidentiality, modern courts have looked to the care taken by the privilege holder in protecting his confidential information, as well as the circumstances surrounding the disclosure and the promptness of the holder’s response to such disclosure.²²² Courts have allowed continued protection following inadvertent disclosure to an adversary where fairness to both parties

218. See Simons, *supra* note 2, at 1007–08.

219. Companies have argued that the sharing of work-product information with the government did not waive work-product protection as against an “adversary” for this same reason. The courts that have considered this argument have rejected it despite the realities of allied interests among corporate counsel and government investigators. See *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) (rejecting argument by a cooperating corporation that the SEC and the DOJ were not “adversaries” for purposes of the work-product doctrine where the corporation was the “target” of the agency investigation at the time of disclosures to the agencies); *McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 820 (Ct. App. 2004) (rejecting the notion that the corporate target and the government shared common interests).

220. See, e.g., *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (requiring that parties “treat the confidentiality of attorney-client communications like jewels—if not crown jewels”); *Underwater Storage, Inc. v. U.S. Rubber Co.*, 314 F. Supp. 546, 549 (D.C. Cir. 1970) (“The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.”); Wigmore, *supra* note 47, § 2325(3), at 629 (explaining that a client bears the risk of “insufficient precautions” against disclosure).

221. See Marcus, *supra* note 199, at 1612 (noting that “classical waiver doctrine” holds that any disclosure to an outsider destroys the attorney-client privilege).

222. See generally Mueller & Kirkpatrick, *supra* note 47, § 5.29.

justified maintenance of the privilege.²²³ This doctrine of “inadvertent waiver” has gained support in the federal system and proposed Federal Rule 502 seeks to codify this more flexible approach.²²⁴ Like selective waiver, this modern approach to inadvertent disclosure is not designed to encourage the frank and full communication between a client and his lawyer. Instead, it is driven by basic notions of fairness and responsibility.²²⁵ Therefore, modern privilege doctrine recognizes exceptions to third-party waiver that are not supported by the underlying purpose of the attorney-client privilege. Further, the modern approach to inadvertent waiver allows privilege protection without making the holder pay the traditional price of complete confidentiality

It is true that the doctrine of inadvertent waiver sanctions a loss of confidentiality in a context decidedly different from that involved in selective waiver to the extent that it permits only the “inadvertent” or “accidental” disclosure of confidential information to one’s adversary. Indeed, several of the courts rejecting selective waiver have objected to the intentional and tactical disclosure of confidential communications as inconsistent with privilege. As outlined above, the joint-defense doctrine permits disclosures for just such tactical reasons. It is not the only place in evolving privilege law where we see purposeful and tactically advantageous disclosures to one’s adversary accompanied by maintenance of the privilege, however. Due to the rising costs of massive document and electronic discovery, the parties to complex litigation have encountered increasing difficulty in performing the thorough privilege review necessary

223. This exception to the doctrine of waiver upon loss of confidentiality is not justified through the increase in communications between client and counsel, but rather through considerations of necessity and fairness. See *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).

224. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 8. At common law, all justification for foreclosing use of privileged information by others was deemed lost once confidentiality was compromised, whether through an intentional or inadvertent disclosure. Accordingly, some courts have held that an inadvertent disclosure of protected information sacrifices crucial confidentiality and, therefore, the privilege. See, e.g., *Genentech, Inc. v. U.S. Int’l Trade Comm.*, 122 F.3d 1409, 1417–18 (Fed. Cir. 1997). A few courts have come down on the opposite side of the spectrum, finding no waiver for accidental or inadvertent disclosures and requiring an “intentional” disclosure to trigger waiver. Most courts, however, have adopted a middle ground approach allowing a waiver through inadvertent disclosure only where the disclosing party has acted carelessly with respect to its privileged information. See *Hopson*, 232 F.R.D. at 235–36 (summarizing the case law regarding inadvertent disclosure of privileged information). Proposed Rule 502(b) adopts this middle ground majority approach to inadvertent waiver, requiring parties to treat their privileged information with care while rejecting a rule of “strict liability for an inadvertent disclosure” which “threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.” May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 8.

225. See *Hopson*, 232 F.R.D. at 243 (holding that findings of waiver due to inadvertent production after reasonable precautions against disclosure were taken would be “unfair” and “improper”).

to preserve confidentiality consistent with common law privilege requirements. The time and expense associated with such privilege review has become prohibitive and has increased concerns over waiver through disclosure. Although disclosure to an adversary defeats the privilege under traditional waiver doctrine, courts have entered protective orders in complex litigation seeking to eliminate waiver through inadvertent discovery disclosures.²²⁶

