THE FUTURE OF THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE CRIMINAL INVESTIGATIONS

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ABSTRACT

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

TABLE OF CONTENTS

Page

I. INTRODUCTION ................................................................. 922

II. THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE ........................................................................................................... 928
   A. Brief Background ............................................................. 928
   B. Development of the Privilege in the Corporate Context ........ 931

III. ORGANIZATIONAL SENTENCING GUIDELINES ...................... 932
   A. Brief History ................................................................. 933
   B. Sanctions ........................................................................ 935
      1. Framework for Organizational Sentencing .................... 935

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I. INTRODUCTION

The Enron\(^1\) and Worldcom\(^2\) scandals in the United States stand as poster children for greed and distrust of corporate America.\(^3\) In the wake of these scandals, the U.S. economy went into a tailspin\(^4\) and legislators scrambled to pick up the pieces: the Sarbanes-Oxley Act of 2002 (SOX) was passed only seven months after Enron's bankruptcy filing in December 2001,\(^5\) federal funding for the Securities Exchange Commission (SEC)\(^6\) was significantly increased,\(^7\) and emphasis was placed both on prosecution and deterrence of financial crime.\(^8\)

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\(^1\)On November 8, 2001, Enron disclosed that its financial statements for 1997 through 2000 and the first and second quarters of 2001 were false and restated these financial statements to reduce previously reported net income by an aggregate of $586 million. See Superseding Indictment at


3See William S. Laufer, Illusions of Compliance and Governance, 6 CORP. GOVERNANCE 239, 239 (2006) (describing that "[t]he downfall of Enron, conviction of Arthur Andersen, and bankruptcy of WorldCom define what has been called an historic period of corporate greed"); see also Pia Sarkar, People in Crisis/WorldCom Unravels/Ex-CEO Bernie Ebbers Flew High, Fell Hard and Took the Telecom Giant with Him, S.F. CHRON., Dec. 27, 2002, at B1 (stating that "Bernie Ebbers of WorldCom stuck out as a glaring example of what went wrong with corporate America in a year defined by greed and deceit—and the loss of public trust," and that Kenneth Lay, former chairman and CEO of Enron, became "the godfather of corporate chicanery after his lavish spending sprees were revealed"). The stock market experienced a third straight year of losses in 2002, in which stocks dropped 22% as a whole, resulting in $2.8 trillion loss in value. Since the market peak in March 2000, shareholder wealth was erased by $7.4 trillion. See Bill Atkinson, Stock Prices Drop for 3rd Year in Row; Declines Accelerate; Corporate Scandals, Weak Economy Get Blame; $2.8 Trillion in Wealth Erased, BALT. SUN, Jan. 1, 2003, at 1A; see also Bishen Bedi, More to Com?, MALAYSIAN BUS., July 16, 2002, at 64 (stating that "share price falls at just five companies—WorldCom, Tyco, Qwest, Enron and Computer Associates—have resulted in a combined US $460 billion loss on stock market capitalisation").


These scandals also renewed the vigor of the federal Organizational Sentencing Guidelines (OSGs or guidelines), promulgated in the early 1990s.⁹ Although the OSGs are no longer mandatory, having been so ruled

⁹See Office of the Sec'y, supra (delivering the announcement by President Bush that the budget included major increases in funding to crack down on corporate fraud and provides "historic levels of funding to allow federal investigators, prosecutors, and regulators to fully enforce the dramatically enhanced corporate governance reforms").

¹⁰Kathleen F. Brickey, Enron's Legacy, 8 BUFF. CRIM. L. REV. 221, 228-29 (2004) ("The recent spate of financial and accounting scandals prompted a broad array of legislative and regulatory responses . . . [including] significant increases in SEC funding.").

¹¹In response to the corporate fraud crisis, the Corporate Fraud Task Force (Task Force) was created by Executive Order in July of 2002. Exec. Order No. 13,271, 67 Fed. Reg. 46,091, reprinted as amended in 28 U.S.C. § 509 (2006). Its charge includes coordinating and directing the investigation and prosecution of major financial crimes, recommending how resources can be best allocated to combat major fraud, facilitating interagency cooperation in the investigation and prosecution of financial crimes, and recommending regulatory and legislative reforms relating to financial fraud. See id. (remarking on the purposes of the creation of Task Force "to strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes"); see also Office of the Press Secretary, Remarks by the President on Corporate Responsibility (July 9, 2002) (transcript available at http://www.gpo.gov/fdsys/pkg/WCPD-2002-07-15/pdf/WCPD-2002-07-15-Pg1158.pdf) (delivering the President's statement about the creation of the Corporate Fraud Task Force, which "will target major accounting fraud and other criminal activity in corporate finance" and "will function as a financial crimes SWAT team, overseeing the investigation of corporate abusers and bringing them to account"). Since the creation of the Task Force on July 9, 2002, through May 31, 2003, the Task Force has dealt with more than 320 criminal fraud investigations involving more than 500 individual subjects, of which 250 have been convicted. See CORP. FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT 2.2 (2003), available at http://www.usdoj.gov/cid/cftf/first_year_report.pdf. As of May 31, 2003, there were criminal charges pending against 354 defendants in connection with 169 filed cases. Id. Also, federal prosecutors achieved "over $2.5 billion in fines, forfeitures and restitution from July 1, 2002 through March 31, 2003" in connection with cases involving securities, commodities, investment, and advanced fee fraud schemes. Id.

SOX required the United States Sentencing Commission to review the existing guidelines to enhance the sentences for obstruction of justice and extensive criminal fraud, securities and accounting frauds, and other white collar crimes. See SOX, supra note 5, §§ 805, 905, 1104; see also News Release, U.S. Sentencing Comm'n, Sentencing Commission Toughens Penalties for White Collar Fraudsters (Apr. 18, 2003), available at http://www.ussc.gov/PRESS/rel0403.htm (announcing that in response to SOX, the Commission "voted unanimously to increase penalties significantly for corporate and other serious white collar frauds"). Judge Diana E. Murphy, Commission chair, has stated that "[t]he Sentencing Commission, by passing this amendment, is continuing to perform its important role in combating corporate fraud." U.S. Sentencing Comm'n, supra. SOX also directed the Commission to review the OSGs to ensure the sufficiency of the guidelines to deter and punish organizational criminal misconduct. See SOX, supra note 5,
by the U.S. Supreme Court, they provide guidance to prosecutors when recommending corporate fines and to judges when setting corporate fines. As will be discussed below, the OSGs emphasize the importance of an organization's cooperation with investigators in mitigating potential fines.

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

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


See id. at 259-60. Although Booker struck down the mandatory nature of the sentencing guidelines and required the federal courts to view them as advisory, it also held that district courts must first calculate the applicable sentencing range according to those guidelines. Id. at 245; see also Paul Fiorelli & Ann Marie Tracey, Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm, 32 J. CORP. L. 467, 476 (2007) (recognizing that federal district courts are still required to look at sentencing guidelines, even though the courts do not have to sentence in accordance with them).

U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2008). The guidelines allow a subtraction of five points from a culpability score if the organization reports an offense to the government, fully cooperates in the investigation, and clearly demonstrates recognition and affirmative acceptance of responsibility. Id. § 8C2.5(g)(1). The guidelines allow a subtraction of two points for full cooperation and acceptance of responsibility, id. § 8C2.5(g)(2), and allow deduction of one point for acceptance of responsibility alone. Id. § 8C2.5(g)(3).


Andersen was charged under 18 U.S.C. § 1512(b)(2)(A)-(B), which makes it a crime to "knowingly . . . corruptly persuade[] another person . . . with intent to . . . cause [that] person to withhold document[s] . . . from [or] alter, destroy, mutilate, or conceal . . . [documents] for use in an official proceeding . . . ." See United States v. Arthur Andersen LLP, 374 F.3d 281, 284 (5th Cir.
trial, the primary issue was whether Andersen destroyed the documents with
the purpose of impeding the SEC's investigation. The jury returned a
guilty verdict on one count of obstruction of justice for shredding Enron-
related documents, and the Fifth Circuit affirmed the district court's
decision. Ultimately, the Supreme Court unanimously reversed Andersen's
conviction. The Court held that the trial court's jury instruction
interpreting the language of the statute "simply failed to convey the requi-
site consciousness of wrongdoing" for a conviction.

With its conviction vacated, Andersen could have resumed operations.
The indictment and subsequent conviction, however, devastated the firm's
reputation. Moreover, because the SEC does not allow convicted felons to

