

The Future of the Attorney-Client Privilege in Corporate
Criminal Investigations

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Abstract:

This manuscript discusses how the Department of Justice (DOJ) has viewed waiver of the attorney-client privilege as an important factor evidencing cooperation when determining whether to enter non-prosecution or deferred prosecution agreements with firms allegedly involved in criminal activities. It further discusses recent changes to the DOJ's guidelines, purporting to take waiver out of the equation in deciding whether to prosecute. Questions remain as to whether the corporate attorney-client privilege is a relic of the past or whether the new guidelines, issued in August, 2008, have indeed restored the privilege to firms under federal investigation.

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The Enron¹ and Worldcom² scandals in the United States stand as poster children for greed and distrust of corporate America.³ In the wake of these scandals, the U.S. economy went into a tailspin⁴ and legislators scrambled to pick

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¹ On November 8, 2001, Enron disclosed that its financial statements for 1997 through 2000 and the first and second quarters of 2001 were false and announced to restate these financial statements to reduce previously reported net income by an aggregate of \$568 million. *See United States v. Causey*, No. H-04-25(S-2) (S.D. Tex. July 7, 2004) (hereinafter *Superseding Indictment*), available at <http://f11.findlaw.com/news.findlaw.com/cnn/docs/enron/usvlay70704ind.pdf>. It was uncovered that Enron considerably inflated those reported earnings, primarily through the use of special purpose entities, by shifting billions of dollars of debt off its balance sheets to hide its losses. *See Joseph Kahn with Jonathan D. Glater, Enron's Collapse: The Overview; Enron Auditor Raises Specter of Crime*, N.Y. TIMES, Dec. 13, 2001, at C1.

² On June 25, 2002, WorldCom announced that its internal review uncovered that huge hidden expenses were improperly booked as capital expenditures, which inflated profits by \$3.8 billion. *See Simon Romero, Turmoil at WorldCom: The Overview; WorldCom Facing Charges of Fraud; Inquiries Expand*, N.Y. TIMES, June 27, 2002, at A1. The company inflated revenues and improperly transferred totally 3.8 billion in operating expense to its capital expenditure accounts to conceal its net losses in 2001 and the first quarter of 2002. *Id.* When finally revealed, the uncovered accounting fraud amounted to \$11 billion, the largest corporate fraud in the U.S. history. In July 2002, WorldCom sought bankruptcy protection (the largest bankruptcy filing in U.S. history). *See Daniel Kadlec, WorldCom Nailed for the Biggest Bookkeeping Deception in History, a Fallen Telecom Giant Gives Investors One More Reason to Doubt Corporate Integrity*, TIME 20, July 8, 2002, at Business Section.

³ *See William S. Laufer, Illusions of Compliance and Governance*, CORP. GOV. 3239, Vol. 6, § 2 (2006) (describing that “[t]he downfall of Enron, conviction of Arthur Andersen, and bankruptcy of WorldCom define what has been called an historic period of corporate greed . . .”); *see also*, Pia Sarkar, *Year in Review People in Crisis WorldCom Unravels Ex-CEO Bernie Ebbers Flew High, Fell Hard and Took the Telecom Giant with Him*, S.F. CHRONICLE, Dec. 27, 2002, at B1 (stating that “Bernie Ebbers of WorldCom stuck out as a glaring example of what went wrong with corporate America in a year defined by greed and deceit -- and the loss of public trust,” and that Kenneth Lay, former chairman and CEO of Enron became “the godfather of corporate chicanery after his lavish spending sprees were revealed . . .”).

⁴ The stock market experienced a third straight year of losses in 2002, in which stocks dropped 22 percent as a whole, resulting in \$2.8 trillion loss in value. Since the market peak in March 2002,

up the pieces. The Sarbanes-Oxley Act of 2002 (“SOX”) was passed only seven months after Enron's bankruptcy filing in December 2001,⁵ federal funding for the Securities Exchange Commission (SEC)⁶ was significantly increased,⁷ and emphasis was placed both on prosecution and deterrence of financial crime.⁸

the shareholder wealth was erased by \$7.4 trillion. See Bill Atkinson, *Stock Prices Drop for 3rd Year in Row; Declines Accelerate Corporate Scandals, Weak Economy Get Blame \$2.8 Trillion in Wealth Erased*, BALT. SUN., Jan. 1, 2003, at 1A; see also Bishen Bedi, *More to Come?*, MALAY. BUS., July 16, 2002, at 64 (stating that “share price falls at just five companies - WorldCom, Tyco, Qwest, Enron and Computer Associates - have resulted in a combined US\$ 460 billion loss on stock market capitalization.”).

⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 18 and 28 U.S.C) [hereinafter SOX]. SOX was passed only seven months after Enron's bankruptcy filing in December 2001. See generally, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1549-68 (2005); see also, Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 376 (2004) (“[t]he criminal provisions of the Act were drafted with extraordinary haste, a haste that produced inartful and sometimes vague or duplicative provisions.”).

⁶ SOX authorized an increase in the SEC's funding from \$438 million in fiscal year (FY) 2002, to \$776 million for FY 2003. SOX, *supra* note 5, § 601. President Bush then signed the resolution to provide the SEC a \$716 million appropriation for FY 2003. See *Implementation of the Sarbanes-Oxley Act of 2002: Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of William H. Donaldson, Chairman of the SEC). Further, the President's FY 2004 budget included \$842 million for the SEC, which was the largest increase in the history of the agency and nearly doubled the SEC budget over FY 2002 levels to hire new accountants, lawyers, and examiners to protect investors and combat corporate wrongdoing. See Press Release, Off. of the Press Secretary, Fact Sheet: Restoring Economic Confidence and Tackling Corporate Fraud (Jan. 11, 2003),

<http://www.whitehouse.gov/news/releases/2003/01/20030111-1.html>. The President's Budget for FY 2004 included only an additional \$25 million for the DOJ, however, to expand investigative and prosecutorial capacity to address the corporate fraud problem, which included \$16 million for the FBI to hire 118 additional staff (56 agents) to investigate corporate fraud, and the balance of the funding for the U.S. Attorneys and Legal Divisions for 94 positions (29 attorneys) to prosecute criminals involved in corporate fraud. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 118; see also Off. of the Press Secretary, *supra* (delivering the announcement by President Bush that the budget included major increases in funding to crack down on corporate fraud that provides “historic levels of funding to allow federal investigators, prosecutors, and regulators to fully enforce the dramatically enhanced corporate governance reforms.”).

⁷ Kathleen F. Brickey, *White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002: Enron's Legacy*, 8 BUFF. CRIM. L.R. 221, 228-229 (2004) (“[t]he recent spate of financial and accounting scandals prompted a broad array of legislative and regulatory responses,” including “significant increases in SEC funding.”).

⁸ In response to the corporate fraud crisis, the Corporate Fraud Task Force was created by Executive Order in July of 2002. Its charge includes coordinating and directing the investigation and prosecution of major financial crimes, recommending how resources can be best allocated to combat major fraud, facilitating interagency cooperation in the investigation and prosecution of

These scandals also renewed the vigor of the federal Organizational Sentencing Guidelines (OSGs or guidelines), promulgated in the early 1990's.⁹ Although the OSGs are no longer mandatory, having been so ruled by the U.S. Supreme Court,¹⁰ they provide guidance to prosecutors when recommending corporate fines and to judges in setting corporate fines.¹¹ As will be discussed

financial crimes, and recommending regulatory and legislative reforms relating to financial fraud. *See* Exec. Order No. 13,271, 67 Fed. Reg. 46, 091 (July 11, 2002) (remarking on the purposes of the creation of Task Force, “to strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.”); *see also* George W. Bush, President, Remarks on Corporate Responsibility (July 9, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/07/20020709-4.html>) (delivering the President’s statement about the creation of Corporate Fraud Task Force, which “will target major accounting fraud and other criminal activity in corporate finance” and “will function as a financial crimes SWAT team, overseeing the investigation of corporate abusers and bringing them to account.”). Since its creation of Task Force on July 9, 2002 through May 31, 2003, federal prosecutors have charged over 250 corporate fraud convictions, and the Task Force has dealt with more than 320 criminal fraud investigations involving more than 500 individual subjects. As of May 31, 2003, criminal charges then pending were against 354 defendants in connection with 169 filed cases. Also, federal prosecutors achieved over \$2.5 billion in fines, forfeitures and restitution from July 1, 2002 through March 31, 2003 in connection with cases involving securities, commodities, investment, and advanced fee fraud schemes. *See* CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT (July 22, 2003), *available at* http://www.usdoj.gov/dag/cftf/first_year_report.pdf.

⁹ SOX required the Commission to review the existing guidelines to enhance the sentences for obstruction of justice and extensive criminal fraud, securities and accounting frauds, and other white collar crimes. *See* SOX, *supra* note 5, §§ 805, 905, and 1104. *See also* News Release, U.S. Sentencing Comm’n, Sentencing Commission Toughens Penalties for White Collar Fraudsters (April 18, 2003), *available at* <http://www.ussc.gov/PRESS/rel0403.htm> (noting that in response to SOX, the Commission “voted unanimously to increase penalties significantly for corporate and other serious white collar frauds.” Judge Diana E. Murphy, Commission chair, stated that “[t]he Sentencing Commission, by passing this amendment, is continuing to perform its important role in combating corporate fraud.”). SOX also directed the Commission to review the OSGs to ensure the sufficiency of the guidelines to deter and punish organizational criminal misconduct. *See* SOX, *supra* note 5, § 805(a)(5). After a two-year review, the Commission adopted the first amendments to the OSGs since they became effective in 1991.

¹⁰ *United States v. Booker*, 543 U.S. 220, 244, 258-260 (2005).

¹¹ *See id.* at 245, 259-60 (Although *Booker* struck down the mandatory nature of the guidelines and required the federal courts to view the guidelines as advisory, it also held that district courts must first calculate the applicable sentencing range according to those guidelines.). *See also* Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 IOWA J. CORP. L. 467, 476 (2007).

below, the OSGs emphasize the importance of an organization's cooperation with investigators in mitigating potential fines.¹²

Further, in response to the scandals of the early 2000's, prosecutors have begun encouraging cooperation through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The terms of these agreements vary from firm-to-firm, but in essence, the government will defer or cease prosecution provided the firm agrees to the terms required by the government.¹³ These often include the appointment of a corporate monitor and cooperation with investigators.

The OSGs, coupled with NPAs and DPAs, provide significant incentives for firms to be seen as cooperative with federal authorities when investigation is imminent. The demise of accounting firm Arthur Andersen illustrates the impact that prosecution may have upon the future of a firm. On May 7, 2002, Arthur Andersen LLP (Andersen) was charged with obstruction of justice for shredding documents related to its audit for Enron in the midst of the SEC investigation of Enron's accounting frauds.¹⁴ At trial, the primary issues concerned whether

¹² U.S. SENTENCING GUIDELINES MANUAL, ch.8, § 8C2.5(g) (2007) [hereinafter USSG]. The guidelines allow subtraction of five points from a culpability score if the organization reports an offense to the government, fully cooperates in the investigation, and clearly demonstrates recognition and affirmative acceptance of responsibility. *Id.* § 8C2.5 (g)(1). The guidelines allow subtraction of two points for full cooperation and acceptance of responsibility, *id.* § 8C2.5(g)(2), and allow deduction of one point for acceptance of responsibility alone. *Id.* § 8C2.5(g)(3).

¹³ Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L.BUS.& FIN. 1, 58 (2007); see U.S. Attorney's Manual, Criminal Resource Manual, 712-715 (1997), available at [http://www.usdoj.gov/usao/eousa/foia reading room/usam/title9/crm00000.htm](http://www.usdoj.gov/usao/eousa/foia%20reading%20room/usam/title9/crm00000.htm); see also Corporate Criminal Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* (Dec. 28, 2005), <http://www.corporatecrimereporter.com/deferredreport.htm> (reporting the thirty-four cases where prosecutors entered into a NPA or a DPA with the corporation. The report also provides the publicly available pretrial diversion agreements).

¹⁴ Andersen was charged under 18 U.S.C. § 1512(b)(2)(A) and (B), which makes it a crime to "knowingly . . . corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter, destroy, mutilate, or conceal" documents for use in, an "official proceeding." See *United States v. Arthur Andersen LLP*, No. Cr. A. H-02-121 (S.D. Tex. Mar. 7, 2002).

