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Making the Most of the Attorney-Client Privilege in a Sarbanes-Oxley World

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FOREWORD

The past several decades have witnessed a phenomenon that can generally be characterized as the criminalization of corporate conduct. This trend has coincided with a significant expansion in the regulation of commercial activity. Many of the statutes governing such activities impose criminal penalties for failure to satisfy their requirements. Too often, these laws are overly broad or vague and they leave the determination as to what constitutes criminal conduct to regulatory or prosecutorial discretion. Consequently, increased criminal enforcement activity has been seen in such areas as environmental law, securities and financial dealings, antitrust, and intellectual property infringement.

The difficulty inherent in doing business in this environment was compounded in the aftermath of the dramatic collapse of Enron and the subsequent succession of high profile corporate scandals. These outrages were met by the predictable governmental response of new laws and regulations intended to prevent further corporate transgressions and to severely punish executives responsible for such problems. Hence, sweeping accounting reform legislation was enacted which significantly increases criminal penalties for corporate executives that run afoul of its strictures.

Suffice it to say that this confluence of events has had a negative impact on the public's perception of business activity and has given rise to a general anti-corporate sentiment in the United States. Prosecutors seem to have been emboldened by this sentiment in the sense that they are conducting an increasing number of criminal investigations of corporations and, correspondingly, they are engaging in more aggressive prosecutions of both companies and their executives and employees.

This report, prepared by Alliance Attorney Rae Ann Steinly Johnson, calls attention to a distressing feature of this ongoing prosecutorial frenzy; that is, the government's heavy-handed demands on corporate targets of investigations to turn over sensitive confidential information. Specifically, we are referring to prosecutors' now-routine demands that corporations being investigated waive their attorney-client privilege and work product protections. Typically today, prosecutors demand such waivers

in return for a determination of corporate cooperation with their investigations. At best, such cooperation will forestall prosecution. Hopefully, if such a waiver does not prevent indictment, it will at least mitigate the sentence if the corporation is ultimately convicted of a crime.

While prosecutors surely see these waiver demands as necessary tools for enforcing the law, protecting the public interest, and ensuring continued investor confidence in the markets, their uncompromising position on this issue is, in a certain sense, shortsighted. Routine waivers of these protections in corporate investigations are likely to make it more difficult for companies to police themselves. Internal investigation will be complicated since employees are less likely to cooperate if they know that their statements might well be turned over to the government and possibly serve as the basis for their personal prosecution. Executives may decide not to consult lawyers before making critical decisions on complex business matters if they know that the intricacies and technicalities of such deliberations might later be scrutinized by prosecutors with the benefit of hindsight. Moreover, lawyers may hedge their best advice if they think that it might later be second-guessed by the government. Of course, the other unintended consequence of routine waiver which can adversely affect shareholders is that it is possible that sensitive information that is released will fall into the hands of predatory plaintiffs' lawyers and serve as the basis for costly litigation aimed at the company.

Indeed, it can be argued that in today's increasingly complex global business environment, protection of the attorney-client privilege and the work product doctrine inures to the benefit of the investing public. Such protection enables the attorney to provide informed and more effective counsel to the corporate client, thus advancing the overall legal compliance objective. In such circumstances, corporate managers are more apt to seek the advice of counsel before embarking on a course of action of questionable legality, thus avoiding potentially costly pitfalls.

Having cited some reasons we believe militate in favor of protecting the attorney-client privilege,

we must admit that we realize that it should not be absolute. There will occasionally be exceptions where overriding public objectives warrant waiver. Such circumstances, however, are likely to be rare and the current prosecutorial pressure being applied across the board for waivers in all corporate investigations cannot be justified as being in the public's interest. The American criminal justice system was founded on the premise that the investigation, prosecution, and conviction of misconduct

should be fair, just, and efficient. This fundamental tenant presupposes that the exercise of government power has limits whether it is focused on individual or corporate citizens.

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Executive Summary

Despite the efforts of public authorities, epitomized by the Sarbanes-Oxley Act¹ (SOX or the Act), the perception of corporate misconduct started by Enron and other scandals lingers. Federal agencies, eager to stop corporate wrongdoers, often pressure companies under investigation to waive the attorney-client privilege as a sign of cooperation. Waiving one of the oldest and most beneficial legal protections should not have to be a prerequisite to cooperate with government investigators. Many legal and corporate organizations, as well as federal courts, agree on this point. Until federal agencies can assure public companies that the attorney-client privilege is not under attack, however, corporations should be prepared to vigorously protect their confidential information. Corporate counsel, in particular, can implement many strategies before and during an investigation to both protect information and demonstrate cooperation without having to relinquish the attorney-client privilege. These strategies include:

- knowing the case law;
- educating employees and corporate officers;
- creating a “magic circle” of employees and advisors to preserve confidential information;
- taking special care with all electronic and paper records, including e-mail;
- executing carefully crafted agreements with government investigators prior to sharing information; and
- considering hiring outside counsel to assist with a government investigation.

This report is designed to encourage both the government and public companies to understand the history and importance of the privilege and to present strategies for businesses to mitigate their risk of losing the privilege in the current legal environment.

Background

In 2002, with corporate scandals consuming headlines and threatening to undermine financial

markets worldwide, Congress passed the Sarbanes-Oxley Act. The purpose of the Act was to combat corruption and restore public confidence by imposing strict accounting and auditing standards for public companies. The perception of widespread corporate wrongdoing that prompted SOX also prompted a number of high profile government investigations of public companies. Businesses generally support government efforts to restore confidence in the marketplace; however, government entities are increasingly pressuring companies to relinquish long-standing traditions of confidentiality and to waive the attorney-client privilege as a sign of “cooperation.” Moreover, in order to comply with certain provisions of SOX, companies are being pressured to disclose sensitive information to auditors. This general trend of highly scrutinizing corporate activity has also prompted insurers and other non-attorney third parties to demand the release of sensitive documents and information. The combination of government investigations and SOX requirements leaves public corporations and their attorneys gravely concerned that such efforts threaten to dissolve one of the most fundamental protections of our legal system—the attorney-client privilege.

The attorney-client privilege is one of the oldest legal doctrines applied in American jurisprudence today. Thanks to our cultural fascination with courtroom dramas, most people understand that communications between an individual and his/her attorney acting in a legal capacity are protected from having to be revealed to others, including the government. Generally, any disclosure of information protected by the privilege outside of attorney-client exchanges, whether intentional or not, may waive the privilege because third parties are under no obligation to maintain confidentiality. When the privilege is waived, the information becomes available to anyone, including adversaries.

Government investigations of public companies are also not a new phenomenon. In the 1970s, U.S. government agencies, particularly the Securities and Exchange Commission (SEC), began investigating companies in earnest following discovery of several bribery scandals. The bribery cases of the 1970s and 1980s were followed by the accounting scandals of the 1990s and 2000s. In response, the Department of Justice (DOJ) and the SEC stepped

¹ Sarbanes-Oxley Act, P.L. 107-204 (July 30, 2002).

up their investigations, and influenced the United States Sentencing Commission (USSC) to establish “cooperation” as a prerequisite for sentencing leniency. This series of government actions, from increased investigations to stricter sentencing guidelines to SOX to aggressive prosecution tactics, is leading collectively to the erosion of the attorney-client privilege. Following directives in 1999 and 2003 from DOJ, federal prosecutors are increasingly pressuring corporations to waive the attorney-client privilege in order to demonstrate cooperation with the government.

Waiving the attorney-client privilege poses an interesting dilemma in terms of corporate cooperation with government investigations and in terms of compliance with SOX requirements. Corporations that waive the privilege potentially face two major problems: the materials they share with the government could be used against them and/or their employees during the course of an investigation and any subsequent legal proceedings, and those materials may then become available to other third parties who may use them to sue the company. Conversely, in certain circumstances, if corporations do not provide information to government entities and auditors, they risk prosecution and non-compliance with SOX requirements. Today, companies routinely waive their protections in the hope that such action will either deter prosecution, or mitigate any penalties. Waivers, however, provide no such guarantee.

Courts have not yet confronted SOX issues directly. As will be detailed later in this report, however, courts are divided on the issue of whether a corporation that discloses information to the government forfeits the privilege entirely for that information. Some courts have found that releasing privileged materials to government investigators does not waive the attorney-client privilege for those materials. Other courts adhere to a stricter interpretation and have found that any revelation of privileged materials renders the privilege waived. The existence of a confidentiality agreement reserving the company’s right to assert the privilege may or may not actually preserve the privilege—depending on the prerogative of the court.

The uncertainty of the consequences of revealing privileged materials to the government leaves corporations confused and anxious. Following SOX, many public companies find themselves in the untenable position of either waiving the privilege or facing a rigorous government investigation with large penalties and potential business collapse looming over their heads. Moreover, because SOX requires public companies to disclose

certain materials to auditors, who may release the information to the government, companies are concerned that to comply with SOX they will lose their protections entirely for this information.

