

**REVITALIZING SELECTIVE WAIVER:
ENCOURAGING VOLUNTARY DISCLOSURE OF CORPORATE
WRONGDOING BY RESTRICTING THIRD PARTY ACCESS TO
DISCLOSED MATERIALS**

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The recent plague of white-collar scandals has shed light on the ugly phenomenon that many of the most trusted names in Corporate America have not been playing fair. Although the Enron and WorldCom collapses have captured most of the media spotlight, countless other corporations are currently under investigation.¹ While Americans were wary of corporate power before these scandals,² such headlines have further ingrained a strong distrust for corporate leadership into the collective American psyche.³ For better or for worse, however, large corporations constitute the backbone of the nation's economy,⁴ and workers, investors, and consumers alike

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¹ Taking into consideration the activities of the Securities and Exchange Commission ("SEC") alone, some have suggested that "based on recent history, approximately 30% of listed companies will be contacted by the SEC Division of Enforcement sometime in the next two years." Association of Corporate Counsel, *SEC Investigations*, available at http://www.acca.com/networks/webcast/sec_investigation.php (last visited Oct. 5, 2004).

² See Aaron Bernstein, *Too Much Corporate Power?*, BUS. WK., Sept. 11, 2000, at 144. Poll results released on August 31, 2000, long before the Enron, WorldCom, and similar scandals broke, suggested that "nearly three-quarters of Americans believe that business has gained too much power." *Id.*

³ See John Gibeaut, *Softening Up Client 'Appeal': Some Corporations Need to Put on a Human Face When Coming Before a Jury*, 89 A.B.A. J. 28, 28 (2003) (noting that "in an Enron-inspired climate, it's almost a yawner when each new poll shows that distrust for corporate America has reached an all-time high."). *Id.*

⁴ See Charles Gray, *Corporate Goliaths: Sizing Up Corporations and Governments*, MULTINATIONAL MONITOR, June 1, 1999, at 26.

suffer when corporate insiders manipulate the system.⁵ Our nation's political leaders, despite their seemingly all-too-cozy relationships with many of those responsible for such transgressions,⁶ have now finally decided that measures must be taken to combat the cauldron of white-collar crime brewing within America's corporations.⁷ While the passage of the Sarbanes-Oxley Act⁸ constitutes a laudable first effort, many are dubious that this law will significantly limit corporate malfeasance.⁹ This Comment advocates that the selective waiver doctrine¹⁰ serves to complement recent attempts to rein in such criminal activity, for it aligns corporations' interests in maintaining crime-free operations and the government's interest in ensuring that

⁵ *Greenhouse Emitters Act on Climate Change*, ENERGY, June 22, 2003, at 21 (observing that "[r]ecent corporate scandals point to the high price paid by everyone . . . for inadequate corporate governance practices.") (quoting Mindy Lubber, Executive Director of Ceres, Press Statement, July 9, 2003).

⁶ See, e.g., Editorial Desk, *Governor Rowland Should Resign*, N.Y. TIMES, Jan. 14, 2004, at A18 (noting the Connecticut Governor's admission to taking bribes from local businessmen to secure favorable government contracts); William M. Welch, *Democrats Begin Fight to Replace Torricelli*, U.S.A. TODAY, Oct. 2, 2002, at 14A (noting accusations that the New Jersey Senator took bribes from a businessman in exchange for his potential influence in business dealings).

⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁸ *Id.* While meant to serve many ends, the Sarbanes-Oxley Act is generally intended to "protect investors by improving the accuracy and reliability of [public] corporate disclosures made pursuant to the securities laws, and for other purposes." *Id.* The SEC had proposed a rule permitting selective waiver as part of the Sarbanes-Oxley Act, but later withdrew that proposal. See Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) [hereinafter Implementation].

⁹ See, e.g., Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885 (2002) (observing that "[t]he Sarbanes-Oxley Act and the revised NYSE listing guidelines may represent only modest and possibly insufficient steps to improve corporate governance more generally."). *Id.* at 901.

¹⁰ Selective waiver is also often referred to as "limited waiver," especially in older works. See, e.g., Beth S. Dorris, Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 823 (1984). The term limited waiver, however, "refers to two distinct types of waivers: selective and partial." *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991). "Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." *Id.* (citing Breckinridge L. Willcox, *Martin Marietta and Erosion of the Attorney-Client Privilege and the Work-Product Protection*, 49 MD. L. REV. 917, 922 (1990); *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1450, 1630-31 (1985) [hereinafter *Developments in the Law*]). This Comment will use the term selective waiver except when quoting a source.

applicable laws are followed.

A corporation that suspects criminal wrongdoing within its ranks inevitably faces a difficult decision.¹¹ It can hire outside counsel to conduct an internal investigation into the matter, and subsequently disclose any relevant findings to the appropriate government agency.¹² Alternatively, the corporation may elect to make no disclosures whatsoever.¹³ Full disclosure benefits the public at large, because, among other advantages, it enables the government to take steps to cure whatever malfeasance has occurred.¹⁴ Since criminal liability can attach to the corporation itself for the acts of its agents,¹⁵ however, the corporation may have much to lose from admitting its own guilt. Therefore, in order to induce corporations to disclose evidence of criminal activity, government agencies typically offer more lenient punishments than would otherwise be imposed.¹⁶

Because corporate misconduct often not only violates criminal laws, but injures third parties as well, it may give rise to significant civil liability.¹⁷ In most jurisdictions, a corporation's disclosure of sensitive materials to a government agency constitutes a complete waiver of the otherwise applicable privileges.¹⁸ A corporation's initial

¹¹ Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 34 (1997).

¹² Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable? Counsel Face Hobson's Choice When Asked to Cooperate With Government*, N.Y. L.J., July 7, 2003, at 7.

¹³ *Id.*

¹⁴ See *Westinghouse*, 951 F.2d at 1425. The court noted, "[w]e do not question the importance of the public interest in voluntary cooperation with government investigations." *Id.*

¹⁵ *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492-93 (1909) (recognizing that a corporation can be held criminally liable for the criminal conduct of its agents, where such illegal acts are committed within an agent's scope of employment).

¹⁶ See Strassberg & Walters, *supra* note 12, at 7; See also *Internal Corporate Investigations: The Dilemma Presented in Considering Whether to Share Investigation Results with the SEC or the Justice Department*, 35 SEC. REG. & L. REP. (BNA) 1170 (July 14, 2003) (noting that "corporate cooperation, disclosure of the complete results of [a corporate] internal investigation, and a willingness to waive attorney-client and work-product protection [are] factors which a prosecutor could consider in determining whether to charge a corporation."); Department of Justice, *Corporate Leniency Policy*, (Aug. 10, 1993) available at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf>.

¹⁷ See Strassberg & Walters, *supra* note 12, at 7.

¹⁸ See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Genentech Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d

disclosure of otherwise privileged materials to the government, according to most courts, waives those privileges as to all other parties; thus, civil litigants seeking to sue the corporation will typically be granted unfettered access to the disclosed materials.¹⁹ Even confidentiality arrangements between the disclosing corporation and the government agency are seldom sufficient to permit the successful assertion of privilege against a civil plaintiff if a previous disclosure was made.²⁰ Thus, a corporation's initial disclosure to the government provides non-government civil litigants with damaging evidence that can be used against the corporation in a suit for damages.²¹ In essence, disclosures to government agencies equip private litigants with "a virtual road map to assist them in their lawsuit."²² Given that the benefits to be derived from lenient criminal punishment are often insignificant when compared to the potential civil liability at stake, corporations aware of their own improprieties often decline to make any disclosures to the government.²³

The selective waiver doctrine encourages corporate cooperation with government investigations, by permitting corporations to retain applicable privileges in subsequent private litigation despite initial disclosures to the government.²⁴ Facilitating disclosure allows law enforcement agencies to levy criminal penalties against the individual perpetrators of the harm, as well as the corporation itself.²⁵ In addition, selective waiver reduces the costs associated with investigating criminal activity,²⁶ and encourages corporations to

Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (all suggesting or concluding that a waiver of privileges to one party is typically a waiver to all parties).

¹⁹ *See id.*

²⁰ *See, e.g., Westinghouse*, 951 F.2d at 1427 (finding a complete waiver despite a confidentiality agreement to the contrary between the disclosing corporation and a government agency). *But see In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (holding that in certain situations, a confidentiality agreement could prevent the complete waiver of all privileges despite an initial disclosure to a government agency).

²¹ *See Strassberg & Walters, supra* note 12, at 7.

²² *Id.*

²³ *See David M. Greenwald & Matthew J. Thomas, Selective Waiver of Privileges, FOR THE DEFENSE*, Dec. 2002, at 10-11.

²⁴ *See id.*

²⁵ *See Strassberg & Walters, supra* note 12, at 7.

²⁶ *See Columbia/HCA*, 293 F.3d at 303. The Sixth Circuit, despite its eventual rejection of the doctrine, observed that "[t]here is considerable appeal, and justification, for permitting selective waiver Considerable savings are realized to the [g]overnment, and through it to the public, in time and fiscal expenditure

enhance their internal compliance efforts, thereby preventing future misconduct.²⁷

Despite these apparent advantages, selective waiver has been repeatedly condemned by both courts and commentators alike.²⁸ Only one federal circuit has adopted the doctrine,²⁹ and only in limited form.³⁰ The doctrine's critics charge that selective waiver places private litigants at a distinct disadvantage,³¹ and that the ends served by selective waiver, although laudable, are inconsistent with the goals of the attorney-client privilege and the work-product protection.³²

This Comment argues that permitting a corporation to waive privileges as to the government, yet retain them against other private litigants, rarely serves to disadvantage private litigants.³³ Furthermore, this Comment demonstrates that the general policies supporting existing privileges, and the benefits that could be derived

related to the investigation of crimes and civil fraud." *Id.*

²⁷ See *id.* The court further noted, "[s]uch a policy might also . . . increase the likelihood that corporations would engage in . . . self-policing . . ." *Id.*; see also Daniel L. Goelzer & Clifford E. Kirsch, *The Doctrine of Selective Waiver or Self Destruction?*, 6 NO. 8 INSIGHTS 11, 14 (1992); Janet L. Hall, Note, "Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine, 1993 U. ILL. L. REV. 981, 996 (1993).

²⁸ See cases cited *supra* note 18. See also Dorris, *supra* note 10, at 823; Jill A. Hornstein, Comment, *Paying the "Traditional Price" of Disclosure: The Third Circuit Rejects Limited Waiver of the Attorney-Client Privilege*, 71 WASH. U. L.Q. 467, 479-80 (1993); Alec Koch, Note, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 374 (1997); Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1228 (1982) [hereinafter *Rabbit*].

²⁹ See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599-600 (8th Cir. 1977) (en banc) (recognizing selective waiver with regard to the attorney-client privilege).

³⁰ See *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235, 237 (E.D. Mo. 1996) (rejecting selective waiver's applicability to the work-product protection); see also *infra* notes 140, 277.

³¹ See, e.g., *Permian*, 665 F.2d at 1222 (positing that "[i]t is apparent that [selective waiver] would enable litigants to pick and choose among [its opponents] [A] litigant who wishes to assert confidentiality must maintain genuine confidentiality."); *Rabbit*, *supra* note 28, at 1218-19 (arguing that "[w]ithin the limits of legislative authorization, the judicial system should not discriminate between private parties and government agencies; justice demands that all litigants be treated by the same rules.>").

³² See, e.g., *Westinghouse*, 951 F.2d at 1425-29 (observing that the goals of selective waiver are inconsistent with the underlying purposes of the attorney-client privilege and work-product protection).

³³ See *infra* notes 230-247 and accompanying text.

from a selective waiver rule, invite widespread recognition of this doctrine in the form of a new corporation-government privilege.³⁴

This Comment advocates the adoption of a modified selective waiver doctrine.³⁵ Part I of this Comment addresses the purposes of the attorney-client privilege and the work-product protection, and their relevance in the corporate context. Part II examines the current state of the selective waiver doctrine, and courts' analyses of its prospects and pitfalls. Part III explores the policy arguments surrounding adoption or rejection of the doctrine, the recommended scope of the privilege, and how it can reasonably be implemented. Finally, Part IV concludes that Congress should implement a selective waiver rule in the form of a new corporation-government privilege, as such a policy would help to align corporate and government interests, and, in the long run, reduce criminal activity within American corporations.

I. Background

A. *The Attorney-Client Privilege*

The attorney-client privilege protects communications between attorney and client from discovery.³⁶ It is the oldest of all the testimonial privileges, arising in Elizabethan times.³⁷ The privilege is intended to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”³⁸ Without the privilege, a “client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal

³⁴ See *infra* notes 293-300 and accompanying text. Just as the attorney-client privilege and work-product protection provide real, although generally unquantifiable benefits, this Comment contends that a new corporation-government privilege would provide significant, although similarly unquantifiable benefits, at limited costs. *Id.*

³⁵ See *id.* *Diversified* held selective waiver to be applicable generally, that is, even in the absence of a confidentiality agreement with the investigating government agency. *Diversified*, 572 F.2d at 599-600. This Comment advocates that selective waiver should only be applicable in cases where an agreement concerning the confidentiality of the materials disclosed is reached between the disclosing corporation and the government agency. See *infra* notes 349-350 and accompanying text.

³⁶ See EDNA SALAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 2 (4th ed. 2001).

³⁷ See *id.*

³⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

advice.”³⁹ While originally a judicial creation,⁴⁰ the attorney-client privilege has been codified in the Federal Rules of Civil Procedure.⁴¹

By its nature, the attorney-client privilege inhibits the truth finding process,⁴² and therefore courts strive to confine the privilege to its “narrowest possible limits” while still maintaining its purpose.⁴³ The attorney-client privilege, like all privileges, serves as an exception to the general rule that the public “has a right to every man’s evidence.”⁴⁴ The attorney-client privilege itself has been often criticized because its burdens (restricted availability of evidence and increased discovery costs) are said to be “plain and concrete” while its benefits (promoting the accessibility to informed legal advice) have been referred to as “indirect and speculative.”⁴⁵ Although the advantages of the privilege are admittedly unquantifiable, the attorney-client privilege has nevertheless become a cornerstone of the Anglo-American legal system, referred to as one of the “bastions of an ordered liberty.”⁴⁶

Because of this narrow interpretation, the attorney-client privilege is extremely fragile and can be lost through purposeful or inadvertent disclosure of otherwise privileged information to other parties.⁴⁷ Since confidentiality is a fundamental element of the attorney-client privilege, a confidentiality breach is typically deemed a waiver of the privilege, and therefore the protections it affords are lost.⁴⁸ “The waiver rule serves to ensure that the privilege, with its attendant costs to the judicial system, is ‘strictly confined . . .’”⁴⁹ Virtually any disclosure to others constitutes a waiver of the attorney-client privilege,⁵⁰ except when the party to whom the information is disclosed shares a common interest in the litigation with the

³⁹ *Fisher v. United States*, 425 U.S. 391, 403 (1976).