Andersen destructed the documents with the purpose of impeding the SEC's investigation.¹⁵ The jury returned a guilty verdict on one count of obstruction of justice for shredding Enron-related documents, and the Fifth Circuit affirmed the district court's decision.¹⁶ Ultimately, the Supreme Court unanimously reversed Andersen's conviction.¹⁷ The Court held that the trial court's jury instruction interpreting the language of the statute¹⁸ "simply failed to convey the requisite consciousness of wrongdoing" for a conviction.¹⁹

With its conviction vacated, Andersen could have resumed operations. The indictment and subsequent conviction, however, devastated the firm's

¹⁵ See Julia Schiller, *Deterring Obstruction of Justice Efficiently: The Impact of Arthur Andersen and the Sarbanes-Oxley Act*, 63 N.Y.U. ANN. SURV. AM. L. 267, 275-77 (2007) (explaining that at trial, the government and Andersen disputed how the jury would be instructed over two main issues: the degree of intent required to prove knowing corrupt persuasion; and the required nexus between the obstruction and the official proceeding); see also Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP & FIN. L. 721, 754 & n.189 (explaining that the section 1512(b) required the prosecutors to prove three elements: (1) Andersen persuaded employees to destroy Enron-related documents; (2) whoever gave these orders intended to impair the SEC investigation of Enron; and (3) high-level employees at the firm were culpable).

¹⁶ *United States v. Arthur Andersen LLP*, 374 F. 3d 281, 284 (5th Cir. 2004).

¹⁷ *Arthur Andersen v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L. Ed. 2d 1008 (2005).

¹⁸ Referring to 18 U.S.C. §1512(b).

¹⁹ *Arthur Andersen*, 544 U.S. at 706. The district court reportedly instructed jury in such a way that "even if petitioner honestly and sincerely believed its conduct was lawful, the jury could convict." Furthermore, the jury "did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular official proceeding." See *Arthur Andersen*, 544 U.S. at 697; see also Schiller, *supra* note 15, at 277 & n.6. The Supreme Court held that the instructions were misleading because, while the statute requires that the defendant "knowingly . . . corruptly persuade, under the instructions, Andersen could have been convicted without proving that the firm knew its conduct was illegal or that there had been a link between the official proceeding and the destruction. The Supreme Court stated that criminality should be limited to only "persuaders conscious of their wrong doing," since "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e]'. *Arthur Andersen*, 544 U.S. at 706. The Court also held that obstruction must have a "nexus" to an official proceeding, and therefore defendant has not violated the statute if he has persuaded another to shred documents "when he does not have in contemplation any particular official proceeding in which those documents might be material. *Id.* at 707-08 (stating that "A 'knowingly . . . corrupt[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.").

reputation.²⁰ Moreover, because the SEC does not allow convicted felons to audit public companies,²¹ the firm agreed to surrender its Certified Public Accounting licenses and its right to practice before the SEC, which effectively put what was once a “big five”²² accounting firm out of the business. Numerous Andersen clients deserted the firm, as did many partners and personnel,²³ and Andersen was obliged to sell off profitable components of its business.²⁴ In the aftermath, nearly 28,000 U.S. Andersen employees lost their jobs.²⁵

It is reasonable to conclude that had Andersen more fully cooperated with federal investigators, it may have been able to reach an NPA or a DPA, potentially avoiding conviction. As discussed below, up until late August 2008, waiver of the attorney-client privilege was a factor weighed by prosecutors evaluating whether a firm would be seen as cooperative.²⁶ Various guidelines issued by the Department of Justice (DOJ) up until then either implicitly or explicitly required firms to waive the attorney-client privilege, among other things, in order to receive credit for cooperating with federal investigators and potentially avoid a criminal

²⁰ See Linda Greenhouse, *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES, June 1, 2005, at A1 (stating that regardless of the Supreme Court’s decision to overturn the case, Andersen “has no chance of returning as a viable enterprise.”). See also, Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1229 (2006); George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 987 (2005).

²¹ Under SEC rules, a felony conviction disqualified Andersen from auditing public companies unless the firm received a waiver by SEC. See SEC Rules of Practice, 17 C.F.R. § 201.102(e) (2003).

²² John Hasnas, *The Significant Meaninglessness of Arthur Anderson, LLP v. United States*, 2005 CATO SUP. CT. REV. 187, 192 (2004-2005).

²³ Kirstin Downey Grimsley, *Andersen Exodus Might Be Near*, WASH. POST, Apr. 17, 2002, at E1 (stating that of the 1,700 U.S. partners at Anderson, more than 80% are looking to other accounting firms and new companies or for a position); see Chase, *supra* note 15, at 745 & n.152.

²⁴ Chase, *supra* note 15, at 745.

²⁵ Charles Lane, *Justices Overturn Andersen Conviction: Advice to Enron Jury on Accountant’s Intent is Faulted*, WASH. POST, June 1, 2005, at A1 (stating that as of June 1, 2005, Andersen had retained only 200 of what was once a 28,000 person staff).

²⁶ See *infra*, Part III below.

indictment. Recent guidelines appear to attempt to restore the privilege by explicitly prohibiting prosecutors from requesting waiver, although they still require firms to divulge relevant facts and firms may waive privilege voluntarily.²⁷ Questions remain as to whether the corporate attorney-client privilege is a relic of the past, or whether the 2008 guidelines have indeed restored the vitality of the attorney-client privilege to firms under federal investigation.

To address these questions, this manuscript proceeds as follows. Part I begins with an overview of the significance of the attorney-client privilege to criminal jurisprudence. Part II continues with a discussion of the Organizational Sentencing Guidelines, which emphasize the importance of cooperation by firms with federal authorities. Part III then addresses prosecutorial discretion and the memoranda issued by the DOJ which provides guidelines to prosecutors regarding the exercise of their discretion. These memoranda also emphasize the role of cooperation. Part IV follows with analysis of non-prosecution and deferred prosecution agreements and once again demonstrates the significance of cooperation. Concluding remarks follow.

I. The Attorney-Client Privilege and Work Product Doctrine

This Part provides a brief background of the attorney-client privilege and work product doctrine. It then discusses the development of the privilege in the corporate context.

²⁷ United States Attorneys' Manual, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations [hereinafter Attorneys' Manual], *available at* <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>., discussed *infra*, Part III E.

A. Brief Background

Recognized at all levels of the United States judiciary system,²⁸ the attorney-client privilege protects the confidentiality of communications made between a client and attorney for the purpose of pursuing or supplying legal assistance.²⁹ Generally, the *advice* is considered privileged, but not the *facts* communicated.³⁰ Rooted in Roman law, the privilege is founded on the notion that a lawyer's loyalty to a client precludes him or her from acting as a witness in the client's case.³¹ The English common law placed a client-oriented twist on this rationale, focusing instead on the right of the client to have his or her secrets protected.³²

It has been argued that the effective administration of justice depends on the encouragement of "full and frank communication"³³ between a lawyer and his or her client. In *Connecticut Mutual Life Ins. Co. v. Shaefer*,³⁴ the U.S. Supreme Court stated that: "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic."³⁵ The policy justifications for upholding privilege were articulated again by the Court twelve years later in 1888, where the Court found privilege to be "founded upon the necessity, in the

²⁸ See 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE §§ 76.1-76.2 (John W. Strong, ed., 5th ed. West 1999) (discussing existence of attorney-client privilege in federal and state courts).

²⁹ *In re LTV Securities Litigation*, 89 F.R.D. 595, 600 (1981) (citing McCormick, Evidence, §95 and 8 Wigmore, Evidence §§2292, 2311).

³⁰ *Upjohn Co v. United States*, 449 U.S. 383, 396 (1981).

³¹ Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 603 (1980).

³² Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CAL. L. REV. 487 (1928).

³³ *Upjohn*, 449 U.S. at 389.

³⁴ *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1876).

³⁵ *Id.* at 458.

interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure.”³⁶

According to Professor John Henry Wigmore:

(1) where the legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except when the client waives the protection.³⁷

Further, Wigmore posited four foundational circumstances without which no privilege, attorney-client or otherwise, should be recognized:

(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.³⁸

Critics of the privilege in Wigmore’s time maintained that securing the confidentiality of the guilty was not a cause for concern and that the innocent had no use for privilege in the first place.³⁹ Wigmore rebutted these criticisms by pointing to the murky distinction between guilt and innocence in civil cases.⁴⁰ He further championed the efficiency that a broadly available privilege would afford, as conscientious legal advisors would discourage frivolous claims and encourage settlements.⁴¹

³⁶ Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

³⁷ 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton Rev. 1961).

³⁸ 4 JOHN HENRY WIGMORE, EVIDENCE § 2317 (1st ed. 1904).

³⁹ See *id.* § 2291.

⁴⁰ See *id.*

⁴¹ See *id.*

Related to the attorney-client privilege is the work product doctrine. This doctrine finds its roots in both case law and code. In *Hickman v. Taylor*,⁴² the Supreme Court introduced the idea of protecting attorney work product—such as an attorney’s notes of witness interviews—from discovery by opponents in litigation. The need for the work product rule arose after the liberalization of pre-trial discovery rules and was subsequently codified in the *Federal Rules of Civil Procedure*.⁴³

Work product protection itself is qualified. Although an attorney’s mental impressions and legal theories are fiercely barricaded, facts that are essential are discoverable.⁴⁴ Further, while the attorney-client privilege protects a large array of confidential communication between attorney and client, work-product can be invoked to seal non-client communications, such as interview memoranda or statements of witnesses taken by a counsel.⁴⁵

⁴² *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁴³ See FED. R. CIV. P. 26(b)(3).

⁴⁴ Courts have recognized two types of attorney work product: fact (or “ordinary”) work product and opinion work product. See *Hickman*, 329 U.S. at 510-12. See also *Upjohn*, 449 U.S. at 401. Fact work product is the factual information, typically the relevant facts that attorney or its agent obtained during the internal investigation. See e.g., *In re Doe*, 662 F.2d 1073, 1076 n.2 (4th Cir.1981) (defined ordinary work product as “those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney.”), cert. denied, 455 U.S. 1000 (1982). Examples of fact work product include a witness statement taken by counsel, investigative reports, and interview memoranda. See Jeff A. Anderson et al., *Special Project, The Work Product Doctrine*, 68 CORNELL L. REV. 760, 791-98 (1983). Opinion work product protection, the “core” of the work product doctrine, only covers “the mental impressions, conclusions, opinions or legal theories of an attorney or other representative.” FED. R. CIV. P. 26(b)(3). For example, “an attorney’s legal strategy, his intended lines of proof, his evaluation of the strengths and weakness of his case, and the inferences he draws from interviews of witnesses” are the examples of opinion work product. See *Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir.), cert. denied, 474 U.S. 903 (1985). In contrast to fact work product that are more easily discoverable by showing of “substantial need” or “undue hardship,” courts have given greater protection for opinion work product. See *Hickman*, 329 U.S. at 511-12; *UpJohn*, 449 U.S. at 400-01. See generally Anderson et al., *supra* note 44.

⁴⁵ A few courts held that the work product doctrine did not protect a witness statement since it simply “records the mental impressions and observations of the witness himself and not those of the attorney.” *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58-59 (N.D. Ohio 1953) See also *Caruso v. Moore-McCormack Lines, Inc.*, 196 F.Supp. 675, 676 (E.D.N.Y.1961).

In terms of policy, the attorney-client privilege is often described under the canopy of promoting the interest of the client in access to legal advice while work-product justifications are framed within the interests of the attorney in litigation.⁴⁶ Still, both privileges promote the same core value of the efficient administration of justice and preservation of the attorney-client relationship.

B. Development of the Privilege in the Corporate Context

The exercise of the attorney-client privilege between a corporation and its lower-level employees was upheld in *Upjohn Co. v. United States*.⁴⁷ A unanimous Court held that the privilege is necessary for “communication of relevant information”⁴⁸ as well as for navigation through “the vast and complicated array of regulatory legislation confronting the modern corporation.”⁴⁹ The Court emphasized that “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions may be protected. An uncertain privilege... is little better

However, in *Hickman* the Court invoked the work product doctrine to protect witness statements regardless of whether they were in the form of the attorney's mental impressions or in interview memoranda. *See, e.g., Upjohn*, 449 U.S. at 400 (holding that memoranda based on witnesses' oral statements revealed attorney's mental processes and are specially protected by rule 26(b)(3)); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943, 949 (E.D. Pa. 1976) (notes of conversations with witness “are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure”); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), affirmed by an equally divided Court, 400 U.S. 348 (1971) (“[w]here an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualified as work product even though the lawyer functioned primarily as an investigator.”). *See generally* Anderson, et al., *supra* note 44, n. 203-210 & 351 and accompanying text. *See also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024 (3d ed. 1998).

