CORPORATIONS

PRIVILEGE IN PERIL: CORPORATE COOPERATION IN THE NEW ERA OF GOVERNMENT INVESTIGATIONS

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Introduction

The protection against disclosure afforded attorney-client communications and attorney work product, a pillar of the American legal system, is in peril. Three principal developments have coalesced to cause this state of affairs. First, the era of vigorous government regulation and prosecution of corporations continues unabated, making names like Enron, topics such as the internal investigation, and obligations such as Sarbanes-Oxley compliance common subjects of boardroom discussion. Second, government policies and practices adopted by the Department of Justice, the Securities and Exchange Commission, and the United States Sentencing Commission strongly encourage and, arguably, practically require a corporation interested in cooperating with a government inquiry to waive the protections of the attorney-client privilege and work-product doctrine that may attach to internal corporate investigations and other corporate legal activity. And third, the majority of courts has not recognized the concept of a limited waiver of privilege, so that a corporation wishing to share some privileged information with the government to facilitate the goals of law enforcement and corporate oversight cannot do so without risking being held to have waived, as to all third parties, applicable privilege or protections regarding the entire subject matter of the privileged material and communications disclosed. The latter concern is most acute in the context of threatened parallel civil litigation undertaken by opportunistic plaintiff"s counsel.

Facilitating legal compliance and reasonable government enforcement is a laudable goal. So too is fostering corporate self-policing and creating a responsible corporate culture. Encouraging corporations to investigate and share with the government the factual results of counsel's inquiry into questionable corporate conduct and practices can help achieve all of these goals. The challenge is to do so without sacrificing the core principles and protections of the attorney-client privilege and the work-product doctrine. As courts and commentators have recognized, the uncertainty surrounding the enforceability of agreements purporting to limit the scope of any waiver associated with providing privileged information to the government can serve as a disincentive for corporations to conduct internal investigations and provide the resulting facts to the government. Left unaddressed, this situation will not only do violence to a cornerstone of the legal system, but also, ultimately, impede the accomplishment of these important objectives.

This paper discusses the law, policy and practice relating to waiver of the attorney-client privilege and work-product protection in the context of government investigations, highlights the risks and what may be the unintended consequences flowing from the government's expectations regarding privilege waiver from cooperating corporate parties, and suggests means to remedy—or at least to mitigate—these risks, while at the same time fostering the achievement of important societal goals and preserving the integrity of these bedrock legal privileges.

Part I briefly defines the chief evidentiary privileges and forms of limited waiver involved when companies respond to government investigations, and surveys the actions taken by Congress and others that have put the privileges in jeopardy. Part II describes the three major positions taken by federal courts of appeals with respect to the validity of a limited waiver, and Part III describes some of the negative effects accompanying the legal uncertainty of voluntarily disclosing privileged materials to the government. Finally, Part IV both recommends legislative solutions to the problem and proposes several means by which corporate counsel might, in the absence of new legislation, maintain their companies' evidentiary privileges while still cooperating with the government.

I. Pressure To Cooperate And Waive Attorney-Client Privilege And Work-Product Protection In Connection With Government Investigations Of Alleged Corporate Wrongdoing

A. Evidentiary Privileges and Waivers: An Overview

The attorney-client privilege protects from discovery communications between an attorney and a client made in confidence in connection with the rendering of legal advice by the attorney.[1] The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[2] While the privilege extends to the communication of facts by a client to his attorney, it does not protect the underlying facts or records.[3]

A client or lawyer may waive the privilege expressly or impliedly by voluntarily disclosing confidential communications to a third party.[4] In general, disclosure of any portion of a privileged communication waives the client's privilege with respect to the entire communication, and indeed with respect to any other privileged communications on the same subject matter.[5]

The work-product doctrine, on the other hand, "is distinct from and broader than the attorney-client privilege,"[6] and extends beyond confidential communications between attorney and client to include "any document prepared in anticipation of litigation by or for the attorney."[7] Courts distinguish between "fact" work product, meaning the "written or oral information transmitted to the attorney and recorded as conveyed by the client,"[8] and "opinion" work product, which encompasses "any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories."[9] As with the attorney-client privilege, the work-product protection may be waived if the attorney or client voluntarily discloses otherwise protected materials to a litigation adversary.[10] Unlike waivers under the attorney-client privilege, however, waivers of the work-product protection often do not extend beyond the actual individual work product to additional work product on the same subject matter.[11]

Courts generally use the term "limited waiver" to describe an implied waiver of an evidentiary privilege that is limited to materials voluntarily disclosed to the government and limited to the government itself.[12] In other words, such a waiver, where recognized, destroys the attorney-client privilege or work-product doctrine only as to materials actually disclosed to the government, and only with respect to the government.[13] The privilege remains operative as to other communications or materials on the same subject-matter, and, with respect to parties other than the government, as to the communications or materials disclosed. As discussed below, however, relatively few courts have endorsed the concept of limited waivers; most have concluded that such efforts at limiting the scope of waivers are ineffective, even where the government explicitly agrees to such an arrangement.

B. Waiver As an Element of "Cooperation"

Regardless of how a company's waiver of its evidentiary privileges is labeled, it is clear that such a waiver increasingly is expected by the government from corporations who wish to cooperate with government investigations.[14] In the last several years, government enforcement agencies such as the DOJ and the SEC have announced policies requiring or strongly encouraging companies to waive their attorney-client privilege and work-product protection. Steps taken by agencies, in particular the U.S. Sentencing Commission, have put companies on notice that any refusal to waive such privileges and protections could be viewed as a failure to cooperate with a government investigation and be held against the company when determining whether to charge or how to sentence a company for its alleged wrongdoing.[15]

Companies must therefore risk waiving available privileges and protections as to third parties, and possibly as to the entire subject matter of communications or work product disclosed, by complying with a request for cooperation via disclosure to the government of privileged communications and protected materials. In the wake of recent high-profile corporate accounting scandals and other developments, the government may be expected increasingly to demand such cooperation. At the same time, in light of increased regulatory and enforcement attention, companies need the advice of their counsel more than ever. In order to ensure that companies can engage in a robust pursuit of enterprise while remaining compliant with legal requirements, the communication between lawyer and client needs to be unhindered by expectations of routine waiver. Thus, critically important government objectives are served by allowing limited waivers of privilege in order to allow companies to cooperate in enforcement matters.

1. DOJ: The Thompson Memorandum

Large companies typically respond to an allegation of internal wrongdoing by retaining outside counsel to investigate the allegation and report the results. As with the proverbial road paved with good intentions, that good-faith effort to learn the facts and obtain independent legal advice can, perversely, inure to a company's detriment.