⁴⁰ See 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).

⁴¹ See FED. R. CIV. P. 26(b)(3).

⁴² See *Jaffe v. Redmond*, 518 U.S. 1, 9 (1996).

⁴³ *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (quoting WIGMORE, *supra* note 40, § 2291).

⁴⁴ WIGMORE, *supra* note 40, § 2192.

⁴⁵ *NLRB v. Harvey*, 349 F.2d 900, 907 (quoting WIGMORE, *supra* note 40, § 2291).

⁴⁶ See EPSTEIN, *supra* note 36, at 2.

⁴⁷ See EPSTEIN, *supra* note 36, at 292-391.

⁴⁸ See 1 MCCORMICK, EVIDENCE, § 91, at 187-88 (Cleary ed. 1972).

⁴⁹ *Rabbit*, *supra* note 28, at 1207 (quoting WIGMORE, *supra* note 40, § 2291).

⁵⁰ See *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 570-71 (E.D. Pa. 1989). The common interest exception protects communications disclosed to another party sharing a common interest with the party asserting the privilege. *Id.*

disclosing party.⁵¹

Courts seek to ensure “fairness” to all interested parties, in that when a certain point of disclosure is reached, or when disclosures are made to certain parties but not others, “fairness requires that [the attorney-client] privilege shall cease whether . . . that result [was intended] or not.”⁵² Many contend that such “limited” disclosures⁵³ transforms the privilege from a “shield” to a “sword,” such that the privilege becomes an offensive “brush on the attorney’s palette,”⁵⁴ instead of a defensive mechanism to protect confidential communications.⁵⁵ In essence, a client cannot assert the attorney-client privilege over certain communications in one context, while not maintaining the confidentiality of those communications in others.⁵⁶

Although courts seek to restrict the scope of the attorney-client privilege to its “narrowest possible limits,”⁵⁷ permitting a “selective waiver” in limited circumstances may help achieve valuable public policy goals.⁵⁸ Dismissing the potential benefits that could be garnered by permitting selective waiver of the attorney-client

⁵¹ See *In re Perrigo Co.*, 128 F.3d 430, 441 n.9 (6th Cir. 1997). The court observed, “under normal circumstances, waiver as to one party should be waiver as to all.” *Id.*

⁵² WIGMORE, *supra* note 40, § 2291.

⁵³ The “fairness” argument has been summed up as follows:

Generally, the fairness argument has been applied in the form of the ‘subject matter’ waiver rule: once a client has disclosed part of a privileged communication, the privilege is deemed waived as to all related communications. To allow clients to choose to reveal only certain parts of a communication—presumably, those parts most favorable to their cause—would be to convert the privilege from a ‘shield’ to a ‘sword’ . . . to paint a ‘misleadingly one-sided’ picture of the facts.

Rabbit, *supra* note 28, at 1208 (internal citations omitted).

⁵⁴ *Columbia/HCA*, 293 F.3d at 306-07. The Sixth Circuit similarly held that a party’s disclosure of privileged materials to a government agency, but not to other parties, resulted in an offensive, or sword-like use of the privilege, as opposed to the intended defensive, shield-like use of the privilege. *Id.*

⁵⁵ See *Teachers Ins. & Annuity Ass’n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 641 (S.D.N.Y. 1981).

⁵⁶ See *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982).

⁵⁷ *Horowitz*, 482 F.2d at 81 (quoting WIGMORE, *supra* note 40, § 2291).

⁵⁸ See *infra* Part III. Part III discusses the various public policy aims that would be advanced by embracing the selective waiver doctrine. See also Hall, *supra* note 27, at 994-1000 (advocating an adoption of selective waiver and discussing its benefits); Rabbit, *supra* note 28, at 1223-25 (discussing the arguments in favor of selective waiver, but ultimately rejecting its application).

privilege, merely because they do not readily lend themselves to demonstration by empirical analysis, would invite a complete abandonment of the privilege itself, as its benefits are only "speculative." In addition, confining the waiver doctrine within its traditional boundaries, and thereby refusing to consider viable alternatives entailing substantial societal gains, makes the law stagnant and unresponsive to the nature of the modern world.⁵⁹

B. The Work-Product Protection

Like the attorney-client privilege, the work-product protection arises from the assumption that an attorney cannot provide full and frank advice to his client, and likewise cannot effectively represent his client, without the expectation that sensitive and potentially damaging information will be kept from his client's adversaries.⁶⁰ First recognized by the United States Supreme Court in 1947,⁶¹ the protection has since been codified within the Federal Rules of Civil Procedure.⁶² Just as the attorney-client privilege has become an accepted aspect of the American legal system, so too has the work-product protection.⁶³

The work-product doctrine generally protects "documents and tangible things, prepared in anticipation of litigation or for trial, by or for another party, or by or for that other party's representative."⁶⁴ Because it protects an attorney's "mental impressions, conclusions, opinions, or legal theories,"⁶⁵ the work-product doctrine has been recognized as necessary to maintain the proper operation of the adversarial system.⁶⁶ This "privilege,"⁶⁷ although broader in scope than the attorney-client privilege,⁶⁸ is unlike the attorney-client privilege in that it is not absolute.⁶⁹ The work-product doctrine

⁵⁹ See *infra* notes 82-102 and accompanying text (discussing the uniqueness of the corporation, and its reliance upon its agents for its survival).

⁶⁰ See EPSTEIN, *supra* note 36, at 477.

⁶¹ *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

⁶² FED. R. CIV. P. 26(b)(3).

⁶³ See generally EPSTEIN, *supra* note 36.

⁶⁴ FED. R. CIV. P. 26(b)(3).

⁶⁵ *Id.*

⁶⁶ John E. Tyler III, *Analyzing New Protections For Intangible Work Product and Harmonizing That Protection with the Use of Privilege Logs*, 64 UMKC L. REV. 743, 757 (1996).

⁶⁷ See *infra* note 70.

⁶⁸ See *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

⁶⁹ See EPSTEIN, *supra* note 36, at 549.

affords parties only a “qualified” protection, where certain materials deemed work product may indeed be discoverable by an opposing party.⁷⁰ Opinion work product, work product containing an attorney’s opinions, mental impressions, strategies, etc., is virtually never discoverable.⁷¹ Conversely, fact work product, encompassing “all other work product,”⁷² is discoverable upon a showing of substantial need and undue hardship.⁷³ The work-product doctrine embodies the collective understanding that adequate representation can only be achieved when an attorney is free to prepare for litigation without the specter of discovery looming over every word the attorney chooses to memorialize.⁷⁴

Waiver of the work-product protection is treated similarly to waiver of the attorney-client privilege.⁷⁵ While waiver of the work-product protection may not always occur by virtue of a disclosure to a third-party, waiver will typically occur when a disclosure is made to a party deemed to be an adversary.⁷⁶ Once waiver occurs, parties in subsequent litigation are permitted to discover materials that would otherwise be protected if the waiver had not occurred.⁷⁷ The common interest exception also applies to the waiver of the work-product doctrine, in that the disclosure of privileged materials to a party sharing a common interest with the party seeking the

⁷⁰ See *id.* at 478. As observed by Professor Epstein, “[t]he words ‘doctrine,’ ‘immunity,’ and privilege (among others) have been used in naming the protection given work product. Some resist the use of the term ‘privilege’ [when describing the work-product doctrine] because the protection is qualified, unlike the traditional communications privileges.” *Id.* See also Charles W. Ehrhardt & Matthew D. Shultz, *Pulling Skeletons from the Closet: A Look into the Work-Product Doctrine as Applied to Expert Witnesses*, 31 FLA. ST. U. L. REV. 67, 90 n.104 (2003) (observing that “[a]lthough work-product protection is often referred to as a privilege, it is in fact a qualified immunity from disclosure rather than a statutory privilege such as the attorney-client privilege.”).

⁷¹ See *Upjohn*, 449 U.S. at 401. The Supreme Court determined, “such work product [i.e., an attorney’s opinions and mental impressions] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.” *Id.*

⁷² *Johnson v. Gmeinder*, 191 F.R.D. 638, 644 n.5 (D. Kan. 2000).

⁷³ See FED. R. CIV. P. 26(b)(3).

⁷⁴ See EPSTEIN, *supra* note 36, at 477.

⁷⁵ See *id.* at 478.

⁷⁶ See *Steinhardt*, 9 F.3d at 234-35. The work-product disclosure to the SEC was deemed to be a waiver as the SEC was held to stand in an adversarial position to the disclosing party. *Id.* Determining whether or not such a disclosure should constitute a full waiver, such that other parties may have access to the disclosed materials, lies at the crux of this Comment.

⁷⁷ See Greenwald & Thomas, *supra* note 23, at 11.

protection will not constitute a waiver.⁷⁸

Since the work-product protection also impedes the truth-finding process, courts have been apt to find waiver of the protection even in cases of inadvertent disclosure, and seek to construe the work-product doctrine narrowly.⁷⁹ The primary benefit of the work-product doctrine, preserving the integrity of the adversarial system,⁸⁰ has been correspondingly criticized as speculative and amorphous.⁸¹ The question thus becomes whether expanding the narrow scope of the work-product doctrine, by permitting a selective waiver of the work-product protection, is justified when there is a realistic prospect of advancing certain valued public policy aims.

C. *The Nature of the Corporation and Privilege*

While corporations are considered legal “persons” in their own right, this is merely a legal fiction.⁸² Corporations are unable to act on their own behalf, and instead they must rely upon their agents and employees.⁸³ Unlike individuals, corporations lack states of mind, and therefore “they cannot simply choose to obey the law.”⁸⁴ Rather, corporations, particularly larger ones, “must implement programs that encourage legal compliance among their agents”⁸⁵ and conduct internal investigations to determine whether their agents

⁷⁸ See *United States v. AT&T*, 642 F.2d 1285, 1289 (D.C. Cir. 1980). In *AT&T*, both the government and MCI brought suit against AT&T on identical anti-trust grounds. *Id.* MCI turned over certain confidential documents to the government to assist in the litigation. *Id.* AT&T sought to acquire those documents in discovery, arguing that MCI had waived its work-product protection over them by virtue of disclosure to the government. *Id.* The D.C. Circuit, rejecting AT&T’s contention that waiver had occurred, held that “[a] disclosure made in the pursuit of such [common] trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.” *Id.* at 1299. See also, Hall, *supra* note 27, at 988 (recognizing “work-product might be disclosed to a nonadversary third party without undermining the purpose of the doctrine because the disclosure still preserves the integrity of the adversarial process.”).

⁷⁹ See, e.g., *Suggs v. Whitaker*, 152 F.R.D. 501, 505 (M.D.N.C. 1993) (holding that “[b]ecause work-product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose.”).

⁸⁰ See EPSTEIN, *supra* note 36, at 477.

⁸¹ See Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 452 (1994).

⁸² See *Burnet v. Clark*, 287 U.S. 410, 415 (1932).

⁸³ *New York Cent.*, 212 U.S. at 493.

⁸⁴ John Calvin Conway, Note, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 621 (1995).

⁸⁵ *Id.*

have committed unlawful acts.

If a corporation suspects unlawful conduct on the part of its agents or employees, it will typically hire outside counsel to gather the facts, assess the corporation's potential liability, and make related recommendations regarding how to proceed.⁸⁶ These investigations may consist of conducting interviews with employees, reviewing documents, and subsequently submitting a report of the findings to management.⁸⁷

Such investigations raise sensitive issues regarding privilege.⁸⁸ In *Upjohn Co. v. United States*,⁸⁹ the Supreme Court addressed the difficulty of applying traditional notions of privilege to a modern, multi-national corporation.⁹⁰ The Upjohn Company ("Upjohn"), a large drug manufacturer,⁹¹ retained counsel to investigate allegations of bribery of foreign officials. In the course of that investigation, counsel conducted interviews with various employees thought to have knowledge of the circumstances.⁹² After being informed by counsel of its findings, Upjohn submitted a report to the Securities and Exchange Commission ("SEC") disclosing its conclusion that certain payments may have been in violation of applicable law.⁹³ The SEC subsequently issued a subpoena, intending to obtain documents revealing the communications between the interviewed employees and the attorneys, as well as the related interview notes and memoranda drafted by those attorneys.⁹⁴ Rejecting the "control group test," the Court held that the communications between counsel and corporate employees were privileged, even though the employees at issue were not of the "highest authority"; that is, they were not the decision-makers within the company.⁹⁵ Furthermore, the Court also determined that the aforementioned notes and

⁸⁶ *Id.* at 621-24.

⁸⁷ *See, e.g., Diversified*, 572 F.2d at 599-600; *Upjohn*, 449 U.S. at 389.

⁸⁸ *See generally*, Greenwald & Thomas, *supra* note 23, at 13.

⁸⁹ 449 U.S. 383 (1981).

⁹⁰ *See generally*, *Upjohn*, 449 U.S. at 389.

⁹¹ In 1995, Upjohn merged with Pharmacia AB, a Swedish pharmaceutical company. *Upjohn to Pfizer* (Apr. 30, 2003), available at http://www.mlive.com/business/kgazette/special/pfizer/200330430_pfizerkz18.html. After another merger in 2000, the consolidated corporation became known simply as Pharmacia Corp. *Id.* In 2003, Pfizer Inc. acquired Pharmacia. *Id.*

⁹² *Upjohn*, 449 U.S. at 387-88.

⁹³ *Id.* at 388.