Evolution and Development of the Attorney-Client Privilege

As mentioned previously, the attorney-client privilege is one of the oldest and most sacred parts of our legal system and has been a recognized facet of our common law for centuries.² The attorney-client privilege arose in the 1500s in England to protect attorneys’ honor by protecting client information, thus the privilege initially belonged to the attorney, not the client.³ After a shift in the 1700s, and by the time of its use in the United States, the privilege protected the client and now only the client may waive the privilege. The U.S. Supreme Court first succinctly described the rationale for the privilege in 1888 in *Hunt v. Blackburn* when it stated that the privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”⁴

The basis for the privilege is to foster open dialogue between a client and his/her attorney. This openness promotes the greater societal interest in compliance with the law by ensuring that a client may speak candidly with an attorney to receive cogent legal advice without fear that the communications will be exposed or used against him.

In general, the privilege shields all communications between an attorney and his/her client with regard to legal advice or services. Once the privilege “attaches” to the communication, the attorney can neither volunteer, nor be compelled to reveal, the privileged communication unless the client “waives” the privilege. This rule appears deceptively simple. In fact, there are volumes of cases, articles, and debates about every nuance of the privilege. There have been challenges to who is a client, who is an attorney, what is a communication, when does the privilege become attached, what constitutes legal advice, how is the privilege waived, and whether one can one partially waive

² Paul R. Rice, *Attorney-Client Privilege in the United States* §§1:1-1.3, pp. 6-7 (West Group, 2d ed., 1999).

³ *Ibid.*

⁴ 128 U.S. 464, 470 (1888).

the privilege. Most recently, debates are raging over what constitutes a waiver for purposes of corporate activity.

Elements and Purpose of the Privilege

In general, the attorney-client privilege shields from disclosure communications between a client and his/her attorney in the course of furnishing legal advice. More precisely, as outlined by Professor Wigmore in his *Treatise on Evidence*, there are eight elements that all must be satisfied in order for the attorney-client privilege to apply. These are: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating 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 the protection be waived.”⁵

There are four elements commonly accepted as necessary to establish the attorney-client privilege: “(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.”⁶ Once the privilege has been found to apply or “attach,” then the communications can be disclosed only by a client’s waiver or under an extraordinary life- or property-threatening circumstance. An attorney cannot otherwise be compelled and cannot volunteer to reveal privileged communications. Generally, however, if privileged materials are revealed to third parties, whether on purpose or by accident, the information is no longer considered confidential, thus the privilege is waived.

The purpose of such a privilege is to promote justice by ensuring that everyone has an opportunity to discuss questionable activity openly with a person skilled in the legal profession. The notion is that a client who speaks freely, without fear that his revelations will be used against him, has the greatest possible opportunity to receive the best professional legal advice and to conform his behavior with acceptable societal standards. In short, the attorney-client privilege promotes client candor and facilitates effective legal representation, thus serving an integral role in the judicial process and in society.

The Attorney-Client Privilege Today

⁵ 8 Wigmore, *Evidence* §2292, p. 554 (McNaughton rev. 1961).

⁶ *Restatement of the Law Governing Lawyers* §118 (Draft No. 1, 1988).

The attorney-client privilege is preserved today in both the rules of evidence and the rules of professional conduct. The rules of evidence prevent any privileged communications from being introduced at trial or at other legal proceedings without the client’s consent.⁷ Professional conduct rules provide guidance to attorneys not to disclose confidential client information unless the client consents or unless there is an extreme emergency where life or property is almost certain to be lost.⁸

What may seem like simple rules relative to the privilege actually have generated a great deal of intense litigation. Federal Rule of Evidence 501 provides that the privilege of witnesses “shall be governed by the principles of the common law as they may be interpreted by the courts,”⁹ and the courts have been especially active in developing such interpretations. Since 1980, the U.S. Supreme Court has considered many cases relative to the attorney-client privilege. In *Trammel v. United States*, the Supreme Court confirmed the importance of the privilege, noting that “the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out,” but limited the privilege only to “private communications.”¹⁰ The privilege is so important that it survives the death of a client as the Court held in *Swidler & Berlin v. United States*.¹¹ In this case, the Court held that the lawyer’s notes taken during an initial interview with a client shortly before the client’s death were protected by the privilege and could not be handed over to the government prosecutor.¹²

The Privilege in a Corporate Context

Since 1915, in *United States v. Louisville & Nashville Railroad Co.*, the Court has assumed that the privilege applies when the client is a corporation.¹³ This assumption remained until 1981 in *Upjohn Co. v. United States* when the Court more solidly articulated the privilege’s application within

⁷ For example, see the following rules of evidence: Cal. Evid. Code §954 (West 2004); Fla. Stat. §90.502 (2004); Minn. Stat. §595.02-.025 (2004).

⁸ Model Rules of Professional Conduct, Rule 1.6 (2004).

⁹ Federal Rule of Evidence, Rule 501, available at <http://www.law.harvard.edu/publications/evidenceiii/rules/501.htm>.

¹⁰ 445 U.S. 40, 51 (1980).

¹¹ 524 U.S. 399 (1998).

¹² *Ibid.*, p. 403.

¹³ 236 U.S. 318, 336 (1915).

a corporate environment.¹⁴ In *Upjohn*, the Supreme Court held that a corporate entity possesses the right to an attorney-client privilege and that a corporation's attorney-client privilege is not limited only to communications between high-ranking corporate employees and corporate counsel. Such a limitation, according to the Court, "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."¹⁵

Common Misperceptions of the Privilege

The *Upjohn* case highlights one of the many common misunderstandings of the privilege—the fact that the corporate attorney-client privilege relates only to the corporate entity and does not apply to individual employees, absent a joint representation agreement.¹⁶ Corporate counsel represents the corporation, not individual employees, although the decision to exercise the privilege on behalf of the corporation is totally within the discretion of corporate management. As described in *Upjohn*, the SEC struck a deal with U.S. corporations that were allegedly paying bribes to foreign governments for government contracts. In exchange for dismissing all the charges against the corporations, the SEC required each company to conduct a thorough internal investigation by an outside law firm, submit the firm's report to the SEC, and sign a cease and desist order. As a result, employees who spoke openly with corporate counsel and acknowledged their participation in the bribery schemes had both their identities and confessions delivered to the government because their individual communications with corporate counsel were not protected by the privilege. For an individual employee to assert the attorney-client privilege, each employee would have needed to hire his own separate counsel to represent him.

Several other misperceptions of the attorney-client privilege in a corporate context warrant special consideration. The mere involvement of an attorney in an activity or process does not in and of itself trigger the privilege.¹⁷ The presence of internal counsel at a corporate meeting where legal issues are discussed or implicated is generally sufficient to trigger the privilege; however, the

attorney must be present in the role of an attorney and not that of a "mere scrivener" or as a corporate agent or business counselor.¹⁸ Similarly, merely copying counsel on written communications that neither seek nor result in the provision of legal advice does not shelter the communication with the protection of the privilege, even when the communications are labeled as "attorney-client communications."¹⁹

Companies can easily fall victim to misunderstandings of the law, even while making a sincere effort at compliance. One practical example is the disclaimer many companies use at the bottom of e-mail messages indicating that the message "may contain privileged or confidential information." While this caveat appears to be a protective device, the reality is that such a disclaimer may not preserve the privilege, and as discussed later in this report, by including such language on every communication it lessens the likelihood that truly privileged information can be identified and protected when necessary. This is because even the broadest interpretation of the privilege requires that the communication be made for the purpose of giving or receiving legal advice, not for any other purpose.

In addition to the nuances of the privilege discussed above, the law also distinguishes "facts" and "communications." Indeed, facts are not communications, and while attorney and client cannot be forced to disclose the details of a conversation about legal strategy or advice, facts about the case are not protected by the privilege merely because they have been shared with an attorney.²⁰ Thus, government investigators or third parties retain the right to question an employee about the facts of a case, but not about the legal advice given or received.

¹⁴ 449 U.S. 383, 395 (1981).

¹⁵ *Ibid*, p. 392.

¹⁶ *Ibid*, pp. 389-390.

¹⁷ *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371, 378 (N.Y. 1991).

¹⁸ For example, see *Pollock v. United States*, 202 F.2d 281, 286 (5th Cir. 1953) ("Where the attorney is a mere scrivener or the transaction involves a simple transfer of title to real estate and there is no consultation for legal advice, it has been held that communications to an attorney are not privileged." *cert. denied*, 354 U.S. 993 (1953)).

