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Pragmatic Selective Waiver: Re-Aligning Corporate Executives' Personal Interests with Those of the Corporation Amidst Government Investigations

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Pragmatic Selective Waiver: Re-Aligning Corporate Executives' Personal Interests with Those of the Corporation Amidst Government Investigations

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I. INTRODUCTION

In the corporate setting, government investigators increasingly ask corporations to waive the attorney-client privilege as part of the "cooperation" necessary to receive incentives.[1] In practice, however, these cooperation incentives have led to what has become known as a "culture of waiver," where waiver of the privilege in the face of investigation has become virtually essential.[2] One way courts have sought to diminish the negative externalities of waiver is through the doctrine of selective waiver. Selective waiver allows the corporation to waive the attorney-client privilege, but only to the government agency during the course of the investigation, while still retaining the right to assert the privilege against third parties.[3]

Thus far, the debate over selective waiver has focused on whether selective waiver should be judicially recognized and how to solve the unsettled nature of the law in the courts. Both the culture of waiver and the uncertainty regarding the selective waiver doctrine's validity have created tension between a corporate executive's personal interests and fiduciary duties. As currently implemented, the selective waiver doctrine may promote a perverse incentive for corporate managers to waive the corporation's attorney-client privilege in order to be deemed "cooperative" individually and thereby decrease their own personal criminal liability while potentially subjecting the company to extensive third-party liability.[4]

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1. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) & cmt. 12 (2004), *available at* http://www.ussc.gov/2004guid/CHAP8.pdf (explaining that full cooperation in an investigation will lower a defendant organization's "culpability score" and that waiver may be necessary for full cooperation).

2. *See infra* Part III.B.1.

3. Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts*, 86 B.U. L. REV. 691, 697 (2006).

4. *See infra* Part III.A.1.

Current and past proposed solutions fail to resolve this problem. Efforts by the Department of Justice ("DOJ") to reduce the requirement of waiver within their cooperation policies[5] have done little to ameliorate this tension. The proposed Attorney-Client Privilege Protection Act ("ACPPA")[6] also fails to eliminate either this tension or the culture of waiver because it still allows for voluntary waiver. The Judicial Conference's Proposed Rule of Evidence 502,[7] while nominally removing the threat of outside liability, allows government agencies to share information, thereby subjecting a company to threat of suit by another agency. Finally, the recently adopted Federal Rule of Evidence 502,[8] which rejects the selective waiver language of the proposed rule, perpetuates the predictability problem by allowing federal judges to determine the validity of selective waiver on a case-by-case basis.

Discarding the selective waiver doctrine is not an option. The realities of the culture of waiver and the inherent nature of corporate investigations command adoption of selective waiver in a predictable, codified form. Such an approach would preserve valuable policies *without* creating negative externalities, such as conflicts between an executive's personal interests and his fiduciary duties to the corporation. Either new legislation or new language is needed to amend the newly enacted Federal Rule 502 in a way that would explicitly recognize selective waiver. Such legislation must protect against both third-party liability and, unlike the formerly proposed Rule 502, separate agency liability. This is the only way to align the executive's personal and fiduciary roles appropriately. Such codification is also needed to protect corporations while giving the government the latitude it requires to investigate corporate crimes, thereby reconciling the duty of protecting shareholders with the preservation of the attorney-client privilege.

The purpose of this Note is to examine selective waiver and the way that non-recognition of the doctrine creates perverse incentives for corporate executives to abrogate their fiduciary duties. This Note

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5. Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

6. For the language of the ACPPA, see S. 186, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:s.186.

7. JERRY E. SMITH, COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 5–6 (2006), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf. This language never reached the Federal Rule of Evidence 502.

8. FED. R. EVID. 502(d).

suggests that the currently proposed solutions do not resolve this tension and that new or amended legislation is needed to reconcile these competing imperatives. Part II discusses the underlying policies and use of attorney-client privilege waiver, the tension the waiver requirement creates between corporations and government agencies, and the use of selective waiver as a solution to this tension. Part III critiques the current and proposed solutions through the lens of predictability and fiduciary duty incentives. Part IV proposes a codification of selective waiver law as a solution to the perverse incentive problem, which will provide certainty and eliminate the negative externalities created by currently available solutions.