⁹⁴ *Id.*

⁹⁵ *Id.* at 383-84.

memoranda were undiscoverable opinion work product.⁹⁶

Although *Upjohn* does not suggest that the Supreme Court would readily adopt the selective waiver doctrine if given the opportunity, the case does evince willingness on the part of the Court to reject the narrowest possible construction of privilege under certain circumstances.⁹⁷ According to most circuit courts, a corporation that voluntarily discloses privileged materials to the government, in cooperation with a government investigation, loses the privilege over those materials in subsequent litigation, even if the corporation discloses those materials pursuant to a well-crafted confidentiality agreement.⁹⁸ Regardless of the government's promises that such materials will be kept from third-party litigants, courts typically find that, upon disclosing such materials to the government, applicable privileges are waived.⁹⁹

Today's corporations confronted with accusations of wrongdoing therefore are said to face a "Hobson's choice."¹⁰⁰ While cooperation with the government will typically result in less stringent punishment, such an advantage may be of relatively little importance if cooperation eventually leads to third-party access to incriminating evidence, which would be otherwise unavailable if the corporation refused to cooperate.¹⁰¹ *Upjohn* directly addressed the inherent difficulty in applying privilege to corporations, which, despite the legal fictions the law has created on their behalf, can only act by and through their agents.¹⁰² In the same vein, a reassessment of the benefits that could be derived from aligning corporate and government interests through selective waiver is in order, instead of a

⁹⁶ *Id.* at 401.

⁹⁷ See, e.g., Chad Bement, Note, *Corporate Invention Records and the Attorney-Client Privilege*, 28 J. CORP. L. 317, 323 (2003) (observing that "[i]n *Upjohn Co. v. United States*, the Supreme Court rejected the narrow control group test and considerably expanded the scope the attorney-client privilege with regard to corporate communications.").

⁹⁸ See, e.g., *Westinghouse*, 951 F.2d at 1420; *Columbia/HCA*, 293 F.3d at 302.

⁹⁹ See, e.g., *Westinghouse*, 951 F.2d at 1420; *Columbia/HCA*, 293 F.3d at 302.

¹⁰⁰ Strassberg & Walters, *supra* note 12, at 7. Technically, the term "Hobson's choice" refers not to a choice between two bad alternatives, although often used in such a manner, but rather a "choice between taking either that which is offered or nothing." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 909 (1996).

¹⁰¹ See Greenwald & Thomas, *supra* note 23, at 13.

¹⁰² See Thomas R. Mulroy and Eric J. Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COMM. L.J. 49, 51 (2002).

mere rejection of the selective waiver under traditional waiver conceptions.

II. DISCUSSION

A. *The Rise of Selective Waiver: Diversified Industries, Inc. v. Meredith*

Generally, the attorney-client privilege is deemed waived to all parties if a privileged communication is disclosed to parties outside of the attorney-client relationship.¹⁰³ Similarly, the protections afforded to work product are lost if such material is disclosed to an adversary or potential adversary.¹⁰⁴ In essence, the “waiver rule” is said to “ensure that . . . privilege[s] ‘[are] strictly confined within the narrowest possible limits consistent with the logic of [their] principle[s].’”¹⁰⁵ During the late 1970s, however, a seemingly progressive movement was afoot to carve out exceptions to these traditional constructions of waiver.¹⁰⁶

At the time, the SEC had instituted a formal “Voluntary Disclosure Program,” offering leniency in exchange for a corporation’s cooperation with an SEC investigation.¹⁰⁷ Given the government’s lack of resources to investigate and prosecute every potential violation of relevant law, the program was seen as a good way to ensure that more illegal practices would be halted.¹⁰⁸ Most notably, the documents disclosed to the SEC in *Upjohn* were disclosed pursuant to this program.¹⁰⁹ While the Voluntary Disclosure Program

¹⁰³ See Greenwald & Thomas, *supra* note 23, at 11.

¹⁰⁴ See *id.*

¹⁰⁵ Hornstein, *supra* note 28, at 472 (citing Rabbit, *supra* note 28, at 1208).

¹⁰⁶ Greenwald & Thomas, *supra* note 23, at 10-11.

¹⁰⁷ See Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665, 668 n.12 (1983). Instituted in 1976, the Voluntary Disclosure Program was primarily designed to combat bribery of foreign officials by American corporations who made such bribes in an effort to gain or retain business in those foreign nations. See *id.* The ongoing practice of bribery led to the passage of the Foreign Corrupt Practices Act in the next year. 15 U.S.C. §§ 78dd-1, 78dd-2 (1977); see also DONALD CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* (2d ed. 1999).

¹⁰⁸ See Judson W. Starr & Nancy Voisin, *Toward an Environmental Voluntary Disclosure Program*, 16 COLUM. J. ENVTL. L. 333, 340 (1991).

¹⁰⁹ See *Upjohn*, 449 U.S. at 388; Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel’s Dual Role as Attorney and Executive*, 62 UMKC L. REV. 549, 554 (1994).

is no longer employed in its original form,¹¹⁰ corporations are still encouraged to voluntarily disclose information regarding potential illegal activities in their midst, and are often punished less severely as a result of their cooperation.¹¹¹

Out of this climate of promoting corporate self-policing and voluntary disclosure arose the doctrine of selective waiver.¹¹² In essence, selective waiver permits a corporation to disclose privileged materials to certain parties, namely government agencies, while retaining the privilege vis-à-vis other litigants.¹¹³ Disclosures of potentially illegal activities made by a corporation to a government agency are typically of interest to third parties that seek to sue civilly for injuries sustained due to such wrongdoing.¹¹⁴ Should such virtual admissions of wrongdoing be made available to third parties, the disclosing corporation, through its voluntary disclosure, would have contributed to its own eventual failure in the subsequent suit.¹¹⁵ As mentioned, the potential advantages of leniency gained through cooperation with the government often fail to outweigh the disastrous consequences that would likely be incurred if third parties were permitted to access the materials disclosed.¹¹⁶ In short, without selective waiver, corporations are less inclined to make any voluntary disclosures to the government.¹¹⁷

In *Diversified Industries, Inc. v. Meredith*,¹¹⁸ Diversified Industries (“Diversified”), a corporation engaged in the business of supplying copper to brass manufacturers, found itself the target of a criminal investigation.¹¹⁹ As a result of a proxy fight among its shareholders, information came to light that Diversified may have established a

¹¹⁰ See Dorris, *supra* note 10, at 796 n.36. Dorris notes that “[t]he SEC no longer employs the [V]oluntary [D]isclosure [P]rogram to obtain information on questionable payments [to foreign officials]; it now employs the program only to obtain disclosures of misrepresentations and omissions in statements submitted pursuant to the 1933 and 1934 Securities Acts.” *Id.*

¹¹¹ See Strassberg & Walters, *supra* note 12, at 7.

¹¹² See Greenwald & Thomas, *supra* note 23, at 11.

¹¹³ See *id.*

¹¹⁴ See *id.* In certain instances, the “third party” seeking access to the disclosed materials is another government agency, and not a private litigant. See, e.g., *Mass. Inst. of Tech.*, 129 F.3d at 683; *Permian*, 665 F.2d at 1217.

¹¹⁵ See Greenwald & Thomas, *supra* note 23, at 12.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ 572 F.2d 596 (8th Cir. 1977) (en banc).

¹¹⁹ *Id.* at 599-600.

“slush fund” to pay bribes to the purchasing agents of Diversified’s customers.¹²⁰ In exchange for agreeing to take a lower grade of copper than contracted for, the purchasing agents of Diversified’s customers were paid out of this “slush fund.”¹²¹ Diversified retained the services of a prominent law firm to conduct an internal investigation in order to determine if such charges were legitimate.¹²² The law firm interviewed many of Diversified’s employees, pored through relevant documents, and eventually produced a memorandum outlining its findings to Diversified’s Board of Directors.¹²³

Unfortunately for Diversified, these allegations of corporate bribery attracted the attention of the SEC.¹²⁴ Pursuant to its own official investigation, the SEC filed a subpoena requesting the memorandum prepared by the law firm.¹²⁵ Seeking leniency, Diversified voluntarily turned over the memorandum and entered into a consent decree with the SEC.¹²⁶

Diversified’s situation, however, worsened when it was sued by one of its former customers, the Weatherhead Company (“Weatherhead”), a brass manufacturer.¹²⁷ Weatherhead’s purchasing agents were among those allegedly bribed by Diversified, and as a result, Weatherhead was supplied with a low grade of copper, although it paid for a higher grade.¹²⁸ Weatherhead alleged tortious interference with the contractual relationship between itself and Diversified, unlawful conspiracy, and anti-trust violations, and sought both actual and punitive damages.¹²⁹ In order to support its allegations, Weatherhead requested the memorandum and contended that Diversified waived the attorney-client privilege through its voluntary disclosure of the memorandum to the SEC.¹³⁰

As the case was decided before *Upjohn*, much of the court’s attention was focused upon the scope of the attorney-client privilege

¹²⁰ *Id.* at 600.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Diversified*, 572 F.2d at 600.

¹²⁵ *Id.*

¹²⁶ *Id.* at 601.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Diversified*, 572 F.2d at 600.

with respect to the control group test and not the selective waiver issue.¹³¹ Almost off-handedly, however, the United States Court of Appeals for the Eighth Circuit adopted selective waiver, observing that “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”¹³² The *Diversified* court supported its decision to adopt selective waiver by recognizing that the plaintiffs were in no way prohibited from bringing their suit, and they were still free to obtain needed evidence from “non-privileged” sources.¹³³

Since the Eighth Circuit’s adoption of selective waiver in 1977,¹³⁴ numerous corporate defendants have sought to rely on the selective waiver theory, but with little success.¹³⁵ The failure of selective waiver to gain widespread approval has caused some commentators to observe that the theory, as articulated in *Diversified*, is “essentially on life support.”¹³⁶ The limited treatment of the doctrine by the *Diversified* court has likely contributed to the theory’s inability to gain much traction in other courts.¹³⁷ While the corporation in *Diversified* was successful in maintaining privilege over materials disclosed to the SEC,¹³⁸ the Eighth Circuit’s analysis of the selective waiver doctrine was limited to a single paragraph, provided scant precedential support,¹³⁹ and has been widely criticized.¹⁴⁰ The Eighth Circuit

¹³¹ *Id.* at 600-10.

¹³² *Id.* at 611.

¹³³ *Id.*

¹³⁴ *See id.* Although finding its first judicial acceptance in *Diversified*, selective waiver was first raised in court in 1973, in *In re Penn. Cent. Commercial Paper Litig.*, 61 F.R.D. 453 (S.D.N.Y. 1973). In *Penn Central*, an attorney for a corporation under investigation by the SEC, testified before an SEC hearing. *Id.* at 457. Subsequently, the plaintiffs in a civil action sought the transcripts of the attorney’s testimony and documents related thereto. *Id.* at 456. The corporation claimed that such documents and transcripts were protected by the attorney-client privilege under the selective waiver theory. *Id.* at 462. Rejecting selective waiver, the district court observed that “[i]t is hornbook law that the voluntary disclosure or consent to disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege.” *Id.* at 463.

¹³⁵ *See cases cited supra* note 18.

¹³⁶ Greenwald & Thomas, *supra* note 23, at 11.

¹³⁷ *See id.*

¹³⁸ *See Diversified*, 572 F.2d at 611.

¹³⁹ *See id.* The court cited *Bucks County Bank & Trust Co. v. Storch*, 297 F. Supp. 1122 (D. Haw. 1969) and *United States v. Goodman*, 289 F.2d 256 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961), to support its adoption of selective waiver.

remains the only federal jurisdiction that can be said to retain selective waiver.¹⁴¹

B. *The Fall of Selective Waiver: Judicial Treatment of the Doctrine Since Diversified*

After *Diversified*, corporations readily began disclosing privileged materials to the government pursuant to agency investigations, seemingly expecting that they would still be able to assert the relevant privileges over such materials as to private litigants if necessary.¹⁴² As one commentator noted, over 425 corporations participated in the SEC's Voluntary Disclosure Program in 1979 (two years after the *Diversified* decision), at a time when widespread adoption of the selective waiver doctrine appeared feasible.¹⁴³ Indeed, in 1981 a district court outside the Eighth Circuit held that a showing of an intent to retain privilege over materials surrendered to a government agency would permit the privilege to subsequently attach in future

Diversified, 572 F.2d at 611. *Bucks County*, however, dealt only with whether waiver of the attorney-client privilege at a suppression hearing constituted a complete waiver. *Bucks County*, 297 F. Supp. at 1123. Likewise, *Goodman* concerned the Fifth Amendment privilege against self-incrimination, and not the attorney-client privilege. *Goodman*, 289 F.2d at 259. In essence, *Diversified* "borrowed" the analysis from these cases, which permitted "selective waivers" in other contexts. See *Diversified*, 572 F.2d at 611.

¹⁴⁰ See, e.g., *Permian*, 665 F.2d at 1221-22; *Westinghouse*, 951 F.2d at 1423-24 (criticizing *Diversified*). For a discussion of the scant treatment of the selective waiver issue by the *Diversified* court, see *Mass. Inst. of Tech.*, 129 F.3d at 684; Koch, *supra* note 28, at 356; Rabbit, *supra* note 28, at 1211; Janice M. Symchych, *Selective Waiver of Attorney-Client Privilege: Although a 1978 8th Circuit Case Gave Corporations Reason to Hope They Could Selectively Disclose Privileged and Work Product Information to the Government in Confidence, Recent Developments Suggest Greater Caution is in Order*, 60-OCT. BENCH & B. MINN 17, 18 (2003).

¹⁴¹ See *Diversified*, 572 F.2d at 611; *United States v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990) (determining that privilege remained despite production of documents to a grand jury); *McDonnell Douglas*, 922 F. Supp. at 243 (noting the "[a]ttorney-client privilege is generally waived by disclosure of . . . confidential communications to any third parties, except in the limited waiver situation recognized in *Diversified*"). The Second Circuit has suggested, however, that it would consider permitting selective waiver in cases where the parties enter into a valid confidentiality agreement. See *Steinhardt*, 9 F.3d at 235; *infra* notes 184-190 and accompanying text.

¹⁴² See Greenwald & Thomas, *supra* note 23, at 12.