⁴⁶ *See Upjohn*, 449 U.S. at 389; *Hickman* 329 U.S. at 510-11 (recognizing that protecting counsel's trial preparation materials from discovery promotes the adversary system); *see also* Anderson et al., *supra* note 44, at 784-88.

⁴⁷ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁴⁸ *Upjohn*, 449 U.S. at 392.

⁴⁹ *Id.* *See also* David B. Fein & Robert S. Huie, *Attacks on Client Privilege Increasing: Government Insistence on Waiver Jeopardizes the Value of the Corporate Privilege*, Mondaq Business Briefing, Feb. 4, 2004, at 1-2.

than no privilege at all.”⁵⁰

The *Upjohn* Court explicitly recognized the complications that result from the inherent stratification of the artificial person of the corporation, but concluded that limiting privilege to only top-tier employees would frustrate “the very purpose of privilege”⁵¹ and could “limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”⁵² In 1985, the Court further clarified that the attorney-client privilege resides in the corporation itself and is not possessed by any individual officer or employee.⁵³ The Court also explicitly recognized that corporate management has the power to waive the confidentiality of communications if it is deemed to be in the company’s best interest.⁵⁴

II. Organizational Sentencing Guidelines

The Organizational Sentencing Guidelines (OSGs) were promulgated by the United States Sentencing Commission in 1991 in order to encourage uniformity in criminal sentences.⁵⁵ The OSGs advise prosecutors to adjust fines upward or downward based on factors such as cooperation with federal investigations and acceptance of responsibility.⁵⁶

The OSGs allow for reductions in the guideline fine range, if an organization “fully cooperated” in the investigation of its criminal conduct.⁵⁷ This may result in an organization receiving the minimum fine set forth in the

⁵⁰ *Upjohn*, 449 U.S. at 393.

⁵¹ *Id.* at 392.

⁵² *Id.*

⁵³ *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985).

⁵⁴ *Weintraub*, 471 U.S. at 348.

⁵⁵ Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 206 (1993).

⁵⁶ See USSG, *supra* note 12, §8C2.5 (g)(1)-(3).

⁵⁷ USSG, *supra* note 12, § 8C2.5(g)(1)-(3).

guidelines. Furthermore, the guidelines allow the sentencing court to depart from the guideline range, and assign a lower fine, if the organization provided “substantial assistance” in the government’s investigation or prosecution of the criminal conduct by others.⁵⁸ As a result, the organization may receive a fine far below what is technically the minimum OSG fine. The potential for a reduced, or even eliminated, sentence in exchange for cooperation presents organizations under government investigation with a strong incentive to cooperate.⁵⁹

Full cooperation has, at times, involved waiver of the firm’s attorney-client privilege. To address the impact of the OSGs on the attorney-client privilege, this Part will first provide a brief history of the OSGs. It will then describe the sanctions and framework for organizational sentencing with a focus on the role of cooperation and waiver of the attorney-client privilege.

A. Brief History

In the mid-1980s, Congress enacted the Sentencing Reform Act of 1984 (“the SRA” or “the Act”).⁶⁰ The purpose of the SRA was to alleviate sentencing disparities and inconsistency that had been prevalent in the federal courts, as well as to increase sentence severity for certain offenses.⁶¹ In addition, the SRA requires courts to consider the goals of just punishment, deterrence, incapacitation, and rehabilitation before imposing a particular sentence.⁶² To alleviate the

⁵⁸ *Id.* § 8C4.1.

⁵⁹ Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 589 (2004).

⁶⁰ Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II (§ 211 et seq.), 98 Stat. 1837 (1984) (codified at 28 U.S.C. 991-998 (1988); 18 U.S.C. 3551-3673 (1988)) (The Sentencing Reform Act was passed as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837).

⁶¹ Nagel & Swenson, *supra* note 55, at 206.

⁶² 18 U.S.C. § 3553(a)(2).

sentencing discretion of individual judges, the SRA authorized the creation of the United States Sentencing Commission (“the Commission”), to be set up as an independent agency in the judicial branch of government.⁶³ The primary purpose of the Commission is to promulgate guidelines for sentencing in the federal criminal court system.⁶⁴ The Federal Organizational Sentencing Guidelines became effective on November 1, 1991, as Chapter Eight of the U.S. Sentencing Guidelines Manual.⁶⁵

In conformity with the legislative purpose of increasing sentencing uniformity and certainty, the guidelines were intended to be mandatory.⁶⁶ In *United States v. Booker*, however, the U.S. Supreme Court struck down the provisions of the SRA that made the guidelines mandatory,⁶⁷ holding that mandatory guidelines violate the defendant’s right to a jury trial.⁶⁸ Under *Booker*, therefore, federal courts must consider the sentencing factors enumerated in the SRA,⁶⁹ and view the guidelines as advisory. Although district courts must calculate the applicable guidelines sentencing range, the courts have discretion to

⁶³ 28 U.S.C. § 991(a).

⁶⁴ 28 U.S.C. § 991(b). *See also* Nagel & Swenson, *supra* note 55, at 207.

⁶⁵ U.S. SENTENCING GUIDELINES MANUAL, ch. 8 (1991).

⁶⁶ Nagel & Swenson, *supra* note 55, at 240-244.

⁶⁷ The Court struck down 18 U.S.C. § 3553(b)(1), which mandated that judges sentence within the applicable guideline range, unless circumstances justifies the judges’ departing from the range. Also, the Court held that 18 U.S.C. §3742 (e) deprived federal appeals courts of the power to review sentences imposed outside the guidelines range. *See Booker*, 543 U.S. at 258, 260.

⁶⁸ *See id.* at 244.

⁶⁹ *Id.* at 259-60. The statutory factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a).

go outside that range in order to “tailor the sentence in light of the other statutory concerns” in § 3553(a).⁷⁰

When Congress enacted the SRA, its primary focus was on the sentencing of individual offenders.⁷¹ It was not clear that the Commission would promulgate sentencing guidelines for organizations as well.⁷² Nothing in the legislative history demonstrated unequivocally a Congressional intent for the promulgation of mandatory organizational guidelines.⁷³ In fact, some commentators argued that the sentencing disparity that prompted the Guidelines’ passage was absent in the organizational context.⁷⁴ Empirical research on organizational sentencing practices conducted by the Commission, however, subsequently revealed a wide disparity in organizational sentencing as well.⁷⁵ The Commission’s findings, together with its broader mandate of establishing sound and effective sentencing policies, supported the belief that Organizational Sentencing Guidelines were necessary for furthering legislative goals.⁷⁶

⁷⁰ *Booker*, 543 U.S. at 245-46; see also Fiorelli & Tracey, *supra* note 11, at 475. For the analysis of the impact of *Booker* on sentencing practices in federal courts, see U.S. SENTENCING COMM’N, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (Mar. 2006), available at <http://www.ussc.gov/bf.htm>.

⁷¹ Nagel & Swenson, *supra* note 55, at 212.

⁷² Emmett H. Miller III, *Recent Developments, Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197, 225 (1993).

⁷³ Nagel & Swenson, *supra* note 55, at 212.

⁷⁴ See, e.g., Leonard Orland, *Corporate Punishment By the U.S. Sentencing Commission*, 4 FED. SENT. R. 50, n.22 (1991).

⁷⁵ SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 1-3, available at <http://www.ussc.gov/orgguide.htm>; see generally Mark A. Cohen, *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions and Sanctions, 1984-1987*, 10 WHITTIER L. REV. 103 (1988-1999) (summarizing the Commission’s research and analysis).

⁷⁶ Miller III, *supra* note 72, at 211-212; Nagel & Swenson, *supra* note 55, at 213-14.

B. Sanctions

Although courts have held that organizations can be found criminally liable for violations of law,⁷⁷ there was lack of agreement among commentators regarding appropriate sanctions prior to adoption of the SRA.⁷⁸ The SRA set out four statutory goals of sentencing: (1) just punishment, (2) deterrence, (3) incapacitation, and (4) rehabilitation.⁷⁹ It also provided means to achieve these goals.⁸⁰ The Act, however, did not specify the most appropriate way to achieve those goals. The Commission, therefore, had considerable discretion in choosing the types and combinations of sanctions to achieve the statutory goals of sentencing.⁸¹

1. Framework for Organizational Sentencing

Overall, the Commission attempted to design the organizational sanctions so that, together with those imposed on the firm's agents, they would provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.⁸² The three substantive sanctions of the OSGs consist of (1) remediation, (2) fines,

⁷⁷ The Supreme Court first upheld the criminal liability of corporations in 1909 in *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). The Court held that a corporation is vicariously liable for the criminal acts of its employee if those acts are committed within the scope of employment or authority and with the intent to benefit the business.

⁷⁸ SUPPLEMENTARY REPORT, *supra* note 75, at 5; Miller III, *supra* note 72, at 199.

⁷⁹ 18 U.S.C. § 3553(a)(2) set forth the four statutory purposes: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

⁸⁰ 18 U.S.C. § 3551(c) provides a term of probation or a fine. In addition to the sentence pursuant to the provision in § 3551(c), the court may order that the defendant forfeit property to the government (§ 3554), the defendant give reasonable notice and explanation of the conviction to the victims (§ 3555) or order restitution (§ 3556).

⁸¹ Miller III, *supra* note 72, at 203.

⁸² USSG, *supra* note 12, ch. 8, introductory cmt.

and (3) probation.⁸³ Each sanction, or combination of sanctions, was adopted to respond to one or more of the sentencing purposes set out in the SRA.⁸⁴

Unlike the sentencing guidelines for individuals, the OSGs first require the sentencing court, whenever practicable, to order remediation.⁸⁵ That is, the organization must remedy the harm caused by the offense.⁸⁶ The remediation guidelines are designed to make victims whole and are not to be considered as punishment.⁸⁷

In contrast, the guidelines for assessing criminal fines divide organizations into two types: criminal purpose organizations and other organizations.⁸⁸ When the sentencing court determines that the organization operated primarily for a criminal purpose, or primarily by criminal means, the guidelines are the most severe. They then require the court to impose a fine sufficient to divest the organization of all its net assets.⁸⁹ For these types of organizations, the Commission found incapacitation to be the most important goal of sentencing.⁹⁰

Other organizations might receive a probationary sentence or a fine that reflects the seriousness of the offense and their culpability.⁹¹ Probation is designed, in part, to achieve specific deterrence and, in part, to rehabilitate organizations by requiring them to establish and maintain an effective compliance program.⁹²

⁸³ USSG, *supra* note 12, ch. 8, §8B – D.

⁸⁴ 18 U.S.C. § 3553(a); SUPPLEMENTARY REPORT, *supra* note 75, at 5.

⁸⁵ USSG, *supra* note 12, ch. 8, introductory cmt.

⁸⁶ *Id.* ch. 8, introductory cmt. & § 8A1.2.

⁸⁷ *Id.* ch. 8, introductory cmt.

⁸⁸ *Id.* ch. 8, introductory cmt. & § 8A1.2(b)

⁸⁹ *Id.* § 8C1.1.

⁹⁰ *Id.* See also Nagel & Swenson, *supra* note 55, at 232-233.

⁹¹ 18 U.S.C. 3551(c) requires that an organization be placed on probation in any case where no fine is imposed; USSG, *supra* note 12, ch. 8, introductory cmt.

⁹² USSG, *supra* note 12, *id.* § 8D1.1.

2. Guidelines for Fines

The guidelines for imposing criminal fines on organizations⁹³ are designed to promote the goals of just punishment and deterrence. They are meant to provide significant incentives to organizations to create and maintain internal mechanisms for preventing and detecting criminal conduct.⁹⁴

In developing the organizational guidelines for fines, the Commission considered the issue of vicarious liability:⁹⁵ organizations act only through agents and thus are vicariously liable for the offenses of their agents.⁹⁶ In addressing this issue, the Commission designed the guidelines for fines to account for both the seriousness of the offense and the degree of culpability.⁹⁷ Also, to further the goal of deterrence, the guidelines take a “carrot and stick approach”⁹⁸ by providing incentives for organizations to prevent and detect criminal conduct.⁹⁹ The OSGs thus impose substantial fines when a convicted organization has been tolerant of violations of law by its employees,¹⁰⁰ but allow for significantly lower fines when an organization has clearly demonstrated in specified ways its antipathy toward lawbreaking.¹⁰¹

For example, organizations that have an effective compliance and ethics program designed to prevent and detect criminal conduct,¹⁰² cooperate with government investigations, and accept responsibility, can reduce their potential

⁹³ *Id.* § 8C2.