The results of an internal investigation are routinely demanded by the government as part of the price of avoiding prosecution or of mitigating punishment. In 2003, the DOJ revised its guidelines for business prosecutions in a memorandum written by Deputy Attorney General Larry D. Thompson entitled "Principles of Federal Prosecution of Business Organizations" (the Thompson Memorandum).[16] The Thompson Memorandum moves a corporation's perceived cooperativeness to center stage in deciding whether to prosecute that corporation. As the memorandum makes clear, "[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[17]

Whether a business's level of cooperation is perceived by the DOJ as sufficiently "authentic" depends, in part, on "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection."[18] Failure to disclose to the government the results of an internal investigation and waive attorney-client and work-product protections, therefore, is deemed evidence of less-than-authentic cooperation.[19]

The Thompson Memorandum suggests that the government's demand for such information ordinarily should be limited to the "factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue" (it is assumed that this is meant to refer to advice contemporaneous with the conduct), but leaves open the possibility that, in certain circumstances, prosecutors should go so far as to "seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."[20] Current DOJ policy thus forces businesses to choose between cooperation that may include privilege waiver, potentially providing other litigation adversaries with

privileged material that they would otherwise not be entitled to receive, and facing the consequences of being deemed to have failed to cooperate in a government investigation.[21] As a practical matter, a finding of a broad subject-matter waiver or waiver as to third parties could substantially impair a company's defenses in related civil litigation and tilt the adversarial playing field decidedly against it.[22]

2. SEC: The Seaboard Report

The SEC in 2001 announced a policy that was later echoed by the (2003) Thompson Memorandum. In a formal release in which the SEC announced that it was taking no action against Seaboard Corporation because of Seaboard's "complete" cooperation with an SEC investigation, the Commission delineated a list of thirteen factors that it had considered in that matter and would in the future consider when determining whether to grant a company leniency in return for its cooperation.[23] Among the factors listed in the report (the Seaboard Report) were:

- Whether the company "promptly, completely and effectively" disclosed the existence of the alleged misconduct to the public and regulators;

- Whether the company conducted or had an outside entity conduct an internal review of the alleged misconduct; and

- Whether the company "promptly" disclosed the results of the review to the SEC, including "a thorough and probing written report detailing the findings of its review."[24]

In discussing disclosure of attorney-client communications and attorney work product to the Commission, the Seaboard Report notes that waiver of such privileges and protections might be necessary as part of a company's "cooperation."[25] The Commission acknowledges the general social interest in preserving these protections, and states that the Commission has in the past been willing to limit the scope of such waivers to the Commission only and to the specific communications or work product disclosed, but nevertheless suggests that waiver will be an important factor in assessing a company's cooperation.[26] Therefore, just as the Thompson Memorandum promotes waiver in criminal investigations, so too the Seaboard Report anticipates that companies seeking to cooperate with the government will waive privileges and protections that are at the heart of their relationship with their lawyers.

3. U.S. Sentencing Commission: Revised Sentencing Guidelines § 8C2.5(g) and Commentary

Recent revisions to the United States Sentencing Guidelines (the Guidelines) are also part of the trend producing pressure on corporations to waive attorney-client privilege and work-product protection. In revisions to the Guidelines that became effective in November 2004, the U.S. Sentencing Commission (the Sentencing Commission) modified the provisions applicable to corporate cooperation with government investigations.[27] The Guidelines have always permitted a reduction in culpability score if a company reports an offense and "fully cooperate[s] in the investigation."[28] In commentary recently added to § 8C2.5,[29] however, the Commission has made clear that full cooperation may include—indeed, in some circumstances may require—waiver of attorney-client privilege and work-product protections: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score. . .unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[30]

Like the Thompson Memorandum, the Guidelines grant prosecutors (and ultimately judges) substantial discretion in determining whether "full cooperation" requires a waiver of the attorney-client privilege and work-product protection. In practice, however, prosecutors may be inclined to request waivers with increasing frequency. Only if "all pertinent information" known to a company can be disclosed without a waiver, the commentary suggests, will cooperation be possible absent one.[31]

The Guidelines thus at least permit prosecutors to seek waivers aggressively from corporate defendants. Perhaps recognizing the potential negative consequences stemming from this policy, the Sentencing Commission indicated in its notice of final priorities for the Guidelines amendment cycle ending May 1, 2006, that it will review, and possibly again amend, "commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections."[32]

C. The Risks of Sharing Privileged Information with the Government

Sharing privileged information with the government is of course normally deemed a waiver of any protection applicable to materials disclosed for purposes of the government's investigation. There is also a substantial risk, however, that providing the government with attorney-client privileged communications and attorney work product will be deemed a waiver extending to all communications or work product relating to the same subject matter.[33] As a general rule, disclosure of attorney-client communications to a third party waives the privilege as to the subject matter of the communication. The government—either the governmental entity conducting the primary investigation or another governmental entity—may contend that by disclosing some privileged information, the company has waived the attorney-client privilege over any other communications concerning the same subject matter.

The risks of voluntarily disclosing confidential materials to the government are further heightened by the presence of parallel civil litigation.[34] Businesses cannot correct their own errors in order to comply with the law or voluntarily cooperate with government investigations without running the substantial risk that their confidential

information will be turned against them in subsequent civil lawsuits. Aggressive plaintiffs' lawyers often seek to obtain the materials disclosed by a company to the government as part of their efforts to establish civil liability. Thus, depending on the magnitude of the civil claims, this battle over evidentiary privileges can have serious financial consequences for a corporation and its shareholders.[35]

II. The Split of Decisional Authority Regarding Limited-Waiver Agreements

Federal case law on waivers of attorney-client privilege and work-product protection in the context of government investigations is currently "in a state of hopeless confusion."[36] Out of the welter of cases, three primary lines of authority have emerged.[37] Most federal circuits that have addressed the issue have held that the voluntary disclosure of protected materials to the government, even for the purpose of cooperating with an official investigation, operates as a waiver, and that any agreement with the government to maintain the confidentiality of such materials is ineffective. Only one jurisdiction, the Eighth Circuit, has accepted the theory of limited waiver absent an agreement with the government or reservation by the disclosing party, holding that the disclosure of privileged materials to the government for the purpose of cooperating with an official investigation does not constitute a waiver. A third group of courts has adopted a middle position, holding that the disclosure of protected materials to the government does not operate as a waiver if the purpose of the disclosure is to cooperate with an official investigation and the holder of the privilege or protection takes substantial steps to maintain its protection as to third parties.

A. Majority Rule: Disclosure to the Government Is a Waiver to All

Most circuits that have addressed the issue have held that voluntary disclosure to the government of otherwise privileged or protected materials constitutes a waiver, at least with respect to the materials produced, and perhaps with respect to all materials on the same subject matter.[38] In *Permian Corp. v. United States*, the D.C. Circuit explained:

> Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency. . . .
>
> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.[39]

The D.C. Circuit has consistently followed this position with respect to the attorney-client privilege,[40] but it has indicated a willingness to recognize a limited waiver with respect to the attorney work-product doctrine under certain circumstances.[41]

Numerous other circuits have followed the D.C. Circuit's lead. The First Circuit in *United States v. Massachusetts Institute of Technology* refused to "carve out" an exception to the general rule that voluntary disclosure implies a waiver of the attorney-client privilege, reasoning that such exceptions have "no logical terminus."[42] Although the First Circuit had previously suggested in dicta that it might recognize a limited waiver of the attorney-client privilege depending on the nature of any prior confidentiality agreement with the government, it has not yet found occasion to test this suggestion.[43] In addition to its holding on the attorney-client privilege, the First Circuit in *MIT* also held that disclosure waives work-product protection with respect to all parties and all future lawsuits.[44] While declining to consider whether such waivers constitute subject-matter waivers, the court stated that "disclosure to an adversary, real or potential, forfeits work product protection."[45]

Decisions in the Second Circuit are inconsistent. In some cases the court of appeals has adhered to a strict rule finding an implied waiver of the attorney-client privilege if a party discloses privileged materials to the government,[46] while in others it has concluded that the circumstances render recognition of such a waiver inappropriate.[47] In addition, with respect to the attorney work-product doctrine, *In re Steinhardt Partners, L.P.* specifically rejected the idea that work product can be subject to limited-waiver agreements, reasoning that "[a]n allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine."[48] The court in *Steinhardt* noted, however, that it was unwilling to adopt a *per se* rule that all voluntary disclosures to the government waive the work-product protection. The court stated that it might recognize a limited waiver when "the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or 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."[49]