¹⁹ *California Union Insurance Co. v. National Union Fire Insurance Co.*, 1989 WL 48413, *2 (N.D.N.Y. Apr. 27, 1989) ("[T]he attorney-client privilege is not available merely by stamping a document that was prepared by an attorney, which contains solely business advice, 'PRIVILEGED AND CONFIDENTIAL,' 'Advice of Counsel.'").

²⁰ *Upjohn*, 449 U.S., pp. 395-396.

Waiver of the Privilege

The majority of litigation dealing with the attorney-client privilege addresses the critical issue of waiver. Even where every requirement of the privilege has been met, the privilege can be waived—either intentionally or inadvertently. Only a client can voluntarily waive the privilege, and he/she does so by agreeing to share or have his/her attorney share otherwise confidential information with others. An inadvertent or implied waiver occurs when information that would otherwise be privileged is not kept confidential. For example, the law is clear that no communications to third parties or in the presence of third parties are privileged unless the third parties are necessary to the provision of legal advice. In *Cavallaro v. United States*,²¹ the United States Court of Appeals for the First Circuit found that the attorney-client privilege did not protect third-party accountants' documents from discovery because the defendants could not prove that the accountants were acting as agents of the attorney in providing legal advice. Although the accounting information was useful to the defendant's attorney, it was not absolutely necessary for the provision of legal advice. The court held that "[t]he involvement of [a] third-party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications" in order to be afforded protection.²² Thus, the court found an implied waiver of the privilege.

Many other circumstances that trigger a waiver may not be obvious to many lawyers and clients. For example, courts have held that the participation of a lawyer at a meeting where the lawyer was not acting in a "representative" capacity resulted in a waiver of the privilege.²³ Likewise, the presence of consultants who have not been specifically hired to assist in the provision of legal advice or to assist

attorneys as non-testifying witnesses has triggered a waiver of the privilege.²⁴ While lawyers may commission non-lawyers to interview witnesses, the results of those interviews will not be privileged unless there is clear evidence that the non-lawyer was acting as the lawyer's agent.²⁵ Indeed, courts have even found the attorney-client privilege does not attach where a client seeks to have a private discussion with counsel, but unwittingly blurts out confidential information within earshot of a law enforcement officer who is leaving the room.²⁶ A useful guide is to know that the "magic circle" of individuals who can properly receive privileged information is very small and including anyone not acting as a direct agent of the attorney or client will result in a waiver of the privilege.²⁷

²⁴ For a general example, see *United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961) ("[I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege. . . . [however] [i]f what is sought is not legal advice but only accounting service, . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.").

²⁵ *Ibid.*, pp. 921-922.

²⁶ *People v. Harris*, 57 N.Y.2d 335, 342-343 (N.Y. 1982) (Defendant blurted out to her attorney over the telephone while an officer was leaving the room, "Oh, my God, I think I've killed Hy." Lower court allowed the officer to enter this statement into the record. Defendant appealed, claiming it was protected by the attorney-client privilege. The appellate court affirmed the lower court's decision, finding that "in this case, defendant's choice to speak to an attorney in the presence of third parties effectively prevented the privilege from attaching.").

²⁷ *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 684 (1st Cir. 1997) ("Even where the cases are limited to those involving a deliberate and voluntary disclosure of a privileged communication to someone other than the attorney or client, the case law is far from settled. But decisions do tend to mark out, although not with perfect consistency, a small circle of 'others' with whom information may be shared without loss of the privilege (e.g., secretaries, interpreters, counsel for a cooperating co-defendant, a parent present when a child consults a lawyer)." (Citations omitted.) Furthermore, "[a]n intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient. On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege.").

²¹ 284 F.3d 236 (1st Cir. 2002).

²² *Ibid.* p. 249 (citing E.S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, pp. 168-69, 189 (4th ed. 2001)).

²³ For example, see *Doe v. Poe*, 92 N.Y.2d 864, 867 (N.Y. 1998) ("The Appellate Division correctly determined that the communications and documents in question are not protected by the attorney-client privilege inasmuch as an attorney, Mr. P., attended the meetings in a non-representative capacity.").

Selective Waivers Generally

Recently, courts have been struggling with the extent and applicability of “selective waivers.”²⁸ Can a client selectively waive the privilege for one party, but not for another? This is an as-yet unresolved question, although it is one facing many corporations today. There have been several cases where companies have waived the privilege in order to disclose information to a government entity, yet wanted to retain the privilege for the same information with regard to private parties. Courts have wrestled with this issue and are divided. The Supreme Court has not specifically ruled on the issue of selective waivers, thus there are different interpretations depending on which state or federal court is considering the issue, and which jurisdiction’s law applies to the case at hand.

In *Upjohn*, the Supreme Court had an opportunity to review a selective waiver with respect to the documents the Upjohn Company provided to the SEC in the course of its investigation. However, in writing the majority opinion, Justice Rehnquist focused on the confidentiality of the communications rather than the issue of waiver. Moreover, the Court specifically refused to draw a bright-line rule for the applicability of a selective waiver, thus differences of opinion within the courts persist.²⁹

The state of the law following *Upjohn* can be summarized as varying. Some courts have ruled that selective waivers are permissible (e.g., *Diversified Industries v. Meredith*³⁰); some courts have determined that selective waivers are never permissible or applicable in any circumstance (e.g., *Westinghouse Electric Corp. v. Republic of the*

*Philippines*³¹); and other courts have tried for a compromise position in which selective waiver is permissible only in circumstances where the privilege holder has executed a confidentiality agreement with the adversarial party (e.g., *In re M & L Business Machine Company, Inc.*³²).

The United States Court of Appeals for the Eighth Circuit was one of the first federal courts to consider the issue of a selective waiver of the attorney-client privilege. In *Diversified Industries v. Meredith*,³³ the Eighth Circuit ruled that voluntary disclosure of information to a government entity does not waive the privilege with respect to other parties. Diversified Industries, Inc. had been involved in the sale of copper to Weatherhead Inc. During the course of litigation, Diversified learned that it had maintained a fund for improper purchases such as bribing officials at Weatherhead. The SEC pursued an investigation during which it subpoenaed several documents from Diversified. Diversified complied. Afterward, Weatherhead sued to obtain copies of these documents from Diversified. Diversified refused, contending that the documents fell under the attorney-client privilege. Weatherhead countered that because Diversified shared the documents with the SEC, there was an implied waiver and the documents were no longer privileged. The Eighth Circuit agreed with Diversified, holding that the disclosure of privileged information to the SEC constituted a “limited waiver of the privilege.”³⁴ Thus, in the Eighth Circuit’s opinion, companies may share otherwise privileged information with the government, but those materials remain privileged with regard to third parties. In the court’s view, applying a selective waiver balances the need of the government to conduct a thorough investigation while still protecting the company from outside adversaries.

Most other federal courts have declined to adopt the concept of a selective waiver. The First, Second, Third, Fourth, Sixth, Federal, and District of Columbia Circuit Courts have considered the issue, and all have declined to adopt the general

²⁸ Courts use various terms to refer to “selective” or “limited” or “partial” waivers. This report uses the term “selective” waiver, following the reasoning of the Third Circuit in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 n. 7 (3d Cir. 1991) (citations omitted): “[W]e prefer not to use [limited waiver rule] because the word ‘limited’ refers to two distinct types of waivers: selective and partial. Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communication to continue asserting the privilege as to the remaining portions of the same communications.”

²⁹ *Upjohn*, 449 U.S., p. 396 (“Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas.”).

³⁰ 572 F.2d 596 (8th Cir. 1978) (en banc).

³¹ 951 F.2d 1414 (3d Cir. 1991).

³² 161 B.R. 689 (D.Col. 1993).

³³ 572 F.2d 596 (8th Cir. 1978) (en banc).

³⁴ *Ibid.* p. 611.

selective waiver concept.³⁵ In the most recent federal circuit court case, decided in 2003, the Sixth Circuit conducted a comprehensive analysis of selective waivers in *In re Columbia/HCA Healthcare Corp.*³⁶ After an extensive discussion and consideration of all the prevailing court opinions regarding selective waivers, including the Eighth Circuit's opinion in *Diversified Industries*, the Sixth Circuit ultimately held that there is no such thing as a "selective waiver" and that once privileged information is revealed—even if it is compelled by the government—the information no longer enjoys the protections of the attorney-client privilege.

Selective Waivers in Light of Confidentiality Agreements

The Sixth Circuit appears to summarize the majority sentiment denying the general concept of selective waivers. However, there is one nuance that has thrown the courts into a tailspin—namely, what to do when the parties execute a confidentiality agreement specifically reserving the attorney-client privilege.

Granted, the Sixth Circuit found no trouble in holding that a confidentiality agreement with government investigators did not preserve the privilege. In *Columbia/HCA*, the privilege was lost even though the corporation had entered into a confidentiality agreement with the government prior to disclosing the information to investigators. The agreement specifically stated that the disclosure "does not constitute a waiver of any applicable privilege or claim."³⁷ Regardless, the Sixth Circuit held that the disclosure constituted a waiver, and all others, including adversaries, could have access to the information.