⁹⁴ Nagel & Swenson, *supra* note 55, at 228-232.

⁹⁵ *Id.* at 234-235.

⁹⁶ USSG, *supra* note 12, ch. 8, introductory cmt.

⁹⁷ SUPPLEMENTARY REPORT, *supra* note 75, at 5.

⁹⁸ Fiorelli & Tracey, *supra* note 11, at 467.

⁹⁹ Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 702-03 (2002); Nagel & Swenson, *supra* note 55, at 226-227.

¹⁰⁰ Nagel & Swenson, *supra* note 55, at 237-38.

¹⁰¹ *Id.*

¹⁰² The definition of “an effective compliance and ethics program” is set forth in USSG § 8B2.1.

finer by up to 95%.¹⁰³ In contrast, organizations that tolerate, encourage, or condone criminal conduct, may face fines multiplied by a factor of four, or 400%.¹⁰⁴

Presumably most firms do not envision being involved in future criminal conduct, yet, the OSGs still provide strong incentives to develop a compliance and ethics program.¹⁰⁵ Although relatively few companies are pursued in court, many more companies are reviewed by federal prosecutors.¹⁰⁶ Documentation of an effective compliance and ethics program could impact a federal prosecutor's initial determination that charges should or should not be filed.¹⁰⁷ Furthermore, despite the advisory nature of the Guidelines, prosecutors, judges and regulators will continue to turn to the OSGs in assessing corporate conduct.¹⁰⁸ Indeed, most firms today have implemented some form of compliance and ethics program,¹⁰⁹ albeit to varying degrees.¹¹⁰

¹⁰³ See Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?* 39 WAKE FOREST L. REV. 565, 567 (2004).

¹⁰⁴ *Id.*

¹⁰⁵ See Steven A. Lauer, *Integrity Interactive Corporation, Corporate Compliance and Ethics Programs: Don't Sell Them Short*, THE METROPOLITAN CORPORATE COUNSEL, Mar. 2006, at 58, available at

<http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=December&artYear=2008&EntryNo=4550>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ T. McCollum, "U.S. Firms Boost Compliance and Ethics Programs," Dec 2006

Entrepreneur.com, available at

<http://www.entrepreneur.com/tradejournals/article/156577782.html>.

¹¹⁰ In a 2003 ethics and compliance survey conducted by Deloitte and *Corporate Board Member Magazine*, 83 percent of respondents indicated that they had a formal ethics code in place. See *Business Ethics and Compliance in the Sarbanes-Oxley Era: A Survey by Deloitte and Corporate Board Member Magazine*, available at

[www.deloitte.com/dtt/cda/doc/content/us_assur_ethicsCompliance\(1\).pdf](http://www.deloitte.com/dtt/cda/doc/content/us_assur_ethicsCompliance(1).pdf). Ronald Berenbeim, director of The Conference Board Working Group on Global Business Ethics and Principles, attributes this development to the promulgation of the Organizational Sentencing Guidelines, and the potential to avoid prosecution or reduce fines if an effective compliance program is in place. See McCollum, *supra* note 109. Surveys demonstrate the impact of the Sentencing Guidelines. Prior to the promulgation of the Federal Sentencing Guidelines, in a 1987 report by The

3. Calculating the Fine

As a general rule, in calculating the corporate fine, the OSGs contemplate calculation of a base fine and a culpability score.¹¹¹ The seriousness of the offense is reflected by the base fine, and the relative degree of an organization's culpability is reflected in its culpability score.¹¹² The base fine is the greatest of: (1) the amount corresponding to the offense level under the Offense Level Fine Table;¹¹³ (2) the pecuniary gain to the organization from the offense; or (3) the pecuniary loss caused by the organization either intentionally, knowingly, or recklessly.¹¹⁴ The culpability score adjusts the base fine upward or downward in response to the organization's culpability.¹¹⁵ Starting with five points, the culpability score generally may be increased or decreased by six factors.¹¹⁶ Four factors increase culpability: (1) involvement in or tolerance of criminal activity by senior personnel;¹¹⁷ (2) prior history of wrongdoing;¹¹⁸ (3) violation of a court order or a condition of probation;¹¹⁹ and (4) the obstruction of justice.¹²⁰ Two

Conference Board, a New York-based research organization, only 44 percent of respondents said their company had any sort of ethics training program for employees. *More Corporate Boards Involved in Ethics Programs* 16 Oct 2006, The Conference Board, available at <http://www.newswise.com/articles/view/524334/>. By contrast, in a 2005 Conference Board survey, 92 percent reported having an ethics training program. The Conference Board surveys also demonstrate the increased involvement of corporate boards in compliance and ethics programs. While in 1986, documented board involvement in an ethics program was found in only 21 percent of companies, 96 percent of respondents had documented board involvement in 2005. *Id.*

¹¹¹ SUPPLEMENTARY REPORT, *supra* note 75, at 5

¹¹² *Id.*

¹¹³ USSG, *supra* note 12, § 8C2.4(d).

¹¹⁴ *Id.* § 8C2.4(a). Pecuniary gain or loss, when greatest, is used to determine the base fine, unless the calculation would unduly complicate or prolong the sentencing process. *Id.* § 8C2.4(c).

¹¹⁵ *Id.* § 8C2.5.

¹¹⁶ *Id.* ch. 8, introductory cmt.

¹¹⁷ *Id.* § 8C2.5(b).

¹¹⁸ *Id.* § 8C2.5(c).

¹¹⁹ *Id.* § 8C2.5(d).

¹²⁰ *Id.* § 8C2.5(e).

factors decrease culpability: (1) compliance; and (2) cooperation. One of the mitigating factors includes the existence of an effective compliance and ethics program.¹²¹

For example, an organization that had an “Effective Compliance and Ethics Program” to “prevent and detect criminal conduct”¹²² in place prior to an offense may have three points subtracted from its culpability score.¹²³ Other mitigating factors are self-reporting, cooperation, and acceptance of responsibility.¹²⁴ An organization may reduce its culpability score if it promptly and thoroughly reports the offense to the government, fully cooperates in the investigation, or accepts responsibility for the offense.¹²⁵

C. The Role of Cooperation

The OSGs allow reduction of the culpability score assigned to a firm if the firm has fully cooperated in the investigation. If the organization promptly reports

¹²¹ *Id.* § 8C2.5(f).

¹²² *Id.* § 8C2.5(f). “Effective Compliance and Ethics Program” is defined in §8B2.1 as “a program designed to prevent and detect criminal conduct.” *See id.* § 8B2.1 Application Notes 1.

¹²³ The reduction is contingent upon prompt reporting to the authorities and non-involvement of high-level personnel in the actual offense conduct. *Id.* § 8C2.5(f)(2)-(3).

¹²⁴ *Id.* § 8C2.5(g).

¹²⁵ The guidelines allow subtraction of five points from a culpability score if the organization reports an offense to the government, fully cooperates in the investigation, and clearly demonstrates recognition and affirmative acceptance of responsibility. *Id.* § 8C2.5(g)(1). The guidelines allow subtraction of two points for full cooperation and acceptance of responsibility (*Id.* § 8C2.5(g)(2)), and allow deduction of one point for acceptance of responsibility alone (*Id.* § 8C2.5(g)(3)). In 2004, the Commission amended the OSGs to emphasize the significance of compliance and ethics programs to prevent and detect criminal conduct. News Release, U.S. Sentencing Comm’n, Commission Tightens Requirements for Corporate Compliance and Ethics Program (Mau 3, 2004), available at <http://www.ussc.gov/PRESS/re10504.htm>. The amendments elevated the criteria for an effective compliance program previously set forth in a commentary application note, 1991 USSG, *supra* note 65, § 8A1.2 cmt. n.3(k), into a new guideline. USSG, *supra* note 12, § 8B2.1. *See* USSG app. C (Supp. Nov. 1, 2004), available at <http://www.ussc.gov/corp/Amend-673.pdf>; Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 WAKE FOREST L. REV. 559, 561 (2004). The amendments clarified and strengthened the criteria that an organization must follow in order to establish and maintain an effective compliance and ethics program to prevent and detect criminal conduct. *Id.* *See also* Fiorelli & Tracey, *supra* note 11, at 482-89.

the offense to the government, fully cooperates with the government, and clearly accepts responsibility for the criminal conduct, the organization may reduce its culpability score by up to five points.¹²⁶ To be considered full cooperation, cooperation with the government must be both timely and thorough.¹²⁷ Timely cooperation must begin at essentially the same time as the organization is officially notified of a criminal investigation.¹²⁸ To satisfy the requirement of thoroughness, an organization must disclose all pertinent information known by it.¹²⁹ The sufficiency of the disclosure will be determined by whether the information is sufficient enough for the government to identify the nature and extent of the offense and the particular individuals responsible for the criminal conduct.¹³⁰ Further, the relevant cooperation is that of the organization. A failure of cooperation by any individual employee does not necessarily disqualify the organization for cooperation credit.¹³¹

Because the organization's culpability score is associated with minimum and maximum multipliers that range from .05 to 4.00, an adjustment of the culpability score may result in a reduction of up to 95% of the ultimate fine range or in a 400% increase.¹³² Prosecutors can influence the severity of the sentence by recommending a reduction of the culpability score for cooperation.¹³³ Although courts ultimately decide the applicable fine, the government's recommendation,

¹²⁶ If an organization fully cooperates and clearly accepts its responsibility, the guidelines allow a two point deduction. *Id.* § 8C2.5(g)(2). Even if an organization fails to report the offense or cooperate in the investigation, it may nevertheless receive one point deduction if it clearly accepts its responsibility. *Id.* § 8C2.5(g)(3).

¹²⁷ *Id.* § 8C2.5 cmt. n.12.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² USSG, *supra* note 12, §§ 8C2.6 & 8C2.7.

¹³³ 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, 154-55 (2000).

based on its assessment of whether a corporation has timely and thoroughly cooperated, often significantly influences the ultimate sentence.¹³⁴ Thus, the OSGs create an almost irresistible incentive for a corporation to cooperate with the government investigators in order to receive reduction in potential fines for cooperation.¹³⁵

The OSGs thus strongly emphasize cooperation in the investigation as a condition for leniency in the sentencing process. Further, the guidelines rely in part upon the prosecutors' assessment of whether the organization has fully cooperated in the investigation and whether the organization's cooperation constitutes substantial assistance to investigators.¹³⁶ These determinations are then factored into plea negotiations and settlement agreements, which directly affect the sentencing recommendations by the government to the court.¹³⁷

D. Waiver of the Attorney-Client Privilege

There are many ways to satisfy the definition of full cooperation under the OSGs.¹³⁸ The OSGs have been silent on whether and how much the waiver of the

¹³⁴ American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 320 (2003); John Hans, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 623 (2005).

¹³⁵ Hans, *supra* note 134, at 621; 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, 650 (2002).

¹³⁶ See USSG, *supra* note 12, §§ 8C2.5(f) & (g)(2)-(3), 8C4.1.

¹³⁷ U.S. SENTENCING COMM'N AD HOC ADVISORY GROUP, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 93 (Oct. 7, 2003), available at <http://www.ussc.gov/corp/advgrprpt./advgrprpt.htm> [hereinafter ADVISORY GROUP REPORT].