The provisions of proposed Federal Rule of Evidence 502 that have been recommended by the Advisory Committee go one step further in relaxing traditional waiver doctrine. In an effort to alleviate the burden associated with complex discovery, the rule would permit federal court orders sanctioning “claw-back” and “quick-peek” arrangements under which parties may voluntarily produce documents to an adversary with limited or no privilege review and then recall privileged materials after production. So long as the arrangement is memorialized in a court order, the production of confidential materials to one’s adversary would not defeat a party’s assertion of the privilege in the instant litigation or any other proceeding in any state or federal court.²²⁷ Thus, these provisions permit parties intentionally to compromise the confidentiality of privileged information to an adversary in the interests of efficiency and preservation of resources in complex civil litigation.²²⁸ They do not encourage frank and full communications with counsel. They do not require a party to jealously guard its confidential information in order to rely upon the privilege. Yet these provisions appear to have almost universal acceptance by the bar and judiciary due to the practical need for an alteration to waiver doctrine in light of modern practice.²²⁹

In light of the modern realities of corporate investigation and the massive and intricate document trails that can only be navigated by an outsider with great difficulty, modern waiver doctrine ought to recognize a party’s freedom to share privileged information with federal officials without a corresponding loss of privilege in third-party litigation. Confidentiality is no longer king. If the preservation of private litigation resources is a sufficient justification for permitting knowing and purposeful exchanges of confidential information without consequence to privilege, the public interest in effective law enforcement and the preservation of public investigatory resources is certainly sufficient to justify selective waiver to government officials. Where all of waiver doctrine is being adjusted to

226. See Marcus, *supra* note 199, at 1611 (noting that courts “[i]n increasing numbers, . . . have entered orders, often on stipulation, that provide that inadvertent production of privileged material through discovery is not a waiver”).

227. See May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 11.

228. See *Hopson*, 232 F.R.D. at 238 (describing the need for such agreements in the context of contemporary electronic discovery).

229. See May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at 2–3.

permit greater flexibility and less rigid adherence to common law confidentiality requirements, it would be counterproductive to tell private litigants that they may share with their “allies,” they may share with their private adversaries, but they will be punished for sharing with the federal government in the pursuit of its law enforcement responsibility. Such a disfavored status for cooperation with government investigations does not serve the public interest any more than the needless waste of private resources to review millions of documents for privileged communications.²³⁰

Critics of selective waiver to government entities also argue that the doctrine has the effect of creating a new “government investigation privilege” and that new privileges should be recognized only sparingly so as to decrease the amount of relevant information shielded from view in litigation.²³¹ At first blush, this argument may have some appeal.²³² Where selective waiver permits corporate clients to avoid sharing their protected information with third parties, despite disclosure to the government, the doctrine of selective waiver indeed takes on characteristics commonly associated with new privileges. Although it may be tempting to condemn the doctrine after framing it in this way, the effort to defeat selective waiver by marking it as a “new privilege” represents a semantic “distraction.”²³³

First and foremost, the only protection to be afforded to the shared information originates with the attorney-client privilege or work-product doctrine existing internally within the corporate client. Permitting disclosure to the government without waiver as to third parties, therefore, does not recognize protections for the government-corporation relationship existing independently of the attorney-client relationship. Thus, the protection envisioned by the doctrine emanates entirely from existing privileges.²³⁴

Furthermore, unlike other common law privileges that ultimately shield information from all adversaries and inhibit the truth-seeking process, the

230. The acceptance of more limited selective waiver protection for disclosures to banking regulators also demonstrates that the concept can function within contemporary privilege doctrine. 12 U.S.C.A. § 1828(x)(1) (2006).

231. See *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1197 (10th Cir. 2006); Dorris, *supra* note 187, at 806 (“The limited waiver rule thus creates an SEC-corporation privilege, with the attorney serving as the link between this new privilege and the traditional attorney-client privilege.”).

232. Indeed, the Tenth Circuit suggested that, in advocating a rule of selective waiver, Qwest was seeking the “substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege.” *In re Qwest*, 450 F.3d at 1197.

233. See Marcus, *supra* note 199, at 1641 (opining that “[w]here there has been . . . an undertaking [by the recipient of the protected information to hold it in confidence] . . . the charge that allowing the recipient to refuse to turn over privileged material creates a new privilege is a distraction”). Marcus also notes that other accepted exceptions to waiver exist without creating new “privileges.” *Id.*

234. *Id.* at 1640 (“[T]he real source of privilege protection is the existing privilege, and the real question is whether disclosure destroys that protection.”).

doctrine of selective waiver will ultimately increase the free flow of information between the corporate client and the government. Rather than burying relevant information from the view of all interested parties, the doctrine of selective waiver will bring to light existing and otherwise unavailable information for the benefit of the one adversary that always serves the public interest when it litigates. Selective waiver cannot be likened to a “new privilege” where its recognition will lead to a net increase in information available to resolve federal investigations. Therefore, selective waiver will further the core and predominant principle of American evidence—to which privilege is a notable and limited exception—that “the public . . . has a right to every man’s evidence.”²³⁵