The Third Circuit, in contrast, has been straightforward in its rejection of limited waivers. In *Westinghouse Electric Corp. v. Republic of the Philippines*, the court firmly rejected limited waivers with respect to both the attorney-client privilege and the work-product doctrine.[50] In particular, the court reasoned that neither the fact that the documents were disclosed pursuant to a subpoena nor the fact that the DOJ had agreed to maintain the confidentiality of the materials altered the traditional rule that "a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[51] The court concluded

that "disclosure of work product to the SEC and to the DOJ waived the work-product doctrine as against all other adversaries."[52]

Similarly, the Fourth Circuit has rejected the concept of limited waiver of attorney-client privilege and non-opinion work-product protection. In *In re Martin Marietta*, the court held that by presenting the United States Attorney with a position paper opposing indictment, the company waived the attorney-client privilege that otherwise attached to the position paper and to "the underlying details" referenced in the paper.[53] The court also concluded that the company "has impliedly waived the work-product [protection] as to all non-opinion work-product on the same subject matter as that disclosed."[54] The Fourth Circuit made clear, however, that the subject-matter waiver did not extend to opinion work-product.[55]

The Sixth Circuit likewise has declined to recognize the limited waiver of the attorney-client privilege or attorney-work-product doctrine.[56] After surveying the relevant case law, the court in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation* concluded that a limited-waiver agreement "has little, if any, relation to fostering frank communication between a client and his or her attorney."[57] Accordingly, the court reasoned that "any form of [limited] waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on the attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'"[58] Further, because the court found "no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege," the court applied the same strict waiver rule to the attorney-work-product doctrine.[59] "'[T]he standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege'—once the privilege is waived, waiver is complete and final."[60]

Finally, the Ninth Circuit also has addressed the issue of limited waivers, although only in the context of litigation between private parties. In *Weil v. Inv./Indicators, Research and Mgmt.*, one of the parties inadvertently disclosed to a party opponent "the substance of Blue Sky counsel's advice regarding registration of Fund shares pursuant to the Blue Sky laws of the various states."[61] Applying the rule that "voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject," the court held that the disclosure (inadvertent or not) waived the privilege.[62] In contrast to those courts endorsing the principle of subject-matter waiver, however, the Ninth Circuit restricted the scope of the waiver to "communications about the matter actually disclosed."[63]

In sum, the D.C., First, Second, Third, Fourth, Sixth, and Ninth Circuits have adopted the rule that disclosure of privileged materials to a third party operates as a waiver of the attorney-client privilege,[64] with the First, Third, Fourth, and Sixth Circuits extending the rule to the attorney-work-product doctrine.[65]

B. Minority Rule: Disclosure to the Government Is Not a Waiver

In *Diversified Industries, Inc. v. Meredith*, the Eighth Circuit adopted the contrary position that the voluntary disclosure to the government of materials protected by the attorney-client privilege waives the privilege only as to the government.[66] The court reasoned that (1) disclosure occurred in "a separate and nonpublic SEC investigation" and (2) "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[67] No other circuits have joined this view, although certain district courts have followed the Eighth Circuit's reasoning.[68]

C. Middle Ground: The Relevance and Effectiveness of a Limited-Waiver Agreement

Still other courts have indicated the possibility of a compromise position. The First and Second Circuits have suggested in dicta that the disclosure of privileged materials to the government might not operate as a waiver of the privilege if the purpose of the disclosure were to cooperate with an official investigation and if the holder of the privilege or protection were to enter into a limited-waiver agreement with the government stating that it did not intend a waiver as to third parties.[69]

The District Court for the Southern District of New York and District Court for the District of Colorado have both echoed this view, stating that they would recognize a limited waiver if, when producing the materials to the government, the party asserting the attorney-client privilege reserves the right, through a protective order, stipulation, or other express means, to assert the privilege in subsequent proceedings.[70] The U.S. District Court for the Southern District of New York explained this position in the following terms:

> "It does not appear that such a reservation would be difficult to assert, nor that it would substantially curtail the investigatory ability of the [government]. . . . Moreover, a contemporaneous reservation or stipulation would make it clear that. . .the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation."[71]

This compromise position "balance[s] the policy goal of encouraging cooperation with the government. . .with the strict requirement of confidentiality."[72] This position appears

to offer a promising avenue for reconciling the competing pressures on today's corporations. Despite its promise, however, no federal court of appeals has yet applied it to uphold a limited waiver.[73]

Federal courts are clearly not uniform in their treatment of the question of whether and to what extent voluntary disclosure to the government of privileged or otherwise protected materials will operate as a waiver of the privilege or protection as to all third parties, or as to the subject matter of the materials disclosed. Indeed, some circuits, like the Second, are beset with intra-circuit conflicts. These inconsistent approaches have created uncertainty and confusion for companies confronted with demands for waiver of privilege in connection with government investigations.

III. Consequences of Not Enforcing Limited-Waiver Agreements with the Government

A. The Uncertain Validity of Limited Waivers Can Discourage Businesses From Identifying and Correcting Their Own Mistakes to Achieve Full Compliance With the Law

The government is demanding more cooperation at the same time that it is expecting improved corporate-governance practices. These goals of punishment and compliance, however, turn out to be self-contradictory if voluntary cooperation with the government unintentionally waives privileges over confidential material produced by businesses themselves. The legal uncertainty surrounding limited waivers can discourage businesses from communicating frankly with their counsel, at least in ways that are memorialized, and from affirmatively investigating and reporting on irregularities, mistakes, and outright wrongdoing.

For instance, because the validity of a limited waiver is uncertain, while the probability of being required as part of cooperation with the government to disclose to it a written or other report resulting from an internal investigation is high, businesses may be less likely to expend the money and other resources necessary for an independent analysis and report. The critical importance of preserving evidentiary privileges in order to safeguard the corporation from potentially ruinous civil litigation may thus render the choice "not between narrower and wider disclosure, but between a disclosure only to government officials and *no disclosure at all*."[74]

Civil litigants may argue that since certain federal statutes give citizens the right to act in some circumstances as "private attorneys general,"[75] the fact that they may ultimately gain access to an internal investigative report should not enter the calculus when determining the validity of limited-waiver agreements. These "private attorneys general," however, stand at cross-purposes with the government in that they demand access to information that, at least in some instances, would not exist without prior government assurances of confidentiality. A corporation's decision to produce otherwise privileged material may depend on the degree of its confidence that disclosure to the government does not mean disclosure to anyone else. Where the high risks of compulsory disclosure make it less likely that a corporation will even produce such materials, civil litigants have no real basis to complain if a court sustains the validity of a limited-waiver agreement with the government. "Insofar as the existence of the privilege creates the communication sought, the exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege."[76] Even if denied discovery of an internal report or other privileged material, in other words, private civil litigants are most likely no worse off than if the corporation had known that disclosure to the government would be unprotected and, therefore, decided not to create the report in the first place. And this result does not compromise the fairness of civil proceedings, because the underlying factual documents and employees are still accessible during discovery.[77] Rather, recognition of an effective limited waiver simply avoids tilting the playing field in civil litigation unfairly in favor of plaintiffs.