¹³⁸ Zornow & Krakaur, *supra* note 133, at 154; see also Buchanan, *supra* note 59, at 604 (suggesting that disclosure of "all pertinent information" sufficient for the government to "identify the extent of the offense and the individual(s) responsible for the criminal conduct" does not necessarily require a corporation to produce notes or its report of investigation prepared by counsel. "Instead the corporation may make the witnesses will make full disclosures to the government, If the government is then able o obtain all pertinent information, the organization's cooperation will be deemed sufficient."). See also James B. Comey, Deputy Attorney General Counsel, Remarks at the American Bar Association 14th Annual institute on Health Care Fraud 2004 (May 13, 2004), in U.S. ATT'YS BULL., Sep. 2005, at 4-6 (stating that the government "does not require any particular method so long as the cooperation is thorough." For example,

attorney-client privilege or the work product protection is a factor in obtaining sentencing credit for cooperation and self-reporting.¹³⁹ In 2002, however, on its tenth anniversary, the Commission formed an ad hoc advisory group to review the general effectiveness of the OSGs.¹⁴⁰ One of the tasks of the Advisory Group was to examine the adequacy of the OSGs' definition of "cooperation," and whether the guidelines sufficiently encourage organizations to self-report illegal conduct and cooperate with federal law enforcement.¹⁴¹ The Advisory Group considered whether the OSGs should provide commentary on the role of waiver of the attorney-client privilege and of the work product protection in assessing whether an organization should receive credit for cooperation.¹⁴² After evaluating the views of the DOJ and the defense bar on the issue,¹⁴³ the Advisory Group

"[c]ooperation is thorough if the corporation arranges a detailed briefing and voluntarily provides relevant documents and the results of witness interviews," or "if the corporation provides a general briefing, coupled with identifying relevant witnesses and bringing them in so the Government can hear from the witnesses themselves." "The bottom line is that for a corporation to get credit for cooperation, it must help the Government catch the crooks."). Comey also suggested that "[o]ccasionally, a corporation, nevertheless, can provide the Government with a thorough briefing of all the relevant facts without waiving work product protection," and "[i]f questions are fully answered without a waiver, prosecutors should consider that to be meaningful cooperation in evaluating all factors in making the charging decision." However, he nevertheless stressed that because corporations frequently gather pertinent facts through an investigation by counsel, "it's fair to say that more often than not, a corporation that has chosen to cooperate will necessarily have to waive its work product protection to some extent to supply the Government with thorough information." *Id.*

¹³⁹ ADVISORY GROUP REPORT, *supra* note 137, at 93.

¹⁴⁰ The Commission planned a review of the guidelines due to the ten-year anniversary of the guidelines. News Release, U.S. Sentencing Comm'n, Sentencing Commission Convenes Organizational Guidelines Ad Hoc Advisory Group (Feb. 21, 2002), *available at* <http://www.ussc.gov/PRESS/re10202.htm>. The Sarbanes-Oxley Act also necessitated that the Commission revise the Organizational Guidelines and related policy statements to ensure their sufficiency to deter and punish organizational misconduct in accordance to the statutory purpose. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 745, § 805(a)(5) (2002) (codified in scattered sections of 11, 18 and 28 U.S.C). *See also*, John F. Fatino, *United States Sentencing Commission Amends Chapter 8 of the Sentencing Guidelines: A Primer on the New Requirements*, 42 NO. 1 CRIM. L. BULL. 3 (2006).

¹⁴¹ ADVISORY GROUP REPORT, *supra* note 137, at 92.

¹⁴² *Id.*

¹⁴³ For a comparison of the views expressed by DOJ and the defense bar over this issue, see *id.* at 99-103. *See also*, Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the*

recommended that the Commission add the following language to the Application Notes¹⁴⁴ for cooperation and substantial assistance departures: “[i]f the defendant has satisfied the requirements for” cooperation or substantial assistance, “waiver of the attorney-client privilege and of work product protections is not a prerequisite” to a reduction in culpability score or to a motion for a downward departure. “However, in some circumstances, waiver of the attorney-client privilege and of work product protections”¹⁴⁵ may be required in order to satisfy the requirements of cooperation. The objective of the Advisory Group was to limit requests for waivers only to situations in which cooperation demands them but not to otherwise encourage them.¹⁴⁶

In 2004, the Commission amended the Application Notes by adding the following sentence: “Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score to receive cooperation credit unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”¹⁴⁷ Although clarifying that waiver is not a prerequisite in order to receive

Organizational Guidelines, 1 OHIO ST. J. CRIM. L. 487, 495-98 (2003-2004). The DOJ recommended that Application Note Twelve to section 8C2.5 be broadened to recognize that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver is necessary for full cooperation. The defense bar, on the other hand, recommended that the guidelines be amended to add an explicit statement that waivers are not prerequisites to obtain cooperation credit at sentencing, because they feared that the silence of the guidelines would create a danger that the request of waivers will become widespread.

¹⁴⁴ Application notes are commentary that provides interpretation and application of the guidelines. See USSG, *supra* note 12, §1B1.7 (referring to *Stinson v. United States*, 508 U.S. 36 (1993), which held that “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. at 38).

¹⁴⁵ ADVISORY GROUP REPORT, *supra* note 137, at 104.

¹⁴⁶ *Id.* at 92-104; O’Sullivan, *supra* note 143, at 499.

¹⁴⁷ Amendment 673, U.S. SENTENCING GUIDELINES MANUAL app. C (Supp. Nov. 1, 2004), available at <http://www.ussc.gov/corp/Amend-673.pdf>.

cooperation credit, this new language suggests that waiver, in some cases, may be required.¹⁴⁸

But after the 2004 amendment, prosecutors routinely began to rely on the new language to obtain waivers.¹⁴⁹ Some commentators found that waiver requests were legitimized by the amended guidelines and might have been the “primary driver” for the increase in waiver demands by the government.¹⁵⁰ In response to widespread criticism, in April 2006, the Commission unanimously agreed to eliminate the commentary in the Application Notes.¹⁵¹ The Commission explained that it found, after public comment and testimony, the commentary could be misinterpreted to encourage waivers, when such waivers were intended

¹⁴⁸ Buchanan, *supra* note 59, at 608-9. Members of the American Bar Association (ABA) expressed their concern that “the exception is likely to swallow the rule.” See Donald C. Klawitter, On Behalf of The American Bar Association, Statement Before the United States Sentencing Commission, Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines regarding Waiver of Attorney-Client Privilege and Work Product Doctrine 5 (Nov. 15, 2005), available at http://www.uscc.gov/corp/11_15_05/Kawiter-ABA.pdf (stating that “[n]ow that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department’s ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department’s policy of routinely requiring privilege waivers.”)

¹⁴⁹ Mark & Pearson, *supra* note 13, at 67-68. For example, according to a survey presented to Congress and the Commission, outside counsel and in-house counsel ranked the USSG third and second respectively as the justification given by prosecutors when they requested waivers. See ASSN OF CORP. COUNSEL, *The Decline of the Attorney-Client privilege in the Corporate Context* 9-10, available at <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16306>. See also Terry Carter, *What’s Good for Business: Corporate View on Attorney-Client Privilege Resonates with Sentencing Commission*, 2 A.B.A. J. 66 (June, 2006) (stating that “[c]ritics say that [Holder and Thomson] memos triggered more requests for waivers, and that the Sentencing Commission’s 2004 policy added fuel to the fire”); see also Klawitter, *supra* note 175, at 4-6 (stating that the 2004 Amendment encouraged “routine government demands for waiver of attorney-client and work product protections.” He also delivered the ABA’s belief that “as a result of the privilege waiver amendment, companies and other organizations will be required to waive their attorney-client and work product protections on a routine basis” and “organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government’s assertion that waiver is ‘necessary.’”).

¹⁵⁰ Mark & Pearson, *supra* note 13, at 68.

¹⁵¹ Amendment 673, *supra* note 147.

to be required only in limited circumstances.¹⁵² Today, the OSGs leave open the question of whether waiver of the attorney-client privilege should be considered a factor in evaluating a corporation's cooperation.¹⁵³

III. Prosecutorial Discretion: Department of Justice Guidelines

Ideally, firms prefer that prosecutors exercise their discretion not to prosecute altogether. The voluntary disclosure of any wrongdoing is crucial for a corporation's chances of receiving an offer of deferred or non-prosecution. Arthur Andersen first refused to accept responsibility for its misconduct; the government pursued prosecution, and the swift demise of the firm sent a strong message to the business community.¹⁵⁴ Once wrongdoings are disclosed, the corporation's level of cooperation may be a consideration in deciding whether to prosecute.¹⁵⁵ Forms of cooperation have included: making witnesses available, voluntarily providing documents, disclosing results of internal investigation, and "[waiving] the attorney-client and work product privileges."¹⁵⁶ Critics of the Justice Department contend that in practice, cooperation and waiver have been synonymous in the eyes of the government.¹⁵⁷ The Department of Justice has issued a number of

¹⁵² *Id.*

¹⁵³ Katherine M. Weiss, *Note: Upjohn Co. v. United States as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C.L. REV 501, 525 (2007).

¹⁵⁴ *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Edwin Meese, III, Ronald Reagan Distinguished Fellow in Public Policy & Chairman, Center for Legal and Judicial Studies, The Heritage Foundation).

¹⁵⁵ See Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations § VI.A (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm,

¹⁵⁶ *Id.*

¹⁵⁷ See Testimony of William M. Sullivan, Jr. Esq., Partner, Winston & Straw, LLP Before the H. Comm. On the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong. 4 (2006). Available at www.winston.com/siteFiles/publications/U.S.HouseofRepsTestimonySullivan.pdf.

guidelines to aid prosecutors in the exercise of their discretion regarding whether to defer or forego prosecution. These guidelines are discussed, chronologically, below.

A. The Holder Memorandum

The first set of DOJ guidelines to provide prosecutorial guidance for bringing criminal charges against corporations was issued on June 16, 1999 by the then-Deputy Attorney General Holder and became known as the Holder Memorandum.¹⁵⁸ Prior to the Holder Memorandum, there were no standard guidelines for prosecutors to follow when deciding whether to prosecute a corporation.¹⁵⁹ The Holder Memorandum was not compulsory but was intended to provide “guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case.”¹⁶⁰ The memorandum recognized that special considerations are necessary for corporate prosecutions,¹⁶¹ and suggested eight factors to be considered by prosecutors, beyond those taken into account when prosecuting individuals.¹⁶² The fourth factor allowed prosecutors to consider “[t]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of

¹⁵⁸ Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice to Heads of Dep’t Components and U.S. Att’y’s on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum].

¹⁵⁹ Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 113-14 (2003).

¹⁶⁰ Holder Memorandum, *supra* note 158, preface.

¹⁶¹ *Id.* at § II.A.

¹⁶² The eight factors are: (1) “the nature and seriousness of the offense;” (2) “the pervasiveness of wrongdoing;” (3) the “history of similar conduct” by the corporation; (4) “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the attorney client and work product doctrine privileges;” (5) the “adequacy of corporation’s compliance program;” (6) any “remedial actions” taken by the corporation; (7) any “collateral consequences” of the corporation’s conduct; and (8) “the adequacy of non-criminal remedies” that might be appropriate. *Id.*

its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.”¹⁶³ The memorandum further provided that “[i]n gauging the extent of the corporation’s cooperation, the prosecutors may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.”¹⁶⁴

The memorandum provided two reasons to explain why the waiver of these privileges is deemed to be important in the government investigation. First, it “permit[s] the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.”¹⁶⁵ Second, “they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”¹⁶⁶ In light of these benefits to be brought through corporate privilege waiver, the memorandum allowed prosecutors to request a waiver in appropriate circumstances.¹⁶⁷ Thus, a corporation’s willingness to waive privilege and disclose otherwise protected information became an important factor for federal prosecutors to assess the corporation’s cooperation with the investigation and impacted discretion in charging decisions.¹⁶⁸

¹⁶³ *Id.*

¹⁶⁴ *Id.* at § VI.A.

¹⁶⁵ *Id.* at § VI.B.

¹⁶⁶ *Id.*

¹⁶⁷ The memorandum notes that “[t]his waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government’s criminal investigation.” *Id.*

¹⁶⁸ Zornow & Krakaur, *supra* note 133, at 155 (stating that “[t]he Memorandum leaves no doubt that the official policy of the Justice Department is to obtain waivers of the corporate attorney-

The memorandum notes, however, that prosecutors should not consider corporate privilege waiver as “an absolute requirement”¹⁶⁹ and that prosecutors should consider the corporation’s willingness to waive privilege as “only one factor in evaluating the corporation’s cooperation.”¹⁷⁰ The DOJ’s guidelines, however, gave prosecutors considerable leverage to request corporations to waive their privileges.¹⁷¹

The DOJ guidelines thus introduced the possibility that a corporation may avoid prosecution, in exchange for waiving the privilege to meet the timely and voluntary disclosure requirement. The DOJ guidelines also gave corporations under government investigation strong incentives to waive the privileges in order to gain cooperation credit. Since the guidelines were issued, prosecutors have frequently asked corporations to waive their privileges and have sometimes viewed refusal as an effort to hide the truth.¹⁷²

B. The Thompson Memorandum

In the wake of the corporate scandals of the early 2000s, the Holder Memorandum was revised on January 20, 2003, by then-Deputy Attorney General Larry D. Thompson.¹⁷³ The Thompson Memorandum was the result of a Corporate Fraud Task Force established by Executive Order, in order to enhance the government’s efforts against corporate fraud.¹⁷⁴ Unlike the Holder Memorandum, the new guidelines were intended to provide “binding guidelines on

client and work product privileges where, in the government's view, these privileges might shield evidence relevant to a criminal investigation.”).