II. ATTORNEY-CLIENT PRIVILEGE WAIVER IN THE CORPORATE WORLD

This Part provides background information regarding the selective waiver doctrine. Section A discusses the corporate attorney-client privilege in general. Section B discusses the waiver of the attorney-client privilege during government investigations of corporations. Section C discusses the use of selective waiver to promote information-gathering by the government agencies in their investigations without subjecting the corporation to third-party liability.

A. Corporate Attorney-Client Privilege

The attorney-client privilege protects from disclosure communications made in confidence between a client and an attorney for the purpose of obtaining or providing legal assistance.[9] The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients."[10] However, the protection of this information is at odds with the judiciary's mission to bring the truth to light.[11] Construed narrowly,[12] the attorney-client privilege is not absolute; divulging information to third parties waives the confidentiality protection.[13]

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9. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 68–72.

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

11. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 759 (6th ed. 2008).

12. *See, e.g.*, *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) (arguing that privilege "obstructs the search for truth" and should be "'strictly confined within the narrowest possible limits' ") (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 554 (McNaughton rev. 1961)).

13. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) ("If clients themselves divulge such information to third parties, chances are that they

The world of corporate attorney-client privilege begins (and often ends) with the Supreme Court's opinion in *Upjohn Co. v. United States.*[14] In *Upjohn*, corporate counsel gave out questionnaires that requested information about alleged payments to foreign government officials by the corporation's managers.[15] Corporate counsel voluntarily notified the Internal Revenue Service ("IRS"), and the IRS began its own investigation.[16] The IRS demanded copies of the questionnaires and notes from the interviews, but the counsel's office refused to provide them because it believed the requested materials were protected under the attorney-client privilege.[17]

Upjohn confirmed and clarified the application of the attorney-client privilege to corporations.[18] The *Upjohn* Court signaled an end to conflicts over the extent and scrutiny of disclosure of attorney-client communications in a corporate atmosphere,[19] ruling in favor of a practical and flexible judicial approach.[20] The *Upjohn* Court declined to disseminate a comprehensive test; instead, the Court stressed the importance of case-by-case decisions on privilege issues.[21] While *Upjohn* still serves as the baseline for attorney-client privilege in corporate settings, the case-by-case analysis has been problematic in its application. Thus, some courts have begun to develop more systematic rules regarding the attorney-client privilege and its waiver, relying on the policies from *Upjohn.*[22]

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would also have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed privileged information to a third party, the basic justification for the privilege no longer applies. . . ." (quoting Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982))).

14. *Upjohn*, 449 U.S. at 389.

15. *Id.* at 386–87.

16. *Id.* at 387.

17. *Id.* at 387–88.

18. *Id.* at 389–97.

19. Prior to *Upjohn*, many courts employed a "control group" test, which extended privilege only to communications between an attorney and a member of the corporation's designated "control group" of executives, a group composed of individuals who are given a decisionmaking function regarding the corporation's legal matters. Other courts used the "subject matter" or "*Harper & Row*" test, where communication was privileged if: (1) the communication was between an attorney and an employee of the corporation; (2) the employee's supervisors directed the employee to make the communication; and (3) the subject matter of the communication dealt with the employee's duties in the context of his employment. Katherine M. Weiss, Note, Upjohn Co. v. United States *as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV 501, 504–05 (2007).

20. *Upjohn*, 449 U.S. at 396.

21. *Id.*

22. *See infra* Part III.A.1.