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15See Julia Schiller, Deterring Obstruction of Justice Efficiently: The Impact of Arthur
Andersen and the Sarbanes-Oxley Act, 63 N.Y.U. ANN. SURV. AM. L. 267, 275-77 (2007) (explain-
ing that at trial, the government and Andersen disputed how the jury would be instructed over two
main issues: "the degree of intent required to prove knowing corrupt persuasion" and the "required
 nexus between the obstruction and the official proceeding"); see also Christopher R. Chase, To
Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes, 8
FORDHAM J. CORP & FIN. L. 721, 754 & n.189 (2003) (explaining that section 1512(b) required the
prosecutors to prove three elements: (1) Andersen persuaded employees to destroy Enron-related
documents, (2) whoever gave these orders intended to impair the SEC investigation of Enron, and
(3) high-level employees at the firm were culpable).
16Arthur Andersen, 374 F.3d at 284.
18To clarify, the statute the Court referred to was 18 U.S.C. § 1512(b) (2006). See Arthur
Anderson, 544 U.S. at 698.
19Arthur Andersen, 544 U.S. at 706. The district court reportedly instructed the jury in such
a way that "even if [petitioner] honestly and sincerely believed that its conduct was lawful, . . . [the
jury could] find [petitioner] guilty." Id. Furthermore, the jury "did not have to find any nexus
between the [persuasion] to destroy documents and any particular official proceeding." Id. at 707;
see also Schiller, supra note 15, at 277 (recognizing that the Court in Arthur Andersen did define
"minimum standards" needed for culpability by emphasizing the requisite mental state). The Supre-
me Court held that the instructions were misleading because, while the statute requires that the
defendant "knowingly . . . corruptly persuad[e]," under the instructions, Andersen could have been
convicted without proof that the firm knew its conduct was illegal or was a link between the official
proceeding and the destruction. Arthur Andersen, 544 U.S. at 706. The Supreme Court stated that
criminality should be limited to only "persuaders conscious of their wrongdoing," since "[o]nly
persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e]."' Id. The
Court also held that obstruction must have a "nexus" to an official proceeding, and therefore, a
defendant has not violated the statute if he has persuaded another to shred documents "when he does
not have in contemplation any particular official proceeding in which those documents might be
material." Id. at 707-08.
20See Linda Greenhouse, Justices Reject Auditor Verdict in Enron Scandal, N.Y. TIMES,
June 1, 2005, at A1 (stating that regardless of the Supreme Court's decision to overturn the case,
Arthur Andersen "has no chance of returning as a viable enterprise"); see also George Ellard,
that Andersen's indictment and its conviction for obstruction of justice caused the demise of the
firm); Earl J. Silbert & Demme Doufelkas Joannou, Under Pressure to Catch the Crooks: The
Impact of Corporate Privilege Waivers on the Adversarial System, 43 AM. CRIM. L. REV. 1225,
audit public companies, the firm agreed to surrender its Certified Public Accounting licenses and its right to practice before the SEC, which effectively put what was once a "big five" accounting firm out of the business. Numerous Andersen clients deserted the firm, as did many partners and personnel, and Andersen was obliged to sell off profitable components of its business. In the aftermath, nearly 28,000 U.S. Andersen employees lost their jobs.

It is reasonable to conclude that had Andersen more fully cooperated with federal investigators, it may have been able to reach an NPA or a DPA, potentially avoiding conviction. As discussed below, up until late August 2008, waiver of the attorney-client privilege was a factor weighed by prosecutors evaluating whether a firm would be seen as cooperative. Various guidelines issued by the DOJ up until then either implicitly or explicitly required firms to waive the attorney-client privilege, among other things, to receive credit for cooperating with federal investigators and potentially avoid a criminal indictment. Recent guidelines appear to attempt to restore the privilege by explicitly prohibiting prosecutors from requesting waiver, although they still require firms to divulge relevant facts and presumably allow firms to waive privilege voluntarily. Questions remain as to whether the corporate attorney-client privilege is a relic of the past, or whether the 2008 guidelines have indeed restored the vitality of the attorney-client privilege to firms under federal investigation.

To address these questions, this article proceeds as follows. Part II begins with an overview of the significance of the attorney-client privilege to

1229 (2006) (stating that after its indictment for obstruction of justice, Andersen essentially "ceased to exist").

21Under SEC rules, a felony conviction disqualified Arthur Andersen from auditing public companies unless the firm received a waiver by SEC. See 17 C.F.R. § 201.102(e) (2008) (listing ways a person may be suspended or disbarred from representing clients by the SEC).


23See Kirstin Downey Grimsley, Andersen Exodus Might Be Near; 80% of Partners Said to Plan Search for Jobs Elsewhere, WASH. POST, Apr. 17, 2002, at E1 (stating that of the 1,700 U.S. partners at Arthur Andersen, more than 80% were looking to other accounting firms and new companies for a position); see also Chase, supra note 15, at 747 (stating that Arthur Andersen's indictment and conviction resulted in the loss of Arthur Andersen's clients, the sale of some of its units, and the departure of personnel).

24Chase, supra note 15, at 747.

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

26See infra Part III.D.

criminal jurisprudence. Part III continues with a discussion of the OSGs, which emphasize the importance of cooperation by firms with federal authorities. Part IV then addresses prosecutorial discretion and the memoranda issued by the DOJ which provide guidelines to prosecutors regarding the exercise of their discretion. These memoranda also emphasize the role of cooperation. Part V follows with analysis of non-prosecution and deferred prosecution agreements and once again demonstrates the significance of cooperation. Concluding remarks follow.

II. THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE

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

A. Brief Background

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

It has been argued that the effective administration of justice depends on the encouragement of "full and frank communication" between a lawyer and his or her client. In Connecticut Mutual Life Insurance Co. v. Shaefer, the U.S. Supreme Court stated that "[i]f a person cannot consult

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33 Upjohn, 449 U.S. at 389.
34 94 U.S. 457 (1876).
his legal adviser without being liable to have the interview made public the
next day by an examination enforced by the courts, the law would be little
short of despotic.\textsuperscript{35} The policy justifications for upholding the privilege
were articulated again by the Court twelve years later in 1888, when it stated
that privilege was "founded upon the necessity, in the interest and admin-
istration of justice, of the aid of persons having knowledge of the law and
skilled in its practice, which assistance can only be safely and readily availed
of when free from consequences or the apprehension of disclosure."
\textsuperscript{36}

According to Professor John Henry Wigmore:

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

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

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

Critics of the privilege in Wigmore's time maintained that securing the
confidentiality of the guilty was not a cause for concern and that the innocent
had no use for privilege in the first place.\textsuperscript{39} Wigmore rebutted these crit-
cisms by pointing to the murky distinction between guilt and innocence in
civil cases.\textsuperscript{40} He further championed the efficiency that a broadly available

\textsuperscript{35} Id. at 458.
\textsuperscript{36} Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
\textsuperscript{37} John Henry Wigmore, A Treatise on the System of Evidence in Trials at
Common Law § 2292, at 3204 (1st ed. 1905) (emphasis omitted).
\textsuperscript{38} Id. § 2285, at 3195 (emphasis omitted).
\textsuperscript{39} See id. § 2291, at 3199-200.
\textsuperscript{40} See id.
privilege would afford, as conscientious legal advisors would discourage frivolous claims and encourage settlements. 41

Related to the attorney-client privilege is the work-product doctrine. This doctrine finds its roots in both case law and code. In Hickman v. Taylor, 42 the Supreme Court introduced the idea of protecting an attorney's work product—such as an attorney's notes of witness interviews—from discovery by opponents in litigation. 43 The need for the work-product rule arose after the liberalization of pre-trial discovery rules and was subsequently codified in the Federal Rules of Civil Procedure. 44

Work-product protection itself is qualified. Although an attorney's mental impressions and legal theories are fiercely barricaded, facts that are essential are discoverable. 45 Further, while the attorney-client privilege protects a large array of confidential communications between attorney and client, the work-product rule can be invoked to seal non-client communications, such as interview memoranda or statements of witnesses taken by counsel. 46

41 WIGMORE, supra note 37, § 2291, at 3202-04.
42 329 U.S. 495 (1947).
43 Id. at 510-14.
44 See FED. R. CIV. P. 26(b)(3).
45 Courts have recognized two types of attorney work product: fact (or "ordinary") work product and opinion work product. See Hickman, 329 U.S. at 510-12; see also Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (stating that both fact and opinion work product are protected from disclosure to an adverse party). Fact work product is the factual information, typically the relevant facts that an attorney or its agent obtained during an internal investigation. See, e.g., Doe v. United States, 662 F.2d 1073, 1076 n.2 (4th Cir.1981) (defining ordinary work product as "those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney"). Examples of fact work product include a witness statement taken by counsel, investigative reports, and interview memoranda. See Jeff A. Anderson et al., Special Project, The Work Product Doctrine, 68 CORNELL L. REV. 760, 791-98 (1983).
46 Opinion work product protection, the "core" of the work-product doctrine, only covers "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." FED. R. CIV. P. 26(b)(3)(B). For example, "an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weakness of his case, and the inferences he draws from interviews of witnesses" are examples of opinion work product. Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985). In contrast to fact work product, which is more easily discoverable by a showing of "substantial need" or "undue hardship," courts have given greater protection to opinion work product. See Upjohn, 449 U.S. at 400-01; Hickman, 329 U.S. at 511-12. See generally Anderson et al., supra, at 817-37 (providing an in-depth look at opinion work product).

47 A few courts have held that the work-product doctrine did not protect a witness statement since it simply "records the mental impressions and observations of the witness himself and not those of the attorney." Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58-59 (N.D. Ohio 1953) (per curiam); see also Caruso v. Moore-McCormack Lines, Inc., 196 F. Supp. 675, 676 (E.D.N.Y. 1961) (holding that statements of a witness taken by an attorney are not protected by the work product doctrine). Courts, however, have applied Hickman's work-product doctrine to protect
In terms of policy, the attorney-client privilege is often described under the canopy of promoting the interest of the client's access to legal advice while work-product doctrine justifications are framed within the interests of the attorney in litigation. Still, both privileges promote the same core value of the efficient administration of justice and preservation of the attorney-client relationship.

B. Development of the Privilege in the Corporate Context

The exercise of the attorney-client privilege between a corporation and its lower-level employees was upheld in *Upjohn Co. v. United States.* A unanimous Court held that the privilege is necessary for "communication of relevant information" as well as for navigation through "the vast and complicated array of regulatory legislation confronting the modern corporation." The Court emphasized that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions may be protected. An uncertain privilege . . . is little better than no privilege at all."

The *Upjohn* Court explicitly recognized the complications that result from the inherent stratification of the artificial person of the corporation, but

witness' statements regardless of whether they were in the form of the attorney's mental impressions or an interview memoranda. See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2024, at 357-61 (2d ed. 1994) (summarizing matters protected by the work-product rule including the general rules for the Hickman's work product doctrine); see, e.g., *Upjohn*, 449 U.S. at 400 (holding that memoranda based on witnesses' oral statements revealed attorney's mental processes and are specially protected by Rule 26(b)(3)); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970) ("Where an attorney personally prepares a memorandum of an interview with a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator."); *aff'd by an equally divided court*, 400 U.S. 348 (1971); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (holding that notes of conversations with a witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). See generally Anderson et al., supra note 45, at 793-95 & nn.203-10, 818-19 & n.351 (discussing in detail whether courts treat various forms of witness statements as work product).