¹⁴³ See Dorris, *supra* note 10, at 822. Dorris observed that "[i]n 1979, when only one court had adopted the limited waiver rule, over 425 corporations had participated in the program." *Id.* In 1979, no other circuit court had yet to address the selective waiver issue since *Diversified*. *Id.* It is possible that the program's success in that year was attributable to the potential for selective waiver to take hold in other jurisdictions apart from the Eighth Circuit.

litigation.¹⁴⁴ One by one, however, federal circuits began to address the issue of selective waiver, and looked upon the doctrine with disfavor.¹⁴⁵

In *Permian Corp. v. United States*,¹⁴⁶ decided in 1981, the United States Court of Appeals for the District of Columbia Circuit flatly rejected selective waiver with respect to the attorney-client privilege, finding the doctrine “wholly unpersuasive.”¹⁴⁷ *Permian* concerned the Occidental Petroleum Corporation’s (“Occidental”) hostile takeover attempt of the Mead Corporation (“Mead”) through an exchange offer.¹⁴⁸ Mead resisted the takeover and filed suits in various courts.¹⁴⁹ During the course of discovery, Occidental turned over millions of documents to Mead, but added a stipulation that any privileged materials turned over to Mead would not constitute a waiver of any applicable privilege.¹⁵⁰ At the same time, Occidental was attempting to obtain SEC approval of the exchange offer’s registration statement, and to that end, turned over 1.2 million of its documents to the SEC.¹⁵¹ In order to expedite the registration process, the SEC sought access to the documents previously turned over to Mead, as Mead had already organized them in a manageable manner.¹⁵²

Occidental acquiesced to the SEC’s request, and instructed Mead to furnish the SEC with the relevant documents, pursuant to an agreement between Occidental and the SEC, whereby the SEC was forbidden from delivering the documents to any third parties.¹⁵³

¹⁴⁴ See *Teachers*, 521 F. Supp. at 644-45 (holding that “disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time disclosure is made.”). See also Hornstein, *supra* note 28, at 476 (noting that “[t]he *Teachers* decision essentially adopted the limited waiver rule articulated in *Diversified* but added a surmountable hurdle—an intent to retain the attorney-client privilege.”).

¹⁴⁵ See cases cited *supra* note 18.

¹⁴⁶ 665 F.2d 1214 (D.C. Cir. 1981).

¹⁴⁷ *Id.* at 1220.

¹⁴⁸ *Id.* at 1215.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1216.

¹⁵¹ *Id.*

¹⁵² *Permian*, 665 F.2d at 1216.

¹⁵³ *Id.* at 1216-17. In essence, the agreement was designed to enable Occidental to retain its privileges over the documents in future litigation. *Id.* While some controversy existed as to whether the agreement between Occidental and the SEC amounted to an agreement to keep *all* of the documents confidential, this matter was settled by the circuit court as the court found that the agreement did, in effect, prevent the SEC from delivering the disclosed materials to third parties. *Id.* at 1219.

Although Occidental eventually chose to abandon the exchange offer, Mead supplied the SEC with approximately 1,000 Occidental documents, of which seven were determined to fall within the ambit of the attorney-client privilege.¹⁵⁴ Thereafter, the Department of Energy (“DoE”) launched an investigation of the petroleum pricing practices of an Occidental subsidiary, and sought the Occidental documents in the SEC’s possession.¹⁵⁵ The SEC informed Occidental of its intention to comply with the DoE’s request, and Occidental asserted the attorney-client privilege over certain documents.¹⁵⁶

The D.C. Circuit found that Occidental had wholly waived any privilege to the documents at issue, and rejected the selective waiver doctrine outright.¹⁵⁷ The court rebuffed Occidental’s assertions that the attorney-client privilege protects the documents from delivery to the DoE, noting “the mantle of confidentiality which once protected the documents [was] so irretrievably breached that an effective waiver of the privilege [was] accomplished.”¹⁵⁸ The court held that a party cannot rationally assert the attorney-client privilege while simultaneously violating the secrecy that the privilege was intended to advance through purposeful disclosure, noting that “the Eighth Circuit’s ‘limited waiver’ rule has little to do with this confidential link between the client and his legal advisor.”¹⁵⁹ Additionally, the court described selective waiver as unfair to third parties, whereby a

Unfortunately for Occidental, however, the court determined that the existence of this agreement could not overcome Occidental’s general waiver of privilege through disclosure to the SEC. *Id.* at 1220-21. Interestingly, one commentator has noted that the agreement would have satisfied the “specific preservation” requirement of the *Teachers* court, and thus selective waiver would have been permitted under that test as a manifestation of an intent to preserve applicable privileges as was evident from the agreement. *See Rabbit, supra* note 28, at 1214 n.104; *Teachers*, 521 F. Supp. 638 at 646.

¹⁵⁴ *Permian*, 665 F.2d at 1217. The trial court determined that another twenty-nine documents were fell within the ambit of the work-product protection, and while the circuit court observed that “[t]he record [did] not compel such a conclusion,” the trial court’s finding was not “clearly erroneous,” and hence was affirmed. *Id.* at 1222.

¹⁵⁵ *Id.* at 1217.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1222.

¹⁵⁸ *Permian*, 665 F.2d at 1220 (quoting *In re Grand Jury of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979)).

¹⁵⁹ *Permian*, 665 F.2d at 1220-21. Disagreeing with the holding in *Diversified*, the *Permian* court noted, “[u]nlike the Eighth Circuit, we cannot see how ‘the developing procedure of corporations to employ independent counsel to investigate and advise them’ would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.” *Id.* at 1221 n.13 (internal citations omitted).

disclosing party “cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting [it] to obstruct others The attorney-client privilege is not designed for such tactical employment.”¹⁶⁰ Finally, by noting that permitting selective waiver in *Permian* would prioritize the SEC’s concerns to the detriment of those of the DoE, the court rejected the policy argument that the benefits of selective waiver outweigh its costs.¹⁶¹

Throughout the remainder of the 1980s, the prospect of selective waiver’s widespread acceptance continued to wane. In *In re Subpoena Duces Tecum*,¹⁶² the D.C. Circuit reaffirmed its rejection of the doctrine, noting that the protections afforded by the attorney-client privilege and the work-product doctrine would be “available only at the traditional price,”¹⁶³ such that a party would not be permitted to “waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial.”¹⁶⁴ Likewise, in *In re Martin Marietta Corp.*,¹⁶⁵ the United States Court of Appeals for the Fourth Circuit refused to allow a corporation to maintain the attorney-client privilege and nonopinion work-product protection over materials previously disclosed to the government.¹⁶⁶

In 1991, the United States Court of Appeals for the Third Circuit rejected selective waiver in *Westinghouse Elec. Corp. v. Republic of Philippines*.¹⁶⁷ Westinghouse Electric Corp. (“Westinghouse”) was under investigation by the Department of Justice (“DoJ”) and the SEC for allegedly bribing members of the Philippine government in

¹⁶⁰ *Id.* at 1221. Quoting Justice Holmes, the court further noted “the [attorney-client] privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice.” *Id.* (quoting *Green v. Crapo*, 62 N.E. 956, 959 (Mass. 1902)).

¹⁶¹ *Permian*, 665 F.2d at 1221.

¹⁶² *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984). *Duces Tecum* involved an unsuccessful attempt by the Tesoro Petroleum Corporation to maintain its privileges over materials previously surrendered to the SEC and a grand jury. *Id.* at 1368. The D.C. Circuit permitted a group of class action plaintiffs to access those materials, holding that Tesoro’s disclosure of the materials to the SEC and the grand jury operated as a waiver of both the attorney-client privilege and work-product protection. *Id.* at 1370-76.

¹⁶³ *Id.* at 1370 (quoting *Permian*, 665 F.2d at 1222).

¹⁶⁴ *Id.*

¹⁶⁵ 856 F.2d 619 (4th Cir. 1988).

¹⁶⁶ *Id.* at 620-23.

¹⁶⁷ 951 F.2d 1414, 1421-28 (1991).

order to secure a lucrative business contract.¹⁶⁸ In response to the allegations, the corporation conducted an internal investigation into the matter, and turned over its results to both agencies, relying on a specific confidentiality agreement with the DoJ and on SEC regulations indicating that such materials would remain nonpublic.¹⁶⁹ Nine years later, the Republic of the Philippines brought their own suit against Westinghouse in a federal district court, alleging *inter alia* fraud, conspiracy, and RICO violations.¹⁷⁰ The Philippine government sought the materials surrendered to the DoJ and the SEC, arguing that the disclosure by Westinghouse operated as a waiver of the attorney-client privilege and the work-product protection, otherwise applicable to those materials.¹⁷¹ Westinghouse responded by claiming that it had only selectively waived its privileges to the materials, and supported its argument by pointing to the confidentiality arrangement with the DoJ and relevant SEC regulations.¹⁷² Unsympathetic to the corporation's position, the Third Circuit ruled that Westinghouse had fully waived its privileges, and permitted the Philippine government to access the documents.¹⁷³

The *Westinghouse* court first observed that selective waiver "extend[s] the [attorney-client] privilege beyond its intended purpose."¹⁷⁴ Selective waiver, it said, "does not serve the purpose of encouraging full disclosure to one's attorney . . . it merely encourages voluntary disclosure to government agencies."¹⁷⁵ Because selective waiver rests on different policy considerations than those that support the attorney-client privilege, the Third Circuit held that to recognize selective waiver would be in effect to recognize a new privilege, something which federal courts had long been cautioned to avoid.¹⁷⁶ While acknowledging the potential benefits that could be derived

¹⁶⁸ *Id.* at 1418-19. Specifically, Westinghouse sought permission to construct the Philippines' first nuclear power plant. *Id.* at 1418.

¹⁶⁹ *Id.* at 1418-19.

¹⁷⁰ *Id.* at 1420.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1426.

¹⁷³ *Westinghouse*, 951 F.2d at 1431.

¹⁷⁴ *Id.* at 1425.

¹⁷⁵ *Id.* The court further observed that "[b]ecause the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine." *Id.*

¹⁷⁶ *Id.* (citing *Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990)) (noting that "because privileges obstruct the truth-finding process, the Supreme Court has repeatedly warned the federal to be cautious in recognizing new privileges.").

from permitting selective waiver, the court believed these benefits were not of sufficient magnitude to allow further hindrance of the truth-finding process.¹⁷⁷ The court also observed that Congress had an opportunity in 1984 to adopt selective waiver, but elected not to do so.¹⁷⁸ Because “under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else,” the court deemed Westinghouse’s agreement with the DoJ irrelevant.¹⁷⁹

The *Westinghouse* court was equally dismissive of the corporation’s arguments that the work-product protection was applicable to the previously disclosed materials.¹⁸⁰ Noting that the work-product doctrine is intended to prevent “an attorney’s work product from falling into the hands of an adversary,”¹⁸¹ the court determined that “a party . . . may continue to assert the doctrine’s protection only when the disclosure furthers the doctrine’s underlying goal.”¹⁸² The court held that Westinghouse had waived the work-product protection against *all* adversaries through its disclosures to the SEC and DoJ, as disclosures to “forestall prosecution . . . or to obtain lenient treatment” are not consistent with the traditional objectives of the doctrine.¹⁸³

Unlike the Third Circuit, the United States Court of Appeals for the Second Circuit left open the possibility that a party could selectively waive applicable privileges in *In re Steinhardt Partners, L.P.*¹⁸⁴ Steinhardt Partners (“Steinhardt”), under investigation for price manipulation of securities,¹⁸⁵ disclosed materials to the SEC without a confidentiality agreement.¹⁸⁶ When civil plaintiffs sought the materials to aid in their suit against the firm, Steinhardt claimed that the materials were protected by the work-product doctrine.¹⁸⁷

¹⁷⁷ *Id.*

¹⁷⁸ *Westinghouse*, 951 F.2d at 1427. (citing *SEC Statement in Support of Proposed §24(d) of the Securities and Exchange Act of 1934*, 16 SEC. REG. & L. REP. (BNA) 458, 461 (Mar. 2, 1984)).

¹⁷⁹ *Id.* at 1427.

¹⁸⁰ *Id.* at 1429.

¹⁸¹ *Id.* at 1428.

¹⁸² *Id.* at 1429.

¹⁸³ *Id.*

¹⁸⁴ 9 F.3d 230 (2d Cir. 1993).

¹⁸⁵ *Id.* at 232.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

Although the court ruled that Steinhardt had waived its privilege in that case, the court declined to adopt “a per se rule that all voluntary disclosures to the government waive work-product protection.”¹⁸⁸ It noted that, “[e]stablishing a rigid rule [rejecting selective waiver outright] would fail to anticipate situations in which the disclosing party and the government . . . have entered into an explicit agreement that the [government agency] will maintain the confidentiality of the disclosed materials.”¹⁸⁹ Therefore, the Second Circuit acknowledged that disclosures made to a government agency, pursuant to a confidentiality agreement, may permit the corporation to assert applicable privileges against other parties despite the prior disclosure.¹⁹⁰

Despite this small victory for supporters of the selective waiver doctrine, other federal circuits followed the Third Circuit’s lead in rejecting the selective waiver doctrine outright, regardless of the existence of a confidentiality agreement.¹⁹¹ In *United States v. Massachusetts Institute of Technology*,¹⁹² while the parties did not enter into a confidentiality agreement, “the [First Circuit] disposed of the selective waiver doctrine with such a broad stroke [that] it seems that the existence of a confidentiality agreement would have made little difference.”¹⁹³ Similarly, the United States Court of Appeals for the Federal Circuit, in *Genentech v. United States International Trade Commission*,¹⁹⁴ refused to apply the doctrine.¹⁹⁵ Most recently in *In re*

¹⁸⁸ *Id.* at 236.

¹⁸⁹ *Id.*

¹⁹⁰ *Steinhardt*, 9 F.3d at 236. In addition, “[s]everal federal district courts, including those in New York, California, and Colorado, have suggested that selective waiver is permissible if the disclosing party enters into a confidentiality agreement and expressly reserves its rights to assert privileges against third parties.” Greenwald & Thomas, *supra* note 23, at 12; *In re Leslie Fay Co. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993); *Kirkland v. Superior Court*, 115 Cal. Rptr. 2d 279, 284 (Cal. Ct. App. 2002).

¹⁹¹ See *Columbia/HCA*, 293 F.3d 289; *Mass. Inst. of Tech.*, 129 F.3d 681; *Genentech*, 122 F.3d 1409.