Since the waiver issue comes to the forefront in many government investigations, the *Upjohn* Court's policies for corporate attorney-client privilege continue to be salient. The Court espoused a pragmatic view of the attorney-client privilege,[23] focusing on increasing predictability, protecting the attorney's fact-gathering role in the corporate context, and incentivizing self-policing and compliance programs.[24] The Court noted that "[a]n *uncertain* privilege, or one which [sic] purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[25] The Court extolled the importance of frank communication and information flow between corporate employees and corporate counsel during internal investigations.[26] The *Upjohn* Court encouraged voluntary compliance with the law by decreasing the conflicting interests for attorneys who conduct internal investigations.[27] On the one hand, the attorney has an incentive to promote compliance with the law, and communications with low-level employees are essential to maintaining compliance.[28] On the other hand, the attorney seeks to avoid exposing the corporation to liability and has an incentive not to interview low-level employees because the attorney-client privilege may not protect these communications.[29] Specifically, the Court recognized that judicial interpretation of the attorney-client privilege can favor frank communication and voluntary compliance with the law.[30]

Without any Supreme Court clarification regarding selective waiver,[31] the *Upjohn* policy should be dispositive when evaluating the

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23. By resolving the conflict in favor of encouraging corporate self-policing and internal investigations, the *Upjohn* Court demonstrated a utilitarian or functionalist pragmatic approach to the attorney-client privilege. *See* Michael L. Waldman, *Beyond* Upjohn: *The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 481 n.39 (1987) (citing *Upjohn* as an example of reliance on utilitarian justifications); Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications via E-mail and the Internet – From* Upjohn Co. v. United States *and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553, 570 (1998) ("[T]he *Upjohn* holding can be interpreted as a functionalist approach.").

24. *Upjohn*, 449 U.S. at 392–95. For a more in-depth analysis of the policy arguments in *Upjohn*, the continuing policy concerns addressed in *Upjohn*, and the application of those arguments to the selective waiver doctrine, see Weiss, *supra* note 19, at 506–08.

25. *Upjohn*, 449 U.S. at 393 (emphasis added).

26. *Id.* at 390–92.

27. *Id.* at 391–92.

28. *Id.*

29. *Id.*

30. *Id.*

31. The Supreme Court itself reaffirmed *Upjohn*'s policy values in *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (citing *Upjohn* for the principle that an asserted privilege must serve public ends).

validity of all attorney-client privilege interpretations, including waiver of the privilege. The exceptions to the waiver doctrine acknowledged by courts[32] are justified because they are "consistent with the goal underlying the privilege."[33] Thus, selective waiver of the attorney-client privilege is tolerable insofar as it is consistent with the rationales justifying the privilege itself.[34]

B. Attorney-Client Privilege Waiver and Government Cooperation Agreements

Corporations bear responsibility for their agents, including corporate officers, who commit illegal acts or misconduct that (a) are within the scope of the agents' employment; and (b) are intended, at least in part, to benefit the corporation.[35] Consequently, criminal actions by any individual within the corporation effectively may be imputed to the entire corporation, even when the acts also violate corporate policy.[36] Prosecutors need only prove that one agent of the corporation committed the act—even if that actor did not have criminal intent—to hold the corporation liable.[37] This element of vicarious liability has led to massive internal compliance investigations conducted by the corporations themselves.[38]

These internal compliance investigations, carried out by either inside or outside corporate counsel, can be the greatest source of information about the internal workings of the company.[39] Government agencies, with their limited resources and "outsider" status, have a difficult time getting "inside" these corporate crimes. Thus, often the government will look for means to obtain the results of the corporation's internal investigations. One way the government gains this information is by encouraging corporations to waive their privilege using a reward system. Under the United States Sentencing

32. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 922–23 (2d Cir. 1961) (allowing communications to be shared with an accountant for purposes of obtaining legal advice from an attorney without waiving the privilege).

33. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991).

34. Mitchell, *supra* note 3, at 700.

35. Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 136 (2007).

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

37. *Id.*

38. Kathryn Keneally & Kenneth M. Breen, *White Collar Crime: New Life for Selective Waiver*, 30 CHAMPION 42, 42 (2006).

39. *Id.*

Commission's Organizational Sentencing Guidelines ("Guidelines"), culpable corporations are rewarded with drastically reduced fines if they cooperate with the government.[40] Due to the increased number of criminal sanctions for white collar crimes[41] and the almost nullifying effect of the drastically reduced sentences, corporations subject to government investigation often are left with little choice but to waive the attorney-client privilege.