*See Upjohn*, 449 U.S. at 389; *see also Hickman* 329 U.S. at 510-11 (recognizing that protecting counsel's trial preparation materials from discovery promotes the adversary system); Anderson et al., supra note 45, at 784-88 (stating that the purpose of the work-product doctrine is to maintain the benefits of the adversary system, enable an open discovery process, and provide protection of an attorney's mental processes).

*449 U.S. 383, 386-87 (1981).*

*49Id. at 392.*


*51Upjohn*, 449 U.S. at 393.
concluded that limiting privilege to only top-tier employees would frustrate "the very purpose of the privilege" and could "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." Four years after *Upjohn*, the Court further clarified that the attorney-client privilege resides in the corporation itself and is not possessed by any individual officer or employee. The Court also explicitly recognized that corporate management has the power to waive the confidentiality of communications if it is deemed to be in the company's best interest.

III. ORGANIZATIONAL SENTENCING GUIDELINES

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

The OSGs allow for reductions in the guideline fine range if an organization "fully cooperated" in the investigation of its criminal conduct. This may result in an organization receiving the minimum fine set forth in the guidelines. Furthermore, the guidelines allow the sentencing court to depart from the guideline range, and assign a lower fine, if the organization provided "substantial assistance" in the government's investigation or prosecution of the criminal conduct by others. As a result, the organization may receive a fine far below what is technically the minimum OSG fine. The potential for a reduced, or even eliminated, sentence in exchange for cooperation presents organizations under government investigation with a strong incentive to cooperate.

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52 *Id.* at 392.
53 *Id.*
55 *Id.* at 348-49.
58 See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1)-(3) (2008).
59 *Id.* § 8C2.5(g)(1)-(2).
60 *Id.* § 8C4.1.
Full cooperation has, at times, involved waiver of the firm's attorney-client privilege. To address the impact of the OSGs on the attorney-client privilege, this part will first provide a brief history of the OSGs. It will then describe the sanctions and framework for organizational sentencing with a focus on the role of cooperation and waiver of the attorney-client privilege.

A. Brief History

In the mid-1980s, Congress enacted the Sentencing Reform Act of 1984 (SRA or the Act).\(^62\) The purpose of the SRA is to alleviate sentencing disparity and inconsistency that had been prevalent in the federal courts, as well as to increase sentence severity for certain offenses.\(^63\) In addition, the SRA requires courts to consider the goals of just punishment, deterrence, incapacitation, and rehabilitation before imposing a particular sentence.\(^64\) To diminish the sentencing discretion of individual judges, the SRA authorizes the creation of the United States Sentencing Commission (Commission), to be set up as an independent agency in the judicial branch of government.\(^65\) The primary purpose of the Commission is to promulgate guidelines for sentencing in the federal criminal court system.\(^66\) The federal OSGs became effective on November 1, 1991 as chapter eight of the U.S. Sentencing Guidelines Manual.\(^67\)

In conformity with the legislative purpose of increasing sentencing uniformity and certainty, the sentencing guidelines were intended to be mandatory.\(^68\) In United States v. Booker,\(^69\) however, the U.S. Supreme Court struck down the provisions of the SRA that made the guidelines mandatory,\(^70\) holding that such a provision violates the defendant's right to a

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\(^63\)Nagel & Swenson, supra note 57, at 206.


\(^66\)Id. § 991(b); see also Nagel & Swenson, supra note 57, at 207 (stating that the Commission is required to determine guidelines for sentencing).

\(^67\)See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2008).

\(^68\)See Nagel & Swenson, supra note 57, at 240-44.

\(^69\)543 U.S. 220 (2005).

\(^70\)Id. at 259-61. The Court struck down 18 U.S.C. § 3553(b)(1), which mandates that the judge's sentence fall within the applicable guideline range, unless circumstances justify the judge's departure from the range. Booker, 543 U.S. at 259-60. Also, the Court held that 18 U.S.C. § 3742(e) deprived federal appeals courts of the power to review sentences imposed outside the guidelines range. Booker, 543 U.S. at 260-61.
jury trial.\textsuperscript{71} Under \textit{Booker}, therefore, federal courts must consider the factors enumerated in the SRA\textsuperscript{72} and view the sentencing guidelines as advisory. District courts must calculate the applicable guidelines' sentencing range, but they have discretion to go outside that range in order to "tailor the sentence in light of the other statutory concerns" in section 3553(a).\textsuperscript{73}

When Congress enacted the SRA, its primary focus was on the sentencing of individual offenders.\textsuperscript{74} It was not clear that the Commission would promulgate sentencing guidelines for organizations as well.\textsuperscript{75} Nothing in the legislative history demonstrates unequivocally a Congressional intent for the promulgation of mandatory organizational guidelines.\textsuperscript{76} In fact, some commentators argued that the sentencing disparity that prompted the sentencing guidelines' passage was absent in the organizational context.\textsuperscript{77} Empirical research on organizational sentencing practices conducted by the Commission, however, subsequently revealed a wide disparity in organizational sentencing as well.\textsuperscript{78} The Commission's findings, together with its broader mandate of establishing sound and effective sentencing policies, support the belief that OSGs are necessary for furthering legislative goals.\textsuperscript{79}

\footnotesize

\textsuperscript{71}See \textit{Booker}, 543 U.S. at 244.

\textsuperscript{72}\textit{id.} at 259-60. The statutory factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a) (2006).

\textsuperscript{73}\textit{Booker}, 543 U.S. at 245; see also Fiorelli & Tracey, \textit{supra} note 11, at 475 (noting the impact of the \textit{Booker} decision on how corporate guidelines will be viewed by courts). For an analysis of the impact of \textit{Booker} on sentencing practices in federal courts, see U.S. SENTENCING COMM'N, REPORT ON THE IMPACT OF \textit{UNITED STATES V. BOOKER} ON FEDERAL SENTENCING (2006), available at http://www.uscc.gov/booker_report/Booker_Report.pdf.

\textsuperscript{74}Nagel & Swenson, \textit{supra} note 57, at 212.


\textsuperscript{76}Nagel & Swenson, \textit{supra} note 57, at 212.


\textsuperscript{79}See Miller, \textit{supra} note 75, at 211-212; Nagel & Swenson, \textit{supra} note 57, at 213-14.
B. Sanctions

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

1. Framework for Organizational Sentencing

Overall, the Commission attempted to design the organizational sanctions so that, together with those imposed on the firm's agents, they would "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." The three substantive sanctions of the OSGs consist of (1) remediation, (2) fines, and (3) probation. Each sanction, or combination of sanctions, was adopted to respond to one or more of the sentencing purposes set out in the SRA.

80The Supreme Court first upheld the criminal liability of corporations in 1909. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493-95 (1909). The Court held that a corporation is vicariously liable for the criminal acts of its employees if those acts are committed within the scope of employment or authority and with the intent to benefit the business. Id.
81See SUPPLEMENTARY REPORT, supra note 78, at 5; Miller, supra note 75, at 199.
82Section 3553(a)(2) sets forth the four statutory purposes: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
83Section 3551(c) provides for a term of probation or a fine. Id. § 3551(c). In addition to the sentence pursuant to the provision in section 3551(c), the court may order that the defendant forfeit property to the government, id. § 3554, the defendant give reasonable notice and explanation of the conviction to the victims, id. § 3555, or order restitution, id. § 3556.
84See Miller, supra note 75, at 203.
86See generally id. §§ 8B-D.
87SUPPLEMENTARY REPORT, supra note 78, at 5; see 18 U.S.C. § 3553(a) (2006).
Unlike the sentencing guidelines for individuals, the OSGs first require the sentencing court, whenever practicable, to order remediation.\textsuperscript{88} That is, the organization must remedy the harm caused by the offense.\textsuperscript{89} The remediation guidelines are designed to make victims whole and are not to be considered as punishment.\textsuperscript{90}

In contrast, the guidelines for assessing criminal fines divide organizations into two types: criminal purpose organizations and other organizations.\textsuperscript{91} When the sentencing court determines that the organization operated primarily for a criminal purpose, or primarily by criminal means, the guidelines are the most severe. They then require the court to impose a fine sufficient to divest the organization of all its net assets.\textsuperscript{92} For these types of organizations, the Commission found incapacitation to be the most important goal of sentencing.\textsuperscript{93}

Other organizations might receive a probationary sentence or a fine that reflects the seriousness of the offense and their culpability.\textsuperscript{94} Probation is designed, in part, to achieve specific deterrence and, in part, to rehabilitate organizations by requiring them to establish and maintain an effective compliance program.\textsuperscript{95}

2. Guidelines for Fines

The guidelines for imposing criminal fines on organizations\textsuperscript{96} are designed to promote the goals of just punishment and deterrence.\textsuperscript{97} They are meant to provide significant incentives to organizations to create and maintain internal mechanisms for preventing and detecting criminal conduct.\textsuperscript{98}

In developing the organizational guidelines for fines, the Commission considered the issue of vicarious liability:\textsuperscript{99} Organizations act only through

\begin{itemize}
  \item \textsuperscript{88}U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt. (2008).
  \item \textsuperscript{89}See id. ch. 8 introductory cmt., § 8A1.2.
  \item \textsuperscript{90}Id. ch. 8 introductory cmt.
  \item \textsuperscript{91}See id. ch. 8 introductory cmt., § 8A1.2(b).
  \item \textsuperscript{92}U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt., § 8C1.1 (2008).
  \item \textsuperscript{93}See id.; see also Nagel & Swenson, supra note 57, at 232-33 (noting that the Commission's goal was to incapacitate the Criminal Purpose Organization by imposing a heavy fine).
  \item \textsuperscript{94}Section 3551(c) requires that an organization be placed on probation in any case where no fine is imposed. 18 U.S.C. § 3551(c) (2006); see also U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt. (2008) (stating that probation may be appropriate in certain circumstances).
  \item \textsuperscript{95}See U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt., § 8D1.1 (2008).
  \item \textsuperscript{96}Id. § 8C.
  \item \textsuperscript{97}See Nagel & Swenson, supra note 57, at 232.
  \item \textsuperscript{98}See id. at 228-32.
  \item \textsuperscript{99}See id. at 234-40.
\end{itemize}
agents and thus are vicariously liable for the offenses of their agents. In addressing this issue, the Commission designed the guidelines for fines to account for both the seriousness of the offense and the degree of culpability. Also, to further the goal of deterrence, the guidelines take a "carrot and stick approach" by providing incentives for organizations to prevent and detect criminal conduct. The OSGs thus impose substantial fines when a convicted organization has been tolerant of violations of law by its employees, but allow for significantly lower fines when an organization has clearly demonstrated in specified ways its antipathy toward law-breaking.