The doctrine of selective waiver is not only consistent with the evolving judicial view of privilege and waiver, it is consistent with contemporary scholarly treatment of privilege and waiver. Commentators have suggested that we should reject the rigid and formulaic application of nineteenth-century privilege doctrine, preferring a framework for waiver analysis that takes into account the costs generated by waiver doctrine, as well as the rights of litigants not privy to the attorney-client relationship. In 1986, Professor Richard Marcus opined that waiver determinations ought not turn on the purposes of the attorney-client privilege or lost confidentiality, but rather should focus on the “unfairness flowing from the act on which the waiver is premised.”²³⁶ Under Professor Marcus’s theory of waiver, “there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.”²³⁷

Viewing waiver through this “fairness” lens supports selective disclosure of privileged communications to government investigators without a corresponding waiver of the privilege to third-party litigants. Because the disclosure of protected material to government investigators in no way disadvantages the civil adversaries of the disclosing entity, fairness does not require disclosure to these adversaries. Plaintiffs in a securities class action suit are no worse off than they would have been had the subject corporation

235. Wigmore, *supra* note 47, § 2192, at 64 (citations omitted).

236. Marcus, *supra* note 199, at 1607. Indeed, Professor Marcus notes that the *Upjohn* model of corporate attorney-client privilege fails to serve the fundamental purpose of encouraging frank and open communications to counsel by placing control over waiver exclusively within the hands of the corporate client. *Id.* at 1622. He argues that if the “traditional purpose” for the privilege does not explain privilege decisions in such contexts, that same traditional purpose of encouraging frank and open communications “does not provide a workable guideline for waiver decisions.” *Id.* Professor Marcus opines that the Supreme Court jurisprudence outwardly adheres to a utilitarian justification for privilege while simultaneously “ensuring a zone of silence for [the] effective and ethical preparation of cases.” *Id.* at 1624.

237. *Id.* at 1608.

not made any disclosures to the government.²³⁸ Unlike the situation in which a party makes a partial and misleading disclosure of privileged information to an opponent, full disclosure to the government in a previous investigation poses no threat of “truth garbling” in subsequent civil litigation. In fact, civil plaintiffs are often helped by successful government investigations, gaining quick access to important unprivileged information they might not have received had the company not cooperated fully with government officials.²³⁹ Even some courts that have rejected selective waiver have failed to recognize any unfairness to third-party civil litigants from application of the doctrine.²⁴⁰ In stating support for a rule of selective waiver, the SEC has likewise noted that private litigants suffer no harm as a result of such a rule.²⁴¹ Professor Marcus suggested that selective disclosure to one party but not another is “not the dangerous type of selective disclosure unless it leads to selective use of part of the material as evidence, thereby raising the truth-garbling concern. Otherwise, there seems to be little unfairness to B flowing from revelation to A, even if A and B are adversaries.”²⁴²

In addition, Professor Paul Rice, another noted scholar in the area of privilege law, has argued that confidentiality represents an atavistic and logically unsupportable component of privilege and waiver doctrine.²⁴³ He has tracked the erosion of the confidentiality requirement through judicial treatment of privilege and waiver and notes that confidentiality is necessary for maintenance of the privilege “more in theory than in practice.”²⁴⁴ He

238. See Letter from Gregory P. Joseph to Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. (Oct. 13, 2006), *available at* <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-003.pdf> (“Nor is it unfair to require civil plaintiffs to conduct their own discovery, without the benefit of materials supplied to facilitate governmental investigations . . .”).

239. See Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (“Private litigants may even benefit from the Commission’s ability to conduct more expeditious and thorough investigations. Indeed, many private securities actions follow the successful completion of a Commission investigation and enforcement action.”).

240. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1426 (3d Cir. 1991).

241. See Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6312 (“[P]reserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials.”).

242. Marcus, *supra* note 199, at 1639; see also Note, *supra* note 46, at 1655 (“Unfairness, therefore, should form no part of a waiver analysis of selective disclosure.”).

243. Rice, *supra* note 165, at 882 (“Judicial practices have made secrecy a non-essential element to the privilege’s *continuation*—suggesting that there is little justification for imposing it in the first instance as a condition for the privilege’s *creation*.”).

244. *Id.* at 897. In addition to recognizing the loss of confidentiality inherent in application of limited or selective waiver, Professor Paul Rice also cites the treatment of common interest circumstances, inadvertent waivers, and collateral estoppel effect of prior

argues in favor of taking the next step to eliminate the confidentiality requirement even at the creation of the attorney-client privilege, claiming that it is the holder's control over the use of his communications rather than their confidentiality which supports the privilege.²⁴⁵ According to Professor Rice, eliminating the useless tradition of confidentiality will serve to eliminate the significant costs it imposes in creating, maintaining, and ascertaining the existence of privilege.²⁴⁶ Consistent with this perspective, the voluntary loss of confidentiality inherent in selective waiver does not undermine core principles of privilege where the holder maintains control over the dissemination of the protected information following disclosure to the government.²⁴⁷

The doctrine of selective waiver is consistent with the evolving interpretation of waiver by the courts and rule makers and survives scrutiny under contemporary scholarly interpretation of the fundamental components of privilege and waiver. Thus, there remains little reason for the continued disfavored status of a doctrine that will protect and promote good corporate citizenship, as well as the public interest. Selective waiver is a concept whose time has arrived.