B. The Uncertain Validity of Limited Waivers Can Discourage Businesses From Voluntarily Cooperating With Government Investigations

The uncertainty regarding principles of limited waiver also can dampen corporations' enthusiasm for cooperating with government investigations. As a simple matter of cost-benefit analysis, "[f]aced 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."[78] This result surely does not further the aim of law enforcement. Some voluntarily disclosed information is irreplaceable: in certain instances, "[t]he *only* way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it."[79] Other means may not be available because it is not the case that "all privileged information has a non-privileged analogue that is discoverable with effort."[80]

Law enforcement's dependence on voluntary cooperation places in sharp relief the government's requests for waiver of attorney-client privilege and work-product protection. It makes good sense to encourage businesses to police their own activities and to report their findings to responsible government officials. Perhaps, given the high-profile abuses of a relatively few corporations, promoting genuine corporate self-governance will come to be viewed as a corporate obligation, notwithstanding the potential adverse consequences as to civil liability under current limited-waiver doctrine. Relying on such a development, however, ignores the fact that voluntary compliance with the law is now a staple of effective law enforcement regarding business activity. This situation presents a need for creative solutions that appropriately balance a respect for the law with the benefits that confidentiality brings to attorney-client relationships.

Without voluntary compliance, the complexity of federal regulations affecting business activities would require the dedication of federal and other law enforcement resources needed for other urgent priorities. Moreover, businesses themselves have a commercial interest in a playing field leveled by general business compliance with the law. Illegal behavior by a few can competitively disadvantage the majority of law-abiding companies. Thus, the latter, which maintain compliance with rigorous internal programs, can be seen as freeing public enforcement resources for use in ferreting out those who would cheat in commercial competition through law-breaking. Internal investigations, often coupled with voluntary disclosures to enforcement authorities, have become featured aspects of corporate compliance efforts. It only makes sense, as a matter of both public and legal policy, to reward and encourage companies to police proactively their own business activities. Because the current state of the law governing limited privilege waiver does not so encourage business, consideration of change is in order.

IV. Recommended Solutions and Steps to Mitigate Adverse Consequences of Waiver

The federal government's demand for "authentic cooperation," including the voluntary disclosure of protected materials, combined with the uncertainty regarding whether such disclosure will be extended to third-party civil litigants, create tensions for corporations and their counsel where there is a desire to cooperate that is counterbalanced by a duty to protect the shareholders' interests from the adverse consequences of civil litigation, including parasitic lawsuits based principally on a business's internal investigations and voluntary disclosures. Under the status quo, good-faith efforts to retain outside counsel, investigate the facts, and report the results for the guidance of corporate officers and directors may place the corporation in peril of third-party plaintiffs whose discovery efforts will be aided by the corporation's attempts to cooperate with the government.

Decisions to date, at least in courts outside the Eighth Circuit, offer little comfort for corporations contemplating a claim of privilege on a limited-waiver theory after disclosure. The conflicting approaches followed by the various circuits amply support review of the validity of limited waivers by the U.S. Supreme Court.[81] Given the uncertainties of both the timing of any such review and of the outcome of judicial intervention, however, consideration of a legislative solution to this critical legal and public policy issue is in order. Two possible legislative solutions, each discussed in detail below, are an amendment to the Securities Exchange Act of 1934 and an amendment to the Federal Rules of Evidence. Pending the adoption of such legislative fixes, however, corporate counsel might wish to adopt alternative strategies, also discussed below, that seek to provide the level of cooperation that the government now requests, while at the same time protecting the company's evidentiary privileges to the greatest extent possible.

A. Amend the Securities Exchange Act of 1934

As noted above, the SEC has indicated on several occasions that it appreciates the benefits to agencies and risks to parties of disclosing protected material. In the Seaboard Report, when discussing a company's decision to waive the attorney-client privilege and work-product protection, the Commission noted that it "recognizes that these privileges, protections and exemptions serve important social interests."[82] The Commission further noted that it had filed an amicus brief arguing that the waiver of the privileges with respect to the SEC did not necessarily waive them as to third parties, and stating that the SEC agrees that, in certain circumstances, a witness's production of protected information does not constitute a subject-matter waiver that would entitle the Commission to further privileged information.[83]

In both 2003 and 2004, acting with the SEC's support, Congress proposed legislation as part of the Securities Fraud Deterrence and Investor Restitution Act that, if adopted, would have implemented the SEC's stated position by explicitly recognizing the validity of limited waivers. The most recent version, proposed in 2004, included the following provision regarding limited waivers:

> Notwithstanding any other provision of law, whenever the [SEC] or an appropriate regulatory agency and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission or the appropriate regulatory agency any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission or the appropriate regulatory agency to which the document or information is provided.[84]

Adding such a provision to the Securities Exchange Act of 1934 would permit disclosure of protected information to government investigators and auditors without forcing a company to waive its protections as to other parties and other materials on the same subject. Although the DOJ neither supported nor opposed the provision, the SEC unequivocally supported it. Testifying on behalf of the SEC, former Director of the Enforcement Division Stephen M. Cutler argued that adoption of the provision "would help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation to voluntarily produce to the Commission important information."[85]

Unfortunately, the proposed legislation never became law. On June 1, 2004, the bill was discharged from the House Judiciary Committee and placed on the calendar; however, the 108th Congress adjourned without taking further action

on the bill.[86] It is unclear whether the current Congress will revive the bill or how a reintroduced bill would fare.

B. Amend the Federal Rules of Evidence

As an alternative to the stalled amendment to the Securities Exchange Act, Congress could provide a uniform rule of decision regarding limited-waiver agreements in all federal courts by exercising its power to amend the Federal Rules of Evidence. While potentially controversial,[87] such an approach would have the virtues of uniformity and clarity. Given Congress's apparent willingness to federalize attorney-client relations to a certain extent,[88] there should be little legislative reluctance to expressly recognize limited waivers by amending the Federal Rules of Evidence. Such an amendment might take the following form:

> **Rule 502. Limited-Waiver Agreements**
>
> (a) DEFINITION. For purposes of this section, a "limited-waiver agreement" means a written agreement between (i) a person or entity and (ii) a Federal Government entity, agency, or authority empowered by law to conduct criminal investigations or to pursue civil enforcement penalties or damages, pursuant to which (1) the person or entity provides to the Government entity confidential information or materials that it controls and that it reasonably believes to be privileged or immune from discovery and therefore not subject to compelled disclosure; (2) the Government agrees to protect the information or materials from disclosure to third parties; and (3) the person or entity providing the information or materials explicitly limits any potential waiver of immunities or privileges that would otherwise be wholly or partially waived by such disclosure.
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> (b) PROTECTION OF INFORMATION. Notwithstanding any other provision of law, disclosure of information or materials to the Government subject to a limited-waiver agreement does not constitute a waiver of any applicable right, privilege, protection, or immunity, such as the attorney-client privilege and work-product protection, that would apply to the information or materials absent disclosure to the government, unless that waiver is expressed in the limited-waiver agreement. No court of the United States shall have jurisdiction to hear any motion, claim, or other action to invalidate a facially valid limitation of waiver created by this section.

Such a rule could be the basis for expressly recognizing the validity of limited-waiver agreements, thereby affording certainty to a company that chooses to cooperate with a government investigation by disclosing confidential materials. Such recognition would clarify the muddled law of limited waivers by effectively endorsing the Eighth Circuit's opinion in *Diversified*, which recognized and encouraged the use of limited-waiver agreements.

With the law thus clarified, corporations would be encouraged "to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers,"[89] no longer fearing that conducting such investigations and then cooperating with the government might lead to the waiver of their privileges and protections with respect to third parties. Corporations would be further encouraged to institute robust compliance programs that include the regular use of outside counsel to investigate and report on allegations of errors and wrongdoing, and then cooperate voluntarily with government investigations where appropriate. Instituting this new rule of evidence, therefore, would have the dual benefit of encouraging more effective self-regulation and internal best-practices, and at the same time greatly increasing the likelihood that corporations will cooperate with the government should possible criminal activity actually arise.[90]

C. Strategies to Cope with the Current Dilemma

Either of these two legislative solutions, even if proposed (or re-introduced, in the case of an amendment to the Securities Exchange Act), would of course take substantial time to enact. The practical reality is that corporate counsel will continue to be faced with the choice of waiving the company's attorney-client privilege and work-product protection or exposing the company to additional liability, or at least to the loss of opportunity to mitigate penalties arising from the government's investigations. Even when presented with such a dilemma, however, there are steps that a company can take to safeguard its protections and still cooperate with the government.