The Guidelines use a "culpability score" to determine a corporation's sentencing level, ranging from one to ten, which is then multiplied against a base fine for that particular crime. [42] This figure is: "(1) the amount assigned to the offense that the organization has committed by an offense level fine table; (2) the pecuniary gain to the organization from the offense; or (3) the pecuniary loss from the offense knowingly caused by the organization, whichever is greater."[43] The initial culpability score accorded to an organization is five, which is increased or decreased by a series of codified aggravating or mitigating factors.[44] One mitigating factor is cooperation, which reduces the culpability score by five, potentially negating all corporate culpability entirely.[45] The Guidelines require timely and thorough cooperation to satisfy this requirement. Timeliness requires contemporaneous cooperation with notification of criminal investigation, while thoroughness requires disclosure of all relevant information to investigating authorities necessary to "identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct."[46] The DOJ clarified, through a series of public memoranda,[47] that disclosure of all relevant information may require waiver of the attorney-client privilege and work-product doctrine. As a result of the "cooperation" factor in its culpability score, a corporation may receive a substantial reduction of its ultimate financial liability.

The cooperation incentive does not apply only to the corporation as an entity; corporate actors who are personally liable for

40. Weiss, *supra* note 19, at 522.

41. *See generally* Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amendments in scattered sections of 15 U.S.C. and 18 U.S.C.).

42. John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 619–20 (2005).

43. *Id.*

44. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004), *available at* http://www.ussc.gov/2004guid/CHAP8.pdf.

45. Hasnas, *supra* note 42, at 620.

46. Buchanan, *supra* note 36, at 594 (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (2004)).

47. *See infra* Part III.B.1.

their criminal conduct if the corporation is found guilty also may benefit from cooperation similarly. For example, prosecutors may file a substantial assistance motion to favor individual corporate executives who have "cooperated."[48] These personal incentives may induce managerial agents, who may be calling the shots during the government investigation, to waive the corporation's attorney-client privilege for their own benefit. This incentive creates a potential conflict-of-interest between the corporate officers' own wellbeing and their fiduciary duties to the corporation and its shareholders.[49] As a result, the corporate executive will have a perverse incentive to side with the government against the corporation that he has a duty to manage. While appearing to be motivated to cooperate with the government for the best interest of the corporation, the manager may be acting clandestinely to reduce his own criminal liability by waiving the corporation's attorney-client privilege.

C. Selective Waiver as a Solution to Tension

1. Selective Waiver in Government Investigations

Selective waiver allows the corporation to waive the attorney-client privilege to allow the government access to the information during the investigation while retaining the right to assert the privilege against other parties.[50] Therefore, any protected information disclosed to the government during investigations or enforcement is not discoverable by potential private third-party litigants after disclosure occurs, as would normally be the case.[51] Corporations and government agencies are increasingly entering into selective waiver agreements prior to any disclosure.[52] Corporations, in cooperation with the government, can avoid the harsh penalty of complete waiver

48. Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795, 798 (2002).

49. *Id.* at 804.

50. Andrew J. McNally, Note, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing By Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 837 (2005).

51. *See, e.g., In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 n.5 (6th Cir. 2002).

52. Mitchell, *supra* note 3, at 691. For an analysis of the origin of the selective waiver controversy, see Richter, *supra* note 35, at 135–36. Courts also may imply selective waiver from mere disclosure to government agencies, absent an agreement between private party and agency that disclosure does not constitute waiver. *Id.*

that privilege law requires and still obtain the benefits of full cooperation with the government.[53]

One problem with selective waiver occurs when corporations perform internal investigations in reliance on these agreements and unearth information that may later expose them to significant liability—e.g., third-party derivative or class action lawsuits—if a later court does not enforce the agreement.[54] Due to the prevailing culture of waiver[55] and the incentive to obtain decreased criminal penalties[56] through cooperation, corporations face a Hobson's choice.[57] They may either take the government's offer of "cooperation" and make the corporation subject to potentially debilitating civil liability, or face individual and corporate criminal penalties. As one commentator observed:

> [C]orporations often have little practical choice regarding disclosure. Pursuant to federal policy and practices, they face considerable pressure to share the results of internal investigations with federal agencies, both to demonstrate "cooperation" and to mitigate potential civil and criminal penalties. Selective waiver agreements have developed as a means to navigate between the pressures and perils surrounding such cooperation.[58]