For example, organizations that have an effective compliance and ethics program designed to prevent and detect criminal conduct, cooperate with government investigations, and accept responsibility, can reduce their potential fines by up to 95%. In contrast, organizations that tolerate, encourage, or condone criminal conduct may face fines multiplied by a factor of four, or 400%.

Presumably most firms do not envision being involved in future criminal conduct; yet the OSGs still provide strong incentives to develop a compliance and ethics program. Although relatively few companies are pursued in court, many more companies are reviewed by federal prosecutors. Documentation of an effective compliance and ethics program could impact a federal prosecutor's initial determination whether charges should be filed. Furthermore, despite the advisory nature of the guidelines, prosecutors, judges, and regulators will continue to turn to the OSGs in assessing corporate conduct. Indeed, most firms today have

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110. See SUPPLEMENTARY REPORT, supra note 78, at 5-6.
111. See Fiorelli & Tracey, supra note 11, at 467.
113. See Fiorelli & Tracey, supra note 11, at 237-38.
implemented some form of compliance and ethics program,\textsuperscript{113} albeit to varying degrees.\textsuperscript{114}

3. Calculating the Fine

As a general rule, in calculating the corporate fine, the OSGs contemplate calculation of a base fine and a culpability score.\textsuperscript{115} The seriousness of the offense is reflected by the base fine, and the relative degree of an organization's culpability is reflected in its culpability score.\textsuperscript{116} The base fine is the greatest of (1) the amount corresponding to the offense level under the Offense Level Fine Table,\textsuperscript{117} (2) the pecuniary gain to the organization from the offense, or (3) the pecuniary loss caused by the organization either intentionally, knowingly, or recklessly.\textsuperscript{118} The culpability score adjusts the base fine upward or downward in response to the organization's culpability.\textsuperscript{119} Starting with five points,\textsuperscript{120} the culpability score generally may be increased or decreased by six factors.\textsuperscript{121} Four factors increase culpability: (1) involvement in or tolerance of criminal activity by senior personnel,\textsuperscript{122}


\textsuperscript{114}In a 2003 ethics and compliance survey conducted by Deloitte and \textit{Corporate Board Member} magazine, 83\% of respondents indicated that they had a formal ethics code in place. See \textit{DELOITTE DEV. LLC & CORP. BD. MEMBER, BUSINESS ETHICS AND COMPLIANCE IN THE SARBANES-OXLEY ERA} 1 (2004), \textit{available at} http://www.deloitte.com/dtt/cda/doc/content/us_assur_ethicsCompliance(1).pdf. Ronald Berenbeim, director of The Conference Board Working Group on Global Business Ethics and Principles, attributes this development to the promulgation of the OSGs and the potential to avoid prosecution or reduce fines if an effective compliance program is in place. See McCollum, \textit{supra} note 113 (demonstrating the impact of the OSGs). Prior to the promulgation of the OSGs, in a 1987 report by The Conference Board, a New York-based research organization, only 44\% of respondents said their company had any sort of ethics training program for employees. The Conference Bd., \textit{More Corporate Boards Involved in Ethics Programs}, \textit{PR NEWSWIRE}, Oct. 16, 2006, \textit{available at} http://www.newswise.com/articles/view/524334/. By contrast, in a 2005 Conference Board survey, 92\% reported having an ethics training program. \textit{Id.} The Conference Board surveys also demonstrate the increased involvement of corporate boards in compliance and ethics programs. While in 1987 documented board involvement in an ethics program was found in only 21\% of companies, 96\% of respondents documented board involvement in 2005. \textit{Id.}

\textsuperscript{115}\textit{SUPPLEMENTARY REPORT, supra} note 78, at 5.

\textsuperscript{116}\textit{Id.}

\textsuperscript{117}\textit{U.S. SENTENCING GUIDELINES MANUAL} § 8C2.4(d) (2008).

\textsuperscript{118}\textit{Id.} § 8C2.4(a). Pecuniary gain or loss, when greatest, is used to determine the base fine, unless the calculation would unduly complicate or prolong the sentencing process. \textit{Id.} § 8C2.4(c).

\textsuperscript{119}See \textit{id.} § 8C2.5.

\textsuperscript{120}\textit{Id.} § 8C2.5(a).

\textsuperscript{121}See \textit{U.S. SENTENCING GUIDELINES MANUAL} ch. 8 introductory cmt., § 8C2.5(b)-(g) (2008).

\textsuperscript{122}\textit{Id.} § 8C2.5(b).
(2) prior history of wrongdoing,\(^1\)\(^2\)\(^3\) (3) violation of a court order or a condition of probation,\(^2\)\(^4\) and (4) obstruction of justice.\(^2\)\(^5\) Two factors decrease culpability: (1) compliance, and (2) cooperation.\(^1\)\(^6\) One of the mitigating factors includes the existence of an effective compliance and ethics program.\(^2\)\(^7\)

For example, an organization that had an effective compliance and ethics program to "prevent and detect criminal conduct" in place prior to an offense may have three points subtracted from its culpability score.\(^2\)\(^9\) Other mitigating factors are self-reporting, cooperation, and acceptance of responsibility.\(^1\)\(^3\)\(^0\) An organization may reduce its culpability score if it promptly and thoroughly reports the offense to the government, fully cooperates in the investigation, or accepts responsibility for the offense.\(^1\)\(^3\)\(^1\)

\(^{1\text{Id.}}\)§ 8C2.5(c).

\(^{2\text{Id.}}\)§ 8C2.5(d).

\(^{3\text{See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(e) (2008).}}\)

\(^{4\text{Id.}}\)§ 8C2.5(f)-(g).

\(^{5\text{See id.} \ § 8C2.5(f).} \)

\(^{6\text{Id.}}\)§ 8B2.1 cmt. 1; see id. ("Compliance and ethics program' means a program designed to prevent and deter criminal conduct.").

\(^{2\text{The reduction is contingent upon prompt reporting to the authorities and non-involvement of high-level personnel in the actual offense conduct. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(2)-(3) (2008).}}\)

\(^{3\text{Id.}}\)§ 8C2.5(g).

\(^{4\text{The guidelines allow a subtraction of five points from a culpability score if the organization reports an offense to the government, fully cooperates in the investigation, and clearly demonstrates recognition and affirmative acceptance of responsibility. Id. § 8C2.5(g)(1). The guidelines allow a subtraction of two points for full cooperation and acceptance of responsibility and allow a deduction of one point for acceptance of responsibility alone. Id. § 8C2.5(g)(2)-(3). In 2004, the Commission amended the OSGs to emphasize the significance of compliance and ethics programs to prevent and detect criminal conduct. News Release, U.S. Sentencing Comm'n, Commission Tightens Requirements for Corporate Compliance and Ethics Program (May 3, 2004), available at http://www.ussc.gov/PRESS/rel0504.htm. The amendments elevated the criteria for an effective compliance program previously set forth in a commentary application note, U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (1991), into a new guideline. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2008); see id. app. C amend. 673 (2008), available at http://www.ussc.gov/corp/Amend-673.pdf; Paula J. Desio, Introduction to Organizational Sentencing and the U.S. Sentencing Commission, 39 WAKE FOREST L. REV. 559, 561 (2004). The amendments clarified and strengthened the criteria that an organization must follow in order to establish and maintain an effective compliance and ethics program to prevent and detect criminal conduct. Id.; see also Fiorelli & Tracey, supra note 11, at 482-89 (stating that the amended sentencing guidelines imposed higher standards for what would be considered an effective compliance and ethics program).}}\)
C. The Role of Cooperation

The OSGs allow reduction of the culpability score assigned to a firm if the firm has fully cooperated in the investigation. If the organization promptly reports the offense to the government, fully cooperates with the government, and clearly accepts responsibility for the criminal conduct, the organization may reduce its culpability score by up to five points.\(^{122}\) To be considered full cooperation, it "must be both timely and thorough."\(^ {123}\) Timely "cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation."\(^ {124}\) To satisfy the requirement of thoroughness, an organization must disclose all pertinent information known by it.\(^ {125}\) The sufficiency of the disclosure will be determined by whether the information is sufficient enough for the government "to identify the nature and extent of the offense and the [particular] individual(s) responsible for the criminal conduct."\(^ {126}\) Further, the relevant cooperation is that of the organization and not the "individuals within the organization."\(^ {127}\) A failure of cooperation by any individual employee does not necessarily disqualify the organization for cooperation credit.\(^ {128}\)

Because the organization's culpability score is associated with minimum and maximum multipliers that range from .05 to 4.00, an adjustment of the culpability score may result in a reduction of up to 95% of the ultimate fine range or a 400% increase.\(^ {129}\) Prosecutors "can influence the severity of the sentence . . . by recommending" a reduction of the culpability score for cooperation.\(^ {130}\) "Although courts ultimately decide . . . [the applicable fine], the government's recommendation, based on its assessment of whether a corporation has . . . 'timely' [and] thorough[ly]" cooperated, often significantly influences the ultimate sentence.\(^ {131}\) Thus, the OSGs "create[] an

\(^{122}\)U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (2008). If an organization fully cooperates and clearly accepts its responsibility, the guidelines allow a two point deduction. \(^{123}\)Id. § 8C2.5(g)(2). Even if an organization fails to report the offense or cooperate in the investigation, it may nevertheless receive a one point deduction if it clearly accepts its responsibility. \(^{124}\)Id. § 8C2.5(g)(3).