C. *Is Federal Selective Waiver Legislation the Answer?*

Some opponents of selective waiver may point to the Evidence Advisory Committee's decision to eliminate selective waiver from the proposed new evidence rule as a defeat of the doctrine on the merits. To the contrary, the Advisory Committee's action on selective waiver did not signal substantive rejection of the concept. Further, the decision to excise the selective waiver provision from the proposed evidence rule did not erect any barrier procedurally to the proposal.

First, the Advisory Committee did not reject the concept of selective waiver on the merits as a part of its action on Federal Rule of Evidence 502. The report that the committee sent to the Standing Committee declined to take any position on the doctrine, noting the public commentary on both sides of the issue.²⁴⁸ The committee recognized that some of the disputed issues raised by the doctrine, such as the alleged "culture of waiver" in federal law enforcement, were not evidence issues appropriate for rule-

privilege determinations as evidence of confidentiality's decreasing importance in the courts.
Id.

245. *Id.* at 888 ("The privilege's protection of the use of a client's statements to counsel is what encourages openness and candor in such communications.").

246. *Id.* at 897-98.

247. Recently, scholars have begun to move even further away from the rigid absolutism inherent in Dean John Henry Wigmore's formulation of privilege. Professor Edward Imwinkelried has suggested that an absolute privilege comes at too great a cost in lost evidence and that a qualified privilege could better serve societal interests. *See Imwinkelried, supra* note 200, at 180.

248. *See generally* May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17.

making action, but rather “political” issues best left to Congress. In an effort to give Congress the benefit of its research on the topic, the Advisory Committee provided a draft cover letter to Congress on selective waiver in its report to the Standing Committee, including draft language for a federal selective waiver statute.²⁴⁹ Therefore, the Evidence Advisory Committee in no way rejected selective waiver, but simply found the concept to be outside its jurisdiction.²⁵⁰

In addition, the severance of the selective waiver provision from proposed Federal Rule of Evidence 502 does alter fundamentally the procedural posture of selective waiver protection. Because selective waiver deals with the attorney-client privilege, Congress would have had to sign off on it even if it had proceeded with the remainder of Federal Rule of Evidence 502.²⁵¹ While taking no position on selective waiver, the Evidence Advisory Committee did a significant amount of work in marshalling the pertinent information on the doctrine and has packaged it for Congress to take over.²⁵² In light of all the interest in selective waiver and all the work that has been done on the proposal thus far, it appears certain that the Advisory Committee’s report on selective waiver and draft statutory language will find its way onto the agenda of the House or Senate Judiciary Committee for consideration at some point. Therefore, while the decision to drop the provision from the proposed evidence rule may put a selective waiver proposal on a slightly different procedural track, the issue remains very much alive. Given that Congress included a narrow selective waiver provision benefiting the banking industry in the Financial Services Regulatory Relief Act of 2006, there is clearly some congressional support for the subject.²⁵³ Still, it is certain that the sound and fury that animated the selective waiver discussion in the rule-making process will follow the concept to Congress.²⁵⁴

249. *Id.*

250. *Id.*; see also Broun & Capra, *supra* note 109, at 272 (noting that “[u]ltimately, the decision of whether to include the selective waiver section is the kind of public policy decision appropriately left to Congress”).

251. See 28 U.S.C. § 2074(b) (2000). Section 2074(b) provides that an “Act of Congress” is necessary for “[a]ny such rule creating, abolishing, or modifying an evidentiary privilege” *Id.*

252. See generally May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9.

253. 12 U.S.C.A. § 1828(x)(1) (2006).

254. See Broun & Capra, *supra* note 109, at 269 (noting the controversy that attended the selective waiver provision in the rule-making process). Interestingly, the selective waiver debate reflects overtones of the “power theory” of privilege that asserts that “the real roots of privilege law lie in the power of those benefiting from it.” Note, *supra* note 46, at 1493. The powerful corporate bar uniformly supports the provisions of Federal Rule of Evidence 502, which have been proposed by the Advisory Committee to ease the costs of complex discovery, and strongly opposes the selective waiver provision, which has been dropped. See generally May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17. “Despite the radical overtones of the power theory, many mainstream commentators have