¹⁶⁹ Holder Memorandum, *supra* note 158, § VI.B.

¹⁷⁰ *Id.*

¹⁷¹ Zornow & Krakaur, *supra* note 133, at 155-56.

¹⁷² *Id.* at 148 (discussing that “the government now views a corporation’s failure to disclose privileged information immediately as a clandestine effort to hide the truth”).

¹⁷³ Thompson Memorandum, *supra* note 155.

¹⁷⁴ *Id.* at preface.

all federal prosecutors who are investigating, and contemplating the prosecution of, corporate crime.”¹⁷⁵ The revisions mainly focused on increasing “emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”¹⁷⁶ In particular, the memorandum recognized that “[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.”¹⁷⁷ The revisions were intended to make sure that “such conduct should weigh in favor of a corporate prosecution.”¹⁷⁸ The factors for charging are largely similar with those in the Holder Memorandum.¹⁷⁹

Like the Holder Memorandum, the Thompson Memorandum refers to waiver of attorney-client and work product privileges in order to evaluate the quality and sincerity of cooperation by a corporation.¹⁸⁰ The new memorandum

¹⁷⁵ Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 78 (2007).

¹⁷⁶ Thompson Memorandum, *supra* note 155, at preface; *see also* Christopher Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and in Practice*, 43 AM. CRIM. L. REV. 1095, 1135 (2006) (explaining that “the Thompson Memorandum directs prosecutors to consider far more carefully whether a company is truly rendering ‘authentic’ cooperation.”).

¹⁷⁷ Thompson Memorandum, *supra* note 155, preface.

¹⁷⁸ *Id.*

¹⁷⁹ The Thompson Memorandum added an additional factor for consideration; “adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.” *See id.* § II.A.8.

¹⁸⁰ The memorandum provides that “[i]n determining whether to charge a corporation, that corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government’s investigation may be relevant factors. In gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.” *Id.* § VI.A. *See also* Wray & Hur, *supra* note 176, at 1175 (explaining that the DOJ, after conscious and careful deliberation, decided to preserve its waiver language in the Holder Memorandum, because “Department officials felt that the Holder Memo’s waiver provision continued to accurately reflect the Department’s stance on the issue: that waiver is a powerful indicator of, but not a litmus test for, the authenticity of a company’s cooperation.”). Wray & Hur further explain that “[T]he Thompson Memo does place a greater premium on gauging the authenticity of companies’ cooperation, which likely explains why it has been interpreted to encourage waiver more than its predecessor.” *Id.*

added another factor to gauge cooperation, requiring prosecutors to consider “whether the cooperation, while purporting to cooperate, has engaged in conduct that impedes the investigation.”¹⁸¹ The memorandum shows several such examples:

[O]verly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsels, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making representations 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.¹⁸²

Thus, the Thompson Memorandum shifts the prosecutor’s focus further to the evaluation cooperation. According to a DOJ official, “for a corporation to get credit for cooperation, it must help the Government catch the crooks.”¹⁸³

The Thompson Memorandum was followed by wide criticism.¹⁸⁴ The Thompson Memorandum continued to encourage prosecutors to evaluate the extent and value of a corporation’s cooperation with reference to its promise to support its employees through advancing attorneys fees, retaining employees without sanction for their misconduct, or providing information to employees about the government’s investigation under a joint defense agreement.¹⁸⁵ When prosecutors determined that corporations were supporting culpable employees through such means, the guidelines permit prosecutors to weigh in favor of corporate prosecution.¹⁸⁶ Critics, therefore, argued that the new memorandum

¹⁸¹ Thompson Memorandum, *supra* note 155, § V.B.

¹⁸² *Id.* § I.B.

¹⁸³ Silbert & Joannou, *supra* note 20, at 1227; Bharara, *supra* note 175, at 81 (describing that the considerations are deliberately selected to create incentives for corporations to help identify individual criminals).

¹⁸⁴ See Bharara, *supra* note 175, at 78-86 and accompanying notes; see also Wray & Hur, *supra* note 176, at 1170-74.

¹⁸⁵ Thompson Memorandum, *supra* note 155, § VI.B.

¹⁸⁶ *Id.*

generated severe conflicts between the rights, privileges, and interests of the corporation and those of its employees,¹⁸⁷ and discouraged full and candid communication between corporate employees and legal counsel.¹⁸⁸

Former Attorney General Edwin Meese has been critical of the Thompson factors:

Much of the [Thompson] Memorandum's coercive power lies in its lack of specific, concrete language explaining how the prosecutors will decide to indict and what weight they will assign to the various factors. . . . It is axiomatic that when a governmental body or agency defines rules for its own conduct that are vague and indefinite, it thereby retains to itself near-absolute discretion to act as it may choose in any given circumstance.¹⁸⁹

C. The McCallum Memorandum

When the Thompson Memorandum came under relatively immediate fire for its pliable standards and general lack of predictability, the DOJ, in 2005, issued the McCallum Memorandum.¹⁹⁰ Deputy Attorney General Joseph D. McCallum proposed that a written waiver process be established in each U.S. Attorney's Office to silence calls for prosecutorial uniformity.¹⁹¹ However, the McCallum Memorandum failed to require that each waiver process be made publicly available to business organizations.¹⁹² Corporations were still in the dark about when and whether they were required to waive privilege. According to one Former U.S.

¹⁸⁷ Bharara, *supra* note 175, at 82-83.

¹⁸⁸ Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice to Head of Dep't components and U.S. Att'ys on Principles of Federal Prosecution in Business Organizations, preface (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

¹⁸⁹ Meese, *supra* note 154, at 5.

¹⁹⁰ Memorandum from Robert D. McCallum, Jr., Deputy Att'y Gen., U.S. Dep't of Justice to Heads of Dep't components and Att'ys Gen. on Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005).

¹⁹¹ *Id.*

¹⁹² *Id.*

Attorney General, that was unacceptable: “Justice requires citizens to be fully informed of what the law and law enforcement officials expect so that citizens may conform their conduct to those expectations.”¹⁹³

D. The McNulty Memorandum

The McNulty Memorandum, issued in December 2006,¹⁹⁴ was the DOJ’s response to the attorney-client uproar and widespread dissatisfaction with the McCallum Memorandum. In testimony before Congress, Deputy Assistant Attorney General Barry Sabin assured Congress that the McNulty Memorandum “expressly provides that waiver of the privilege is not a pre-requisite to a finding that a company has cooperated.”¹⁹⁵ The McNulty Memorandum set out to establish a formal approval channel for prosecutors requesting waivers from potential corporate defendants. Under the McNulty Memorandum, DOJ attorneys must demonstrate a “legitimate need” before seeking a waiver by showing:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.¹⁹⁶

Even if a prosecutor succeeds in establishing a legitimate need for a waiver request, the company may still decline the request with no negative consequences (at least theoretically). If, however, the company acquiesces in the request, the DOJ will consider it “favorably; after all, the government wants to encourage

¹⁹³ Meese, *supra* note 154, at 7.

¹⁹⁴ McNulty Memorandum, *supra* note 188.

¹⁹⁵ *The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice) [hereinafter Sabin].

¹⁹⁶ *Id.* at 5.

cooperation ... and certainly a corporation would want to receive a benefit.”¹⁹⁷ In practice, it is difficult to envision an environment where waiver is viewed positively, yet refusal would have no effect on a prosecutor’s propensity for leniency. In defense of this skepticism, the law firm of Milberg Weiss Bershad & Schulman tried to enter into a DPA with the government when the government indicted it for having given secret rebates to lead plaintiffs in class action suits,¹⁹⁸ but negotiations immediately broke down when the government insisted that it waive its attorney-client privilege and the firm refused to do so.¹⁹⁹

Under the McNulty Memorandum, requests for waiver are divided into two categories. Category I information pertains to factual inquiries; by and large, these requests are less controversial. Category I requests are approved by a U.S. Attorney in consultation with the Assistant Attorney General of the Criminal Division. Category II waiver requests, those pertaining to legal advice and more sensitive conversations, must be approved by the Deputy Attorney General. When companies volunteer to hand over privileged documents, no approval is necessary for acceptance.²⁰⁰ Of course, some requests spill over across these categories because what is “purely factual information” is open to interpretation.²⁰¹

The DOJ was quick to point out that within the three months following the release of the McNulty Memorandum, no Category II requests were made by prosecutors.²⁰² The absence of formal requests is of little comfort to firms,

¹⁹⁷ *Id.* at 5-6.

¹⁹⁸ Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN & COM L. 45, 82 (2006).

¹⁹⁹ *Id.* at 81.

²⁰⁰ Sabin, *supra* note 195, at 6.

²⁰¹ Mintz Levin, *Department of Justice Modifies Thompson Memorandum Guidance on Attorney-Client Privilege Waivers and Advancement of Attorneys’ Fees in Government Investigations*, MONDAQ BUS. BRIEFING, Jan. 12, 2007, at 3 [hereinafter Levin, *DOJ Modifies Thompson*].

²⁰² *Id.* at 5.

however, as the question remains whether reduced waiver demands will actually reduce the incidence of waivers and “the concomitant erosion”²⁰³ of privilege. Circumstantial coercion defines the culture of waiver more so than does explicit requests by prosecutors.²⁰⁴ And although the McNulty Memo explicitly forbids prosecutors from considering the advancement of legal fees when deciding whether to indict, business groups still feel that the enormous disparity in bargaining power incentivizes businesses to abandon their employees in an effort to demonstrate their full cooperation.²⁰⁵

E. The 2008 Guidelines

On August 28, 2008, Deputy Attorney General Mark R. Filip announced another round of guidelines for corporate prosecution (the “2008 Guidelines”).²⁰⁶ Instead of issuing a new memorandum, the new guidelines are set forth in the United States Attorneys’ Manual.²⁰⁷ The 2008 Guidelines are intended to respond primarily to criticisms of some prosecutors’ abusive practices in deciding whether to give cooperation credits,²⁰⁸ and revise the preceding guidelines concerning

²⁰³ *Id.*

²⁰⁴ Levin, *DOJ Modifies Thompson*, *supra* note 201, at 3.

²⁰⁵ Bill McConnell, *Specter Bill Would Curb Prosecutors*, DAILY DEAL, Sept. 19, 2007.

²⁰⁶ See Mark R. Filip, Deputy Att’y General, Remarks at the Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008) (transcript available at <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>) [hereinafter Filip Remarks]; See Press Release, Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), available at <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>.

²⁰⁷ See Attorneys’ Manual, *supra* note 27.

²⁰⁸ See Filip Remarks, *supra* note 206 (addressing the concerns expressed by the legal community about the unfair demands by prosecutors to corporations to hand over privileged materials or privilege waivers “as a precondition for receiving cooperation credit” and the prosecutors’ practices to withhold cooperation credits based on a corporation’s advancement of attorneys’ fees to its employees, failure to sanction culpable employees, or joint defense agreements); Attorneys’ Manual, *supra* note 27, § 9-28.710.

privilege waivers, corporation's advancement of attorneys' fees to employees, and joint defense agreement, among others.²⁰⁹

The 2008 Guidelines make it clear that whether a company has cooperated should not be evaluated by whether it waived attorney-client privilege or work product protection, but rather by the extent to which the company disclosed "the relevant facts" to the government.²¹⁰ That is, prosecutors should give cooperation credit based on whether the company has timely disclosed the relevant facts rather than whether the corporation has disclosed the privileged materials.²¹¹ In contrast to the McNulty Memorandum, which, under special conditions, had allowed federal prosecutors to request waivers and disclose non-factual attorney-client communication ("Category II" information), the 2008 Guidelines expressly prohibit prosecutorial requests for this communication.²¹² Under the 2008 Guidelines, although a corporation still "remains free to convey non-factual or 'core' attorney-client communications or work product,"²¹³ the corporation need not disclose this communication and prosecutors may not request the disclosure of this as a condition for cooperation credit.²¹⁴ Further, the 2008 Guidelines encourage corporate counsel to report instances where prosecutors continue to

²⁰⁹ See Attorneys' Manual, *supra* note 27, § 9-28.710.

²¹⁰ See *id.*

²¹¹ *Id.*

²¹² See Phillip Remarks, *supra* note 206.

²¹³ See *id.* § 9-28.710.