\(^{125}\)Id. § 8C2.5 cmt. 12.

\(^{126}\)Id.

\(^{127}\)Id.

\(^{128}\)U.S. SENTENCING GUIDELINES § 8C2.5 cmt. 12 (2008).

\(^{129}\)Id.

\(^{130}\)Id.

\(^{131}\)Id.

\(^{132}\)See id. §§ 8C2.6, 8C2.7.


\(^{134}\)Am. Coll. of Trial Lawyers, The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations, 41 DUQ. L. REV. 307, 320 (2003); see also
almost irresistible incentive" for a corporation to cooperate with the government investigators in order to receive a reduction in potential fines for cooperation.  

The OSGs thus strongly emphasize cooperation in the investigation as a condition for leniency in the sentencing process. Further, the guidelines rely in part upon the prosecutors' assessment of whether the organization has fully cooperated in the investigation and whether the organization's cooperation constitutes "substantial assistance" to investigators.  

"These determinations [are] then factor[ed] into plea negotiations and settlement agreements, which directly affect the sentencing recommendations" by the government to the court.  

D. Waiver of the Attorney-Client Privilege

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

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142 Hasnas, supra note 141, at 621; see also William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 650 (2002) (noting that so long as management cooperates with authorities, criminal sanctions are mitigated).


145 Zornow & Krakaur, supra note 140, at 154; see also Buchanan, supra note 61, at 604. "[D]isclosure of all pertinent information . . . sufficient for . . . [the government to] identify . . . the extent of the offense and the individual(s) responsible for the criminal conduct" [does not necessarily require a corporation to] produce notes or its report of investigation[s] [prepared by counsel]. Instead the corporation may make the appropriate witnesses available . . . to . . . make full disclosures to the government . . . [As a result,] if the government is then able to obtain all pertinent information, the organization's cooperation will be deemed sufficient.

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. 12 (2008)); James B. Comey, Deputy Attorney Gen., Remarks to the American Bar Association 14th Annual Institute on Health Care Fraud (May 13, 2004), in U.S. ATTYS BULL., Sept. 2005, at 4 (describing how the government "does not require any particular method so long as the cooperation is thorough"). For example, [c]ooperation is thorough if the corporation arranges a detailed briefing and voluntarily provides relevant documents and the results of witness interviews . . . [or] if the corporation provides a general briefing, coupled with identifying relevant witnesses and bringing them in so the Government can hear from the witnesses themselves . . . [Simply,] for a corporation to get credit for cooperation, it must help the [g]overnment catch the crooks.

Id. Comey also suggested that

[o]ccasionally, a corporation . . . can provide the [g]overnment with a thorough
"waiver of the attorney-client privilege or the work product protection doctrine is a factor in obtaining [sentencing] credit for cooperation and self-reporting."146 In 2002, on its tenth anniversary, however, the Commission formed an ad hoc "Advisory Group" to review the general effectiveness of the OSGs.147 One of the tasks of the Advisory Group was to examine the adequacy of the OSGs' definition of "cooperation" and "whether the guidelines . . . sufficiently encourage organizations to self-report . . . illegal conduct and cooperate with federal law enforcement."148 The Advisory Group considered whether the OSGs should provide commentary on the role of waiver of the attorney-client privilege and work-product protection when assessing whether an organization should receive credit for cooperation.149 After evaluating the views of the DOJ and the defense bar on the issue,150 the Advisory Group recommended that the Commission add the following language to the Application Notes151 for cooperation and substantial assis-

briefing of all the relevant facts without waiving work product protection . . . [and] [i]f questions are fully answered without a waiver, prosecutors should consider that to be meaningful cooperation in evaluating all factors in making the charging decision.

Id. at 4, 6. However, he nevertheless stressed that because corporations frequently obtain pertinent facts through counsel's own investigation, "it's fair to say that more often than not, a corporation that has chosen to cooperate will necessarily have to waive its work product protection to some extent to supply the [g]overnment with thorough information." Id. at 4.

146 ADVISORY GROUP REPORT, supra note 144, at 93.


148 ADVISORY GROUP REPORT, supra note 144, at 92.

149 Id. at 99-103.

150 See id. (comparing the views expressed by the DOJ and the defense bar over this issue); see also Julie R. O'Sullivan, Some Thoughts on Proposed Revisions to the Organizational Guidelines, 1 OHIO ST. J. CRIM. L. 487, 495-98 (2004) (illustrating the different views of the defense bar and the DOJ with respect to waiver of privileges). The DOJ recommended that Application Note Twelve to section 8C2.5 be broadened to recognize that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver is necessary for full cooperation. Id. at 497. The defense bar, on the other hand, recommended that the guidelines be amended to add an explicit statement that waivers are not prerequisites to obtain cooperation credit at sentencing, because they feared that the silence of the guidelines would create a danger that the request of waivers will become widespread. Id. at 496.

151 Application notes are commentary that provide interpretation and application of the guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (2008) (referring to Stinson v.
tance departures: "If the defendant has satisfied the requirements for cooperation" or substantial assistance, "waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score" or to a motion for a downward departure. \(^{152}\) "However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation." \(^{153}\) The objective of the Advisory Group was to limit requests for waivers only to situations in which cooperation demands them, but not to otherwise encourage them. \(^{154}\)

In 2004, the Commission amended the Application Notes by adding the following sentence: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . [to receive cooperation credit] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." \(^{155}\) Although clarifying that waiver is not a prerequisite to receive cooperation credit, this new language suggests that waiver, in some cases, may be required. \(^{156}\)

And after the 2004 amendment, prosecutors routinely began to rely on the new language to obtain waivers. \(^{157}\) Some commentators found that

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United States, 508 U.S. 36, 38 (1993), which held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

\(^{152}\) ADVISORY GROUP REPORT, supra note 144, at 104.

\(^{153}\) Id.

\(^{154}\) Id. at 92-104; O'Sullivan, supra note 150, at 499.


\(^{156}\) Buchanan, supra note 61, at 608-09. Members of the American Bar Association (ABA) expressed their concern that "the exception is likely to swallow the rule." See Donald C. Klawiter, Chair of the ABA Antitrust Law Section, on Behalf of the American Bar Association Appearing Before the United States Sentencing Commission Concerning Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege and Work Product Doctrine 4 (Nov. 15, 2005), available at http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.

Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers.

\(^{157}\) Mark & Pearson, supra note 13, at 67-68. For example, according to a survey presented to Congress and the Commission, outside counsel and in-house counsel ranked the U.S. Sentencing Guidelines third and second, respectively, as the justification given by prosecutors when they requested waivers. See AM. CHEMISTRY COUNCIL ET AL., SURVEY RESULTS, THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT 9-10 (2005), available at http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16306; see also
waiver requests were legitimized by the amended guidelines and might have been the "primary driver" for the increase in waiver demands by the government.\textsuperscript{158} In response to criticism, the Commission, in April 2006, unanimously agreed to remove the commentary in the Application Notes.\textsuperscript{159} The Commission explained that it found, after public comment and testimony, that the commentary could be misinterpreted to encourage waivers, when such waivers were intended to be required only in limited circumstances.\textsuperscript{160} Today, the OSGs "leave open the question of whether waiver of the attorney-client privilege should still be considered a factor in evaluating a corporation's cooperation."\textsuperscript{161}

IV. PROSECUTORIAL DISCRETION: DEPARTMENT OF JUSTICE GUIDELINES

Ideally, firms prefer that prosecutors exercise their discretion not to prosecute altogether. The voluntary disclosure of any wrongdoing is crucial for a corporation's chances of receiving an offer of deferred or non-prosecution. Andersen first refused to accept responsibility for its misconduct; the government pursued prosecution, and the swift demise of the firm sent a strong message to the business community.\textsuperscript{162} Once wrongdoings are disclosed, the corporation's level of cooperation may be a consideration in

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\textsuperscript{158} Mark & Pearson, \textit{supra} note 13, at 68.

\textsuperscript{159} \textit{Id.}


deciding whether to prosecute.\textsuperscript{163} Forms of cooperation have included making witnesses available, voluntarily providing documents, disclosing results of internal investigations, and "[waiving] the attorney-client and work product protection."\textsuperscript{164} Critics of the DOJ contend that, in practice, cooperation and waiver have been synonymous in the eyes of the government.\textsuperscript{165} The DOJ has issued a number of guidelines to aid prosecutors in the exercise of their discretion regarding whether to defer or forego prosecution. These guidelines are discussed, chronologically, below.

A. The Holder Memorandum

The first set of DOJ guidelines to provide prosecutorial guidance for bringing criminal charges against corporations was issued on June 16, 1999 by the then-Deputy Attorney General Eric Holder. These guidelines became known as the Holder Memorandum.\textsuperscript{166} Prior to the Holder Memorandum, there were no standard guidelines for prosecutors to follow when deciding whether to prosecute a corporation.\textsuperscript{167} The Holder Memorandum was not compulsory but was intended to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."\textsuperscript{168} The memorandum recognized that special considerations are necessary for corporate prosecutions,\textsuperscript{169} and suggested eight factors beyond those taken into account when prosecuting individuals to be considered by prosecutors.\textsuperscript{170} The fourth factor allowed


\textsuperscript{164}Id.


\textsuperscript{166}Memorandum from Eric Holder, Deputy Attorney Gen., to All Component Heads and U.S. Attorneys (June 16, 1999) [hereinafter Holder Memorandum], available at http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.


\textsuperscript{168}Holder Memorandum, supra note 166, at preface.

\textsuperscript{169}Id. § II.A.