It is true that there has been a preference for common law development of privilege and waiver doctrine in the federal arena, but common law development is ill suited to providing the protection sought by corporate selective waiver.²⁵⁵ Judicial recognition of the protection in one circuit would accomplish little for corporate actors amenable to suit in various jurisdictions. Forum shopping based upon access to otherwise privileged corporate information would be sure to follow sporadic judicial recognition of the protection.²⁵⁶ As commentators have noted, a legislative pronouncement binding in all circuits is the only mechanism by which the doctrine of selective waiver can be truly effective.²⁵⁷ Congress could take different paths to achieve selective waiver protection. Congress could enact selective waiver legislation to be included within the Federal Rules of Evidence even though the Evidence Advisory Committee recommended no action on the proposal.²⁵⁸ On the other hand, Congress could enact selective waiver legislation as a separate statute within the U.S. Code. Enacting selective waiver as part of Federal Rule of Evidence 502 or as a companion Federal Rule of Evidence would combine all comprehensive changes to traditional waiver doctrine in a single location easily accessible within the Federal Rules of Evidence and appears to be the preferable route.²⁵⁹

The draft language composed by the Evidence Advisory Committee provides an excellent starting point for selective waiver legislation. By

acknowledged the role of political power in the development of privilege law." Note, *supra* note 46, at 1494.

255. See *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1192 (10th Cir. 2006) ("[T]he rule Qwest advocates would be a leap, not a natural, incremental next step in the common law development of privileges and protections.").

256. Federal legislation also will resolve any concerns regarding the conflicting obligations imposed on the government by the Freedom of Information Act. See, e.g., Dorris, *supra* note 187, at 806–11 (discussing conflict between the Freedom of Information Act and a common law limited waiver rule that could be resolved through federal legislation); Janet L. Hall, Note, "Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work Product Doctrine, 1993 U. Ill. L. Rev. 981, 1002–03.

257. See Broun & Capra, *supra* note 109, at 217 ("If there is going to be a consistent solution, it is going to have to come by rule or statute."); Hall, *supra* note 256, at 1004 ("Ideally, Congress should consider passing legislation allowing a limited waiver rule . . ."); Raymond E. Watts, Jr., Comment, *Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a Comprehensive Limited Waiver Doctrine*, 39 Mercer L. Rev. 1341, 1352 (1988) (opining that a "statute is preferable to judicial action because it gives the explicit guidance needed by corporate counsel contemplating disclosure of confidential information").

258. Congress has previously enacted federal rules of evidence that were contrary to the recommendations of the Advisory Committee. See Fed. R. Evid. 413–415 (enacted as part of the Violent Crime Control and Law Enforcement Act of 1994); see also Broun & Capra, *supra* note 109, at 218 (noting that "the congressional enactment could be in the form of an addition to the federal rules").

259. On the other hand, one might argue that the Federal Rules of Evidence are the last place a state litigant would look to determine its rights and that a separate statute might make more sense if the provision is made applicable to state courts. See *infra* notes 262–63 and accompanying text.

protecting corporations disclosing privileged information to any and all federal entities, the draft statute would provide comprehensive protection that none of the previous regulatory or legislative selective waiver proposals would have achieved.²⁶⁰ The original selective waiver provision deleted from Federal Rule of Evidence 502 would have protected corporations cooperating with federal entities from findings of waiver in both federal and state courts.²⁶¹ In response to federalism concerns over altering existing waiver rules in state proceedings, the Advisory Committee has proposed two options for congressional consideration—one applicable in state and federal proceedings and one applicable only in federal court.²⁶² The protection to be afforded by federal selective waiver legislation will be meaningful only if applicable in state courts. Corporations are amenable to suit in state courts on numerous claims—selective waiver protection will achieve little in the way of increased corporate cooperation if companies cannot rely upon it in this arena as well.²⁶³ Further, while state court application may raise federalism concerns, scholars have suggested that it would raise no genuine constitutional problem.²⁶⁴ Thus, Congress will need to make the protection effective in state, as well as in federal, courts if selective waiver legislation is to accomplish its objectives.

Even with this additional coverage, federal selective waiver legislation may provide imperfect protection to disclosing corporations. Because federal offices and agencies would need to pass on privileged corporate information disclosed as otherwise required by law, some information could be shared beyond the federal agency to whom the corporation originally discloses.²⁶⁵ For example, under Federal Rule of Criminal Procedure 16 and the Supreme Court's holding in *Brady v. Maryland*, the government

260. Several previous proposals would have protected disclosures to the SEC only. *See supra* note 110. In addition, the Financial Services Regulatory Relief Act of 2006 provides selective waiver protection for disclosures to federal and state banking regulators only. 12 U.S.C.A. § 1828(x)(1) (2006).

261. *See supra* note 113 and accompanying text.

262. The draft statutory language makes applicability to state proceedings provisional by placing the term “state” in brackets throughout the draft statute. *See* May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 4.

263. *See* Broun & Capra, *supra* note 109, at 246 (“Controlling subsequent use of matters disclosed . . . to federal regulators in all courts, state and federal, is essential if such limitations are to be meaningful to the parties.”).