¹⁹² 129 F.3d 681 (1st Cir. 1997).

¹⁹³ Greenwald & Thomas, *supra* note 23, at 12 (citing *Mass. Inst. of Tech.*, 129 F.3d at 685). In *Mass. Inst. of Tech.*, the Internal Revenue Service sought documents previously disclosed to the Department of Defense (“DoD”) by the Massachusetts Institute of Technology (“MIT”). *Id.* at 683. MIT asserted the attorney-client privilege and work-product protection over the documents; however, the First Circuit found that those privileges had been waived through MIT’s disclosure of those documents to the DoD. *Id.* at 685.

¹⁹⁴ 122 F.3d 1409 (Fed. Cir. 1997).

¹⁹⁵ *Id.* at 1417. As observed by the Federal Circuit, “[t]his court . . . has never

Columbia/HCA Healthcare Billing Practices Litigation,¹⁹⁶ the United States Court of Appeals for the Sixth Circuit rejected selective waiver “in any of its various forms,”¹⁹⁷ despite the existence of an applicable confidentiality agreement,¹⁹⁸ and held that adopting selective waiver would transform privilege into “a sword rather than a shield.”¹⁹⁹

III. SELECTIVE WAIVER DOCTRINE SHOULD BE UNIVERSALLY ADOPTED

Supporters of selective waiver argue that the doctrine encourages increased cooperation between corporations and the government,²⁰⁰ “[p]romot[es] [h]eightedened [o]bservance of [l]aws and [r]egulations,”²⁰¹ and reduces costs for both the investigatory agencies and the judiciary.²⁰² In addition, cooperation may increase the likelihood that the malfeasance at issue will cease, and those perpetrating the crimes will be prosecuted.²⁰³ While the hopeful days of *Diversified* have long since passed, perhaps the current climate of corporate scandal and malfeasance warrants giving selective waiver a second chance. The recent enactment of the Sarbanes-Oxley Act²⁰⁴ and the Enron and WorldCom collapses have caused directors of American corporations “to conduct internal investigations at the first sign of trouble.”²⁰⁵ The fruits of these investigations would surely serve a greater societal purpose by being placed in the hands of a regulatory agency rather than ending up in a paper shredder. While selective waiver unfortunately does not fall within the ambit of

recognized such a limited waiver.” Also, “[the plaintiff] has presented no compelling arguments as to why we should apply such a limited waiver theory in this case.” *Id.*

¹⁹⁶ 293 F.3d 289 (6th Cir. 2002). In *Columbia/HCA*, private litigants sought access to certain materials previously disclosed to the DoJ by Columbia/HCA Healthcare Corporation (“Columbia/HCA”), pursuant to a confidentiality agreement, in order to assist in a Medicare fraud suit against Columbia/HCA. *Id.* at 291-92. The Sixth Circuit determined that Columbia/HCA had waived the attorney-client privilege and work-product protection through its disclosure to the DoJ. *Id.* at 302.

¹⁹⁷ *Id.* at 302.

¹⁹⁸ *Id.* at 292.

¹⁹⁹ *Id.* at 307.

²⁰⁰ See Hall, *supra* note 27, at 994.

²⁰¹ Hall, *supra* note 27, at 995.

²⁰² See *id.* at 996-97.

²⁰³ See Thomas M. McMahon, *Criminal Enforcement of Environmental Laws*, 474 PRAC. LAW INST./LIT. 319, 452 (1993) (noting that New Jersey’s voluntary disclosure procedure requires “the nature and extent of the offense and the individuals responsible for the criminal conduct”).

²⁰⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. (2002)

²⁰⁵ Greenwald & Thomas, *supra* note 23, at 11.

“traditional” privilege doctrine, the important societal benefits made available by selective waiver, with only minimal costs, warrant recognition of selective waiver in the form of a new privilege. Before addressing the arguments that support this conclusion, we briefly review the arguments against selective waiver.

A. *Arguments Against Selective Waiver*

Critics of selective waiver are initially suspicious that compliance with applicable laws can actually be achieved through adoption of the doctrine.²⁰⁶ Pointing to evidence showing voluntary disclosures to the government despite the absence of selective waiver,²⁰⁷ some have concluded that the doctrine’s speculative benefits cannot justify a radical departure from traditional waiver concepts.²⁰⁸

Critics also charge that the selective waiver doctrine, even if effective in encouraging disclosure to government agencies, is inherently unfair to private litigants.²⁰⁹ Most notably, the *Permian* court invoked this “fairness doctrine,”²¹⁰ and held that permitting a party to “pick and choose” among those to whom it will disclose confidential information would be unfair to those third parties to whom disclosures are not made.²¹¹ One commentator, seizing upon this reasoning, has argued that “[w]ithin the limits of legislative authorization, the judicial system should not discriminate between private parties and government agencies; justice demands that all litigants be treated by the same rules.”²¹² In addition, some critics of selective waiver point out that the public goals promoted by litigation brought by regulatory agencies are also promoted by litigation

²⁰⁶ See Dorris, *supra* note 10, at 822-23. Relying on the aforementioned data concerning corporation participation in the Voluntary Disclosure Program for the year 1979, Dorris contended that “[t]he SEC-corporation privilege within the limited waiver rule thus can be abandoned without significantly decreasing voluntary disclosures to the SEC.” *Id.*; see *infra* notes 236-238 and accompanying text.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See *Permian*, 665 F.2d at 1221-22.

²¹⁰ *Id.*; *Westinghouse*, 951 F.2d at 1426 (describing the D.C. Circuit’s assertion that the selective waiver doctrine was unfair as an application of the “fairness doctrine”).

²¹¹ *Permian*, 665 F.2d at 1221-22. As noted by the *Permian* court, “[i]t is apparent that such a doctrine would enable litigants to pick and choose among regulatory agencies in disclosing and withholding communications of tarnished confidentiality for their own purposes. . . . [A] litigant who wishes to assert confidentiality must maintain genuine confidentiality.” *Id.*

²¹² Rabbit, *supra* note 28, at 1218-19.

brought by public interest groups.²¹³

The main criticism of the selective waiver doctrine, however, focuses upon the inherent difficulty that arises when attempting to reconcile the doctrine with traditional notions of the attorney-client privilege and the work-product protection.²¹⁴ The underlying purpose of the attorney-client privilege is to “encourage full and frank communications between attorneys and their clients,”²¹⁵ whereas the work-product protection is intended to ensure the proper function of the adversarial system by generally preventing adversaries from discovering each other’s trial strategies.²¹⁶ Selective waiver, it is argued, departs from the intended purpose of the attorney-client privilege, for while the doctrine may encourage disclosure to the government, it does not serve to promote full disclosure between a client and his attorney.²¹⁷ Likewise, the purpose of the work-product protection is said not to be advanced through selective waiver, as the promotion of disclosures to the government are “foreign to the objectives [of preserving the adversarial system] underlying the work-product doctrine.”²¹⁸ Finally, opponents of the selective waiver theory hold that permitting a party to “selectively waive” the attorney-client privilege or the work-product protection conflicts with the general rule that privileges are to be “narrowly construed” and not extended beyond their intended purpose.²¹⁹

B. *Justifying Selective Waiver*

Selective waiver should be universally adopted because it encourages cooperation between offending corporations and the government, thereby reducing costs while simultaneously enhancing law enforcement capabilities.²²⁰ Selective waiver does not suffer under a “fairness” analysis, for it does not prevent third parties from

²¹³ *Id.* at 1219.

²¹⁴ *See infra* notes 260-283 and accompanying text.

²¹⁵ *Upjohn*, 449 U.S. at 389.

²¹⁶ *See supra* notes 64-74 and accompanying text.

²¹⁷ *See supra* notes 159-160 and accompanying text.

²¹⁸ *Westinghouse*, 951 F.2d at 1429.

²¹⁹ *See, e.g., Permian*, 665 F.2d at 1221 (holding that “[b]ecause the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed, . . . and courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure.” (citations omitted)).

²²⁰ *See Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002); Hall, *supra* note 27, at 995-96.

bringing their own suit, and moreover, the doctrine would not place most private litigants in any worse position than they would be without selective waiver.²²¹ These benefits, and the lack of significant costs, justify holding the government and private litigants to separate standards with regard to selective waiver. Selective waiver, however, undeniably departs from the traditional goals of the attorney-client privilege and work-product protection. Given that these privileges are to be narrowly construed, selective waiver can more accurately be described as a new “corporation-government” privilege,²²² rather than mere extensions of the more familiar privileges.²²³ The social benefits of this new privilege far outweigh its drawbacks, and entrenching the entire realm of privilege within the bounds of traditionalism makes little sense.

1. The Benefits of Selective Waiver

The absence of selective waiver deprives government agencies of potentially valuable information that could otherwise assist them in the enforcement of applicable laws.²²⁴ Full disclosure of incriminating materials by corporations to the government increases the likelihood that the perpetrators of corporate malfeasance will be brought to justice.²²⁵ In effect, individuals apt to commit white-collar crime will be discouraged from doing so under a regime in which corporate books revealing such wrongdoing are accessible to law enforcement. Additionally, a stipulation of the government’s offer of leniency could reasonably include a demand that the target corporation increase its internal compliance efforts, to further ensure that such wrongdoing will be prevented in the future. As a whole, society benefits from selective waiver because encouraging corporate disclosure results in greater adherence to applicable laws and regulations.

Society also benefits from selective waiver in that corporate

²²¹ See *Westinghouse*, 951 F.2d at 1426 n.14.

²²² See Dorris, *supra* note 10, at 801-06. Dorris describes selective waiver as “[a]n SEC-Corporation [p]rivilege in [d]isguise,” for it encourages a target corporation to voluntarily disclose incriminating materials to the SEC, in hopes of leniency, as opposed to furthering the goals of the attorney-client privilege or work-product protection. *Id.* Extending this notion beyond merely disclosures to the SEC to disclosures to any government agency renders the privilege a “corporation-government” privilege. *Id.*

²²³ *Id.*

²²⁴ See *supra* note 132 and accompanying text.

²²⁵ See *supra* note 24 and accompanying text.

cooperation with government agencies decreases costs related to lengthy investigations.²²⁶ Apart from increasing the likelihood that these inquiries will bear fruit, “encouraging corporations to disclose their internal investigations confidentially allows [a government agency] to resolve its investigation expeditiously and efficiently.”²²⁷ A recent *amicus curiae* brief submitted by the SEC revealed that the agency substantially benefited from voluntary disclosures from certain targets, from which it was able to avoid incurring costs associated with “approximately 29,000 hours of work.”²²⁸ Such time and cost savings permit agencies to resolve “a higher volume of investigations,” thereby permitting further enforcement of applicable laws and decreasing the potential for corporate criminal activity.²²⁹ These public policy advantages further strengthen the case that selective waiver should be universally adopted.

2. Fairness of Selective Waiver to Third Parties

Selective waiver may appear initially repugnant as seemingly “unfair to third parties,” for it permits corporations to retain privileges despite prior disclosures to the government, yet assert those same privileges against subsequent litigants.²³⁰ Selective waiver, however, imposes only a limited burden upon subsequent litigants, while simultaneously providing the incentives necessary to encourage corporations to provide much needed disclosures. Although subsequent litigants as a whole are slightly worse off with a selective waiver rule in place, the benefits of selective waiver far outweigh its costs.

Advocates of selective waiver, including the SEC,²³¹ contend that the doctrine is Pareto optimal,²³² that is, that it places subsequent litigants in *no worse a position* than they would otherwise be in without

²²⁶ See Hall, *supra* note 27, at 995-96; Saito, 2002 WL 31657622, at *8.

²²⁷ Saito, 2002 WL 31657622, at *8.

²²⁸ *Id.* at *8 n.55.

²²⁹ *Id.* at *8.

²³⁰ See *supra* notes 209-213 and accompanying text.

²³¹ Implementation, *supra* note 8, at 6312 (summarizing the SEC’s position on the selective waiver issue, as well as noting that the SEC believes that private litigants are no worse off under a selective waiver rule than otherwise). For over twenty years the SEC advocated that the selective waiver doctrine should be adopted. See *supra* note 330 and accompanying text.

²³² “Pareto optimality” is defined as “[a]n economic situation in which no person can be made better off without making someone else worse off.” BLACK’S LAW DICTIONARY (8th ed. 2004).

a selective waiver rule.²³³ This assumes that a corporation, without the benefit of selective waiver, will *never* elect to disclose materials to a government agency because of the threat that those materials will eventually be used against the corporation in a later lawsuit. If this assumption is accurate, subsequent litigants would be in no worse a position under selective waiver than under the current regime: if such materials are not initially disclosed, they are obviously not later obtainable by subsequent litigants.²³⁴

This argument ignores the fact that corporate disclosures continue to occur, even though selective waiver is generally not permitted.²³⁵ Imagine that a corporation, in the absence of a selective waiver rule, weighs its options, discloses otherwise privileged materials to the government, and concludes that the benefits of disclosure outweigh its costs. Without selective waiver, a private litigant who seeks those materials will be able to obtain them despite a privilege assertion by the corporation. If selective waiver were implemented, the private litigant would be *unable* to obtain those same materials even though the disclosing corporation would have been willing to make the same disclosure whether selective waiver was available or not. Hence, the argument that private litigants are treated equally with or without selective waiver is not entirely true.

This raises the question of when a corporation would willingly make a disclosure in the absence of selective waiver, knowing that such materials are susceptible to later discovery. As mentioned,

²³³ See, e.g., *Westinghouse*, 951 F.2d at 1426 n.14. Although ultimately rejecting selective waiver, the Third Circuit conceded that “when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred.” *Id.*; *Saito*, 2002 WL 31657622, at *8 (contending “disclosure to one adversary does not prejudice a subsequent adversary any more than it would have if the initial disclosure had never been made.”); *Developments in the Law*, *supra* note 10, at 1645 (observing that “[b]ecause the privilege-holder’s adversary stands in no better or worse position than if the selective disclosure never occurred, selective disclosure . . . poses little threat of unfairness.”); *Implementation*, *supra* note 8, at 6312 (noting “[a]t worst, private litigants would be in exactly the same position that they would have been in if the [SEC] had not obtained the privileged or protected materials.”).

²³⁴ See *Implementation*, *supra* note 8, at 6312.