²¹⁴ See *id.* § 9-28.720(b). The new guidelines provide two exceptions, both of which are well established in the existing law. When a corporation asserts "an advice-of-counsel defense" or when communications between a corporation and its counsel are "made in furtherance of a crime or fraud," prosecutors may legitimately ask for the disclosure of such communications. See *id.* § 9-28.720(b)(i)-(ii).

demand disclosure of privileged information.²¹⁵ The 2008 Guidelines thus appear to protect “non-factual or core” attorney-client privilege and work product protection.²¹⁶ That policy is consistent with the established law that privilege does not extend to underlying facts that are incorporated into the communication or the work product.²¹⁷ The 2008 Guidelines are not, however, clear regarding whether factual work product such as witness statements, investigative reports, or interview memoranda prepared by counsel in the course of an internal investigation may be subject to disclosure in exchange for leniency.²¹⁸ This ambiguity may leave a corporation under continuing pressure to disclose such materials to show it has fully disclosed “relevant facts.”

²¹⁵ See *id.* § 9-28.760.

²¹⁶ The guidelines state that attorney-client communications that are “both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice lie at the “core of the attorney-client privilege.” Likewise, the guidelines state that “non-factual or core attorney work product,” for example, “an attorney’s mental impressions or legal theories lies at the core of the attorney work product doctrine.” See *id.* § 9-28.720(b).

²¹⁷ See, e.g., *In re International Sys. & Control Corp. Sec. Litig.*, 91 F.R.D. 552, 561 (S.D.Tex. 1981).

²¹⁸ The guidelines specifically refer to those situations in which counsel interview corporate personnel during an internal investigation and acknowledge that “certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product.” Further the guidelines state that “[t]o receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews,” but “the corporation does need to produce, and prosecutors may request...relevant factual information acquired through those interviews unless the identical information has otherwise been provided. See Attorneys’ Manual, *supra* note 27, § 9-28.720(a) & n.3. However, it is not clear if “the protected notes or memoranda” cover the entire notes or memoranda prepared by attorneys, or only cover “core” work product such as attorney’s impression revealed in those notes or memoranda. In addition, the 2008 Guidelines expressly prohibit federal prosecutors from taking into account a corporation’s advancement or reimbursement of attorneys’ fees to employees in evaluating cooperativeness. See Attorneys’ Manual, *supra* note 27, § 9-28.730. Finally, the new guidelines make it clear that “the mere participation” in a joint defense agreement will not render a corporation ineligible for cooperation credit. See *id.*

IV. Non-Prosecution and Deferred Prosecution Agreements

How the 2008 Guidelines will impact prosecutorial practices with respect to firms' willingness to voluntarily waive privilege is yet to be determined. Review of recent NDAs and DPAs entered into after the issuance of the McNulty Memorandum but before the 2008 Guidelines, may foretell some trends.²¹⁹ As discussed above, the McNulty Memorandum also attempted to curtail perceived abuses in prosecutorial practices regarding requests for waiver. Review of a sample of various NDAs and DPAs entered into 2007 or 2008,²²⁰ however, discloses agreements still containing requests for waiver of privilege. The next section describes five different ways privilege has been dealt with in NDAs and DPAs during this time period. These include provisions that: (1) contain outright waiver requests; (2) describe possible adverse effects from withholding privileged information; (3) differentiate between requests for factual and non-factual information; (4) expressly acknowledge that the government will not request waiver of privilege; or (5) do not refer to the waiver issue at all.

²¹⁹ See Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 Am. Crim. L. Rev. 159, 179-80 (2008) (while the authors state that the "data reveals a marked turn away from waiver as a gauge of a company's full and on-going cooperation with the government," the article does not tell how many agreements contained the express language of waiver request). Compare with the following: a study on the agreements entered before 2006 found that nearly 80% included waiver request. See Orland, *supra* note 198, at 79; a survey of pre-McNulty Memorandum agreements entered into from 2003 to 2006 found that about two-thirds of the agreements contained an express waiver request. See Lawrence D. Finder & Ryan D. McConnel, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 St. Louis U. L.J. 1, 22 (2006).

²²⁰ At the time of this study, research disclosed no NPAs or DPAs entered into under the 2008 Guidelines yet publicly available for review.

A. Outright Waiver Requests: The Country Club (DPA, 2008)

On February 6, 2008, The Country Club of Jackson, Mississippi (“The Country Club”) entered into a deferred prosecution agreement with the DOJ and the U.S. Attorney’s Office for the Southern District of Mississippi in connection with violations of immigration and social security laws.²²¹ The government filed a criminal complaint charging The Country Club with hiring and continuing to employ illegal aliens while knowing that such aliens were unauthorized to work and furnishing false information to the Social Security Administration (“SSA”), with the intent to deceive the Administration as to the aliens' identities.²²²

The DPA expressly requires The Country Club not to claim privilege with regard to documents or information requested by the prosecutors relating to the conduct under investigation.²²³ The waiver provision does not differentiate

²²¹ See Deferred Prosecution Agreement between The Country Club of Jackson and the United States of America 9 (Feb. 6, 2008), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/jacksoncountryclub.pdf>.

²²² See Criminal Complaint between the United States of America and The Country Club of Jackson, Mississippi, No. 3:08-mj-00109 (LRA) (Southern District of Mississippi, Jackson Division, 2008). In the DPA, The Country Club agreed to pay a fine of \$214,500, adhere to the Best Practices of the ICE Mutual Agreement between the Government and Employers (“IMAGE”) Program, and implement comprehensive policies and internal systems to comply with the program. *Id.* at 2-5. Each quarter the company is also required to conduct public workshops at its own expense throughout Mississippi to train other employers on how to legally complete I-9 forms; detect and deter fraudulent documents; use the Basic Pilot Employment Verification Program; and adhere to the Best Practices of the IMAGE program. *Id.* at 5-6. Prior to the workshops, The Country Club is required to make public announcements both in a local newspaper in the vicinity where the workshops will be held and in a newspaper of state-wide circulation.

²²³ See Deferred Prosecution Agreement between The Country Club of Jackson and the United States of America 9 (Feb. 6, 2008), *supra* note 221. Paragraph 12 specifies:

The Country Club agrees not to assert, in relation to any request of the United States, a claim of privileges (such as attorney-client privilege) or immunity from disclosure (such as work product) as to any documents or information requested by the United States related to the conduct described in the Statement of Facts, the criminal complaint, or the affidavit in support of the criminal complaint filed pursuant to this Agreement

between factual information and non-factual information. According to the state government, the Country Club's DPA is intended to convey a message that the government will vigorously prosecute violations of federal immigration law by employers.²²⁴

B. Possible Adverse Effects from Withholding Privileged Information: AGA Medical Corporation (DPA, 2008)

On June 3, 2008, AGA Medical Corporation (AGA), a privately-held medical device manufacturer, entered into a DPA with the DOJ in connection with corrupt payments to Chinese government officials²²⁵ in violation of the Foreign Corrupt Practices Act ("FCPA").²²⁶ Between 1997 and 2005, AGA, one of its high-ranking officers, and other AGA employees allegedly agreed to make corrupt payments, through AGA's local Chinese distributor, to physicians in government-

²²⁴ See Press Release, U.S. Attorney's Office of Southern District of Mississippi, Criminal Complaint Filed against the Country Club of Jackson for Immigration and Social Security Violations; United States and the Country Club Enter into Deferred Prosecution Agreement (Feb. 7, 2008), *available at* <http://www.usdoj.gov/usao/mss/Feb%207%202008a.html>. The U.S. Attorney Dunn Lampton commented:

Due to a lack of emphasis, our federal immigration laws have not been traditionally and consistently enforced against employers. That is about to change in the Southern District of Mississippi. Today's agreement should be viewed as a one-time occurrence, intended to serve as a clear and unequivocal warning to all employers throughout the state that, from this day forward, this office will be vigorously prosecuting employers who violate our federal immigration laws . . . The most effective way to combat illegal immigration is to go after the prospect of employment that draws illegal immigrants to this country and our state . . . Employers are now on notice and I expect them to follow the law. After today, employers of illegal aliens will be criminally prosecuted in the Southern District of Mississippi.

²²⁵ See Press Release, U.S. Dep't of Justice, AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/June/08-crm-491.html>.

²²⁶ The Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.).

owned hospitals in China in order to increase its sales to the hospitals.²²⁷ It was also alleged that from 2000 through 2002, AGA, a high-ranking officer, and the Chinese distributor agreed to pay bribes to Chinese government officials at the State Intellectual Property Office in order to obtain approval of AGA's patent applications.²²⁸

According to the DPA, the DOJ agreed to defer prosecution in recognition of AGA's voluntary and timely disclosures and thorough internal investigation.²²⁹ Furthermore, AGA reported all its findings to the DOJ, took remedial measures in conformity with the agreement, and promised to continue to cooperate with the government.²³⁰ Under the DPA, AGA admits its responsibilities for the conduct and agreed to pay a \$2 million penalty.²³¹ Although the cooperation provisions do not require an outright waiver of privileges as part of the continuing obligation of disclosure, the DOJ reserved the right to access privileged information.²³² If AGA

²²⁷ See AGA press release, *supra* note 225.

²²⁸ *Id.*

²²⁹ See Deferred Prosecution Agreement between the United States of America and AGA Medical Corporation 3 (June 3, 2008), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/agamedical.pdf>.

²³⁰ *See id.*

²³¹ *See id.* at 8.

²³² *See id.* at 4.

Voluntary Cooperation

. . .

i. The Department specifically reserves the right to request that AGA provide the Department with access to information, documents, records, facilities and/or employees that may be subject to a claim of attorney-client privileges and/or the attorney work product doctrine.

ii. Upon written notice to the Department, AGA specifically reserves the right to withhold access to information, documents, records, facilities and/or employees based upon an assertion of a valid claim of attorney-client privilege or application of the attorney work-product doctrines. Such notice shall include a general description of the nature of the information, documents, records,

rejects submitting the requested information based on a privilege claim, the rejection will be considered when evaluating whether full cooperation exists.²³³ AGA is also prohibited from withholding information based on a privilege claim.²³⁴ Finally, AGA also agreed to implement compliance policies and procedures to detect and prevent violations of the FCPA and other applicable anti-corruption laws, and to engage an independent corporate monitor with expertise in the FCPA.²³⁵

C. Differentiation between Requests for Factual and Non-Factual Information: Blue Cross & Blue Shield of Rhode Island (DPA, 2007)

On December 13, 2007, Blue Cross & Blue Shield of Rhode Island (“BCBSRI”) entered into a deferred prosecution agreement with the U.S. Attorney’s Office for the District of Rhode Island and the DOJ, in connection with a corruption investigation.²³⁶ The government’s investigation discovered bribery of three members of the state Senate in order to obtain favorable legislation.²³⁷

Under the DPA, BCBSRI agreed to pay \$20 million and to enact a series of ethical and compliance reforms intended to improve the company’s relationship

facilities and/or employees that are being withheld, as well as the basis for the claim.

iii. In the event that AGA withholds access to the information, documents, records, facilities and/or employees of AGA, the Department may consider this fact in determining whether AGA has fully cooperated with the Department.

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ *See* Press Release, U.S. Dep’t of Justice, Blue Cross Blue Shield of Rhode Island Enters Agreement with the Government, Agrees to Pay \$20 Million to Resolve Public Corruption Allegations (Dec. 13, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/December/07_crm_998.html.

²³⁷ *Id.*

with state officials.²³⁸ The company also agreed to hire an independent monitor for two years to oversee its ethics reform and compliance with the agreement.²³⁹ The DPA expressly states that the company's cooperation is "an important and material factor underlying the Government's decision to enter into this Agreement."²⁴⁰ Under the DPA, BCBSRI is required to cooperate continuously, including not asserting "any claim of privilege (including but not limited to the attorney-client privilege and the work product protection) as to any documents, records, information, or testimony requested by the Government that relates to the factual material generated as a result of BCBSRI's internal investigation."²⁴¹ This provision allows BCBSRI to assert privilege "with respect to privileged communications between BCBSRI and its defense counsel that post-date the beginning of the criminal investigation."²⁴² The disclosure obligation is, however, silent regarding privileged communication that pre-dates the investigation and attorney work product generated in connection with the company's internal investigation. To the extent that they relate to factual information generated through the course of internal investigation this information would be continuously subject to the disclosure obligations.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See Agreement between the U.S. Attorney's Office for the District of Rhode Island and the Dep't of Justice, Criminal Division, Public Integrity and Blue Shield & Blue Shield of Rhode Island 5, available at <http://www.corporatecrimereporter.com/documents/pin.bcbs.agreement.pdf>.

²⁴¹ *Id.* at 6.

²⁴² *Id.* at 6-7.