Enforceable selective waiver agreements allow corporations to maintain legal compliance and conduct internal investigations, both of which serve overall public policy goals and protect both consumers and shareholders, even though these internal investigations potentially produce fodder for future civil suits. However, courts do not always enforce selective waiver agreements. If an agreement is not recognized by the court, through the agreement the corporation has facilitated third-party claims and increased the possibility of additional civil penalties. Whether a particular court believes that selective waiver is in accord with the *Upjohn* policies[59] or other policy considerations[60] determines whether a court will uphold selective waiver agreements.

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53. *See, e.g.*, Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1420 (3d Cir. 1991) ("[D]isclosure of privileged information to any third party, including the government, destroys the privilege.").

54. *See* Mitchell, *supra* note 3, at 692.

55. *See infra* Part III.B.1.

56. *See supra* Part II.B.

57. A Hobson's choice is an "apparently free choice when there is no real alternative." MERRIAM-WEBSTER'S ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/hobson's%20choice (last visited Oct. 3, 2008).

58. Mitchell, *supra* note 3, at 692 (internal citations omitted).

59. *See generally* Upjohn Co. v. United States, 449 U.S. 383 (1981).

60. *See infra* Part III.A.

2. Selective Waiver at Common Law

The selective waiver doctrine can be traced to the 1978 decision of *Diversified Industries, Inc. v. Meredith.*[61] Diversified Industries, Inc. ("Diversified") voluntarily produced subpoenaed materials to the Securities and Exchange Commission ("SEC") pursuant to a securities investigation.[62] In subsequent litigation, a third party sought to compel Diversified to produce these materials, claiming either that the materials were not covered by the attorney-client privilege or, alternatively, that the privilege had been waived by disclosure to the SEC.[63] The court held that voluntary disclosure of privileged materials to the SEC did not waive the privilege.[64] According to the *en banc* court,

> As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.[65]

From this lone paragraph the selective waiver doctrine was born.[66]

Despite the Eighth Circuit's initial adoption of the selective waiver doctrine, the concept has gained little judicial support in subsequent years. Just three years after the Eighth Circuit's decision in *Meredith*, the D.C. Circuit rejected the selective waiver doctrine in *Permian Corp. v. United States.*[67] There, a corporation sought to enjoin the SEC from giving documents to another government agency instead of third-party litigants.[68] The D.C. Circuit found that a limited waiver would not "serve the interests underlying the common-law privilege for confidential communications between attorney and client."[69] The court noted that the justification for granting the privilege "ceases when the client does not appear to have been desirous of secrecy."[70] The court further explained that a selective waiver exception

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61. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
62. *Id.* at 599.
63. *Id.*
64. *Id.* at 611.
65. *Id.* (internal citations omitted).
66. The court justified selective waiver with the policy of encouraging internal investigations by corporations, not with the policy of divulging confidential information to the government. *Id.*
67. Permian Corp. v. United States, 665 F.2d 1214, 1221–22 (D.C. Cir. 1981).
68. *Id.* at 1215.
69. *Id.* at 1220.
70. *Id.* (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2311, at 599 (McNaughton Rev. 1961)).

effectively would transform the privilege into a tactical litigation tool, which was not the purpose for which the privilege was designed.[71] Finally, the court rejected the "government necessity" argument, stating that it was "aware of no congressional directive or judicially-recognized priority system that places a higher value on cooperation with the SEC."[72]

The Sixth Circuit rejected selective waiver as to both attorney-client privilege and attorney work-product in *In re Columbia/HCA Healthcare Corporation*.[73] In that case, the corporation agreed to produce some internal audits to the DOJ in exchange for a cooperation agreement with stringent confidentiality provisions.[74] When private litigants sought an order compelling the production of privileged documents,[75] the Sixth Circuit rejected the corporation's selective waiver defense, finding its waiver "complete and final."[76] The Sixth Circuit conceded that selective waiver encourages disclosure to government agencies, but it reasoned that the attorney-client privilege was never designed "to protect conversations between the client and the government," and the court questioned whether the government should enter into such agreements.[77]