\textsuperscript{170}The eight factors are: (1) "[t]he nature and seriousness of the offense," (2) "[t]he pervasiveness of wrongdoing," (3) the "history of similar conduct" by the corporation, (4) "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product doctrine privileges," (5) the "adequacy of the corporation's compliance program," (6) any "remedial actions" taken by the corporation, (7) any "[c]ollateral consequences" of the
prosecutors to consider "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."\textsuperscript{171} The memorandum further provided that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."\textsuperscript{172}

The Holder Memorandum provided two reasons to explain why the waiver of these privileges is deemed important in the government's investigation. First, it "permit[s] the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."\textsuperscript{173} Second, "they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation."\textsuperscript{174} In light of these benefits to be brought through corporate privilege waiver, the memorandum allowed prosecutors to "request a waiver in appropriate circumstances."\textsuperscript{175} Thus, a corporation's willingness to waive privilege and disclose otherwise protected information became an important factor for federal prosecutors to assess the corporation's cooperation with the investigation and impacted discretion in charging decisions.\textsuperscript{176}

The memorandum notes, however, that prosecutors should not consider corporate privilege waiver as "an absolute requirement,"\textsuperscript{177} and prosecutors should consider the corporation's willingness to waive privilege as "only one factor in evaluating the corporation's cooperation."\textsuperscript{178} Nonethe-

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  \item corporation's conduct, and (8) "[t]he adequacy of non-criminal remedies" that might be appropriate. \textit{Id.}
  \item \textsuperscript{171}\textit{Id.}
  \item \textsuperscript{172}"The Memorandum notes that "[t]his waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation." \textit{Id.} at n.2.
  \item \textsuperscript{174}\textit{Id.}
  \item \textsuperscript{175}\textit{Zornow & Krakaur, supra note 140, at 155 ("The Memorandum leaves no doubt that the official policy of the Justice Department is to obtain waivers of the corporate attorney-client and work product privileges where, in the government's view, these privileges might shield evidence relevant to a criminal investigation.").}
  \item \textsuperscript{176}\textit{Holder Memorandum, supra note 166, § VI.B.}
  \item \textsuperscript{177}\textit{Id.}
\end{itemize}
less, the DOJ's guidelines gave prosecutors considerable leverage to request corporations to waive their privileges.¹⁷⁹

The DOJ guidelines thus introduced the possibility that a corporation may avoid prosecution in exchange for waiving the privilege to meet the timely and voluntary disclosure requirement. They also gave corporations under government investigation strong incentives to waive the privileges in order to gain cooperation credit. Since the guidelines were issued, prosecutors have frequently asked corporations to waive their privileges and have sometimes viewed refusal as an effort to hide the truth.¹⁸⁰

B. The Thompson Memorandum

On January 20, 2003, in the wake of the corporate scandals of the early 2000s, the Holder Memorandum was revised by then-Deputy Attorney General Larry D. Thompson.¹⁸¹ The Thompson Memorandum was the result of a Corporate Fraud Task Force established by executive order to enhance the government's efforts against corporate fraud.¹⁸² Unlike the Holder Memorandum, the new memorandum was intended to provide "binding guidance on all federal prosecutors who are investigating, and contemplating the prosecution of, corporate crime."¹⁸³ The revisions mainly focused on increasing "emphasis on and scrutiny of the authenticity of a corporation's cooperation."¹⁸⁴ In particular, the memorandum recognized that "too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation."¹⁸⁵ The revisions were intended to make sure that "such conduct should weigh in favor of a

¹⁷⁹Zornow & Krakaur, supra note 140, at 155-56.
¹⁸⁰Id. at 148 (discussing how "the government now views a corporation's failure to disclose privileged information immediately as a clandestine effort to hide the truth").
¹⁸¹See Thompson Memorandum, supra note 163.
¹⁸²Id. at preface.
¹⁸⁴Thompson Memorandum, supra note 163, at preface; see also Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and in Practice, 43 AM. CRIM. L. REV. 1095, 1135 (2006) (explaining that "the Thompson Memo directs prosecutors to consider far more carefully whether a company is truly rendering 'authentic' cooperation").
¹⁸⁵Thompson Memorandum, supra note 163, at preface.
corporate prosecution."^{186} The factors for charging are largely similar to those in the Holder Memorandum.^{187}

Like the Holder Memorandum, the Thompson Memorandum refers to waiver of attorney-client and work-product privileges to evaluate the quality and sincerity of cooperation by a corporation.^{188} The new memorandum added another factor to gauge cooperation, requiring prosecutors to consider "whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation."^{189} The memorandum shows several such examples:

[O]verly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.^{190}

Thus, the Thompson Memorandum shifts the prosecutor's focus further to the evaluation of cooperation. According to a DOJ official, "'[F]or a corporation to get credit for cooperation, it must help the Government catch the crooks.'"^{191}

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^{186}Id.
^{187}The Thompson Memorandum added an additional factor for consideration: "adequacy of the prosecution of individuals responsible for the corporation's malfeasance." See id. § II.A.8.
^{188}The Thompson Memorandum provides that [i]n determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.
^{189}Thompson Memorandum, supra note 163, § VI.B.
^{190}Id.
^{191}Silbert & Joannou, supra note 20, at 1227 (quoting James B. Comey, Deputy Attorney
The Thompson Memorandum was followed by wide criticism.\textsuperscript{192} It continued to encourage prosecutors to evaluate the extent and value of a corporation's cooperation with reference to its promise to support its employees "through the advancing of attorneys fees, through retaining . . . employees without sanction for their misconduct, or through providing information to employees about the government's investigation [under] a joint defense agreement."	extsuperscript{193} When prosecutors determined that corporations were supporting culpable employees through such means, the memorandum permits prosecutors to weigh in favor of corporate prosecution.\textsuperscript{194} Critics, therefore, argued that the new memorandum generated severe conflicts between the rights, privileges, and interests of the corporation and those of its employees,\textsuperscript{195} and "discourage[ed] full and candid communications between corporate employees and legal counsel."\textsuperscript{196} Even former Attorney General Edwin Meese has been critical of the Thompson factors:

Much of the [Thompson] Memorandum's coercive power lies in its lack of specific, concrete language explaining how the prosecutors will decide to indict and what weight they will assign to the various factors. . . .

It is axiomatic that when a governmental body or agency defines rules for its own conduct that are vague and indefinite, it thereby retains to itself near-absolute discretion to act as it may choose in any given circumstance.\textsuperscript{197}

C. The McCallum Memorandum

When the Thompson Memorandum came under relatively immediate fire for its pliable standards and general lack of predictability, the DOJ, in 2005, issued the McCallum Memorandum.\textsuperscript{198} Then-Deputy Attorney

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\textsuperscript{192}See Bharara, \textit{supra} note 183, at 77-86 and accompanying notes; see also Wray & Hur, \textit{supra} note 184, at 1170-74 (evaluating both the pros and cons of increased cooperation with the government by waiving privileges).

\textsuperscript{193}Thompson Memorandum, \textit{supra} note 163, § VI.B (footnote omitted).

\textsuperscript{194}Id.

\textsuperscript{195}See Bharara, \textit{supra} note 183, at 82-83.


\textsuperscript{197}Meese Statement, \textit{supra} note 162, at 127.

\textsuperscript{198}See Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., to
General Joseph D. McCallum proposed that a written waiver process be established in each U.S. Attorney's Office to silence calls for prosecutorial uniformity. But the McCallum Memorandum failed to require that each waiver process be made publicly available to business organizations.

Corporations were still in the dark about when and whether they were required to waive privilege. According to one former U.S. Attorney General, that was unacceptable: "Justice requires citizens to be fully informed of what the law and law enforcement officials expect so that citizens may conform their conduct to those expectations."

D. The McNulty Memorandum

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

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


199 See id.
200 See id.
201 Meese Statement, supra note 162, at 130.
202 McNulty Memorandum, supra note 196.
204 Id. at 20.
Even if a prosecutor succeeds in establishing a legitimate need for a waiver request, the company may still decline the request with no negative consequences (at least theoretically). If, however, the company acquiesces to the request, the DOJ will consider it favorably.205 After all, "[t]he government wants to encourage cooperation . . . and certainly a corporation would want to receive a benefit."206 In practice, it is difficult to envision an environment where waiver is viewed positively, yet refusal would have no effect on a prosecutor's propensity for leniency. In defense of this skepticism, the law firm of Milberg, Weiss, Bershad & Schulman tried to enter into a DPA with the government when the government indicted it for giving secret rebates to lead plaintiffs in class action suits,207 but negotiations immediately broke down when the government insisted that it waive its attorney-client privilege and the firm refused to do so.208

Under the McNulty Memorandum, requests for waiver are divided into two categories. Category I information pertains to factual inquiries; by and large, these requests are less controversial. Category I requests are approved by a U.S. Attorney in consultation with the Assistant Attorney General of the Criminal Division. Category II waiver requests, those pertaining to legal advice and more sensitive conversations, must be approved by the Deputy Attorney General. When companies volunteer to hand over privileged documents, no approval is necessary for acceptance.209 Of course, some requests spill across these categories because what is "purely factual information" is open to interpretation.210

The DOJ was quick to point out that within the three months following the release of the McNulty Memorandum, no Category II requests were made by prosecutors.211 The absence of formal requests is of little comfort to firms, however, as the question remains whether reduced waiver demands will actually reduce the incidence of waivers and "the concomitant erosion"212 of privilege. Circumstantial coercion defines the culture of

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205McNulty Memorandum, supra note 196, at 10.
206Sabin Statement, supra note 203, at 19.
208Id.
209Sabin Statement, supra note 203, at 21.
211See Sabin Statement, supra note 203, at 22.
212See Mintz Levin Litig. Group, United States: McNulty Memorandum Revises DOJ Guidelines for Corporate Prosecutions, but Is It Enough?, MONDAQ BUS. BRIEFING, Jan. 12, 2007,
waiver more so than does explicit requests by prosecutors.\textsuperscript{213} And although the McNulty Memorandum explicitly forbids prosecutors from considering the advancement of legal fees when deciding whether to indict, business groups still feel that the enormous disparity in bargaining power incentivizes businesses to abandon their employees in an effort to demonstrate full cooperation.\textsuperscript{214}

E. The 2008 Guidelines

On August 28, 2008, Deputy Attorney General Mark R. Filip announced another round of guidelines for corporate prosecution (2008 Guidelines).\textsuperscript{215} Instead of issuing a new memorandum, the 2008 Guidelines are set forth in the United States Attorneys' Manual.\textsuperscript{216} The 2008 Guidelines are intended to respond primarily to criticisms of some prosecutors' abusive practices in deciding whether to give cooperation credits\textsuperscript{217} and revise the preceding guidelines concerning privilege waivers, a corporation's advancement of attorneys' fees to employees, and joint defense agreements, among others.\textsuperscript{218}

The 2008 Guidelines make it clear that whether a company has cooperated should not be evaluated by whether it waived the attorney-client privilege or work-product protection, but rather by the extent to which the company disclosed the relevant facts to the government.\textsuperscript{219} That is, prosecutors should give cooperation credit based on whether the company has timely disclosed the relevant facts rather than whether the corporation has disclosed privileged materials.\textsuperscript{220} In contrast to the McNulty Memo-

\textsuperscript{213}Id.