1. Negotiate a Limited-Waiver Agreement

Any time a corporation intends to disclose privileged or protected information to the government—and in particular, when it plans to share the results of an internal investigation into potential wrongdoing—it should first negotiate a limited-waiver agreement with the government. Although most courts presented with arguments for the principle of limited waiver have rejected them, some courts, as discussed above, have recognized the harm that earlier jurisprudence is causing. Further, it is worth noting that while arguments for the principle of limited waiver have most often been rejected, the cases involving negotiated agreements (as opposed to an argument that the principle should be recognized absent an agreement by the government to maintain the confidentiality of the materials disclosed) are relatively few. Moreover, in the majority of cases discussing the possibility of limited-waiver agreements, the courts have identified an inconsistency between a term or terms of the negotiated agreement and the principle itself.[91]

Under a negotiated limited-waiver agreement, the company would agree to disclose arguably privileged or

protected materials in exchange for the government's assurance that it will not disclose those materials to any third party. Particular attention should be paid to the government's rights under the agreement: limited-waiver agreements are ineffective if they are conditional or if the government has discretion to unilaterally disclose the information obtained under the agreement.[92] Negotiating a limited-waiver agreement (as opposed to simply hoping that a court will subsequently recognize the principle of limited waiver absent any such express agreement) has the benefit of, in effect, enlisting the government in support of the agreement's enforceability. Moreover, if a dispute regarding waiver arises in another matter, the limited-waiver agreement can serve as primary evidence of the corporation's lack of intent to waive more broadly as to third parties. There is thus no harm, and there may be some benefit, in attempting to negotiate a limited-waiver agreement with the government prior to any disclosure. A corporation should in any event, even if the government is unwilling to enter into a limited-waiver agreement, expressly reserve the right to assert available privileges and protections in the future.[93]

2. Adopt Strategies to Limit Disclosure and Potential Waiver to Facts Only

Regardless of whether the government is willing to negotiate a limited-waiver agreement, a corporation could offer to produce only non-opinion work-product to the government—for example, the factual results of an internal investigation—and withhold all opinion work-product and communications protected by the attorney-client privilege. Offering to provide only the factual results of an investigation may be regarded by enforcement authorities as sufficient "cooperation," while diminishing the risk of waiver of privilege or work-product protection that a broader disclosure would entail.[94] While such disclosure probably provides the government no more than what a court would allow third parties to discover, even if a limited waiver were otherwise recognized as protecting confidential attorney-client communications or opinion work-product,[95] the government likely will wish to conduct its own legal analysis of the import of relevant facts in any event, and may be satisfied by such a disclosure.

If the government deems an offer of the facts themselves to be insufficient cooperation, a corporation might take the further step of providing a "roadmap" to the government in addition to the factual results of the investigation. Such a roadmap could provide the government guidance as to what documents bear close examination, what people potentially to be interviewed are most likely to have significant information, and what leads may be pursued most productively. This method can offer a trail for the government to follow that will allow it to identify the nature and extent of possible wrongdoing and those responsible for such conduct.[96] The virtue of such guidance is that it may be viewed as a more sincere or "authentic" form of cooperation, while arguably preserving the corporation's privileges.

At the same time, it is important to recognize that analytical guidance might be viewed as opinion work-product, and that providing too much guidance to the government may be deemed a subject-matter waiver of protection as to such work product.[97] A corporation's ability to limit the scope of its waiver will likely depend at least in part on how its agreement with the government characterizes the guidance the corporation will provide. Thus, pointing the government in the right direction is arguably a limited waiver; telling the government the specific legal significance of disclosed materials could constitute a subject-matter waiver as to opinion work-product.

Each of the two recommendations above requires, at a minimum, that the corporation and its counsel be diligent in keeping fact-based, non-opinion work-product separate from opinion work-product and other communications protected by the attorney-client privilege. One effective way to achieve this separation is for the corporation's counsel to open separate matters, one (or more) for a non-privileged factual inquiry, and one (or more) for legal analysis and opinion work-product necessary to advise the corporation on its potential liabilities, defenses and options to address government investigations and potential civil litigation. Creating and maintaining separate matters will provide support for the position that the work performed in each of these contexts remains separate, and that the fruits of counsel's work in the factual investigation context can be disclosed to the government without waiving the privilege as to opinion work-product created in a separate matter.

This principle of separation might be taken further by engaging separate firms to conduct the factual inquiry and to provide legal analysis and advice. While this approach likely will add expense, it may be far less costly than the "price" attached to a wholesale waiver. The confused state of the case law and the increasingly demanding regulatory environment call for creative approaches that, while altering current "standard" practices, will afford a company maximum legal protection for its confidential materials. Bifurcating the tasks of outside counsel in conducting an internal investigation is one such method designed to facilitate the release of the facts to the authorities without operating as a waiver of evidentiary privileges that attach to legal advice and analysis.

Finally, consideration should be given to openly identifying any factual investigation or inquiry and its results as non-privileged from the outset. A corporation and its counsel may make clear to government authorities upon commencing an investigation of potential wrongdoing that the corporation makes no claim of privilege or other protection regarding the factual investigation. Absent any such claim or assertion of privilege or protection from compelled disclosure, voluntary disclosure of the factual results of such an investigation to the government should not result in a determination that there has been a waiver of any privilege or protection.

Conclusion

The current state of the law concerning waiver of attorney-client privilege and work-product protection in the context of cooperation with government inquiries serves to frustrate the important societal objectives of, first, uncovering wrongdoing and encouraging companies to police themselves, disclose their own wrongdoing and cooperate with government inquiries, and, second, of preserving privileges designed to ensure that lawyers and clients can communicate unfettered by the specter of disclosure of the client's thoughts and the lawyer's work product. Legislation is probably needed to restore the vitality of the imperiled attorney-client privilege and enable the candid communication necessary to both of these objectives. Until legislatures are persuaded to act in this regard, however, companies must adopt other strategies to deal with the competing pressures.

The current state of affairs presents an important test for responsible public officials. The existing tension between what enforcement officials have determined will constitute "cooperation" and what they expect internal self-policing to accomplish ill serves both corporations and the public. Absent reform, business entities will continue to suffer under the Hobson's choice that current public and legal policy has created.

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Footnotes

[1] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

[2] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[3] *Id.* at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of underlying facts by those who communicated with the attorney. . . . 'The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into this communication to his attorney.'") (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).

[4] *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002).

[5] *See, e.g.*, *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (waiver of privilege for position paper waived privilege protection for communications underlying it); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter."); *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); ("[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.").

[6] United States v. Nobles, 422 U.S. 225, 238 n.11 (1975).

[7] *In re* Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir. 1986); *see also* Fed. R. Civ. P. 26(b)(3) (establishing work-product defense in federal civil litigation); Fed. R. Crim. P. 16(a)(2), (b)(2) (stating defense in federal criminal cases).

[8] *In re* Antitrust Grand Jury, 805 F.2d at 162.

[9] *Id.* at 163–64.

[10] *See Nobles*, 422 U.S. at 239 & n.14; Westinghouse Elec. Co. v. Republic of the Philippines, 951 F.2d 1414, 1429-30 (3d Cir. 1991) (holding that work-product protection was waived where a company made disclosures to the Securities and Exchange Commission (SEC or the Commission) and the Department of Justice (DOJ) during the course of investigations).