Most recently, the Tenth Circuit seemed to join the majority of circuits in rejecting selective waiver,[78] although it did not completely foreclose its use in future cases. In *In re Qwest Communications International Securities Litigation*, documents were again provided to the DOJ and SEC pursuant to subpoenas and written confidentiality agreements.[79] When civil plaintiffs subsequently sought these same materials, the magistrate judge found that Qwest had waived its privilege.[80] On appeal, the Tenth Circuit concluded that the *record* did not "justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material."[81] Because the *Quest* court expressly noted that its holding depended

71. *Id.* at 1221.

72. *Id.*

73. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 306–07 (6th Cir. 2002).

74. *Id.* at 292.

75. *Id.* at 293.

76. *Id.* at 302–07.

77. *Id.* at 302–03.

78. *In re* Qwest Commc'ns Int'l Sec. Litig., 450 F.3d 1179, 1200 (10th Cir. 2006).

79. *Id.* at 1181.

80. *Id.* at 1182.

81. *Id.* at 1192.

solely upon the record of the case, the doctrine of selective waiver may be open for consideration in the lower courts in the Tenth Circuit.[82]

Federal and state courts' views of selective waiver have been inconsistent, and the doctrine remains unsettled. The lack of a uniform approach to selective waiver complicates a corporation's decision to waive its attorney-client privilege to the government by making it difficult for a corporation and its attorneys to predict whether these agreements will be upheld.[83] Selective waiver agreements are rejected by a majority of courts, although the reasoning differs from jurisdiction to jurisdiction, and few courts have been willing to recognize selective waiver under certain conditions.[84] This doctrinal dissonance can be divided into three basic camps: (1) disclosure to a government agency completely waives attorney-client and work-product privileges;[85] (2) disclosure to a government agency does not constitute waiver per se;[86] and (3) selective waiver is permissible only in situations in which the government has signed a binding confidentiality agreement prior to the disclosure.[87] The majority of courts fall into the first camp, rejecting selective waiver entirely because they are not convinced that the policy justifications for the attorney-client privilege or work-product doctrine can override the traditional rules governing waiver.[88] However, courts at both the district and appellate level have found these exogenous policy considerations sufficiently compelling to uphold selective waiver agreements. Many district courts evaluate the application of the selective waiver doctrine on a case-by-case basis because the law remains unsettled and circuit courts have not provided clear guidance.

III. UNSETTLED NATURE OF SELECTIVE WAIVER JURISPRUDENCE: PROBLEMS AND PROPOSED SOLUTIONS

This Part discusses the problems caused by the unpredictability in courts' adoption of selective waiver and the solutions that promote the *Upjohn* principles and pragmatic policies.

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82. *Id.*

83. *See infra* Part III.

84. *See infra* notes 87–96 and accompanying text.

85. Mitchell, *supra* note 3, at 697–98.

86. *Id.* at 698.

87. Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 734 (2006). There is an additional variation in the third camp, as at least one court has allowed selective waiver to opinion work-product, but not to fact work-product. *In re* Qwest Commc'ns Int'l Inc. Sec. Litig., No. Civ.01-CV014551REBCBS, 2006 WL 278279, at *1 (D. Colo. Feb. 2, 2006).

88. Mitchell, *supra* note 3, at 701.

First, Section A discusses the attorney-client privilege and the perverse incentives for corporate executives to waive the privilege without due regard to the shareholders' best interests. Section B examines potential solutions to the problems surrounding selective waiver.