Not all federal courts agree with the Sixth Circuit on this particular point. In fact, the federal courts remain clearly divided on the applicability of a confidentiality agreement in relation to selective waivers. The first of several federal district courts to specifically hold that a confidentiality agreement

with government agencies preserves the privilege as to third parties came in 1981 from the Southern District of New York in *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*³⁸ Ultimately the court ruled that "disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege **unless** the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made."³⁹ (Emphasis added.)

A few federal circuit courts have left open the possibility of upholding the privilege when there is a confidentiality agreement. The Second Circuit refused to draw a bright-line rule on the applicability of an explicit agreement in *In re Steinhardt Partners*.⁴⁰ *Steinhardt* dealt with the applicability of the attorney work product doctrine⁴¹

³⁸ 521 F.Supp. 638 (S.D.N.Y. 1981). There are also a series of cases that followed and upheld the finding in *Teachers Insurance*, including *In re M & L Business Machine Company, Inc.*, 161 B.R. 689, 695-696 (D.Col. 1993) (adopted the *Teachers Insurance* reasoning as "a compromise position"); *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 526 (N.D.Cal. 1988) (adopting the *Teachers Insurance* view, and distinguishing the case by the fact that the bank was not disclosing information to the U.S. Attorney "for the purpose of obtaining some benefit for itself."); and *Schnell v. Schnell*, 550 F.Supp. 650 (S.D.N.Y. 1982) (finding disclosure to SEC did not constitute waiver of the attorney-client privilege).

³⁹ *Teachers*, 521 F.Supp., pp. 644-645.

⁴⁰ 9 F.3d 230, 236 (2d Cir. 1993) ("Establishing a rigid rule would fail to anticipate situations in which the disclosing party and government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.").

⁴¹ This report addresses the attorney-client privilege and not the attorney work product doctrine. First articulated by the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), the work product doctrine is another legal construct meant to protect confidential information. The work product doctrine is similar to the attorney-client privilege in that it provides for the protection of certain information—namely, materials prepared in anticipation of litigation—under the *Hickman* theory that "it is essential that a lawyer work with a certain degree of privacy" in order to fulfill his legal obligations to his client. The work product doctrine, however, is treated somewhat differently by the courts. As such, this report will not examine the doctrine in detail; rather, it is included because clients often attempt to protect confidential information with the attorney-client privilege in conjunction with the work product doctrine, and the two are often referred to as the "attorney-client and work product protections." See the general comparison of attorney-client privilege and work product doctrine, for example, in *In re Columbia/HCA Healthcare*, 293 F.3d 289 (6th Cir. 2002).

³⁵ These cases are as follows: *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Martin Marietta*, 856 F.2d 619 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (6th Cir. 2002); *Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409 (Fed. Cir. 1997); and *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

³⁶ 293 F.3d 289, 293-303 (6th Cir. 2002).

³⁷ *Ibid*, p. 299.

where the Steinhardt Partners sought to keep documents prepared by their attorneys and voluntarily disclosed to the SEC out of the hands of another party attempting to sue them in civil court. While there was no confidentiality agreement at issue in the facts of the case, the Second Circuit held that there may be situations where a government agency and the company may enter into an agreement to protect the confidentiality of reports, and that this agreement may maintain the company's assertion of the privilege.

In 1995, the First Circuit initially opened the door to the possibility of upholding the privilege with confidentiality agreements. In *United States v. Billmyer*, the court suggested that a successful argument for selective waiver “might well depend importantly on just what had been disclosed to the government **and on what understandings.**”⁴² (Emphasis added.) In 1997, however, the First Circuit appeared to close this door slightly in *United States v. Massachusetts Institute of Technology*, saying that although it is possible to carve out some disclosures to government agencies as not waiving the privilege, “courts have been unwilling to start down this path—which has no logical terminus—and we join in this reluctance.”⁴³ By contrast, also in 1997, the Seventh Circuit in *Dellwood Farms, Inc. v. Cargill, Inc.* denied plaintiff's selective waiver claim because “the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further.”⁴⁴

The most recent federal district court opinion, *In re Natural Gas Commodities Litigation* delivered on December 2, 2005, specifically affirmed selective waivers with an executed confidentiality agreement, in spite of plaintiffs argument that “a majority of Circuits have held” otherwise.⁴⁵ In this case, the U.S. District Court for the Southern District of New York found that “[p]ursuant to the Second Circuit's holding in *Steinhardt*, courts in this district have held that voluntary disclosure to government agencies pursuant to an explicit non-waiver agreement does not waive . . . the attorney-client privilege.”⁴⁶

The McKesson cases.—Perhaps the best illustration of courts' disparate treatment of selective

waivers and confidentiality agreements, however, involves the McKesson Corporation (a.k.a. McKesson HBOC, Inc.). In the early 2000s, McKesson publicly disclosed that its auditors uncovered accounting improprieties. This disclosure led to several shareholder lawsuits in multiple jurisdictions throughout the United States. The U.S. Attorney and the SEC also opened formal investigations of these accounting problems. McKesson hired an outside law firm to perform an investigation and agreed to cooperate with the government.

McKesson shared the results of its internal investigation with the U.S. Attorney and SEC after executing confidentiality agreements specifically stating McKesson's intent not to waive the attorney-client and work product protections. Government authorities agreed to non-disclosure, although they reserved the right to publicly disclose information under certain circumstances, including a prosecution of McKesson, or in the case of the SEC, “except to the extent that the [SEC] Staff determines that disclosure is otherwise required by federal law or in furtherance of the Commission's discharge of its duties and responsibilities.”⁴⁷ Ultimately, neither the U.S. Attorney nor the SEC took any action against McKesson regarding the accounting issues. Plaintiffs in the various shareholder suits, however, asked the courts to compel McKesson to turn over the same internal investigation documents to them that McKesson provided to the government.

In 2002, the Delaware Court of Chancery in *Saito v. McKesson HBOC, Inc.* sided with McKesson and adopted the selective waiver theory thereby denying the shareholders' access to the investigation documents.⁴⁸ This opinion was also upheld on appeal in March 2005.⁴⁹ In February 2004, however, in *McKesson HBOC, Inc. v. The Superior Court of San Francisco County*, the California Court of Appeals rejected the selective waiver theory and ordered McKesson to turn over the documents to the shareholders who sued in California.⁵⁰ McKesson requested a reconsideration

⁴² 57 F.3d 31, 37 (1st Cir. 1995).

⁴³ 129 F.3d 681, 686 (1st Cir. 1997).

⁴⁴ 128 F.3d 1122, 1127 (7th Cir. 1997).

⁴⁵ *In re Natural Gas Commodities Litigation*, 2005 WL 3288007 at *2 (S.D.N.Y. Dec. 2, 2005).

⁴⁶ *Ibid.*

⁴⁷ As quoted in an article by the law firm of Hinshaw & Culbertson, “Attorney-Client Privilege and Work Product Protection Considered Waived by Disclosure to the Government Notwithstanding Confidentiality Agreements,” (Mar. 3, 2004) available at http://www.hinshawlaw.com/knowledge/alert_detail.aspx?id=398&type=5303.

⁴⁸ 2002 WL 31657622 (Del. Ch. 2002).

⁴⁹ *Saito v. McKesson HBOC, Inc.*, 870 A.2d 1192 (Del.Supr. Mar. 8, 2005).

⁵⁰ 115 Cal.App.4th 1229 (Cal. Ct. App. 2004).

of the decision; however, the court denied a review of its decision in June 2004. These McKesson cases perfectly demonstrate the courts' disparate treatment of selective waivers and confidentiality agreements throughout the country.

Government and Corporate Investigations: An Historical Perspective

Over the last 30 years, the U.S. government has increasingly deployed widespread investigations into a broad array of corporate behavior. In the 1970s, several companies were publicly criticized for alleged bribery schemes. The SEC responded by increasing its efforts to investigate public companies. These investigations carried over into the 1980s, during which time DOJ began increasing its emphasis on investigating criminal activities. In 1987, the United States enacted federal sentencing guidelines for convicted criminals and extended these guidelines to apply to companies in 1991, expressing for the first time the government's interest in company "cooperation." The emphasis on cooperation continued throughout the late 1990s. As the corporate scandals of the early 2000s broke headlines (and bank accounts), Congress passed SOX and sought to curb alleged corporate wrongdoing.

The public's growing distrust of public companies, combined with SOX, encouraged government entities to step up their investigative efforts. SOX also provided a platform for the DOJ, the SEC, and the USSC, as well as State Attorneys General, to more aggressively pursue corporations, emphasize corporate "cooperation," and continually redefine what it means for a corporation to "cooperate." This series of events over the past three decades has led to a degradation, if not total erosion, of the attorney-client privilege.