[11] *See, e.g.*, *In re* United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307 (D.D.C. 1994); Fleet Nat'l Bank v. Tonneson Co., 150 F.R.D. 10, 16 (D. Mass. 1993); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1190-91 (D.S.C. 1974). *But see Martin Marietta*, 856 F.2d at 625 (holding that once the corporation made testimonial use of privileged documents by disclosing them to the government during settlement negotiations, the corporation "impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed.").

[12] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (*en banc*) (holding that the voluntary disclosure of otherwise privileged materials in a "separate and nonpublic SEC investigation" effected "only a limited waiver of the privilege").

[13] Under the heading of "limited waiver," some courts distinguish between a "selective" waiver, which "permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties," and a "partial" waiver, which "permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." *Westinghouse*, 951 F.2d at 1423 n.7 (citations omitted); *accord Columbia/HCA*, 293 F.3d at 294 n.5. Because partial waivers seldom arise in practice, this paper adheres to the more generic (and widely used) term "limited waiver" as shorthand for the claim that a third party may not discover privileged materials voluntarily disclosed to the government pursuant to an official investigation.

[14] There is no general duty to cooperate or make disclosure to the government in the context of an investigation. In appropriate circumstances, a company can thus reasonably elect not to disclose privileged material.

[15] The policies and practices of these government entities are not the only factors contributing to erosion of the attorney-client privilege. For example, recent legislation imposes requirements on publicly traded companies' outside auditors that, in practice, have led to demands by those auditors that the companies waive attorney-client and work-product privileges as part of any audit of the companies' financial statements. *See, e.g.*, 15 U.S.C § 7262(b) (2004).

[16] Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys re: "Principles of Federal Prosecution of Business Organizations," (January 20, 2003), *available at* <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm>.

[17] *Id.* at 1.

[18] *Id.* at 3.

[19] *Id.* at 6-8.

[20] *Id.* at n.3.

[21] In what one hopes will be a move by the DOJ to revisit its policy on requiring waivers, on October 21, 2005, acting Deputy Attorney General Robert D. McCallum, Jr. directed all United States Attorneys and Heads of Department Components to establish written waiver review procedures for their districts or components. Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to United States Attorneys and Heads of Department Components re: "Waiver of Corporate Attorney-Client and Work Product Protection," (October 21, 2005). The memorandum requires federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking waivers of the attorney-client privilege or work product protection. The memorandum also acknowledges that waiver procedures adopted in different districts or departmental components may vary. The memorandum does not indicate that the DOJ will stop requiring waivers of attorney-client privilege and work product protection from business organizations. By elevating the decision to request such waivers to the discretion of individual United States Attorneys or other supervisors, the memorandum might fairly be read as signaling closer scrutiny of such requests and providing an avenue for a more limited use of them.

[22] The DOJ, unsurprisingly, does not view the impact of the Thompson memorandum in the same way, and denies that privilege waivers are being forced on companies. *See* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587, 597-98 (2004); Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporation under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, Vol. 51, No. 6, United States Attorneys' Bulletin (Nov. 2003).

[23] *See* Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship and Cooperation to Agency Enforcement Decisions, Securities Exchange Act of 1934 Release No. 44969, Accounting and Auditing Enforcement Release No. 1470, October 23, 2001.

[24] *Id*.

[25] *Id* n.3.

[26] *Id*. In fact, since the Seaboard Report was issued, its factors have been used much more often as a sword by the SEC to fine companies for lack of "cooperation" (including cases where the SEC found that there was no underlying wrongdoing) than as a shield by companies to avoid being charged or receive reduced charges.

[27] In a recent holding, the Supreme Court concluded that Guidelines are advisory, rather than binding, thus somewhat reducing their influence. United States v. Booker, 125 S. Ct. 738 (2005). How this modification will affect the application to corporate defendants of the section and commentary in question remains to be seen.

[28] U.S.S.G. § 8C2.5(g).

[29] Section 8C2.5, "Culpability Score—Self Reporting, Cooperation, and Acceptance of Responsibility," deals with determining the "culpability score" for an organizational defendant.

[30] Federal Sentencing Guidelines Manual § 8C2.5(g), comment.

[31] It bears note, of course, that the Guidelines apply only after a corporation is convicted of an offense. Nevertheless, they may influence the government's decisions, and a corporation's conduct, in the course of an investigation or case.

[32] *See* 70 Fed. Reg. 37145 (June 28, 2005). The Sentencing Commission has received several comment letters regarding the privilege waiver issue, including one signed by an author of this paper, among other former senior DOJ officials. *See* Letter from Former Department of Justice Officials to the Honorable Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission (Aug. 15, 2005), *available at* <http://www.abanet.org/poladv/dojlettertoussc.pdf> (urging the Sentencing Commission to remedy the Guidelines amendment dealing with privilege waiver because it is "eroding and weakening the attorney-client and work-product protections afforded by the American system of justice").

[33] *See* n.5, *supra*.

[34] *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.").

[35] It bears note, however, that a business may not be able to shield relevant factual information in its possession from disclosure via a claim of privilege or protection in any event, even if materials reflecting that information constitute attorney work product. *See*, *e.g.*, Fed. R. Civ. P. 26(b)(3) (noting that "a party may obtain discovery of documents and tangible things. . .prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney. . .)" upon a showing of "substantial need" and an inability to obtain the substantial equivalent without "undue hardship"). Where a business's efforts to correct its errors and comply with the law involve an investigation into the facts of its potential wrongdoing, the facts it discovers thus may be discoverable by a civil adversary regardless of whether it discloses them to the government.

[36] *Columbia/HCA*, 293 F.3d at 295 (citation omitted).

[37] The Tenth and Eleventh Circuits have not yet ruled on the validity of limited-waiver agreements, although district courts in each circuit have issued holdings that may be interpreted as supporting a limited waiver. A district court in the District of Colorado upheld a

limited waiver of the attorney-client privilege because a bank "took substantial steps to ensure" confidentiality absent a formal agreement, the bank was not to obtain a benefit for itself, and the bank did not seek to protect the privilege against any other federal regulatory agency. *In re* M & L Bus. Mach. Co., Inc., 161 B.R. 689, 696 (D. Col. 1993). Similarly, the Northern District of Georgia held that attorneys approved of by the SEC to investigate were not performing legal services for the company and therefore no evidentiary privileges were waived. Osterneck v. E. T. Barwick Indus., 82 F.R.D. 81, 85 (N.D. Ga. 1979).

[38] *See* Permian Corp. v. United States, 665 F.2d 1214, 1219–20 (D.C. Cir. 1981); United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse*, 951 F.2d at 1425 (3d Cir.); *Martin Marietta.*, 856 F.2d at 623 (4th Cir.); *Columbia/HCA*, 293 F.3d at 302 (6th Cir.); *Weil v. Invest./Indicators, Research and Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981). *See also* Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003) (regarding waiver to defendant who happened to be the mayor).

[39] *Permian Corp.*, 665 F.2d at 1221.

[40] *Id.* at 1222 (declining to enjoin the release to the U.S. Department of Energy of privileged documents, which an oil company voluntarily disclosed to the SEC under an agreement that the SEC would not divulge the documents without prior notice, on the basis that "a litigant who wishes to assert confidentiality must maintain genuine confidentiality"); *In re* Sealed Case, 676 F.2d 793, 823, 820 (D.C. Cir. 1982) (holding that disclosure to the SEC of privileged materials did not preclude a grand jury from discovering them, both because "a grand jury's claim to disclosure is stronger than that of a civil litigant" and because the company had failed to secure an agreement, as other companies had done, "to prevent the SEC from disclosing privileged documents to third parties"); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (refusing to find a limited waiver of the attorney-client privilege for documents voluntarily disclosed to the SEC).