D. Express Acknowledgement that Privilege Waiver Is Not Required: Lawson Products, Inc. (DPA, 2008)

On August 11, 2008, Lawson Products, Inc., a publicly-traded company headquartered in Des Plaines, Illinois, entered into a DPA with the U.S. Attorney's Office for the Northern District of Illinois relating to the government's investigation of the company's customer loyalty programs.²⁴³ The company was charged with mail fraud.²⁴⁴ According to the charge, the company maintained incentive programs under which its sales agents could provide incentive rewards if the employees of Lawson customers ordered a greater amount of merchandise. These kickbacks amounted to nearly \$10 million over thirteen years from 1992 to 2005.²⁴⁵

Under the DPA, Lawson accepted responsibility for the conduct, agreed to continue to implement a compliance and ethics program designed to prevent and detect corrupt sales practices, and to pay a \$30 million penalty.²⁴⁶ The cooperation provisions in the agreement also require the company to provide all documents and records requested by the government. The provision, however, expressly states that those documents and records do not include those protected by attorney-client or work product privileges.²⁴⁷ The provision further provides

²⁴³ See Press Release, U.S. Att'y Northern District of Illinois, Lawson Products to Pay \$30 Million Under Deferred Prosecution Agreement Involving Corrupt Sales Practices (Aug. 11, 2008), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr0811_01.pdf.

²⁴⁴ *Id.*

²⁴⁵ *See id.*

²⁴⁶ See Deferred Prosecution Agreement between the United States of America and Lawson Products, Inc. 5 (Aug., 2008), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr0811_01b.pdf.

²⁴⁷ *See id.* at 2-6. The provision specifies that:

LAWSON PRODUCTS shall provide the United States with all documents and records that the United States requests and are not subject to valid claims of attorney-client or work product privileges. The United States shall not assert that

that the government shall not assert that the company has waived its privilege based on the company's acts already known to the government at the time of the agreement.²⁴⁸

E. No Reference to the Privilege Issue: ESI Entertainment Systems Inc. (DPA, 2008)

On June 3, 2008, ESI Entertainment Systems Inc. ("ESI"), a technology company based in Canada entered into a DPA with the U.S. Attorney's Office for the Southern District of New York related to illegal internet gambling.²⁴⁹ Under the DPA, ESI agreed to pay \$9,114,342 as disgorgement of illegal proceeds.²⁵⁰ ESI also agreed: (1) not to participate in illegal gambling transactions involving U.S. residents; (2) to maintain and regularly monitor the effectiveness of internal procedures and controls designed to prevent its services from being used to conduct or process illegal gambling transactions; and (3) to retain a firm to monitor the compliance of ESI.²⁵¹ The DPA does not contain any language relating to waiver of privilege, nor does it differentiate between factual information and non-factual information. The cooperation provisions simply require ESI to completely and truthfully disclose all information in its possession, including all information about the company's past and ongoing activities and its

any act by LAWSON PRODUCTS known to the United States as of the date of this Agreement constitutes a waiver of its attorney-client or work product privileges in any respect as to matters relating to the scheme described in the Information and Statement of Facts.

²⁴⁸ *Id.*

²⁴⁹ See Press Release, U.S. Att'y Southern District of New York, Canadian Internet Payment Company Admits Criminal Wrongdoing and Agrees to Pay \$9.1 Million for Conspiring to Promote Internet Gambling Businesses (June 5, 2008), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/June08/esidpapr.pdf>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

present and former employees, and volunteer and provide any information and documentation that may be relevant to the investigation.²⁵² The charge will be dismissed after eighteen months if ESI complies with the terms of the DPA.

F. Impact of the 2008 Guidelines

Among the terms relating to privilege in the agreements examined above, an outright request for waiver, like that in The Country Club agreement, would not be permissible under the 2008 Guidelines. A waiver provision allowing prosecutors to consider a company's rejection of waiver as a factor for evaluating cooperation, like the term in the AGA agreement, also appears to be no longer permissible. An agreement modeled after the ESI DPA which contains no reference to privilege waiver would likely still be allowed. Under this type of agreement, however, the corporation may still feel obliged to voluntarily waive privilege to meet its requirements of complete and truthful disclosure, and voluntary disclosure of relevant documentation.

On the other hand, the BCBSRI terms, requiring no assertion of privilege claims on factual materials generated through the internal investigation, seem to generally comply with the policy under the new guidelines. As discussed above, although the 2008 Guidelines prohibit waiver requests regarding "non-factual or core" attorney-client privilege communication and attorney work product, the new

²⁵² See Deferred Prosecution Agreement between United States Attorney Southern District of New York and ESI Entertainment Systems, Inc. 4 (June 3, 2008), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/esi.pdf>.

guidelines do not clearly define factual work product.²⁵³ As long as the BCBSRI provisions do not require disclosure of non-factual or core attorney-client communication or work product, but instead only require disclosure of factual material, including factual attorney work product, such provisions seem permissible under the new guidelines.

Conclusion

A March, 2006 survey of more than 1400 in-house and outside counsels indicated that nearly 75% of corporate lawyers believe a culture of waiver has permeated the DOJ and SEC.²⁵⁴ The data on DPAs and NPAs seem to support this. Nearly 80% of the DPAs entered into before June, 2006 reportedly include waiver of privilege.²⁵⁵ One would imagine the percentage to be significantly lower if corporations believed waiver to be optional and inconsequential.

It may be the DOJ's policy to encourage prosecutors to consider a corporation's cooperation in its charging decisions that has given prosecutors the most significant leverage in the past to encourage a corporation to waive privilege.²⁵⁶ As the DOJ guidelines emphasize, prosecutors have considerable discretion "in determining when, whom, how, and even whether to prosecute for

²⁵³ See discussion of 2008 Guidelines, *supra* Part III.E.

²⁵⁴ Marty Steinberg, *Coping with a 'Culture of Waiver,'* FIN. EXECUTIVE, Sep. 1, 2007, at 47.

²⁵⁵ Orland, *supra* note 198, at 79.

²⁵⁶ See Zornow & Krakaur, *supra* note 133, at 154 (explaining that "[f]ederal prosecutors more and more frequently go so far as to state that unless a company provides its privileged information to the government, the company will be deemed to have cooperated."); 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, 543 (2003) (discussing that the memorandum "go[es] quite far toward effectively forcing a corporation to waive privilege protections if its hopes to obtain favorable charging treatment at the hands of DOJ prosecutors").

violations of federal criminal law.”²⁵⁷ By obtaining cooperation credit, a cooperative corporation may not only decrease potential fines under the Organizational Sentencing Guidelines but may be able to avoid indictment altogether. Considering that a corporation would likely suffer significant social and economical damages “before there is any determination that the corporation has committed a crime or had engaged in any wrongdoing”²⁵⁸ upon indictment, avoiding prosecution becomes particularly significant. Further, as the Arthur Andersen case illustrates, a criminal indictment has a potentially devastating impact on the corporation under investigation.²⁵⁹ Corporations under criminal investigation therefore, are under incredible pressure to avoid such a result.²⁶⁰

The recent 2008 Guidelines purport to eliminate the pressure on firms to waive their rights to privilege in exchange for favorable treatment. The new guidelines expressly state that “eligibility for cooperation credit is not predicated on waiver.”²⁶¹ Further, “so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.”²⁶² Under the 2008 Guidelines, therefore, a prosecutor

²⁵⁷ Thompson Memoranda, *supra* note 155, § II.B; McNulty Memorandum, *supra* note 188, § III.B.

²⁵⁸ Silbert & Joannou, *supra* note 20, at 1229 (explaining that “being named in a criminal indictment has many immediate and negative effects on a corporation, including negative publicity and reputational damage, a drop in the corporation’s stock price, a negative effect on credit rating, debarment or exclusion from certain kinds of business, increased legal fees and expenses, pressure to remove certain employees before there has been any determination of guilt, and problems with regulators”).

²⁵⁹ U.S. v. Stein, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) (stating “that no major financial services firm has ever survived a criminal indictment,” and noting that the indictment of Arthur Andersen “resulted in the collapse of the firm, well before the case was tried”).

²⁶⁰ *Id.*

²⁶¹ See Attorneys’ Manual, *supra* note 27, § 9-28.720

²⁶² *Id.* at 9-28.720(a).

may no longer use a cooperation credit as leverage to request a corporation to waive privileges.

Yet, in order to fulfill prosecutorial requests for full cooperation with the governmental investigation, the corporation generally must have conducted internal investigations, voluntarily disclosed relevant documents, identified individual wrongdoers, shown lines of authority and responsibility within the organization, and provided reports of the internal investigations.²⁶³ Furthermore, as Sam Buell, a former federal prosecutor points out, “[t]hese days in corporate America virtually nothing happens without the involvement of a lawyer. And so if you’re trying to unravel sort of everything that happened around a particular business transaction, you need to see the lawyer communications as well to determine what was going on.”²⁶⁴

Thus, although the 2008 Guidelines expressly remove official demands for privilege waivers, corporations under governmental investigations may still feel pressure to voluntarily waive privilege, particularly relating to factual work product. The results of internal investigation reports or interview memoranda with witnesses prepared by counsel have been the materials most frequently requested by the prosecutors in the course of investigations,²⁶⁵ conceivably because these materials provide the core facts concerning the alleged misconduct and expedite the government’s investigation.²⁶⁶ The 2008 Guidelines remain ambiguous regarding whether disclosure of internal investigation reports or interview memoranda prepared by attorneys may be required in order for a firm to

²⁶³ See Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceeding: Basic Principles and Tactical Considerations*, PLI Order No. 14673 943, 951 (Sep.-Oct., 2008).

²⁶⁴ *NPR Weekend Edition Sunday: Attorney-Client Privilege Under Attack?* (NPR radio broadcast May 21, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5420689>.

²⁶⁵ ASSN OF CORP. COUNSEL, *supra* note 149, at 8.

²⁶⁶ *Id.* at 9.

receive credit for cooperation. If a corporation is deemed to have failed to timely disclose the relevant facts “for whatever reasons,” the guidelines instruct prosecutors not to give cooperation credit.²⁶⁷

Thus, it may be too early to conclude whether the new guidelines will diminish the widespread culture of waiver.²⁶⁸ It seems likely that some corporations will continue to waive the privileges and disclose the privileged information in order to show prosecutors the completeness of their cooperation and thereby obtain full cooperation credit. To the extent prosecutorial practices under the McNulty Memorandum, which purportedly attempted to curtail pressures on firms to waive privilege, give any indication of potential future practices, waiver may still be indirectly encouraged.

Yet, it is possible that the 2008 Guidelines may strike a new balance between protection of the attorney-client privilege and the efficient prosecution of corporate crime. To the extent firms are not coerced into waiving privilege, full and frank communication between a lawyer and a client should remain in tact. Waiver that is truly voluntary may promote the efficient adjudication of justice and may help restore public confidence in the corporate world.²⁶⁹ Time will tell

²⁶⁷ See Attorneys’ Manual, *supra* note 27, § 9-28.710.

²⁶⁸ Some critics note a possibility that the new guidelines will be revised adversely again in the future depending on changes in the DOJ’s corporate prosecution policy. See H. Thomas Wells Jr., President, ABA, New U.S. Department of Justice Corporate Charging Guidelines (Aug. 28, 2008) (transcript available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=437>) (reinforced the urgent necessity of the legislation “to permanently solve the problem of government-coerced waiver”). He criticized that the DOJ frequently revised its corporate prosecution guidelines (the new guidelines is the fifth) and new guidelines can “provide no certainty that critical attorney-client privilege, work product, and employee constitutional rights will be protected in the future.” *Id.* Concern has also been expressed that the DOJ guidelines will have no binding effect on other federal agencies’ practices. See *id.* (criticizing that the new DOJ policy has no binding effects to “reverse the widespread culture of waiver created by” the other federal agencies including the SEC).

²⁶⁹ See William R. McLucas, Howard M. Shapiro, & Julie J. Song, *Symposium 2006: The Changing Face of White Collar-Crime: The Decline of the Attorney-Client Privilege in the*

whether 2008 Guidelines have struck an appropriate balance. Time will also tell whether the culture of corporate waiver is here to stay.²⁷⁰

Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 641 (2006); Lonnie T. Brown, Jr., *Legal Ethics Symposium: Lawyers' Ethics in An Adversary System: Reconsidering the Corporate Attorney-client Privilege: A Response to the Compelled Waiver Paradox*, 34 HOFSTRA L. REV. 897 (2006).

²⁷⁰ The new guidelines themselves recognize such voluntary waivers “occur routinely.” See *Attorneys' Manual*, *supra* note 27, § 9-28.710.