The 1970s and 1980s: The Government Responds to Corporate Bribery and Criminal Activity

Information came to light during the 1970s that suggested many of the largest corporations in the United States allegedly paid bribes and made secret political contributions to obtain foreign business.⁵¹ The SEC was overwhelmed with the number of potential investigations, so it initiated a "voluntary

⁵¹ The Sixth Circuit includes a general discussion of corporate investigations in *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289, 295 n. 7 (6th Cir. 2002). Some of these companies included Occidental Petroleum Corporation, Westinghouse Electric Corporation, Diversified Industries, Inc., the Upjohn Company, and many others.

disclosure program" to encourage corporations to come forward voluntarily with past misdeeds.⁵² In exchange, the SEC agreed not to pursue certain enforcement efforts. Most companies responded, at the SEC's urging, by creating internal audit committees who worked with outside legal counsel to prepare full reports documenting any illegal company practices. The companies then shared the results of these internal investigations with the SEC in exchange for more lenient treatment.⁵³ These investigations laid the foundation for today's government investigative efforts.

The government continued down the investigative path well into the 1980s. During that period, there was an increasing emphasis on stamping out criminal activity, both individual and corporate. The U.S. Sentencing Commission was created by the Comprehensive Crime Control Act of 1984 to essentially ensure uniform sentences for criminal

⁵² The SEC's voluntary disclosure program was considered highly successful. As the U.S. Court of Appeals for the District of Columbia Circuit noted in *In re Sealed Case*, 676 F.2d 793, 818-819 (D.C. Cir. 1982):

As the many cases concerning companies that participated in the [SEC] program attest, the program involved a unique use of private lawyers and the adversary system to accommodate the joint needs of government and the private sector. Participating corporations used their own lawyers and resources to perform independent investigations of their business practices, and they turned over the full results of the investigations to the SEC. The program was valuable to corporations because their boards of directors often had inadequate knowledge of the corporations' actual business practices, and because the SEC offered leniency, with a chance to avoid an intrusive and embarrassing formal investigation, to corporations that made full disclosure and ended any objectionable practices uncovered during the investigation. The program was valuable to the SEC because it brought hundreds of corporations into compliance with the law without a massive commitment of government resources to investigations and litigation.

Several government agencies followed the SEC's lead by instituting voluntary disclosure programs of their own, including the Department of Defense (DOD) and the Environmental Protection Agency (EPA). Although these programs have evolved over time, voluntary disclosure programs are still in place today. A full description of the DOD Fraud Voluntary Disclosure Program is available at <http://www.dodig.mil/Inspections/IPO/voldis.htm>. The EPA's Voluntary Audit Policy is described in detail on their website at <http://www.epa.gov/region02/capp/cip/policy.htm>.

⁵³ For a longer contextual discussion, see *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426 n. 11 (3d Cir. 1991).

offenders.⁵⁴ The USSC created a set of sentencing guidelines that went into effect November 1, 1987. These guidelines work by providing judges with sentencing time ranges that take into account the seriousness of the offense and the defendant's criminal record.

The 1990s and 2000s: Accounting Scandals, SOX, and Pressure To Waive Privilege

In 1991, the USSC added sentencing guidelines for companies, saying they must cooperate with prosecutors to be given leniency in sentencing. These guidelines also became the basis for the requirement that all publicly traded companies must have "an effective compliance program." In 2004, the USSC elevated these criteria into a new separate guideline at Section 8B2.1 and elaborated on them to be more rigorous and, by its own admission, impose "significantly greater responsibilities upon an organization's governing authority (e.g., Board of Directors) and executive leadership."⁵⁵

When first promulgated, the sentencing guidelines were mandatory for federal judges. Following the Supreme Court's decision in *United States v. Booker* in 2005, however, the guidelines are no

longer mandatory, but must be consulted and taken into account during sentencing.⁵⁶ Moreover, the compliance program language is viewed as "well-established" and in no way threatened by the *Booker* decision.

The Delaware Chancery Court, well-recognized for its business law acumen, actually set the stage for more vigorous corporate standards in 1996 by suggesting officers and directors of public companies *have an affirmative duty* to ensure the company's accuracy and compliance with the law.⁵⁷ (Emphasis added.) As a sidenote, the court also suggested that corporate officers could be held personally liable if the company does not have an effective compliance program:

[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.⁵⁸

In 1999, then-Deputy Attorney General Eric Holder wrote a memorandum (hereinafter referred to as the "Holder Memo") to federal prosecutors outlining the standards which prosecutors should follow in federal prosecutions of corporations.⁵⁹ The Holder Memo suggested nine criteria for prosecutors to consider in prosecuting corporations, including the extent to which companies "cooperated" with government investigations, and suggested that waiving the attorney-client privilege was one sign of "cooperation." Then the corporate scandal dam broke, with highly egregious wrong-

⁵⁴ "An Overview of the United States Sentencing Commission" available at [http://www.usc.gov/general/USSC/Coverview 2005.pdf](http://www.usc.gov/general/USSC/Coverview%202005.pdf).

⁵⁵ Paula Desio, "An Overview of the United States Sentencing Commission and the Federal Sentencing Guidelines," available at <http://www.usc.gov/TRAINING/corpor04.pdf>, p. 3. The current criteria for an effective compliance program are: standards and procedures reasonably capable of detecting and preventing criminal conduct; responsibility at all levels and adequate resources and authority for the program; personnel screening and exercise of care in delegation of discretionary authority; effective communication of standards and procedures to employees (i.e., training programs); reasonable steps to achieve compliance (i.e., monitoring, evaluating, and auditing); non-retaliatory internal reporting systems; incentives and discipline to promote compliance; and appropriate response upon detection of an offense, including self-reporting of wrongdoing. Two of these criteria for an effective compliance program are particularly important to the current discussion of the attorney-client privilege. The self-reporting criterion is important because its existence may mitigate the penalty if a company is convicted of a federal crime. Likewise, continuous monitoring and evaluation is important because it shows an understanding that the compliance program is dynamic and is responsive to change. If demonstrated, both of these criteria might influence a prosecutor not to indict because the wrongdoing was an anomaly that could not have been detected earlier and was reported once discovered through monitoring. Perhaps more importantly, the very existence of an effective compliance program might influence a prosecutor not to indict.

⁵⁶ *United States v. Booker*, 543 U.S. 220 (2005).

⁵⁷ *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996) (stating that officers and directors have a duty to assure "that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with the law and its business performance").

⁵⁸ *Ibid*, p. 970.

⁵⁹ Eric Holder, Memorandum from The Deputy Attorney General to All Component Heads and United States Attorneys, *Re: Bringing Criminal Charges Against Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

doing by Enron, WorldCom, Tyco, Global Crossing, Adelphia, and Arthur Andersen consuming headlines worldwide. On July 30, 2002, the President signed SOX into law, setting rigorous accounting and auditing standards for public companies and imposing severe penalties for non-compliance. As Congress attempted to clamp down on corporate misdeeds with the passage of SOX, the DOJ, the SEC, and other government entities pursued corporate investigations more aggressively. Ultimately, the Holder Memo was only a precursor to a more pointed 2003 DOJ memo that took a much stronger stance on government investigations.

The Privilege Following Sarbanes-Oxley

The Sarbanes-Oxley Act arose in response to several very public corporate scandals in the late 1990s and early 2000s. Lawmakers determined that instituting more stringent standards on public companies would help restore consumer and investor confidence in businesses. The legislation itself is voluminous, consisting of ten titles, and purports to improve the accuracy and reliability of corporate disclosures made pursuant to existing securities laws. The Act imposes many requirements on public companies,⁶⁰ such as prohibiting auditors from performing non-audit services contemporaneously with an audit; mandating company audit committees consisting of at least one financial expert; requiring financial statements to fully and accurately reflect the financial condition of the company; mandating the certification of financial records by chief executive officers and chief financial officers; establishing stringent internal controls and requiring that annual reports include internal control reports that outside auditors must assess and attest to; and authorizing increased civil and criminal penalties for non-compliance. Public companies have spent considerable time, energy, and resources to bring their businesses into compliance with this myriad of requirements.⁶¹

The Act has, unfortunately, also created an unintended consequence by adding to the pressure

many corporations feel to waive their attorney-client privilege, in spite of the fact that doing so may expose company information to adversaries. SOX created the Public Company Accounting Oversight Board (PCAOB) (under the direction and authority of the SEC) to oversee audits, establish auditing standards, and enforce compliance. Section 103 of SOX required the PCAOB to promulgate standards governing public corporation audits. Subsequently, in June 2004, the PCAOB issued Standard No. 3 which requires auditors to develop and maintain documentation in sufficient detail to support the audit report conclusions.⁶² Companies are concerned that auditors, relying on Standard No. 3, will demand privileged information during the preparation of an audit opinion. If the corporation discloses this information, it risks waiver of the privilege with regard to all others. But if the corporation does not provide material information to an auditor, it risks receiving a “qualified” opinion on the company’s financial statements. Such “qualified” opinion may, in turn, deflate investor confidence and place the entire business enterprise in jeopardy.