[41] *Permian Corp.*, 665 F.2d at 1217-18 (holding that lower court's decision to allow a limited waiver of work-product protection was not clearly erroneous); United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (upholding a claim of work-product protection against a civil defendant's attempt to discover documents given to the government by two other corporations, against whom the defendant was litigating in separate proceedings, on the ground that "a disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege"); *Subpoenas Duces Tecum*, 738 F.2d at 1373-74 (holding that the work-product doctrine did not protect materials disclosed to the SEC when the holder of the privilege made no effort to secure a confidentiality agreement from the SEC before disclosing the privileged materials and when litigation was anticipated at the time of the disclosure).

[42] 129 F.3d at 686. *But see* United States v. Buco, 1991 WL 82459 at *2 (D. Mass. May 13, 1991) (finding a limited waiver was appropriate because "the public interest served by encouraging the free flow of information between the banks and their federal regulators is substantial").

[43] 129 F.3d at 686; United States v. Desir, 273 F.3d 39, 45-46 (1st Cir. 2001) (commenting that the First Circuit has not had much opportunity to address implied waiver of privilege and declining to address the issue there). *See* United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995).

[44] 129 F.3d at 687.

[45] *Id.* at 688.

[46] *See*, *e.g.*, *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (holding that disclosure of a corporate report by counsel for an underwriter waived attorney-client privilege, because "[o]nce a corporate decision is made to disclose [materials] for commercial purposes, no matter what the economic imperatives, the privilege is lost, not because of voluntariness or involuntariness, but because the need for confidentiality served by the privilege is inconsistent with such disclosure").

[47] *See, e.g.*, *In re* Grand Jury Proceedings, 219 F.3d 175, 186–87 (2d Cir. 2000) (declining to find an implied waiver of the attorney-client privilege based solely on the grand jury testimony of a corporate officer); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (holding that disclosure of attorney communications to the SEC for purposes of cooperating with an investigation did not constitute waiver of the attorney-client privilege); IBM Corp. v. United States, 471 F.2d 507, 517 (2d Cir. 1973) (granting a writ of mandamus and vacating a district court order, which had directed the company to disclose to the government certain documents previously disclosed under a protective order to a private litigant in a separate case, on the grounds that (1) the government had already agreed to accept redacted versions of the previously disclosed documents and (2) the order "ignores the real issue, namely, are the documents privileged and was there a knowing and voluntary waiver of the privilege").

[48] *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235, 236 (2d Cir. 1993) (further noting that "the SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective-waiver doctrine by two circuits"); *accord* Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993) (holding that even an agreement of confidentiality does not prevent disclosure from constituting a waiver of the privilege); Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 174 (S.D.N.Y. 2002) (rejecting the limited waiver of the attorney-work-product protection based on an expansive definition of "adversary"). *But see* GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979) (stating that "the mere disclosure of. . .protected attorney work product to the government. . .will not constitute a waiver of. . .[the] work product privilege.").

[49] *Steinhardt*, 9 F.3d at 236 (citations omitted).

[50] 951 F.2d 1414, 1429-30 (3d Cir. 1991). *But see Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) ("Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.").

[51] 951 F.2d at 1427.

[52] *Id.* at 1429.

[53] *Martin Marietta*, 856 F.2d at 623; *accord In re* Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979) (holding that limited waivers do not apply to a grand jury proceeding, but only private litigation, and that the grand jury was already in possession of the SEC transcript and documents from the prior disclosure.).

[54] *Martin Marietta*, 856 F.2d at 625.

[55] *Id.*; *see also* Black & Decker Corp. v. United States, 219 F.R.D. 87, 91-92 (D. Md. 2003) ("While the waiver of fact attorney work product may extend to all fact work product of the same subject matter, the waiver will not extend to opinion work product except in extreme circumstances.") (citing *Martin Marietta*, 856 F.2d at 627).

[56] This rejection of limited waivers is directly contrary to the Sixth Circuit's prior holding that "a corporation's submissions of portions of a report does not waive the attorney client privilege if the report is not released in 'significant part.'" *In re* Perrigo Co., 128 F.3d 430, 438 (6th Cir. 1997) (citations omitted). Indeed, the court of appeals previously endorsed society's interest in promoting "future communications between the independent directors and attorneys reviewing whether a derivative action is in the corporation's interest." *Id.* at 439.

[57] *Columbia/HCA*, 293 F.3d at 303.

[58] *Id.* (quoting *Steinhardt*, 9 F.3d at 235).

[59] *Id.* at 306.

[60] *Id.* at 307 (quoting *Westinghouse*, 951 F.2d at 1429). The Third and Sixth Circuits also employ this blanket rule. *See Westinghouse*, 951 F.2d at 1429 (3d Cir.); *Columbia/HCA*, 293 F.3d at 307 (6th Cir.) (quoting *Westinghouse*, 951 F.2d at 1429).

[61] Weil v. Inv./Indicators, Research and Mgmt., 647 F.2d 18, 25 (9th Cir. 1981).

[62] *Id.* at 24; *accord* Handgards v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("Voluntary disclosure of a part of a privileged communication is a waiver as to the remainder of the privileged communication about the same subject."); *cf. In re* Worlds of Wonder Sec. Litig., 147 F.R.D. 208, 212 (N.D. Cal. 1992) (holding that disclosure to the SEC of documents protected by the work-product doctrine to the SEC waived the protection because "[d]isclosure as part of an informal investigation is more voluntary, if that is possible, than disclosure in response to subpoena, as in *Westinghouse*"). *But see* Fox v. California Sierra Fin. Serv., 120 F.R.D. 520, 527 (N.D. Cal. 1988) (stating that "without steps to protect the privileged nature of such information, fairness requires a finding that the attorney-client privilege has been waived as to the disclosed information and all information on the same subject").

[63] *Weil*, 647 F.2d at 25.

[64] *See Permian Corp.*, 665 F.2d at 1222; *Massachusetts Inst. of Tech.*, 129 F.3d at 686; *In re* John Doe Corp., 675 F.2d at 489; *Westinghouse*, 951 F.2d at 1429-30; *Martin Marietta*, 856 F.2d at 623; *Columbia/HCA*, 293 F.3d at 303; *Weil*, 647 F.2d 24.

[65] *See Massachusetts Inst. of Tech.*, 129 F.3d at 687; *Westinghouse*, 951 F.2d at 1429-30; *Martin Marietta*, 856 F.2d at 623; *Columbia/HCA*, 293 F.3d at 306. As noted above, the Fourth Circuit has indicated that a subject-matter waiver does not extend to opinion work-product. *Martin Marietta*, 856 F.2d at 625. The First, Third, and Sixth Circuits have not decided the question explicitly.

[66] *Diversified*, 572 F.2d at 611; Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 284 (8th Cir. 1984) (following *Diversified*); United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (same); *see also* St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 639 (N.D. Iowa 2000) (applying *Diversified*'s analysis to the work-product doctrine); Biben v. Card, 119 F.R.D. 421, 428 (W.D. Mo. 1987) (recognizing a limited waiver to the extent that "the information involved was communicated to independent outside counsel for the purpose of assisting the [holders of the privilege] in investigating their own alleged wrongdoing"). The Eight Circuit is still alone in allowing selective waiver. *See In re* Lupron Marketing and Sales Practices Litig., 383 F. Supp. 2d 8 (D. Mass. 2004) (calling *Diversified* a "celebrated and controversial" twenty-five year old opinion, bringing forth a doctrine which, as the First Circuit observed . . . , has. . .no Circuit siblings. . . .") (citing United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997).