²³⁵ See, e.g., *Columbia/HCA*, 293 F.3d at 293. Despite the overwhelming amount of authority rejecting selective waiver, *Columbia/HCA* disclosed otherwise privileged materials to the DoJ. *Id.* With or without selective waiver, government disclosures are likely to continue to occur, although they are likely to be fewer in number without the incentives created by a selective waiver rule. See *infra* notes 236-242 and accompanying text.

supporters of selective waiver have cited the disclosures made pursuant to the SEC's short-lived Voluntary Disclosure Program as evidence that corporations need no additional incentives to cooperate with government investigations.²³⁶ Such data, however, are misleading. First, although 425 corporations are said to have participated in the Voluntary Disclosure Program in a single year,²³⁷ the degree of specificity provided within those disclosures is unclear. It is rational to assume that a rule affording protection to voluntary disclosures would increase corporations' willingness to cooperate more fully, even though some level of cooperation can be achieved without such a rule. Second, the disclosures made pursuant to the Voluntary Disclosure Program occurred shortly after the Eighth Circuit's decision in *Diversified*, at a time when corporations may have been confident that courts would generally recognize a selective waiver rule.²³⁸ Third, the fact that some corporations have participated in the Voluntary Disclosure Program without selective waiver does not reflect the amount of cooperation that could be achieved if a rule protecting voluntary disclosures were to exist.

Since the essence of privilege is confidentiality, statistical information concerning the reasons for nondisclosure is difficult to obtain. As is the case with respect to the attorney-client privilege and the work-product protection, policy choices concerning whether to adopt or expand a particular privilege are rarely supported by hard data.²³⁹ Nevertheless, despite this lack of data, it appears that many valuable disclosures are not made because no general rule exists to maintain privileged status over otherwise privileged materials voluntarily turned over to the government. Parties typically defend their privileges unless dire circumstances or foolishness effectuate their voluntary surrender.²⁴⁰ Practitioners generally advise that disclosures to the government should be avoided whenever possible,

²³⁶ See Dorris, *supra* note 10, at 822 (observing that in 1979, over 425 corporations participated in the SEC's Voluntary Disclosure Program); *Westinghouse*, 951 F.2d at 1426 (citing Dorris, *supra* note 10, at 822).

²³⁷ Dorris, *supra* note 10, at 822.

²³⁸ *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

²³⁹ See, e.g., *Hickman*, 329 U.S. at 511 (citing no data, but in support of adopting the work-product doctrine, noting that without such protection, "[t]he effect on the legal community would be demoralizing. And the interests of clients and the cause of justice would be poorly served.").

²⁴⁰ See Cynthia B. Feegan, Comment, *Issues of Waiver in Multi-Party Litigation: The Attorney-Client Privilege and the Work-Product Doctrine*, 61 UMKC L. REV. 757, 760 (1993) (noting that "[i]nstances of express waiver are rare . . .").

as the fallout from losing privileged status over sensitive materials can be catastrophic.²⁴¹ Furthermore, the fact that the SEC continues to support selective waiver suggests that it believes a vast amount of information is lost due to fears, founded or unfounded, that disclosed materials could be made public.²⁴²

Given increased availability of potentially valuable disclosures which could be realized through selective waiver, and the relatively few disclosures presently made in its absence, selective waiver approaches Pareto optimality even if it does not achieve it absolutely. The prospective costs associated with a poorly chosen disclosure cause corporations to resist cooperation, therefore placing *most* private litigants in no worse a position than they would be under a selective waiver regime. The aforementioned social benefits associated with the doctrine more than offset the advantages gained by the small number of litigants who benefit from the current absence of selective waiver.

Far from constituting an offensive or unfair use of privilege,²⁴³ selective waiver permits the aforementioned public policy concerns to be advanced, but at little cost to third parties.²⁴⁴ The presence or absence of selective waiver likely weighs heavily in a corporation's decision to disclose or not to disclose sensitive materials to the government.²⁴⁵ Without the ability to retain privileges after the initial disclosure, a corporation is similarly likely to refuse to make such disclosures.²⁴⁶ Thus, government agencies are deprived access to many useful materials, as are subsequent litigants. If selective waiver were adopted, the corporation would be more likely to cooperate with the government and make full disclosure of privileged documents. Rather than being unfair to private litigants, who may

²⁴¹ See Strassberg & Walters, *supra* note 12.

²⁴² Implementation, *supra* note 8, at 6312 (“[T]he [SEC] finds that allowing issuers to produce internal reports to the [SEC] . . . without waiving otherwise applicable privileges serves the public interest because it significantly enhances [SEC’s] ability to conduct expeditious investigations . . .”).

²⁴³ See *supra* notes 54, 160 and accompanying text.

²⁴⁴ *Westinghouse*, 951 F.2d at 1426 n.14.

²⁴⁵ See Greenwald & Thomas, *supra* note 23, at 50.

²⁴⁶ *Saito*, 2002 WL 31657622, at *9. As noted by the *Saito* court:

Imposing the harsh consequence of a waiver upon disclosing parties will discourage confidential disclosures. When the benefits of leniency . . . are uncertain, yet the burden of exposing a company’s Achilles’ heel to a flood of adversaries is certain, corporations will be less likely to choose to disclose work product to the SEC.

Id.

still bring suit, “litigating [third parties] want to have their cake and eat it too: they want disclosing parties to continue disclosing to [government agencies] so they are better protected, while at the same time they want access to these disclosures for their own tactical advantage.”²⁴⁷

3. The Unique Role of the Government Litigant

A selective waiver rule which permits privileges to be asserted against private litigants despite prior government disclosures disrupts the equal treatment all litigants are currently provided.²⁴⁸ Selective waiver necessarily requires that the government be “given special favor when it comes to benefiting from selective waiver of privilege.”²⁴⁹ It is true that to some degree that private suits also vindicate the public interest by punishing corporate malfeasance.²⁵⁰ Nonetheless, there are good reasons for believing that government suits are generally better suited to serving public interests. Private litigants are often sidetracked in their effort to be made whole.²⁵¹ Since the primary motivation in private suits is damages, rather than remedying future harms, private litigants most often lack the necessary focus upon curative measures.²⁵² By contrast, government suits are focused on remedying and preventing illegal behavior.²⁵³

²⁴⁷ *Id.*

²⁴⁸ See Jody Okrzesik, Note, *Selective Waiver: Should the Government Be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115, 167-68 (2003).

²⁴⁹ *Id.*

²⁵⁰ *Columbia/HCA*, 293 F.3d at 303 (contending that “[a] plaintiff in a shareholder derivative action or a qui tam action who exposes accounting and tax fraud provides as much service to the ‘truth finding process’ as an SEC investigator”).

²⁵¹ *Id.* at 312 (Boggs, J., dissenting) (observing that “[p]rivate litigants, often encouraged by large potential liability, on balance will have a greater incentive to press the legal envelope and to pursue legal actions less certainly within the public interest.”).

²⁵² *See id.*

²⁵³ *See EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1291 (11th Cir. 2004). The *Pemco* court observed:

This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. . . . It is precisely this public interest function that distinguishes governmental agencies from private litigants, . . . these agencies have responsibilities with a scope far beyond the legal interests of individual plaintiffs.

Id. (internal citations omitted); *see also* Martin H. Redish & Andrew L. Matthews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 31 (2004) (observing that when

This, coupled with the government's ability to levy criminal penalties, warrants different treatment of these two classes of litigants.

In his dissenting opinion in *Columbia/HCA*, Judge Boggs outlined four reasons why treating the government differently from private litigants in the context of selective waiver is justifiable.²⁵⁴ First, Judge Boggs posited that, due to the limited resources and financial impartiality of a government investigation, the "government investigations are more likely to be in the public interest."²⁵⁵ Second, he observed that the government's authority to fine or imprison offenders gives government investigations a unique character.²⁵⁶ Third, "[t]he costs and benefits of government investigations are diffuse, and therefore managing those costs and benefits most efficiently is definitionally in the public interest."²⁵⁷ Lastly, Judge Boggs noted that the more stringent procedural requirements of a criminal matter, as opposed to a civil one, should permit disclosures to a government entity, while shielding those disclosures from private litigants.²⁵⁸

"Unlike private litigants, government litigants 'represent and serve a public constituency, even in litigation.'"²⁵⁹ Although at risk of being labeled paternalistic, selective waiver better equips the government to pursue the public interest while having little or no effect upon private suits. Recognizing the fundamental differences between the goals and limitations of the private and government litigant makes clear that distinguishing the two in the manner that selective waiver demands is justified.

private litigants are induced to further the public interest through enforcement of their individual private rights, those litigants are often referred to as "private attorneys general.").

²⁵⁴ *Columbia/HCA*, 293 F.3d at 312 (Boggs, J., dissenting). For a complete discussion of Justice Boggs' dissent, see Okrzesik, *supra* note 248, at 164-70.

²⁵⁵ *Columbia/HCA*, 293 F.3d at 312 (Boggs, J., dissenting). While private suits may not vindicate public interests effectively due to personal matters at stake, it has been argued that unlike private litigants, public interest groups who initiate suit do so free from personal interests. *See id.*; Rabbit, *supra* note 28, at 1219. Public interest groups, however, are not investigatory arms of a democratically elected government, and therefore should not be entitled to benefit from selective disclosure. *See infra* note 257 and accompanying text.

²⁵⁶ *Columbia/HCA*, 293 F.3d at 312 (Boggs, J., dissenting).

²⁵⁷ *Id.* (Boggs, J., dissenting).

²⁵⁸ *Id.* (Boggs, J., dissenting).

²⁵⁹ Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 810 (2004).

4. Reconciling Selective Waiver with Traditional Privilege Concepts

The most frequent source of criticism of selective waiver arises from the apparent inconsistencies between the underlying purposes of the attorney-client privilege and work-product doctrine, and the underlying function of selective waiver.²⁶⁰ Selective waiver encourages disclosure to the government, which although laudable, is an end different in kind from encouraging disclosure to one's attorney²⁶¹ or maintaining the integrity of the adversarial system.²⁶² The correct response to this fact, however, is not to reject selective waiver but rather to recognize it as a new "corporation-government" privilege.²⁶³

a. Selective Waiver and The Attorney-Client Privilege

Proponents of selective waiver, however, have often sought to fit the square peg of selective waiver into the round hole of traditional privilege constructions.²⁶⁴ The *Diversified* court attempted to reconcile the objectives of the attorney-client privilege with those of selective waiver by observing that corporations may elect not to hire counsel to conduct internal investigations in response to allegations of wrongdoing without the doctrine.²⁶⁵ It has also been argued that a corporation "who cooperates with a government investigation is seeking 'informed legal advice' with the objective of fully complying with the applicable laws and regulations."²⁶⁶ A corporation, however, may acquire legal advice from an attorney without disclosing those communications to a government agency.²⁶⁷ While the attorney-client privilege is said to "promote broader public interests in the observance of law and administration of justice,"²⁶⁸ this goal is merely the desired by-product of fostering "full and frank communication between attorneys and their clients."²⁶⁹

²⁶⁰ See, e.g., *Permian*, 665 F.2d at 1219; *Westinghouse*, 951 F.2d at 1429; *Steinhardt*, 9 F.3d at 235; *Mass. Inst. of Tech.*, 129 F.3d at 684; *Columbia/HCA*, 293 F.3d at 306. See also, Hall, *supra* note 27, at 1000.

²⁶¹ See *supra* note 38 and accompanying text.

²⁶² *Id.*

²⁶³ See *infra* notes 293-300 and accompanying text.

²⁶⁴ See, e.g., Hall, *supra* note 27, at 1000-01.

²⁶⁵ See *Diversified*, 572 F.2d at 611.

²⁶⁶ Hall, *supra* note 27, at 1000.

²⁶⁷ *Permian*, 665 F.2d at 1221.

²⁶⁸ *Upjohn*, 449 U.S. at 389.

²⁶⁹ *Id.*

Expanding the privilege to include communications between corporations and non-attorney third parties vitiates the general principle that existing evidentiary privileges are to be narrowly construed.²⁷⁰ Often, these communications could be said to only bear an attenuated relation with promoting “observance of the law.”²⁷¹ Such a rule could enable virtually any communication between two parties to be privileged provided that it is intended to bring the disclosing party within compliance with applicable laws. Construing the attorney-client privilege in this manner reduces the attorney to the status of a middleman, bridging the gap between the traditional attorney-client privilege and a new privilege protecting disclosures by a corporation to the government.²⁷² As such, selective waiver can more accurately be described as creating a new realm of protected communications.²⁷³

b. Selective Waiver and the Work-Product Protection

Attempts to harmonize selective waiver with the underlying goals of the work-product protection likewise suffer from a similar disconnect. As mentioned, the work-product doctrine is intended to preserve the nature of the adversary system by protecting documents and tangible things prepared by or on behalf of an attorney in anticipation of litigation from discovery.²⁷⁴ A disclosure of such would-be protected materials to an adversary results in a waiver of the privilege vis-à-vis all parties.²⁷⁵ Typically, when a corporation discloses materials otherwise protected by the work-product doctrine to the government, this act is considered an implied waiver of the privilege, as the government is most often considered an adversary.²⁷⁶ Even the Eighth Circuit, despite the *Diversified* holding, rejects the application of selective waiver to the work-product doctrine.²⁷⁷

²⁷⁰ United States v. Nixon, 418 U.S. 683, 709-10 (1974).

²⁷¹ *Id.* While corporations may seek full future compliance with applicable laws and regulations, it is naïve to assume that a corporation’s decision to disclose materials is motivated by the desire to achieve compliance with applicable laws rather than desire to avoid harsh punishment.

²⁷² See Dorris, *supra* note 10, at 805-06.

²⁷³ See *id.* at 806.

²⁷⁴ See *Hickman*, 329 U.S. at 510-11.

²⁷⁵ See *supra* notes 75-77 and accompanying text.

²⁷⁶ See *supra* note 76 and accompanying text.