The SOX requirements create another slippery slope for losing the attorney-client privilege by introducing auditors to the list of non-attorney third parties who require access to certain confidential company information. Under SOX, auditors report to the PCAOB the information companies disclose to them. By releasing information to auditors, who in turn release information to government entities, the company is at risk of losing the attorney-client privilege it may otherwise have with regard to this information. Moreover, under SOX and under the Securities and Exchange Act of 1934, the PCAOB and SEC have the authority to use these materials to investigate and prosecute public companies for non-compliance. Even further, it is possible that the DOJ could use this same information to criminally prosecute public companies.

Prosecutors Turn Up the Heat: DOJ’s Approach

Following passage of SOX, prosecutors and regulators are demanding increasing amounts of information, including materials related to internal investigations and other materials that normally are protected by the attorney-client privilege. These same prosecutors and regulators are also pushing companies to waive both the attorney-client and work product protections as a sign of “cooperation.”

⁶⁰ The complete details of the legal requirements are in the Sarbanes-Oxley Act, P.L. 107-204 (July 30, 2002).

⁶¹ The Manufacturers Alliance/MAPI has conducted several surveys of members regarding the resources required to comply with SOX requirements: see e.g., Leslie D. Miller, “External Audit Fees—2004 and 2005,” S-108 (July 2005) and “Sarbanes-Oxley Act of 2002 Section 404 External Audit Fees,” S-103 (October 2004); and Donald A. Norman, “The Cost of SOX and the Compliance Process,” S-105 (April 2005).

⁶² PCAOB Release No. 2004-006, available at <http://www.pcaobus.org>.

As mentioned earlier, two directives issued in 1999 and 2003 by DOJ place significant importance on a corporation demonstrating a willingness to cooperate with government investigators. So much so, that a corporation must now seriously consider relinquishing its attorney-client privilege and sharing the fruits of its internal investigation in order to be considered “cooperative.” Often, companies feel there is a veiled threat that a company’s failure to waive the privilege will have serious adverse consequences.

The Thompson Memo

In January 2003, then-Deputy Attorney General Larry D. Thompson issued a memorandum (hereinafter referred to as the “Thompson Memo”)⁶³ revising the DOJ’s “Principles of Federal Prosecution of Business Organizations” as presented in the Holder Memo. Mr. Thompson specifically stated that the purpose of these revisions was for “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”⁶⁴ The memo instructed federal prosecutors to consider nine factors in determining whether to prosecute a “corporate target.” One criterion was whether the corporation voluntarily disclosed wrongdoing and “its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.”⁶⁵ While this instruction merely reiterated DOJ’s 1999 policy, the Thompson Memo’s tone is strong and declares firmly that DOJ has a renewed interest and vigor in prosecuting corporations. The cover sheet also insinuates that some businesses lack sincerity in cooperating with the government and blatantly questions the ethics of some corporations’ governance:

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation. 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. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.⁶⁶

The Thompson Memo goes on to reiterate the nine criteria prosecutors should use to determine whether to prosecute a corporation. These factors include the nature and seriousness of the offense, the pervasiveness of wrongdoing, a history of similar conduct, timely and voluntary disclosure, existence and adequacy of a compliance program, any remedial actions, potential collateral consequences, adequacy of prosecution of responsible individuals, and the adequacy of the remedies available. The Memo also indicated stricter scrutiny of a company’s cooperative efforts, and strongly suggested that companies must go to great lengths to sufficiently demonstrate “cooperation,” including waiver of the attorney-client and work product protections. To help prosecutors determine the extent of a corporation’s cooperation, the Thompson Memo provides the following guidance: “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.”⁶⁷ With regard to waiving privileges, the Thompson Memo advises:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets,

⁶³ Larry D. Thompson, Memorandum From The Deputy Attorney General to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003).

⁶⁴ *Ibid*, on the cover sheet to the Memo.

⁶⁵ *Ibid*, p. 3.

⁶⁶ *Ibid*, on the cover sheet to the Memo.

⁶⁷ *Ibid*, p. 6.

without having to negotiate individual cooperation or immunity agreements.⁶⁸

This guidance places the corporation in the peculiar position of becoming its own prosecutor—conducting an internal investigation to discern the truth, then essentially being required to turn over investigative documents to a government entity with the power to prosecute it. A recent case involving Computer Associates International, Inc. illustrates this point.⁶⁹ Three former executives pleaded guilty to obstruction of justice for lying to outside counsel that the company had retained to investigate alleged improprieties. The guilty pleas rested on the theory that by lying to outside counsel, they had misled federal officials since the results of the internal investigation were ultimately turned over to the government.⁷⁰

The Thompson Memo also strongly encourages a corporation to offer up its employees as scapegoats by turning over potentially damaging statements of its employees. Given that the attorney-client privilege in a corporate context generally protects only the corporation and not individual employees, the DOJ's "obtain[ing] statements . . . without having to negotiate individual cooperation or immunity agreements" sets up employees for a fall, and ultimately discourages employees from being forthright with company counsel, thereby limiting counsel's ability to determine exactly what, if anything, inappropriate transpired. Discouraging employees from cooperating with company counsel defeats the purpose of the attorney-client privilege discussed earlier in this report. Company counsel need a complete picture of corporate activity in order to provide the best advice to the company and to ultimately help the company conform to appropriate standards. If company employees cannot or will not share relevant information out of fear that their statements will be used against them, company counsel are severely restricted in their ability to provide cogent legal advice to the company.

Moreover, the price the company may pay for being "cooperative" with a government entity may

extend far beyond the government action at hand. If a company chooses to waive its privileged material, then according to a majority of courts, that material is open for all to see and use, including company adversaries, and the overall business enterprise may be in jeopardy.

DOJ is not alone in pressuring corporations to consider waiving the attorney-client privilege. The SEC, the USSC, the Federal Energy Regulatory Commission (FERC), the Commodities Futures Trading Commission, and the National Association of Securities Dealers all have adopted measures that increase the pressure on corporations to waive the privilege. For example, on November 1, 2004, the Federal Sentencing Guidelines were amended to essentially require an organization to waive privileges in order to receive leniency in sentencing. This action amended the commentary to Section 8C2.5 to add: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) *unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*"⁷¹ (Emphasis added.)

Defining "Full Cooperation"

The definition of "full cooperation," at least among federal agencies, seems to be a moving target. With each successful investigation, prosecutors and regulators appear to up the bar as to what constitutes full cooperation from a company. Alice Martin, the U.S. attorney who prosecuted the HealthSouth Corporation case, observed, "Once one prosecutor has gotten cooperation of a certain level, that level becomes what we all now consider cooperation."⁷²

Some recent investigations demonstrate this point. A Netherlands-based food services company commonly known as Royal Ahold⁷³ recently avoided SEC sanctions only by agreeing to "cooperate" with the SEC. This "cooperation" consisted of conducting a comprehensive internal investigation using

⁶⁸ *Ibid*, p. 7.

⁶⁹ See Alex Berenson, "Case Expands Type of Lies Prosecutors Will Pursue," *The New York Times*, May 17, 2004, p. C1.

⁷⁰ *Ibid*. As reported in *The New York Times* article, the three executives pleaded guilty on April 9, 2004, to obstruction of justice and to securities fraud, and agreed to work with prosecutors in hopes of receiving shorter sentences.

⁷¹ Federal Sentencing Guidelines, §8C2.5, commentary.

⁷² Lori P. Cohen, "In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees; as Sentencing Rules Stiffen, KPMG Axes Tax Partners, Won't Pay Their Legal Costs; What 'Cooperation' Entails," *The Wall Street Journal*, June 4, 2004, p. A1.