\textsuperscript{217}See Filip Remarks, supra note 215 (addressing the concerns expressed by the legal community about the unfair demands by prosecutors to corporations to hand over privileged materials or privilege waivers "as a precondition for receiving cooperation credit" and the prosecutors' practices to withhold cooperation credits based on a corporation's advancement of attorneys' fees to its employees, failure to sanction culpable employees, or joint defense agreements); see also ATTORNEYS' MANUAL, supra note 27, § 9-28.710.

\textsuperscript{218}See ATTORNEYS' MANUAL, supra note 27, § 9-28.730.

\textsuperscript{219}Id. § 9-28.710.

\textsuperscript{220}Id. §§ 9-28.710 to -28.720.
randum, which, under special conditions, had allowed federal prosecutors to request waivers and disclose non-factual attorney-client communication (Category II information), the 2008 Guidelines expressly prohibit prosecutorial requests for this communication.\footnote{See Filip Remarks, supra note 215.} Under the 2008 Guidelines, although a corporation still "remains free to convey non-factual or 'core' attorney-client communications or work product,"\footnote{See ATTORNEYS' MANUAL, supra note 27, § 9-28.710.} the corporation need not disclose this communication and prosecutors may not request the disclosure of this as a condition for cooperation credit.\footnote{Id. § 9-28.720(b). The new guidelines provide two exceptions, both of which are well established in the existing law. When a corporation asserts "an advice-of-counsel defense" or when communications between a corporation and its counsel are "made in furtherance of a crime or fraud," prosecutors may legitimately ask for the disclosure of such communications. Id. § 9-28.720(b)(i)-(ii).} Further, the 2008 Guidelines encourage corporate counsel to report instances where prosecutors continue to demand disclosure of privileged information.\footnote{Id. § 9-28.760.} The 2008 Guidelines thus appear to protect "non-factual or core" attorney-client privilege and work-product protection.\footnote{See id. § 9-28.720(b). The guidelines state that attorney-client communications that are "both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege." Id. Likewise, the guidelines state that "non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine." Id.} That policy is consistent with the established law that privilege does not extend to underlying facts that are incorporated into the communication or the work product.\footnote{See, e.g., In re Int'l Sys. & Control Corp. Sec. Litig., 91 F.R.D. 552, 561 (S.D. Tex. 1981).} The 2008 Guidelines are not, however, clear regarding whether factual work product such as witness statements, investigative reports, or interview memoranda prepared by counsel in the course of an internal investigation may be subject to disclosure in exchange for leniency.\footnote{The guidelines specifically refer to those situations in which counsel interview corporate personnel during an internal investigation and acknowledge that "certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product." ATTORNEYS' MANUAL, supra note 27, § 9-28.720(a) n.3. Further, the guidelines state that [t]o receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews. . . . [But] the corporation does need to produce, and prosecutors may request . . . relevant factual information acquired through those interviews, unless the identical information has otherwise been provided . . . .}
corporation under continuing pressure to disclose such materials to show it has fully disclosed "relevant facts."

V. NON-PROSECUTION AND DEFERRED PROSECUTION AGREEMENTS

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

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

On February 6, 2008, The Country Club of Jackson, Mississippi (The Country Club) entered into a DPA with the DOJ and the U.S. Attorney's Office for the Southern District of Mississippi in connection with violations

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Id. However, it is not clear if "the protected notes or memoranda" cover the entire notes or memoranda prepared by attorneys, or only cover "core" work product such as attorney's impressions revealed in those notes or memoranda. In addition, the 2008 Guidelines expressly prohibit federal prosecutors from taking into account a corporation's advancement or reimbursement of attorneys' fees to employees in evaluating cooperativeness. See id. § 9-28.730. Finally, the new guidelines make it clear that "the mere participation" in a joint defense agreement will not render a corporation ineligible for cooperation credit. See id.

228 See Peter Spivack & Sujit Raman, Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements, 45 AM. CRIM. L. REV. 159, 179-80 (2008). Although the authors state that the "data reveals a marked turn away from waiver as a gauge of a company's full and on-going cooperation with the government," the article does not tell how many agreements contained the express language of waiver request. Id. Compare Orland, supra note 207, at 79 (reporting that a study on the agreements entered before 2006 found that nearly 80% included waiver request), with Lawrence D. Finder & Ryan D. McConnell, Devolution of Authority: The Department of Justice's Corporate Charging Policies, 51 ST. LOUIS U. L.J. 1, 22 (2006) (reporting that from 2003 to 2006 about two-thirds of agreements contained an express waiver request).

229 At the time of this study, research disclosed no NPAs or DPAs entered into under the 2008 Guidelines yet publicly available for review.
of immigration and social security laws. The government filed a criminal complaint charging The Country Club with hiring and continuing to employ illegal aliens while knowing that such aliens were unauthorized to work and furnishing false information to the Social Security Administration (SSA), with the intent to deceive the SSA as to the aliens' identities.

The DPA expressly required The Country Club not to claim privilege with regard to documents or information requested by the prosecutors relating to the conduct under investigation. The waiver provision did not differentiate between factual information and non-factual information. According to the state government, The Country Club's DPA is intended to convey a message that the government will vigorously prosecute violations of federal immigration law by employers.

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231See Criminal Complaint, United States v. The Country Club of Jackson, Miss., No. 3:08-mj-109-LRA (S.D. Miss. Feb. 6 2008). In the DPA, The Country Club agreed to pay a fine of $214,500, adhere to the Best Practices of the ICE Mutual Agreement between the Government and Employers (IMAGE) Program, and implement comprehensive policies and internal systems to comply with the program. See The Country Club DPA, supra note 230, ¶¶ 3-4. Each quarter the company is also required to conduct public workshops at its own expense throughout Mississippi to train other employers on how to legally complete I-9 forms; detect and deter fraudulent documents; use the Basic Pilot Employment Verification Program; and adhere to the Best Practices of the IMAGE program. Id. ¶¶ 5-6. Prior to the workshops, The Country Club is required to make public announcements both in a local newspaper in the vicinity where the workshops will be held and in a newspaper of state-wide circulation. Id. ¶ 5.

232Id. ¶ 12. Paragraph 12 specifies:

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

Id.


Due to a lack of emphasis, our federal immigration laws have not been traditionally and consistently enforced against employers. That is about to change in the Southern District of Mississippi. Today's agreement should be viewed as a one-time occurrence, intended to serve as a clear and unequivocal warning to all employers throughout the state that, from this day forward, this office will vigorously prosecuting employers who violate our federal immigration laws. . . . The most effective way to combat illegal immigration is to go after the prospect of employment that draws illegal immigrants to this country and our state. . . . Employers are
B. Possible Adverse Effects from Withholding Privileged Information: AGA Medical Corporation (DPA, 2008)

On June 3, 2008, AGA Medical Corporation (AGA), a privately-held medical device manufacturer, entered into a DPA with the DOJ in connection with corrupt payments to Chinese government officials in violation of the Foreign Corrupt Practices Act (FCPA). Between 1997 and 2005, AGA, one of its high-ranking officers, and other AGA employees allegedly agreed to make corrupt payments, through AGA's local Chinese distributor, to physicians in government-owned hospitals in China in order to increase its sales to the hospitals. It was also alleged that from 2000 through 2002, AGA, a high-ranking officer, and the Chinese distributor agreed to bribe Chinese government officials at the State Intellectual Property Office in order to obtain approval of AGA's patent applications.

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

now on notice and I expect them to follow the law. After today, employers of illegal aliens will be criminally prosecuted in the Southern District of Mississippi.

Id.


236 See AGA Press Release, supra note 234.

237 Id.


239 See id.

240 Id. ¶¶ 2, 6.

241 See id. ¶ 5(a)(i). The agreement contained the following terms under the heading "Voluntary Cooperation":

Voluntary Cooperation

i. The Department specifically reserves the right to request that AGA provide the Department with access to information, documents, records, facilities and/or employees that may be subject to a claim of attorney-client
ting the requested information based on a privilege claim, the rejection will be considered when evaluating whether full cooperation exists. 242 AGA is also prohibited from withholding information based on a privilege claim. 243 Finally, AGA also agreed to implement compliance policies and procedures to detect and prevent violations of the FCPA and other applicable anti-corruption laws, and to engage an independent corporate monitor with expertise in the FCPA. 244

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

On December 13, 2007, Blue Cross & Blue Shield of Rhode Island (Blue Cross) entered into a deferred prosecution agreement with the U.S. Attorney's Office for the District of Rhode Island and the DOJ in connection with a corruption investigation. 245 The government's investigation discovered bribery of three members of the state Senate in order to obtain favorable legislation. 246

Under the DPA, Blue Cross agreed to pay $20 million and to enact a series of ethical and compliance reforms intended to improve the company's relationship with state officials. 247 The company also agreed to hire an independent monitor for two years to oversee its ethics reform and compliance with the agreement. 248 The DPA expressly states that the company's

 privileges and/or the attorney work product doctrine.

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

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

Id. ¶ 5(a)(i)-(iii).