²⁷⁷ See *In re Chrysler Motors Corp. Overnight Evaluation Program*, 860 F.2d 844, 846 (8th Cir. 1988). In *Chrysler*, the Eighth Circuit held that a corporation’s disclosure of materials otherwise covered by the work-product protection, were

Corporations have often sought to claim that work product disclosures to government agencies fall within the ambit of the common interest exception,²⁷⁸ which permits non-adversarial disclosures without waiver of the work-product protection.²⁷⁹ Proponents of selective waiver argue that “because both the government and the cooperating [corporation] are likely to be working toward a similar goal (the disclosing party’s compliance with laws and regulations) the parties can be said to share common interests in the matter.”²⁸⁰ Such arguments always fail to sway courts, as even those few courts that embrace selective waiver reject them.²⁸¹ It is difficult to view the relationship between the investigating government agency and the target corporation as anything other than adversarial, given that the government seeks to criminally

discoverable by the government by virtue of their prior disclosure to certain class action plaintiffs. *Id.* While *Chrysler* did not make mention of *Diversified* with respect to selective waiver, the issue of whether *Diversified* continued to remain good law in light of *Chrysler* came before a district court within the Eighth Circuit in *McDonnell Douglas*, 922 F. Supp. at 243. Reconciling *Chrysler* and *Diversified*, the district court distinguished *Chrysler* on the grounds that it involved the work-product protection, unlike *Diversified*, which exclusively addressed the selective waiver issue within the context of the attorney-client privilege. *Id.* Thus, selective waiver does not apply to the work-product protection in the Eighth Circuit. *Id.* Interestingly, however, “[w]hy waiver doctrine should require different resolutions for voluntary disclosures of attorney-client work product rather than attorney-client privileged communications was not examined [by the *McDonnell Douglas* court] in terms of any policy justifications associated with either doctrine.” James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 658 n.81 (1997). Of course, *Chrysler* is also distinguishable from *Diversified* on the grounds that the initial disclosure made in *Chrysler* was made to a private party, and a privilege was asserted against the government, whereas in *Diversified*, the initial disclosure was made to the government, and a privilege was asserted against a private party. See *Chrysler*, 860 F.2d at 845-46; *Diversified*, 572 F.2d at 600.

²⁷⁸ See, e.g., *Columbia/HCA*, 293 F.3d at 314 (Boggs, J., dissenting); *Westinghouse*, 951 F.2d at 1431; *Mass. Inst. of Tech.*, 129 F.3d at 686 (holding the common interest exception inapplicable as the corporation was considered an adversary of the government, not a party sharing a common interest with the government).

²⁷⁹ See *supra* note 78 and accompanying text.

²⁸⁰ Hall, *supra* note 27, at 998.

²⁸¹ See *Saito*, 2002 WL 31657622, at *5. As observed by the chancery court:

The common interest question here boils down to whether the [investigating agency] acts as a friend or foe. . . . [The disclosing corporation] knew it was a target [and] knew the disclosure was being sought as part of this investigation. . . . The fact that [the disclosing corporation] ‘cooperated voluntarily’ does not transform the relationship from adversarial to friendly.

Id. at *4-*5. (internal citations omitted).

punish the corporation.²⁸² While the nature of the adversarial relationship is unique in that the parties include law enforcement and a suspected offender, in contrast with opposing civil litigants, the parties are adversaries nonetheless.²⁸³ As the work-product doctrine does not distinguish between criminal and civil adversaries, selective waiver does not fit neatly within the parameters of the work-product protection.

c. Selective Waiver and the Self-Evaluative Privilege

The self-evaluative privilege limits the discoverability of certain self-critical analyses, the accuracy of which are of great public import, and the accuracy of which could potentially be compromised if discovery were to be permitted.²⁸⁴ Although first recognized in 1970,²⁸⁵ the self-evaluative privilege has been met with significant skepticism, with some courts suggesting that the Supreme Court has implicitly rejected the new privilege entirely.²⁸⁶ Apart from the privilege's uncertain validity,²⁸⁷ finer points of the self-evaluative privilege reveal that even if the privilege is judicially accepted, it does not embrace selective waiver.²⁸⁸

Although materials disclosed pursuant to a government investigation may be of significant public importance, the accuracy, creation, or disclosure of which could be chilled if no privilege were applicable to them, "courts may be inclined to allow a waiver of the self-evaluative privilege through voluntary disclosures to a government agency."²⁸⁹ First, while "a self-evaluative review may be

²⁸² See *Westinghouse*, 951 F.2d at 1428 ("Unlike a party who assists the government in investigating or prosecuting another, . . . Westinghouse was the target of investigations conducted by the agencies. Under these circumstances, we have no difficulty concluding that the SEC and the DOJ were Westinghouse's adversaries.") (internal citation omitted).

²⁸³ See *id.*

²⁸⁴ See Conway, *supra* note 84, at 634; Ronald G. Blum & Andrew J. Turro, *The Self-Evaluative Privilege in the Second Circuit: Dead or Alive?*, 75 N.Y. ST. B.J. 44, 44 (June 2003). The self-evaluative privilege is also known as the self-critical analysis privilege. *Id.*

²⁸⁵ See *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970).

²⁸⁶ See Blum & Turro, *supra* note 284, at 45 (observing that "[s]everal local federal district courts suggest that the 1990 U.S. Supreme Court decision in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 492 U.S. 182 (1990) conclusively rejects the very basis of the privilege.").

²⁸⁷ *Id.*

²⁸⁸ See Conway, *supra* note 84, at 656-57.

²⁸⁹ *Id.* at 657.

worthless if the results are not shared with certain federal agencies,” the privilege does not specifically contemplate the issue of waiver.²⁹⁰ Second, by law many courts *require* corporations to conduct the self-critical analysis.²⁹¹ As a voluntary disclosure of sensitive materials to the government does not appear to fall within the grasp of the sporadically accepted self-evaluative privilege,²⁹² selective waivers are not readily permissible within the protections afforded by the self-evaluative privilege.

d. Selective Waiver as a New Corporation-Government Privilege

The previous discussion demonstrates that existing evidentiary privileges rest on policy considerations different from those that support selective waiver. Selective waiver should, therefore, be recognized as a new evidentiary privilege, a corporation-government privilege, rather than a mere extension of existing privileges. In this way, the integrity of our existing privileges remains because they do not become riddled with exceptions. Just as an attenuated argument can be made to fit the attorney work-product protection within the parameters of the attorney-client privilege, the two privileges indeed are unique and apply in different circumstances. Similarly, the selective waiver doctrine is a creature distinct from any of our existing privileges.

Evidentiary privileges are a cause for concern “because they impede the search for truth.”²⁹³ Consequently, a new privilege should not be created “unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”²⁹⁴ As the previous discussion demonstrates, selective waiver encourages a corporation under criminal investigation to disclose otherwise privileged material, thereby allowing for the expeditious resolution of such inquiries.²⁹⁵ The increased likelihood of bringing the perpetrators to justice, and the increased potential that similar corporate malfeasance will not occur again, however, come at the cost of certain evidence being

²⁹⁰ *Id.*

²⁹¹ *Id.* at 637.

²⁹² *Id.* at 641.

²⁹³ *Pierce County v. Guillen*, 537 U.S. 129, 130 (2003).

²⁹⁴ *Univ. of Pa.*, 493 U.S. at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

²⁹⁵ *See Westinghouse*, 951 F.2d at 1425-29.

unavailable at subsequent civil trials.²⁹⁶ While perhaps the absence of such evidence may “impede the search for truth”²⁹⁷ in civil trials, the corporation, “by waiving the privilege as to the [g]overnment[,] . . . furthers the truth-finding process” with respect to the criminal investigation.²⁹⁸ As mentioned, this evidence may come to neither the government nor the civil litigant if selective waiver is not permitted.²⁹⁹ The government’s unique role as protector of the public interest at large warrants this type of specialized treatment.³⁰⁰ In sum, a new corporation-government privilege would enhance the overall truth-finding process.

IV. IMPLEMENTING SELECTIVE WAIVER

The inquiry into whether selective waiver should be adopted does not end by merely concluding that a new privilege embodying selective waiver concepts should be received. Multiple forms of the doctrine exist, requiring a weighing of the interests at stake associated with each form. Determining the appropriate branch of government to adopt selective waiver is also of particular concern. Furthermore, the scope of the new privilege must be determined. This Comment concludes that selective waiver should be adopted by Congress in the form of a new privilege, shielding from discovery by private litigants only those materials which would otherwise be protected by traditional privileges, provided a confidentiality agreement is secured at the time of the initial disclosure.

A. *Selective Waiver Forms*

Selective waiver can take a variety of forms, each having its own unique advantages and drawbacks. For any type of selective waiver, especially one construed as an entirely new privilege, an initial disclosure must be made to a government agency.³⁰¹ One form of

²⁹⁶ See *Columbia/HCA*, 293 F.3d at 303.

²⁹⁷ *Guillen*, 537 U.S. at 130.

²⁹⁸ *Id.* (quoting *Permian*, 665 F.2d at 1221).

²⁹⁹ See *supra* notes 230-247 and accompanying text.

³⁰⁰ See *supra* notes 254-259 and accompanying text.

³⁰¹ An additional form of selective waiver exists, known as “general selective waiver.” Rabbit, *supra* note 28, at 1217. General selective waiver entirely abandons the very notion of implied waiver, such that “a breach of confidentiality . . . in one setting or to one party would never effect a waiver of the privilege as to any other party or in any other proceeding.” *Id.* at 1218. Pursuant to a general selective waiver, a party could disclose privileged materials to a private litigant, yet maintain privileged status over those materials in subsequent litigation against the

selective waiver, known as “selective administrative selective waiver,” permits a party to maintain its privileges over materials after an initial disclosure to a government agency even vis-à-vis another government agency.³⁰² On the other hand, the selective waiver doctrine could also take the form of an “overall administrative selective waiver,”³⁰³ whereby a disclosing party would be permitted to maintain its applicable privileges over materials previously disclosed to a government agency, but only vis-à-vis private parties, such that other government agencies would not be thwarted in their efforts to subpoena the previously disclosed materials.³⁰⁴ This latter form of the doctrine appropriately balances the competing interests at stake, and comes closest to achieving the goals of the selective waiver doctrine.

1. Selective Administrative Selective Waiver

The form of the selective waiver doctrine known as selective administrative selective waiver may in many cases prevent one government agency’s access to materials previously disclosed to another government agency.³⁰⁵ In short, when a corporation makes a disclosure, the otherwise applicable privileges are waived only to that agency—the privileges would remain as to all other parties, including both private litigants and other government agencies. *Permian* is illustrative of the problem a selective administrative selective waiver would create.³⁰⁶ In *Permian*, a corporation asserted its otherwise applicable privileges over materials previously disclosed to the SEC when the DoE sought discovery of those materials.³⁰⁷ Rejecting selective waiver, the *Permian* court warned that permitting selective waiver in such a case would allow the corporation to prioritize the SEC’s concerns over those of the DoE.³⁰⁸

government. *Id.* A general selective waiver does not advance the public policy goals underlying the doctrine. *Id.*

³⁰² Rabbit, *supra* note 28, at 1217. The author of the aforementioned note refers to this form of the doctrine as “selective administrative limited waiver.” The term “selective waiver,” however, is preferred over the term “limited waiver.” *See supra* note 10.

³⁰³ Rabbit, *supra* note 28, at 1217 (referring to this form of the doctrine as “overall administrative limited waiver”).

³⁰⁴ *See id.*

³⁰⁵ *See id.*

³⁰⁶ *Permian*, 665 F.2d at 1221.

³⁰⁷ *See supra* notes 147-156 and accompanying text.

³⁰⁸ *Permian*, 665 F.2d at 1221.

2. Overall Administrative Selective Waiver

Overall administrative selective waiver permits a disclosing corporation to maintain its privileges in subsequent litigation against private parties, but not against other federal agencies.³⁰⁹ Thus, corporations' disclosures will not be subject to the prying eyes of private litigants seeking access to the disclosed materials, but nevertheless are at risk of being subpoenaed by other government agencies.³¹⁰ Rejecting selective administrative selective waiver in favor of the "overall administrative" form of the doctrine is advantageous for a variety of reasons. This construction of selective waiver removes impediments to government investigations, as it allows a free flow of information between individual government agencies. In this way, a corporation is not permitted to "pick and choose among regulatory agencies."³¹¹ A disclosure to one agency operates as a waiver to all agencies, but not to private litigants.³¹² Given the special role and powers of the government related to pursuing the public interest, it is proper to afford the federal government as a whole the use of the disclosed materials in any manner which best serves the public interest.³¹³

Yet, even if one assumes the benefits potentially achievable through the doctrine in the abstract, this form of the selective waiver is not without criticism.³¹⁴ First, like other forms of selective waiver, overall administrative selective waiver "would give governmental agencies a decided advantage over private parties in the evidentiary process,"³¹⁵ as even non-governmental public interest groups would not be permitted to benefit from corporate disclosures to the government.³¹⁶ Second, since a disclosure made pursuant to an overall administrative waiver may be made available to other federal agencies, disclosing corporations must be mindful that their waiver is quite broad. *Permian* is merely one example where one federal agency seeks access to materials previously disclosed to another.³¹⁷ Under this form of selective waiver, therefore, corporations may still

³⁰⁹ See Rabbit, *supra* note 28, at 1217.

³¹⁰ See *id.*

³¹¹ *Permian*, 665 F.2d at 1221-22.

³¹² See *supra* notes 309-311.

³¹³ See Rabbit, *supra* note 28, at 1218-19.

³¹⁴ See *id.*

³¹⁵ *Id.* at 1218.

³¹⁶ *Id.* at 1219.

³¹⁷ See generally *Permian*, 665 F.2d at 1217.

resist an initial waiver, as expanding the scope of waiver undermines corporate willingness to cooperate with government investigations.