A. The Tension Between Government Investigations and Corporate Attorney-Client Privilege

1. The Unsettled Nature of Selective Waiver in the Courts

The different approaches to selective waiver in the circuit courts reflect differences in balancing the policies that justify selective waiver and those that call for its rejection. Each court purports to uphold the *Upjohn* principles, but each has its own interpretation of what the *Upjohn* principles are. The case-by-case determination championed by the *Upjohn* decision is the only portion of the decision that has been unanimously upheld in selective waiver jurisprudence. The Eighth Circuit in *Diversified* is the only circuit court to expressly adopt the selective waiver doctrine.[89] The circuits that purportedly reject selective waiver are the First,[90] Second,[91] Third,[92] Fourth,[93] Sixth,[94] Seventh,[95] Tenth,[96] D.C.,[97] and Federal Circuits.[98] Often,

89. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

90. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–86 (1st Cir. 1997) (rejecting the *Diversified* approach, forcing MIT to disclose audits obtained by the Department of Defense to the IRS). *But see* United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995) (stating that "[i]f there were ever an argument for limited waiver, it might well depend importantly on just what had been disclosed to the government and on what understandings"). Thus, even with precedent established, the First Circuit has developed a case-by-case analysis; the First Circuit is open to recognizing selective waiver dependant on the facts.

91. *See In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (agreeing with the *Permian* court's decision and reasoning). *But see In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (denying application of selective waiver under the particular facts before the court, but declining to adopt a per se rule that all voluntary disclosures waive work-product protection).

92. *See* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991) ("[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose."); *see also In re Steinhardt Partners, L.P.*, 9 F.3d at 235 ("[S]elective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.").

93. *See In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (rejecting selective waiver for attorney-client privilege and non-opinion work product).

94. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002) (rejecting "the concept of selective waiver, in any of its various forms").

however, these rejections are merely fact-based, non-precedential opinions; thus, they are subject to change. The First Circuit, while technically recognized as rejecting selective waiver, has actually advocated for a case-by-case analysis when deciding whether to recognize selective or "limited" waiver.[99] Other courts supposedly rejecting selective waiver, such as those in the Second Circuit, refuse to establish a per se rule, leaving the selective waiver doctrine open to different interpretations.[100] As the Tenth Circuit recognized in *Qwest,* these cases are fact-specific.[101] Thus, many courts of appeals merely find that selective waiver was unenforceable on the facts adjudicated and do not reject selective waiver in other cases. The Fifth, Ninth, and Eleventh Circuits have not yet addressed the doctrine, and there is no clear consensus in the district courts of these circuits. Federal selective waiver jurisprudence is thus in "a state of hopeless confusion."[102]

Even within "settled" circuits, without Supreme Court precedent or a per se basis of interpretation, attorneys and corporations cannot predict whether precedent will be followed when they decide to enter selective waiver agreements. Richard Humes, Associate General Counsel for the SEC, asks if securities lawyers may "tell their corporate clients in good faith that they should execute these confidentiality agreements with any realistic expectation that they will be given effect by a court presiding over a private action

95. *See* Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1127–28 (7th Cir. 1997) (rejecting selective waiver, but leaving open the possibility that selective waiver conditioned on the presence of a confidentiality agreement might be sustainable).

96. *See In re* Qwest Commc'ns Int'l Sec. Litig., 450 F.3d 1179, 1201 (10th Cir. 2006) (holding that "the record *in this case* does not justify adoption of selective waiver" (emphasis added)).

97. *See* Permian Corp. v. United States, 665 F.2d 1214, 121–22 (D.C. Cir. 1981) (rejecting limited or selective waiver of documents provided to the SEC).

98. *See* Genentech, Inc. v. U.S. Int'l Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (citing the *Permian* decision and rejecting the limited waiver theory).

99. United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995) ("If there were ever an argument for limited waiver, it might well depend importantly on just what had been disclosed to the government and on what understandings.").

100. *See In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (denying application of selective waiver under the particular facts before the court, but declining to adopt a per se rule that all voluntary disclosures waive work-product protection).