⁷³ Royal Ahold's official company name is Koninklijke Ahold N.V. The company is known in the United States primarily for owning and operating Giant grocery stores.

outside consultants and law firms, disclosing all identified questionable activity to the SEC and the DOJ, waiving its attorney-client and work product protections, making employees in the United States and abroad available for government interviews, and turning over the results of its internal investigation.⁷⁴ KPMG recently concluded that “full cooperation” required it to waive the attorney-client privilege and work product doctrine protections, refuse to pay legal costs for its partners and employees unless they agreed to speak with prosecutors, decline to enter into any joint defense agreements, agree to tell—and provide—prosecutors all documents its partners and employees requested to use in their own defense, and refuse to give defense attorneys access to all of the same documents it provided to the government.⁷⁵ In contrast, Lucent Technologies Inc.’s May 2004 settlement with the SEC included a \$25 million penalty for an alleged lack of cooperation because Lucent’s outside counsel made a statement during the investigation denying fraudulent activity, and because Lucent indemnified employees under investigation.⁷⁶

The ill-fated waiver of Arthur Andersen is another case in point. Andersen, a then-prominent national accounting firm, waived the privilege in an effort to cooperate with government investigators. The government, however, prosecuted Andersen for obstructing justice by shredding documents related to the Enron scandal. The firm was found guilty of obstructing an SEC proceeding,⁷⁷ and ultimately the firm fell apart as a result, going from over 25,000 employees to only several hundred today.⁷⁸ Jurors in the case later indicated that the crux of the conviction rested on previously privileged materials that the government was able to produce after the firm waived its privilege. As reported in the *Houston Chronicle*:

Jurors say their decision did not hinge on the shredding allegations but on [an]

October 16 e-mail from Andersen lawyer Nancy Temple to lead Enron auditor David Duncan. The jurors said it indicated Temple realized the [SEC] might investigate Andersen, and with that in mind, she suggested Duncan alter an earlier internal memo about advice given to Enron regarding its third-quarter earnings.⁷⁹

The Supreme Court’s recent reversal of that conviction⁸⁰ is little solace to the now-defunct firm.

The Outlook for Change

Given the vigor of government agencies in their pursuit of corporate wrongdoers, it seems unlikely that the government will back off its demands for cooperation, including waiver of attorney-client and work product protections. After passage of SOX, the SEC recommended that Congress amend the Securities and Exchange Act to ensure that a company’s selective waiver to the SEC would not result in a general waiver of the privilege to other parties. That legislation, however, never passed.

Groups outside of the government are actively working to educate government leaders on the detrimental effects of eroding the privilege. The Association of Corporate Counsel (ACC) conducted a survey of corporate counsels (both members and nonmembers) in early 2005 to assess the extent of the attack on the attorney-client privilege.⁸¹ Their survey of over 700 in-house and outside counsel concluded that the privilege is indeed under attack, with nearly one-third of respondents indicating that they have personally experienced an erosion of the privilege in their interactions with government entities.⁸²

The American Bar Association (ABA) has also taken a strong stand on the need to preserve the privilege. The ABA formed a Task Force in October 2004 to examine the erosion of the privilege and to educate policymakers on the importance of preserving the attorney-client privilege. In August 2005, the ABA adopted a resolution opposing the

⁷⁴ Michael Bobelian, “Dodging a Bullet—Royal Ahold Shows the Benefits of Cooperation With the SEC,” *New York Law Journal*, Nov. 4, 2004, p. 5.

⁷⁵ Cohen, *op. cit.*, n. 72.

⁷⁶ Bobelian, *op. cit.*, n. 74. See also Cohen, *op. cit.*, n. 72.

⁷⁷ *United States v. Arthur Andersen LLP*, 374 F.3d 281 (5th Cir. 2004), *rev’d by Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005).

⁷⁸ “Arthur Andersen Avoids Criminal Rap,” CNN/Money Online (Nov. 23, 2005), available at http://money.cnn.com/2005/11/23/news/midcaps/arthur_andersen.

⁷⁹ Tom Fowler and Todd Ackerman, “The Andersen Verdict/Andersen Guilty/Outcome Viewed as Final Blow for Firm,” *Houston Chronicle* (June 16, 2002), p. A1.

⁸⁰ *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005).

⁸¹ The Association of Corporate Counsel, “Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?” (April 6, 2005) available at <http://www.acca.com/advocacy/attyclient.php>.

⁸² *Ibid.*

government's practice of demanding waivers.⁸³ In the ABA's view—and in the view of many others, including the Manufacturers Alliance/MAPI—the attorney-client privilege is absolutely essential to ensuring a beneficial attorney-client relationship. The privilege promotes compliance with the law by allowing clients to get frank legal advice, ensures effective advocacy by allowing clients to be fully candid with their legal representatives, ensures access to justice, and promotes optimal functionality of the judicial system. The Manufacturers Alliance/MAPI agrees that any government policy or practice that coerces public companies to waive attorney-client and work product protections is detrimental to these companies, to the judicial system, and to society.

The government is starting to take notice of the extreme concern voiced in the corporate and legal communities regarding the privilege. Recently, on October 21, 2005, Acting Deputy Attorney General Robert D. McCallum, Jr., issued a follow-up to the Thompson Memo to direct federal prosecutors “to establish a written waiver review process.”⁸⁴ Such a process would require “federal prosecutors to obtain approval from a U.S. Attorney or other supervisor before seeking a waiver of the attorney-

client privilege.” This process appears to limit the autonomy of individual prosecutors to aggressively pursue privilege waivers; however, it is too early to tell how this directive will impact waiver demands, if at all. Moreover, the memo does not provide any guidance or steps that prosecutors must follow in order to obtain approval, suggesting this process is not as formal as necessary to truly curb prosecutorial waiver requests.

The USSC also has opened discussions on the need to amend the commentary to the Federal Sentencing Guidelines' Section 8C2.5 (discussed earlier in this report) regarding the waiver of attorney-client and work product protections. On November 15, 2005, the USSC held a public meeting featuring several speakers from the ABA, the U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers, and others who all reinforced the need to uphold the sanctity of the attorney-client privilege.⁸⁵ The Manufacturers Alliance/MAPI shares the concerns expressed by these groups and urges government entities to restore the attorney-client privilege to its fullest protection.

Strategies For Mitigating the Risk of Losing the Privilege

In an ideal situation, a company would have ample time to conduct its own review prior to deciding whether to waive its privileges. In practice, the government can request a waiver at any time or point in an investigation. A company may have to decide with little or no information whether it is prudent to waive the privilege. Once a waiver is made, it cannot be undone. Moreover, waivers cannot be conditional, meaning that the company cannot seek any special consideration in return for agreeing to waive the privilege. The government merely suggests, but will not promise, leniency in exchange for a waiver.

Companies want to take steps to minimize the likelihood of an external investigation, while simultaneously undertaking efforts to maximize the attorney-client privilege. Following are several strategies companies should consider to mitigate the risk of losing the privilege.

⁸³ The ABA resolution, available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf states:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversarial system of justice; and FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections; FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage.

⁸⁴ Robert D. McCallum, Jr., Memorandum From The Acting Deputy Attorney General to Heads of Department Components and United States Attorneys, *Re: Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005).

⁸⁵ For more details, please see the Meeting Agenda and Speaker Statements, United States Sentencing Commission, Public Meeting Panel Discussion on the Attorney-Client Waiver and the Federal Sentencing Guidelines (Nov. 15, 2005) available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

Before an Investigation

There are several steps in-house counsel can take prior to becoming the target of an investigation to minimize the risks of an investigation and to help preserve the attorney-client privilege.

Know the case law for the courts in your jurisdiction. As previously discussed, the courts are divided on the use and applicability of the attorney-client privilege with regard to government investigations. Counsel should be aware of the case law regarding the privilege within the company's jurisdiction and should use that knowledge to inform company leadership and guide the implementation of an effective compliance program.

Advise employees, especially senior management, that the privilege is fragile. Government agencies and courts are still struggling with the application of the attorney-client privilege. Most courts seem to be following strict interpretations regarding when and how the privilege is waived. Senior company management should be made aware of the fragility of the privilege as it now stands so that the company can be adequately prepared if an investigation occurs. Counsel should emphasize the need to be cautious with confidential company information and to limit meeting participants and documents when confidential company information is being discussed.

Ensure that your company has an effective compliance program in place, including steps to conduct internal investigations. While not an absolute legal requirement, the Federal Sentencing Guidelines provide for leniency for companies that have devised and implemented an effective compliance program—meaning one that meets all of the USSC criteria. Compliance programs have to be continuously monitored to ensure their effectiveness and must be modified to address any detected shortcomings, as well as changing corporate circumstances. Counsel should ensure that this program is in place and includes guidance for conducting internal investigations. Having an effective compliance program in place prior to an investigation will help demonstrate a company's honesty and willingness to cooperate, as well as keep the company focused on what it needs to do to protect itself throughout an investigation. Such a plan should reduce surprises, guide company activity during a potentially disruptive time, and will help minimize disruption to the overall business enterprise.

At a recent meeting of the Manufacturers Alliance/MAPI Law Council, for example, one member suggested a common sense approach to monitoring the effectiveness of the compliance

program. This company has hired two former federal prosecutors to evaluate the elements of its compliance program and to grade its "effectiveness." Once graded the company will take whatever steps are necessary to correct any perceived deficiencies in its compliance programs.