242 See AGA DPA, supra note 238, ¶ 5(a)(i).

243 See id. ¶ 5(a)(ii).

244 See id. ¶ 5(a)(iii).


246 Id.

247 Id.

248 Id.
cooperation is "an important and material factor underlying the Government's decision to enter into this Agreement."249 Under the DPA, Blue Cross is required to cooperate continuously, including not asserting "any claim of privilege (including, but not limited to, the attorney-client privilege and the work-product protection) as to any documents, records, information, or testimony requested by the Government that relates to the factual material generated as a result of [Blue Cross'] internal investigation."250 This provision allows Blue Cross to assert privilege "with respect to privileged communications between [Blue Cross] and its defense counsel that post-date the beginning of the criminal investigation."251 The disclosure obligation is, however, silent regarding privileged communications that pre-date the investigation and attorney work product generated in connection with the company's internal investigation. To the extent that they relate to factual information generated through the course of an internal investigation, this information would be continuously subject to the disclosure obligations.

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

On August 11, 2008, Lawson Products, Inc. (Lawson), a publicly-traded company headquartered in Des Plaines, Illinois, entered into a DPA with the U.S. Attorney's Office for the Northern District of Illinois relating to the government's investigation of the company's customer loyalty programs.252 The company was charged with mail fraud.253 According to the charge, the company maintained incentive programs under which its sales agents could provide rewards if the employees of Lawson customers ordered a greater amount of merchandise.254 These kickbacks amounted to nearly $10 million over thirteen years from 1992 to 2005.255

Under the DPA, Lawson accepted responsibility for the conduct, continued its implementation of a compliance and ethics program designed to prevent and detect corrupt sales practices, and paid a $30 million

250Id. ¶ 13(f).
251Id.
253Id.
254Id.
255Id.
penalty. The cooperation provisions in the agreement require the company to provide all documents and records requested by the government. But they expressly state that those documents and records that must be produced do not include those protected by the attorney-client or work-product privileges. The provision further provides that the government shall not assert that the company has waived its privilege based on the company's acts already known to the government at the time of the agreement.

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

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

257 See id. ¶ 7a. The provision specifies: LAWSON PRODUCTS shall provide the United States with all documents and records that the United States requests and are not subject to valid claims of attorney-client or work product privileges. The United States shall not assert that any act by LAWSON PRODUCTS known to the United States as of the date of this Agreement constitutes a waiver of its attorney-client or work product privileges in any respect as to matters relating to the scheme described in the Information and Statement of Facts.

258 See id.
261 See id.
262 See id.
require ESI to completely and truthfully disclose all information in its possession (including all information about the company's past and ongoing activities and its present and former employees) and volunteer to provide any information and documentation that may be relevant to the investigation.\footnote{See ESI DPA, supra note 259, ¶ 8.}
The charge will be dismissed after eighteen months if ESI complies with the terms of the DPA.\footnote{Id. ¶ 10.}

\section*{F. Impact of the 2008 Guidelines}

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

On the other hand, the Blue Cross terms, requiring no assertion of privilege claims on factual materials generated through the internal investigation seem generally to comply with the policy under the new guidelines. As discussed above, although the 2008 Guidelines prohibit waiver requests regarding "non-factual or core" attorney-client privilege communication and attorney work product, they do not clearly define factual work product.\footnote{See supra Part IV.E for a discussion of the 2008 Guidelines.} As long as the Blue Cross provisions do not require disclosure of non-factual or core attorney-client communication or work product, but instead only require disclosure of factual material, including factual attorney work product, such provisions seem permissible under the 2008 Guidelines.

\section*{VI. Conclusion}

A March 2006 survey of more than 1,400 in-house and outside counsels indicated that nearly 75\% of corporate lawyers believe a culture of
waiver has permeated the DOJ and SEC. The data on DPAs and NPAs seem to support this. Nearly 80% of the DPAs entered into before June 2006 reportedly include waiver of privilege. One would imagine the percentage to be significantly lower if corporations believed waiver to be optional and inconsequential.

It may be the DOJ's policy to encourage prosecutors to consider a corporation's cooperation in its charging decisions that has given prosecutors the most significant leverage in the past to encourage a corporation to waive privilege. As the DOJ guidelines emphasize, prosecutors have considerable discretion "in determining when, whom, how, and even whether to prosecute for violations of federal criminal law." By obtaining cooperation credit, a cooperative corporation may not only decrease potential fines under the OSGs but may be able to avoid indictment altogether. Considering that a corporation would likely suffer significant social and economical damages "before there is any determination that the corporation has committed a crime or has engaged in any wrongdoing" upon indictment, avoiding prosecution becomes particularly significant. Further, as the Andersen case illustrates, a criminal indictment has a potentially devastating impact on the firm under investigation. Firms under criminal

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267 Orland, supra note 207, at 79, 86-87 tbls.I, II.
268 See Zornow & Krakaur, supra note 140, at 154 ("[F]ederal prosecutors more and more frequently go so far as to state that unless a company provides its privileged information to the government, the company will be deemed not to have cooperated."); see also Lance Cole, Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided), 48 VILL. L. REV. 469, 543 (2003) (stating that the Holder Memorandum "go[es] quite far toward effectively forcing a corporation to waive privilege protections if it hopes to obtain favorable charging treatment at the hands of DOJ prosecutors").
269 McNulty Memorandum, supra note 196, § III.B; Thompson Memorandum, supra note 163, § II.B.
270 Silbert & Joannou, supra note 20, at 1229. The article goes on to explain that being named in a criminal indictment has many immediate and negative effects on a corporation, including negative publicity and reputational damage, a drop in the corporation's stock price, a negative effect on credit rating, debarment or exclusion from certain kinds of business, increased legal fees and expenses, pressure to remove certain employees before there has been any determination of guilt, and problems with regulators.
271 See supra text accompanying notes 14-25.
272 See, e.g., United States v. Stein, 435 F. Supp. 2d 330, 337 & n.11 (S.D.N.Y. 2006) (stating "that no major financial services firm has ever survived a criminal indictment," and noting that the indictment of Arthur Andersen "resulted in the collapse of the firm, well before the case was tried").
investigation therefore, are under incredible pressure to avoid such a result.273

The 2008 Guidelines purport to eliminate the pressure on firms to waive their rights to privilege in exchange for favorable treatment. They expressly state that "[e]ligibility for cooperation credit is not predicated upon the waiver ... ."274 Further, "so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process."275 Under the 2008 Guidelines, therefore, a prosecutor may no longer use a cooperation credit as leverage to request a corporation to waive privileges.

Yet in order to fulfill prosecutorial requests for full cooperation with the governmental investigation, the corporation generally must have conducted internal investigations, voluntarily disclosed relevant documents, identified individual wrongdoers, shown lines of authority and responsibility within the organization, and provided reports of the internal investigations.276 Furthermore, as Sam Buell, a former federal prosecutor points out: "These days in corporate America virtually nothing happens without the involvement of a lawyer. And so if you're trying to unravel sort of everything that happened around a particular business transaction, you need to see the lawyer communications as well to determine what was going on."277

Thus, although the 2008 Guidelines expressly remove official demands for privilege waivers, corporations under governmental investigations may still feel pressure to voluntarily waive privilege, particularly relating to factual work product. The results of internal investigation reports or interview memoranda with witnesses prepared by counsel have been the materials most frequently requested by the prosecutors in the course of investigations,278 conceivably because these materials provide the core facts concerning the alleged misconduct and expedite the government's investigation.279 The 2008 Guidelines remain ambiguous regarding whether disclosure of internal investigation reports or interview memoranda prepared

271 Id. at 337-38.
273 Id. § 9-28.720(a).
276 AM. CHEMISTRY COUNCIL ET AL., supra note 157, at 8.
277 Id. at 9.
by attorneys may be required in order for a firm to receive credit for cooperation. If a corporation is deemed to have failed to timely disclose the relevant facts "for whatever reason," the guidelines instruct prosecutors not to give cooperation credit.\textsuperscript{280} 

It may be too early to conclude whether the new guidelines will diminish the widespread culture of waiver.\textsuperscript{281} It seems likely that some corporations will continue to waive the privileges and disclose the privileged information to show prosecutors the completeness of their cooperation and thereby obtain full cooperation credit. To the extent prosecutorial practices under the McNulty Memorandum, which purportedly attempted to curtail pressures on firms to waive privilege, give any indication of potential future practices, waiver may still be indirectly encouraged.

Yet it is possible that the 2008 Guidelines may strike a new balance between protection of the attorney-client privilege and the efficient prosecution of corporate crime. To the extent firms are not coerced into waiving privilege, full and frank communication between a lawyer and a client should remain intact. Waiver that is truly voluntary may promote the efficient adjudication of justice and may help restore public confidence in the corporate world.\textsuperscript{282} Time will tell whether the 2008 Guidelines have struck an appropriate balance. Time will also tell whether the culture of corporate waiver is here to stay.\textsuperscript{283}

\textsuperscript{280}See ATTORNEYS' MANUAL, supra note 27, § 9-28.720(a).

\textsuperscript{281}Some critics note a possibility that the new guidelines will be revised adversely again in the future depending on changes in the DOJ’s corporate prosecution policy. See H. Thomas Wells Jr., President, ABA, New U.S. Department of Justice Corporate Charging Guidelines (Aug. 28, 2008), available at http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=437 (reinforcing the urgent necessity of the legislation "to permanently solve the problem of government-coerced waiver"). He criticized the DOJ for frequently revising its corporate prosecution guidelines (the new guidelines is the fifth revision) and because the new guidelines can "provide no certainty that critical attorney-client privilege, work product, and employee constitutional rights will be protected in the future." Id. He also expressed concern that the DOJ guidelines will have no binding effect on other federal agencies' practices. See id. (arguing that the new DOJ policy has no binding effects to "reverse the widespread culture of waiver created by" the other federal agencies including the SEC).


\textsuperscript{283}The new guidelines themselves recognize that such voluntary waivers "occur routinely." See ATTORNEYS' MANUAL, supra note 27, § 9-28.710.