264. Although the application of selective waiver protection in state court proceedings may invite constitutional challenges, the Advisory Committee has concluded that the provision would pass constitutional muster if enacted by Congress pursuant to its Commerce Clause authority. *See* May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 5; *see also* Mitchell, *supra* note 107, at 739 (opining that “[s]elective waiver legislation that binds state courts would be a valid exercise of Congressional power provided that it is (1) clearly rooted in an enumerated federal power; (2) clearly evinces an intent to create a substantive right; and (3) clearly expresses an intent to bind state courts”).

265. May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. (Proposed 2006), at 9.

would be obligated to share privileged corporate information with any individual criminal defendant to the extent that the corporate information could be deemed “material” to the defense of the individual.²⁶⁶ Indeed, federal courts have ordered government disclosure of corporate internal investigation information on this basis.²⁶⁷ Further, although it would protect disclosing corporations from findings of waiver in favor of third-party litigants, selective waiver legislation would place no limitations on the use of protected corporate information by the federal entity receiving it.²⁶⁸ The federal entity could disclose protected information publicly even when not legally obligated to do so.²⁶⁹ The government’s use of privileged corporate information in a public trial or other proceeding could undermine a company’s interests in continued confidentiality. In rejecting selective waiver protection, the Tenth Circuit in *In re Qwest* recently echoed concerns raised by Professor Marcus some twenty years ago about widespread sharing and continued protection of information. Some may argue that the continued protection of information that has been shared in an open and notorious fashion could, in some circumstances, threaten to turn any proceeding in which the information is suppressed into a mockery of justice.²⁷⁰ There is concern, therefore, that disclosure of protected corporate information by the federal government could defeat a company’s ability to shield the information from civil adversaries even if selective waiver legislation is adopted.

The draft statute prepared by the Evidence Advisory Committee would resolve this potential concern with a bright-line rule protecting corporations from waivers in favor of all other parties “regardless of the extent of

266. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); Fed. R. Crim. P. 16(a)(1)(E)(i) (requiring the government to permit the defendant to inspect and copy or photograph documents that are in the possession, custody or control of the government and that are material to the preparation of the defense).

267. *See, e.g., United States v. Bergonzi*, 216 F.R.D. 487, 502 (N.D. Cal. 2003) (ordering the government to produce an internal investigation report prepared by outside corporate counsel and interview memoranda to former company executives being prosecuted for securities, wire, and mail fraud pursuant to *Brady* and Fed. R. Crim. P. 16).

268. May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 4–5. The draft statutory language provides that the rule “does not . . . limit or expand a government office or agency’s authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law.” *Id.* at Draft of Cover Letter to Congress on Selective Waiver, at 4. The committee note accompanying the draft statutory language also specifies that, “The rule does not purport to affect the disclosure of protected communications or information after receipt by the federal office or agency.” *Id.* at Draft of Cover Letter to Congress on Selective Waiver, at 5.

269. *Id.*

270. *See In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179, 1194 (10th Cir. 2006); Marcus, *supra* note 199, at 1641–42.

disclosure” by the government entity.²⁷¹ A draft committee note included with the statutory language specifies, “Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.”²⁷² This bright-line protection should be incorporated into any legislative proposal if selective waiver is to achieve its goal of encouraging corporate cooperation. If the legislative protection were entirely dependent upon the government’s ultimate use of the disclosed information, it would give a target corporation little assurance at the outset when it is weighing the costs and benefits of cooperation. The absence of clear statutory language regarding the effects of government use of corporate information would reintroduce the very risk that threatens to stifle corporate cooperation under current waiver doctrine. Thus, Congress should include clear language in any proposed statute prohibiting any waiver as a result of government dissemination of privileged corporate information.

Another hole in the selective waiver protection envisioned by the Evidence Advisory Committee involves privileged disclosures made to state government agencies and investigators. The selective waiver provision originally drafted for the Advisory Committee provided protection from findings of waiver based upon corporate disclosures to federal and state government entities.²⁷³ The protection for disclosures to state agencies was dropped from the proposed rule prior to its publication for notice and comment, and the draft statutory language to be sent to Congress similarly covers only disclosures to federal entities.²⁷⁴ It makes sense to limit the scope of federal selective waiver legislation to encouraging cooperation with the federal government in the pursuit of its oversight obligations.²⁷⁵ Federal legislation governing the ramifications of disclosures originally made at the state level would present significant federalism concerns.²⁷⁶ Furthermore, the absence of protection at the state

271. May 15, 2007, Report of the Evidence Advisory Committee, *supra* note 17, at Draft of Cover Letter to Congress on Selective Waiver, at 5.

272. *Id.*

273. See Broun & Capra, *supra* note 109, at 248, 262 (noting that subsection (b)(3) of the original draft of Federal Rule of Evidence 502 provided protection for disclosures to state regulators).