3. Suggested Form

Although overall selective waiver may inhibit certain disclosures that would occur if the information would be available to only one agency, implementing an overall administrative selective waiver best advances the public policy goals achievable through selective waiver. An expansive waiver policy, i.e., one which allows federal agencies to share disclosed materials, is more likely to be eventually implemented as it constitutes a less radical shift from the current rule, which generally rejects selective waiver. Although a disclosing corporation must be mindful that under such a rule its waiver of privilege operates as a waiver with regard to all federal agencies, this fact alone is unlikely to prevent increased cooperation with government investigations. Much of the legal scholarship addressing selective waiver, including commentary by corporate practitioners,³¹⁸ concerns the consequences of an initial disclosure as operating as a waiver as to private litigants, giving rise to the presumption that corporations are particularly wary of the threat of the private litigant.³¹⁹ Additionally, the government's position as a representative of the public in

³¹⁸ See, e.g., Greenwald & Thomas, *supra* note 23, at 11; Strassberg & Walters, *supra* note 12, at 7. David M. Greenwald is a partner at Jenner & Block, LLC. Greenwald & Thomas, *supra* note 23, at 11; Jenner & Block Attorney Directory, at <http://www.jenner.com/people/bio.asp?id=46> (last visited Feb. 7, 2005); Matthew J. Thomas is also a partner at Jenner & Block, LLC. Greenwald & Thomas, *supra* note 23, at 11; Jenner & Block Attorney Directory, at <http://www.jenner.com/people/bio.asp?id=28> (last visited Feb. 7, 2005). Richard M. Strassberg is a partner at Goodwin Procter, LLP and served as chief of the Major Crimes Unit in the United States Attorney's Office for the Southern District of New York. *Id.* Sarah E. Walters is a former associate at Goodwin Procter, LLP. Press Release, Goodwin Procter, LLP, Goodwin Procter Attorneys Win 2004 Burton Award for Legal Achievement (June 14, 2004) at <http://www.goodwinprocter.com/press-release.asp?ID=54>. Mr. Strassberg and Ms. Walters were selected to receive the Burton Award for Legal Achievement, "which honors excellence in legal writing" for the cited article *Is Selective Waiver of Privilege Viable?* *Id.*; Strassberg & Walters, *supra* note 12, at 7.

³¹⁹ See, e.g., Strassberg & Walters, *supra* note 12, at 7. Strassberg & Walters observed:

It is a fair bet that any civil lawsuits that follow a government investigation are sure to request the disclosure of any internal investigation, and if the privilege no longer applies, the company may find itself handing over to *civil plaintiffs* a virtual road map to assist them in their lawsuit.

Id. (emphasis added).

general, and not merely certain private interests,³²⁰ warrants particularized treatment of the government litigant.³²¹ While disclosures to one federal agency operate as a waiver to all federal agencies under the preferred form of selective waiver, this fact alone is unlikely to eviscerate the public policy benefits behind the doctrine.

Allowing federal agencies as a whole to share disclosures among themselves allows for the most effective and appropriate enforcement of law. Unlike private litigants, who are primarily concerned with their own aims,³²² federal agencies, operating under the auspices of serving the public interest, must be permitted to make full use of disclosed materials so that the public is adequately protected from all corporate misconduct, not merely misconduct that relates to the duties of the agency to whom the first disclosure is made. Although a broader selective waiver rule will inevitably cause certain corporations to refrain from cooperating with certain government investigations, an overall federal selective waiver is nevertheless likely to increase the number of disclosures that are currently made, for it effectively removes the threat of private litigants making use of said disclosures.

B. Congressional Action Is Required

Selective waiver occupies an area of legal limbo. Neither legislatures nor courts have indicated that they are the appropriate body to embrace the doctrine. Whereas courts claim that Congress may act to permit selective waiver,³²³ Congress has been especially reluctant to tinker with privilege law.³²⁴ The difficult policy considerations related to choosing the appropriate form of selective waiver, weigh heavily in favor of this matter being addressed legislatively.³²⁵ Conversely, courts traditionally have monopolized

³²⁰ See *supra* notes 254-259 and accompanying text.

³²¹ See *supra* notes 248-259 and accompanying text.

³²² See *supra* note 259 and accompanying text.

³²³ See *Mass. Inst. of Tech.*, 129 F.3d at 685.

³²⁴ See Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87-88 (2002) (observing that when the Federal Rules of Evidence were initially adopted, Congress, "displaying rare interest in the proposed rules and the rule-making process," specifically rejected a section of the proposed rules codifying privilege law.).

³²⁵ See Karla H. Alderman, Comment, *Making Sense of Oregon's Equitable Exception to the American Rule of Attorney Fees after Armatta v. Kitzhaber*, 35 WILLAMETTE L. REV. 407, 413 (1999) (observing that the United States Supreme Court has declined to rule in a manner which would necessarily hold certain public interests in higher esteem than others); see also *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 702-03 (1980)

privilege law,³²⁶ primarily because of their experience and understanding of such doctrines.³²⁷ Because courts generally reject selective waiver³²⁸ and Congress is hesitant to enter the privilege fray,³²⁹ the net result is the maintenance of the status quo. Although judicial efforts to adopt selective waiver should be welcomed, the promise of the doctrine can likely only be realized through legislative action.

In 1984, the SEC, recognizing the benefits of selective waiver, asked Congress to amend section 24(d) of the Securities and Exchange Act of 1934 (“the Exchange Act”).³³⁰ Specifically, the SEC proposed that “the disclosure of any information by any person to the [SEC] . . . shall not constitute a waiver of any legally cognizable privilege,” if the disclosing party asserts the privilege and its basis

(Burger, C.J., concurring) (noting that a proper interpretation of statutory text that results in “‘bad’ public policy” is “the concern of Congress where changes can be made.”); *see also In re Terry W.*, 130 Cal. Rptr. 913, 914-15 (Cal. Ct. App. 1976). The *Terry* court observed that a parent’s disclosure of incriminating statements made by her child to law enforcement was not protected by either the privilege against self-incrimination nor a “penumbral” right to privacy. *Id.* at 914. The court went on to note that “the penumbra is limited to the relationship of husband and wife . . . [and] [a]ttempts to expand its dimensions to [other areas] have proved unsuccessful.” *Id.* at 914-15 (citations omitted). The *Terry* court concluded “[the fact] [t]hat the problem is one which should be addressed *legislatively rather than judicially* is emphasized by unanswerable questions whether the ‘privilege’ should be that of parent, child, or both, how the ‘privilege’ may be waived, and what exceptions, if any, to the ‘privilege’ should exist.” *Id.* at 915 (emphasis added). Similarly, the policy concerns related to the scope and form of a selective waiver rule suggest that the matter is better addressed through legislative action.

³²⁶ *See* Glynn, *supra* note 324, at 87-88.

³²⁷ *See* FED. R. EVID. 501. Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.

³²⁸ *See supra* notes 142-199 and accompanying text.

³²⁹ *See supra* note 327.

³³⁰ *SEC Review of Enforcement Remedies, Proposed Legislation on Administrative Proceedings, FOIA Privilege*, 16 SEC. REG. & L. REP. (BNA) 456, 461 (Mar. 2, 1984).

therefor.³³¹ Although the acceptance of selective waiver by the SEC would appear to lend credence to the doctrine's value, the doctrine's detractors have seized upon Congress' failure to adopt the SEC proposal in an effort to support the argument against selective waiver.

The *Westinghouse* court, in justifying its rejection of selective waiver, incorrectly noted that "Congress rejected an amendment to the [Exchange Act] . . . that would have established a selective waiver rule."³³² Congress, in fact, "did not reject the [SEC's 1984] proposal; rather, the House Committee to which the proposal was submitted [merely] took no action."³³³ Not only did the Third Circuit mischaracterize the nature of the alleged congressional "rejection" of selective waiver, but the court also erroneously afforded this circumstance meaning.³³⁴ Rather than constituting any form of persuasive authority, such "unsuccessful proposals to amend a law, in the years following its passage, carry no significance."³³⁵ Although the *Westinghouse* court, as well as numerous commentators, have relied upon House Committee's failure to act on the SEC proposal as constituting a reason to reject selective waiver,³³⁶ the fact "that the proposal before that House Committee in 1984 was not ultimately enacted carries no significance."³³⁷

Most recently, the SEC proposed a rule permitting selective waiver as part of the Sarbanes-Oxley Act.³³⁸ Subsection 205.3(e)(3) read: "[w]here an issuer, through its attorney, shares with the [SEC] information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons."³³⁹ The SEC, however, ultimately withdrew its proposal citing "the concern that some courts might not adopt the [SEC's] analysis of [selective waiver], and that this could lead to adverse consequences for the attorneys and issuers who disclose information to the [SEC] pursuant to a confidentiality agreement,

³³¹ *Id.*

³³² *Westinghouse*, 951 F.2d at 1425.

³³³ Implementation, *supra* note 8, at 6312 n.116.

³³⁴ See *Westinghouse*, 951 F.2d at 1425.

³³⁵ NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992).

³³⁶ See, e.g., *Westinghouse*, 951 F.2d at 1425.

³³⁷ Implementation, *supra* note 8, at 6312 n.116 (citing *Am. Family*, 978 F.2d at 299).

³³⁸ See *id.*

³³⁹ *Id.*

believing that the evidentiary protections accorded that information remain preserved.”³⁴⁰ In essence, the SEC feared that “attorneys might disclose information to the [SEC] in the belief that the evidentiary privileges for that information were preserved, only to have a court subsequently rule that the privilege was waived.”³⁴¹

The parameters of a rule embracing selective waiver require a legislative solution, as courts’ cool reception of the doctrine has prevented its widespread judicial adoption.³⁴² General proscriptions against expanding our existing privileges have effectively caused courts to turn a blind eye to the public benefits afforded by a selective waiver rule.³⁴³ Courts, however, cannot be expected to weigh the large-scale competing interests at stake surrounding the decision to adopt a selective waiver rule. The current political climate, only recently rocked by a swath of corporate scandals,³⁴⁴ renders the selective waiver issue sufficiently ripe for legislative action.

C. *Scope of the New Privilege*

An overall corporation-government privilege requires two important limitations. First, the “privilege” should be qualified³⁴⁵, much like the work-product protection, such that a showing of substantial need or undue hardship would be sufficient to vitiate the protections of the privilege.³⁴⁶ While qualifying the privilege may serve to chill a corporation’s willingness to make disclosures to the government, the new privilege nevertheless renders cooperation with a government investigation more attractive than without the privilege. Accounting for the potential that certain circumstances may require the privilege to yield to greater concerns renders the privilege flexible in situations where such flexibility is warranted.³⁴⁷ Although the work-product protection may also be overcome in

³⁴⁰ *Id.* at 6312 n.117

³⁴¹ *Id.* at 6312. In support of its decision to withdraw its proposed selective waiver rule, the SEC cited a potential conflict with FED. R. EVID. 501. *Id.*; *see supra* note 327 and accompanying text. Additionally, the SEC noted concern that “it was uncertain if the Sarbanes-Oxley Act granted the [SEC] the authority to promulgate a [selective waiver] rule.” Implementation, *supra* note 8, at 6312.

³⁴² *See supra* notes 142-199 and accompanying text.

³⁴³ *Id.*

³⁴⁴ *See supra* note 1 and accompanying text.

³⁴⁵ *See supra* note 70.

³⁴⁶ *See supra* note 73 and accompanying text.

³⁴⁷ *Id.*

extraordinary circumstances, attorneys continue to prepare documents and tangible things revealing trial strategy.³⁴⁸ Likewise, corporations will likely make disclosures to the government even though the new privilege protecting those disclosures is a qualified one.

Additionally, recognition of the corporation-government privilege should be conditioned on the existence of a confidentiality agreement between the government agency and the disclosing corporation. The confidentiality agreement makes certain that the government, in pursuit of the public interest, maintains control over whether the corporation-government privilege should attach to the disclosure.³⁴⁹ In so doing, the government agency can restrict the scope of the privilege, and ensure that the new privilege will only become applicable when, in the opinion of the government agency, the public interest in obtaining the disclosure outweighs other concerns.³⁵⁰

CONCLUSION

Although selective waiver does not advance the same values as attorney-client, work-product, and self-evaluative privileges³⁵¹, it does advance other important public values.³⁵² It serves to complement existing methods of curtailing corporate criminal activity.³⁵³ A qualified corporation-government privilege, conditioned upon a confidentiality agreement, will enhance cooperation with government investigations by corporations suspected of wrongdoing.³⁵⁴ This disclosure serves vital public interests by facilitating the prosecution of white-collar criminals, thus decreasing the likelihood of similar offenses occurring in the future.³⁵⁵ Furthermore, this disclosure, facilitated by a new corporation-government privilege, will enable the government to conduct cost-

³⁴⁸ *Id.*

³⁴⁹ *See Saito*, 2002 WL 31657622, at *8 (observing that “[t]he SEC restricts its grants of confidentiality agreements to situations where it has reason to believe that obtaining work product is in the public interest and will result in greater efficiency in the investigation.”).

³⁵⁰ *See id.*

³⁵¹ *See supra* notes 264-292 and accompanying text.

³⁵² *See supra* notes 224-229 and accompanying text.

³⁵³ *See supra* notes 224-229 and accompanying text.

³⁵⁴ *See supra* notes 345-350 and accompanying text.

³⁵⁵ *See supra* notes 224-229 and accompanying text.

efficient investigations, resolve a higher quantity of investigations, and require cooperating corporations to institute internal controls to detect criminal wrongdoing within their midst.³⁵⁶

Although a corporation-government privilege necessarily inhibits post-disclosure private litigant discovery efforts, the current regime, by granting private litigants access to corporate disclosures, fails to provide sufficient incentives to foster voluntary disclosures.³⁵⁷ The existing post-disclosure discovery burden chills corporate cooperation with government investigations, thereby hindering law enforcement efforts.³⁵⁸ Corporations' decreased willingness to make such disclosures also reduces the availability of disclosed materials currently discoverable by private litigants.³⁵⁹ The selective waiver doctrine, implemented in the form of a corporation-government privilege, therefore provides substantial benefits at low cost.³⁶⁰ The only significant burden associated with the new privilege is that it induces lawmakers and judges to abandon their fears of recognizing new privileges.³⁶¹

Opponents have hoped that selective waiver would fade into the annals of legal history, but the doctrine has survived in commentary and in certain courts because it provides the proper incentives for corporate cooperation with government investigations. Congress should implement a selective waiver rule in the form of a new privilege in order to obtain voluntary disclosures necessary to combat criminal activity brewing within America's corporations.

³⁵⁶ See *supra* notes 226-229 and accompanying text.

³⁵⁷ See *supra* notes 226-229 and accompanying text.

³⁵⁸ See *supra* notes 226-229 and accompanying text.

³⁵⁹ See *supra* notes 230-247 and accompanying text.

³⁶⁰ See *supra* notes 230-247 and accompanying text.

³⁶¹ See *supra* note 176 and accompanying text.