Consider NOT labeling every document and e-mail as "privileged and confidential." Materials that are truly privileged and confidential should not be confused and mixed with all materials that the company produces. Overuse weakens the privilege argument in truly important matters. Companies should give thought beforehand as to what information is critical to protect, and what is not. By doing so, materials that the company needs or wants to claim as privileged will be readily identifiable (making it less likely that the materials will be inadvertently disclosed, thereby waiving the privilege) and will make it easier to demonstrate in good faith that the material really is privileged.

When an Investigation Appears Likely or Is Initiated

Once the company determines that an investigation may be likely or a government entity has initiated an investigation, there are several more steps that a company can take internally to create, identify, and preserve the privilege to the fullest extent. There are also several steps companies can take externally in interacting with the government to mitigate loss of the privilege.

Identify the individual(s) with the authority to communicate with investigators and channel all information through that person. A company should designate the person(s) with the authority to communicate with the government during an investigation. This provides a central point of contact for employees and for the government which helps minimize the risk of communicating information that should be protected.

Identify all of the issues. This may seem obvious, but it is critical to identify all of the relevant issues to appropriately create and maintain the attorney-client and work product protections. An investigation may involve multiple allegations, multiple events, and implicate multiple parties. It is crucial to detail all of the issues from the outset so that no one issue will be overlooked and so that materials and witnesses pertaining to one allegation can be distinguished from another allegation. By separating the issues, the company can ensure that the appropriate people with the appropriate expertise are teamed up for the investigation.

Create and preserve the "magic circle." As previously demonstrated, preserving confidential

information is critical to preserving the attorney-client privilege. One inadvertent revelation to an outside party can release a floodgate of otherwise privileged materials to the government and potentially to outside parties. Attorneys should directly identify and retain any consultants or experts who are necessary to provide legal advice. Retainers for such individuals should specifically delineate each person's role in assisting counsel to assess legal risk and to advise the company accordingly. These retainers should be fully executed before any work begins. In any interview, meeting, or strategy session carefully consider who is attending and whether an attendee's participation can be construed as an "unrelated third party" whose presence or involvement raises the risk of losing the privilege. Remember that there are only a few people, such as interpreters, legal secretaries, and others who are considered "essential" to providing legal advice, and preserving this "magic circle" is necessary to retain the protection of the attorney-client privilege.⁸⁶

Carefully consider what to put in writing and/or in e-mails. Written materials are the most easily discoverable and often the most detrimental pieces of evidence during an investigation or prosecution. Counsel should carefully consider what information will be documented in writing, whether draft materials will be saved (mindful of the Doctrine of Spoliation⁸⁷), and who constitutes the potential universe of recipients for any reports or materials generated during an investigation. Materials that are committed to writing should be clearly labeled "privileged and confidential." Likewise, the use of e-mail during the course of an investigation should be carefully considered. E-mail makes exchanging information easy; however, it can be preserved forever, and the author has almost no control over who may eventually have access to the message. All of this makes e-mails a threat to the attorney-client privilege and, as such, they should be used sparingly.

Take special care with all electronic records. Electronic records, documents, and data⁸⁸ such as e-

mail, can create problems for counsel during an investigation. They may be hard to identify, difficult to locate, and may be part of multiple drafts or copies. One way to manage electronic records is to create a privilege log that lists all of the documents that may raise the attorney-client privilege or other protections. Retrieve all of the documents and e-mails, scan any related paper documents, and send all of the files into one electronic database. The company can then use specialized software to review these documents, weed out multiple copies, and flag all documents that may be a privileged communication. Counsel should review each of these documents to make a final determination on which are privileged and for what reason.

Approach the government agency and investigators with respect and provide non-privileged information incrementally. Government agencies emphasize the importance of a company cooperating during the course of an investigation. When and how a company demonstrates that cooperation can make a huge difference in whether a company is prosecuted and to what extent the investigation will be pursued. For DOJ investigations, the Thompson Memo makes clear that there are at least nine factors a federal prosecutor should consider in deciding whether to prosecute a corporate entity. There are many opportunities within this context for companies to demonstrate their willingness to cooperate without having to waive the attorney-client privilege. Companies can and should: (1) provide non-privileged information incrementally when available to demonstrate honesty and forthrightness; (2) share the company's compliance program to gain credit for the internal investigation; (3) disclose any subsequently discovered wrongdoing immediately to the appropriate authorities; (4) avoid negative publicity and communicating with the government through the media; and (5) implement employee sanctions as appropriate.

Consider suspending normal document retention procedures. During the normal course of business, companies routinely discard documents, recycle electronic devices, uninstall old software, install new software, and otherwise dispose of records and files. Once an investigation has commenced, or there is a likelihood that an investigation is imminent, companies should consider

⁸⁶ A more detailed discussion and analysis of the "magic circle" is available in *Massachusetts Institute of Technology*, 129 F.3d., p. 684.

⁸⁷ The Doctrine of Spoliation provides that if an entity destroys, alters, or mutilates evidence, a factfinder can infer that the evidence was unfavorable, and that the act constitutes obstruction of justice. See *Black's Law Dictionary*, 6th Ed., p. 1401 (West Publishing Co. 1997).

⁸⁸ Documents and data are electronic if they exist in a medium that can be read only through use of a computer or

other electronic device (e.g., magnetic discs, tapes, and optical discs). Also included in this category of documents are voice-mail messages and file back-ups, voice-mail tapes, website information (including log files), metadata, and cookies.

suspending these normal routines in order to ensure that relevant material is not lost or destroyed. One way to ensure this is for counsel, promptly upon learning an investigation is about to commence, to circulate a memo instructing appropriate personnel not to discard or dispose of certain specified categories of documents (e.g., all e-mails to XYZ Corp. or all documents from the Mexico plant facility). Remember that the intentional destruction of documents during the course of a government investigation may constitute obstruction of justice. Issuing a memo to employees to retain documents increases the likelihood that documents will not be destroyed, that the government will not pursue such a charge, and/or that the penalty for obstruction will be substantially reduced.

Special Considerations Prior To Waiving Privilege

If your company is contemplating waiving privileges, consider the following.

Execute carefully crafted agreements with regulators or prosecutors prior to releasing any potentially privileged documents to maximize the company's protection. While the courts remain divided on the effect such an agreement has on privileged communications, the agreements are still useful in building a record of your efforts to preserve the privilege. These agreements should make clear that the information is being provided voluntarily at the request of the agency. Specifically state that information is being provided confidentially and with no intention of creating a general waiver of the privilege. Also, specifically state that it is the intention of both the company and the government entity that the disclosure should not act as a waiver of privilege. Any agreement should also limit the scope of privileged materials to be shared with the government, including clearly defining the subjects of these materials, and limiting them, if possible, to materials created before the investigation.

If the company conducts an internal investigation, ***carefully consider whether to disclose a written report of the investigation to the government.*** By submitting a report of the investigation to the government, the company faces a substantial risk that all of the company's privileges with respect to the investigation will be deemed waived. Voluntary self-disclosure, however, may mitigate potential criminal penalties. Any report or materials prepared as part of the investigation should be clearly marked as privileged and confidential, and distribution should be limited to only those with an absolute need to know.

Carefully consider the timing of any disclosures or waivers. Making such significant de-

isions with little or no information is not prudent. Companies would be wise to defer waiver decisions until internal investigations are mature and there are fewer unknowns that may place the company in greater jeopardy.

Finally, ***consider hiring outside counsel who have a relationship with regulators or agencies doing the investigation.*** Firms that have an understanding of particular agencies or regulators may have insight as to the most favorable approach to an investigation. These firms can help highlight what may be of greatest importance during an investigation and may provide guidance on what pitfalls to avoid, as well as what has worked well for other clients in similar situations. If possible, consider firms with whom the company does not have an existing relationship. Hiring an independent third party will emphasize the seriousness with which the company is conducting its investigation.

Summary and Conclusion

The attorney-client privilege has recently come under attack as the government pressures companies to cooperate with government investigations. There are several steps companies can take, however, before and during an investigation to mitigate the risk of losing the attorney-client privilege. This report provides a high-level overview of the privilege and suggests several steps that companies can take to help preserve the privilege. As companies struggle to deal with the intricacies and requirements of SOX, companies, and particularly in-house counsel, would be well-served to understand the nuances of the privilege and prepare to take the necessary steps to protect it well before an investigation is ever commenced.

Given the state of the Sarbanes-Oxley world in which public U.S. companies operate today, it is unlikely that the government will reduce its demands for disclosure of confidential information when performing its investigative duties. Indeed, it is more likely that government pressure to disclose such information will be increased in future investigations. The Manufacturers Alliance/MAPI agrees with the ABA and others that any government policy or practice that coerces public companies to waive attorney-client and work product protections is detrimental to these companies, to the judicial system, and to society. We remain committed to a better solution, and we are hopeful that case law will evolve to mitigate the potential adverse consequences of these disclosures. The Manufacturers Alliance/MAPI will also continue to track developments affecting the attorney-client privilege and report on them to our membership.