274. The committee omitted the protection at the state level because it believed that a federal rule governing disclosures at the state level would need “an especially strong justification” that was lacking. See *id.* at 262.

275. *Id.* at 266 (“Shouldn’t the decision of whether selective waiver is useful in limiting the costs of state investigations be left to the state?”).

276. Although Congress may have the power to enact a rule governing disclosures made at the state level, commentators have noted the comity concerns that arise in providing selective waiver protection for cooperation with state entities where the law of the state does not. *Id.* (“It might be thought too drastically contrary to comity to impose a federal law based on the premise of limiting the cost of government investigations, where the investigation is being pursued by a state entity in a state without a selective waiver provision.”). Like the federal courts, several state courts have rejected the protection of selective waiver under state

level will not dilute the protection afforded by federal selective waiver. Even without protection at the state level, companies will enjoy certainty with respect to their disclosures to federal investigators.²⁷⁷ Federal evidence law has played a crucial role in guiding the states regarding best practices, and federal selective waiver legislation could serve as a valuable model for state jurisdictions contemplating similar protections.²⁷⁸

In drafting language for a selective waiver statute, the Advisory Committee chose to omit any requirement that the government and cooperating corporation enter a confidentiality agreement in order to obtain selective waiver protection.²⁷⁹ The committee found that a confidentiality agreement between the government and the privilege holder was not a necessary precondition to a selective waiver rule because “[u]ltimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.”²⁸⁰

The goal of efficient law enforcement through corporate cooperation is not entirely unrelated to the presence of an agreement between the government and the disclosing party, however.²⁸¹ If the proposed

privilege doctrine, depriving cooperating companies of the benefit of their attorney-client and work-product protections when facing civil litigants. *See, e.g., McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 820–21 (Ct. App. 2004); *McKesson Corp. v. Green*, 610 S.E.2d 54, 56–57 (Ga. 2005) (denying selective waiver of attorney-client and work-product protections in connection with government investigations). It is possible that there is a legitimate federal interest in encouraging corporate disclosures to state investigators as well. The federal government could achieve valuable assistance from active corporate oversight by state governments. If so, the federal interest could also be served by selective waiver protection for disclosures to state entities. Indeed, Congress provided selective waiver protection for disclosures to both federal and state banking regulators in the Financial Services Regulatory Relief Act of 2006. 12 U.S.C.A. § 1828(x)(1) (2006) (providing that disclosures to federal and state banking regulators do not waive privileges as to private parties). For the sake of legislative efficiency, Congress should consider this issue as part of any selective waiver proposal.

277. As noted by the authors of Federal Rule of Evidence 502, “Most of the horror stories . . . have arisen in federal and not state proceedings.” Broun & Capra, *supra* note 109, at 262.

278. *See Mini-Hearing of the Advisory Comm. on Evidence Rules, supra* note 16, at 57–60 (testimony of Peter B. Pope, Deputy Att’y Gen. of the State of New York) (discussing investigation and prosecution of white collar crime at state level and efforts to obtain “a similar common law exception in New York State”).

279. *See supra* note 114 and accompanying text.

280. *See* May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 10.

281. At least one federal agency has suggested that the government’s willingness to agree to confidentiality is strongly tied to the government’s need for disclosure and cooperation to streamline an ongoing investigation. In withdrawing the proposed SEC selective waiver regulation initially drafted as part of the Sarbanes-Oxley Act, the SEC noted that it enters confidentiality agreements only when investigators feel that obtaining the protected information will save substantial time and resources and/or provide more prompt monetary relief to investors. *See Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003).

legislation is designed to encourage protected disclosures to the government in cases where such disclosures will significantly advance the efficiency and efficacy of a particular investigation, the government ought to have some continuing role in defining the class of cases where such disclosures are imperative and thus, where waiver protection is warranted.²⁸² The government's agreement that corporate information should be withheld from third-party litigants could signal its need for the corporate information disclosed. Further, if selective waiver legislation is to tread on established waiver doctrine only as narrowly as is necessary, it seems that some pre-disclosure agreement between the privilege holder and the government would demonstrate the holder's genuine *ex ante* concern over downstream dissemination in a manner most consistent with traditional concepts of privilege and waiver.²⁸³ Finally, requiring an agreement as to the effect of privileged disclosures to the government could serve to curtail alleged abuses of the federal cooperation policies currently under fire. Such an agreement could document whether the government "requested" the waiver, thus triggering the new procedural and substantive limitations on such requests outlined in the McNulty Memo.²⁸⁴ Therefore, some agreement between the corporate privilege holder and government seems most consistent with the purposes of the protection and traditional waiver doctrine.