[67] *Diversified*, 572 F.2d at 611.

[68] *See, e.g.*, Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (holding that "voluntary submissions to agencies in separate, private proceedings should be a waiver only as to that proceeding"); *In re* Grand Jury Subpoena, 478 F. Supp. 368, 372–73 (D. Wis. 1979) (stating that "voluntary cooperation with the Securities and Exchange Commission or with an Internal Revenue Service or grand jury investigation would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege").

[69] *See Steinhardt*, 9 F.3d at 236 (2d Cir. 1993); United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995). The Seventh Circuit has ruled similarly on the inverse issue—whether disclosure by the government to the target of a criminal investigation waives the law enforcement investigatory privilege as to third party civil plaintiffs—finding that disclosure, even without an express confidentiality agreement, did not waive the privilege. *See* Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1126, 1127 (7th Cir. 1997).

[70] *See In re* Leslie Fay Companies, Inc. Securities Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995); Teachers Ins. & Annuity Ass'n of America v. Shamrock Broad. Co., 521 F. Supp. 638, 644–45 (S.D.N.Y. 1981); *In re* M & L Bus. Mach. Co., 161 B.R. 689, 696 (D. Colo. 1993). *See also In re* Natural Gas Commodity Litig., 2005 WL 145666 at *8 (S.D.N.Y. 2005) (stating that the court is "bound by *Steinhardt* until the Second Circuit (or Supreme Court) reverses or otherwise modifies").

[71] *Teachers*, 521 F. Supp. at 646.

[72] *M & L Bus. Mach.*, 161 B.R. at 696.

[73] *See*, *e.g.*, United States v. Bergonzi, 403 F.3d 1048, 1049-50 (9th Cir. 2005) (plaintiff conceded that defendants could use the disclosed materials, making the issue of privilege waiver moot); United States v. Bergonzi, 216 F.R.D. 487, 497 n.10 (N.D. Cal. 2003) (finding no precedent for such an agreement).

[74] *Columbia/HCA*, 293 F.3d at 307 (Boggs, J., dissenting) (emphasis in original).

[75] *See, e.g.*, Rotella v. Wood, 528 U.S. 549, 558 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."); Graham County Soil & Water Conservation Dist. v. United States, 125 S.Ct. 2444, 2447 (2005) (holding that the False Claims Act may be enforced by the Attorney General or by private individuals bringing *qui tam* actions in the government's name).

[76] *Columbia/HCA*, 293 F.3d at 309 (Boggs, J., dissenting).

[77] *See In re* LTV Sec. Litig., 89 F.R.D. 595, 621 (N.D. Tex. 1981).

[78] *Columbia/HCA*, 293 F.3d at 309–10 (Boggs, J., dissenting).

[79] *Id.* at 311 (Boggs, J., dissenting).

[80] *Id.*

[81] *See* Upjohn Co. v. United States, 449 U.S. 383, 390–92 (1981) (resolving a circuit split over whether the "control group test" determines when a corporation is entitled to assert the attorney-client privilege).

[82] Seaboard Report at n.3.

[83] Seaboard Report at n.3. *See* Brief of SEC as Amicus Curiae, McKesson HBOC, Inc., No. 99-C-7980-3 (Ga. Ct. App. Filed May 13, 2001).

[84] Securities Fraud Deterrence and Investor Restitution Act of 2004, H.R. 2179, 108th Cong. § 4 (2d Sess. 2004).

[85] Stephen M. Cutler, "Testimony Concerning the Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179," before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, June 5, 2003, *available at* <www.sec.gov/news/testimony/060503tssmc.htm>; *see* S. Rep. No. 108-475, at 24-25 (2004) (echoing Director Cutler's statements).

[86] Legislative history obtained from <http://thomas.loc.gov/home/search.html> (accessed September 24, 2005).

[87] *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Pro. § 5421, at 648, 652 (1980) (stating that the version of Rule 501 rejected by Congress "ignited a controversy that continues to smoulder. . .because the Advisory Committee chose to make no provision for the application of state privilege law in diversity cases" and that "the controversy over issues of privilege was to be a major factor in the decision of Congress to intervene for the first time in the rulemaking process").

[88] Congress recently launched a similar foray into the regulation of attorney-client relationships by imposing stiffer reporting requirements on attorneys practicing before the SEC. Section 307 of the Sarbanes-Oxley Act directs the SEC to promulgate rules that have resulted in an "up-the-ladder" reporting requirement in the event of a material breach of the securities laws or a breach of fiduciary duty. *See* 15 U.S.C. § 7245; 17 C.F.R. §§ 205 (2005).

[89] *Diversified*, 572 F.2d at 611.

[90] Amending the Federal Rules of Evidence, of course, would only affect enforcement of limited-waiver agreements in federal courts. It would not bind state courts to enforce limited-waiver agreements, since the Federal Rules apply only to proceedings in federal courts. Fed. R. Evid. 101. Most state rules of evidence, however, mirror the Federal Rules of Evidence: as of 2004, forty-one states had adopted various versions of the federal rules as their own evidentiary rules. Michael E. Solimine, *The Future of Parity*, 46 Wm. & Mary L. Rev. 1457, 1488 (2005); *see* 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Prac. & Pro., § 5009. Adopting such a Federal Rule of Evidence would encourage states to incorporate the rule's principle by amending their own rules of evidence. Of course, such a state-by-state reform effort would be lengthy, and the desired result of widespread adoption uncertain.

[91] *See In re* Syncor ERISA Litig., 229 F.R.D. 636, 646 (C.D. Cal 2005) (terms of a confidentiality agreement were inconsistent with cases suggesting that limited-waiver agreements were possible, because the agreement required the SEC to keep documents confidential "except as to the extent that the [SEC] determines that disclosure is otherwise required by law or would be in furtherance of the [SEC's] discharge of its duties and responsibilities"); *United States v. Bergonzi*, 216 F.R.D. 487, 496-97, 497 n.10 (N.D. Cal. 2003) ("Although McKesson entered into what it fashions to be confidentiality agreements with the Government entities involved, the agreement made by the Government to keep the documents was not unconditional.") (citing *Massachusetts Inst. of Tech.*, 129 F.3d at 683); *Billmyer*, 57 F.3d at 37 (suggesting that the court would recognize a limited waiver of the attorney-client privilege, depending on the terms of any agreement with the government); *Steinhardt*, 9 F.3d at 236 (same).

[92] *See* note 91, *supra*.

[93] *See* notes 69-70, *supra*, and accompanying text.

[94] Even circuits that follow the strict waiver rule have recognized that opinion work-product deserves protection when disclosure to the government waives the attorney-client privilege. *See Martin Marietta*, 856 F.2d at 625. With that in mind, it is important to approach the government as soon as practicable, before the government is regarded as an "adversary" for purposes of the attorney-work-product doctrine. *But see* Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 170 (S.D.N.Y. 2002) (waiver of work-product doctrine extends to potential adversaries).

[95] *See Diversified*, 572 F.2d at 611; *In re* LTV Sec. Litig., 89 F.R.D. at 616.

[96] The commentary to § 8C2.5 of the Sentencing Guidelines conditions the determination of whether a company has "cooperate[d]" in part on the adequacy of the information provided by the company for prosecutorial purposes: "To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." § 8C2.5 commentary n.12. Short of waiving privilege as to communications or work product, providing the government a roadmap may be an option for companies seeking to satisfy this requirement.

[97] *See Westinghouse*, 951 F.2d at 1429.