The Advisory Committee rejected a confidentiality agreement requirement as unworkable and dangerous, expressing concerns that the very uncertainty the rule was designed to erase would be reintroduced by government inability to promise perfect confidentiality.²⁸⁵ The committee's fears are well founded. In order to make effective use of the

282. In rethinking the general approach to waiver doctrine and selective waiver specifically, Professor Marcus has noted that waiver analysis presents a problem of clearly identifying who can be within the "charmed circle" of privilege without working a waiver. Marcus, *supra* note 199, at 1641. According to Professor Marcus, the most reasonable formulation includes those actors who have agreed to maintain confidentiality. *Id.* Therefore traditional acceptance of confidentiality would limit selective waiver in a manner more consistent with the common law.

283. See Note, *supra* note 46, at 1653 (noting that, under this "free market approach" to limited waiver, "the only corporations to receive the limited waiver treatment would be the ones that would not have chosen to cooperate without the additional encouragement of special treatment").

284. See *supra* notes 178–81 and accompanying text. An agreement that would trigger such procedural hurdles for the government would create true mutuality. Agreeing to selective waiver protection would not be costless for the government. This could control any government willingness to agree to selective waiver protection in investigations where access to privileged documents can and should be avoided.

285. May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 9 ("If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work-product immunity.").

corporate disclosures, the government will be unable to agree to strict confidentiality provisions that would limit its ability to prosecute or regulate using the information provided.²⁸⁶ Courts may find government agreements retaining sufficient flexibility inadequate to trigger selective waiver protection for the disclosing entity. Illustrating the Advisory Committee's prediction, the Tenth Circuit rejected Qwest Communication's claim of selective waiver despite confidentiality agreements negotiated with both the SEC and the DOJ, finding:

The record does not indicate whether Qwest negotiated or could have negotiated for more protection of the Waiver Documents, or whether, as it asserted at oral argument, seeking further restrictions would have so diluted its cooperation to render it valueless. Be that as it may, the confidentiality agreements gave the agencies broad discretion to use the Waiver Documents as they saw fit, and any restrictions on their use were loose in practice.²⁸⁷

Concerned that parties relying on new selective waiver legislation would have their expectations disappointed by such detailed review of confidentiality agreements, the Advisory Committee drafted the statutory language without any agreement condition at all.²⁸⁸ While requiring a "confidentiality" agreement as part of the rule is unworkable for the reasons advanced by the committee, the statute could require pre-disclosure "mutual selection" of full selective waiver protection. Once such a "mutual selection" has been made by both the government and the privilege holder, the full protections of selective waiver granted by the legislation would apply. This would eliminate judicial autopsies of specific agreements that threaten to undermine the protection promised by the proposed legislation, but allow for continuing mutuality between federal entities and privilege holders on a case-by-case basis.

CONCLUSION

The time for federal legislation protecting parties that disclose privileged information in cooperation with federal government investigations is overdue. Exchanging leniency for cooperation represents a well-accepted and time-honored law enforcement technique. For over three decades, federal government entities have utilized that technique to encourage voluntary disclosures from corporate entities to facilitate efficient and successful investigations of organizational malfeasance. Such disclosures by corporate targets have proven to be valuable weapons in the fight against

286. Broun & Capra, *supra* note 109, at 269 (noting that the Advisory Committee found that the SEC needed "flexibility" in order to fulfill its enforcement obligations and that the SEC "could not be bound to absolute nondisclosure").

287. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1194 (10th Cir. 2006).

288. May 15, 2006, Report of the Evidence Advisory Committee, *supra* note 9, at Fed. R. Evid. 502 (Proposed 2006), at 9.

corporate fraud—a fight that has faced increasing challenges in recent years. Despite controversy over existing government cooperation policies, voluntary disclosure in some form promises to remain as an important feature in corporate investigations—with or without selective waiver protection.

Federal selective waiver legislation would close one big door that is wide open under existing law. Plaintiffs suing corporations beset by government investigations in parallel civil proceedings will no longer be permitted to demand protected corporate material simply because the company voluntarily provided it to the federal government. As evidenced by some of the recent cases rejecting corporate pleas for selective waiver to government officials in just such contexts, this is an area of vulnerability that is critical to cooperating corporations.²⁸⁹ This added protection will serve not only the corporate interest in effective resolution of agency investigations, but also the greater public interest in effective law enforcement and stable corporations participating in our market. Furthermore, selective waiver can fit comfortably into the contemporary flexible paradigm of privilege and waiver.

With a proposal that would offer comprehensive waiver protection finally on the table, corporate counsel appear poised to snatch defeat from the jaws of victory by raising a loud hue and cry in opposition. It is certain that the political controversy that animated the rule-making proceeding will follow the proposal to Congress. If the proposal's opponents are successful, they are most likely to perpetuate the universe in which we currently operate for their clients—namely, the continuation of federal policies that generate some privileged disclosures to the government with no selective waiver protection to provide cover for corporations faced with massive civil exposure. The public will be the ultimate loser, foregoing other corporate information that could preserve valuable federal resources and aid in the effective battle against corporate criminal activity.

289. See, e.g., *In re Qwest*, 450 F.3d at 1179; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

Notes & Observations