101. *In re Qwest Commc'ns*, 450 F.3d at 1201. The *Qwest* court noted repeatedly that it was deciding the case on the basis of the record before it and seemed to be particularly skeptical of Qwest's arguments because the agreement was entered into while Qwest was already in private litigation concerning the same subject matter; thus, Qwest knew that the documents were likely to be subpoenaed and that the risk of finding a waiver was substantial. *Id.*

102. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294–95 (6th Cir. 2002) (quoting *In re* M&L Bus. Mach. Co., 161 B.R. 689, 696 (D. Colo. 1993)) (citations and internal quotations omitted).

against the company in [sic] which the internal report is sought?"[103] He acknowledges that while a lawyer has an obligation to advise his client as to the state of the law in any particular district court or circuit, there has been no precedential decision rejecting selective waiver in many jurisdictions, nor any Supreme Court precedent on the issue.[104] Thus, it is reasonable in any jurisdiction to advise a client to: (1) sign a selective waiver agreement with the government; and (2) rely on a court to uphold the agreement based on the unique facts of the case. Even in jurisdictions where it is "settled" that courts reject the selective waiver doctrine, reliance on a selective waiver agreement would not be frivolous or unreasonable because of the case-specific nature of these decisions. Accordingly, the decision to make a selective waiver agreement, even when against precedent, could not be challenged, even if it is not in the best interest of the corporation.

Even in jurisdictions ruling against selective waiver, judges have made compelling arguments in support of selective waiver. For example, Judge Danny Julian Boggs's dissent in the Sixth Circuit made a persuasive case for selective waiver, focusing on a "more pragmatic approach"[105] that looks at incentives for corporate privilege holders under the third-party waiver rule and the public policy underlying cooperation with government agencies.[106] Judge Boggs noted that policy questions "are at the heart of the privilege inquiry," and privilege rules should be decided with an eye toward the public interest and potential negative side effects.[107] Looking at *Upjohn*, Judge Boggs could not find any rule "narrowly constraining the considerations that courts may take into account in developing rules regarding a common law privilege or requiring that courts turn a blind eye to the practical effect of the privilege rules that they are charged to create."[108]

As long as the validity of these agreements remains unsettled, "corporations may be dissuaded from full cooperation with investigative agencies, and the government's ability to discover and

103. Richard Humes, *Remarks of an SEC Associate General Counsel*, 57 CASE W. RES. L. REV. 341, 353 (2007).

104. *Id.*

105. *In re Columbia/HCA*, 293 F.3d at 309 (Boggs, J., dissenting). Judge Boggs found no need to tie selective waiver to the underlying purpose of the attorney-client privilege: "It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege." *Id.* at 308 (emphasis omitted).

106. *Id.* at 309–10.

107. *Id.* at 310.

108. *Id.*

prosecute corporate wrongdoing may suffer."[109] Without a predictable selective waiver doctrine, neither the government nor private parties are likely to obtain the privileged information because of the disincentives created.[110] This furthers the truth-seeking process by increasing total access to information despite prohibiting disclosure to third-party litigants, which is the purpose of the attorney-client privilege itself.[111] Government agency acquisition of this information serves public interests; yet satisfying that interest can be appropriately achieved by carving out a right of limited use to preserve the privilege against use by potential third-party litigants.[112]

2. The Problem of Perverse Incentives and Fiduciary Duty for Corporate Officers

There has been very little scholarship addressing the effects of selective waiver on corporate CEOs and other officers who may face perverse incentives when making the decision to waive the attorney-client privilege. Much of the scholarship regarding selective waiver focuses on its impact on government investigations,[113] its impact on corporate attorney-employee relationships,[114] traditional attorney-client privilege concerns,[115] fundamental fairness,[116] constitutional and congressional rights,[117] and other facets of the selective waiver issue. Abstraction of the corporate entity is easy and common (and

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109. Mitchell, *supra* note 3, at 698.

110. *See In re Columbia/HCA*, 293 F.3d at 312–13 (Boggs, J., dissenting) ("Without the exception, much otherwise disclosed material would stay completely in the dark, under the absolute cover of privilege. The exception aids the government in bringing violations of the law to light.").

111. *See id.* at 307 (Boggs, J., dissenting) (arguing that "a government investigation exception to the third-party waiver rule would increase the information available over that produced by the court's rule and would aid the truth-seeking process."). Judge Boggs concluded that "[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail." *Id.* at 311.

112. *Id.* at 311–12.

113. *See, e.g.*, Jody E. Okrzesik, *Selective Waiver: Should the Government be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115 (2003) (proposing that federal courts adopt selective waiver with a valid confidentiality agreement as a compromise).

114. *See, e.g.*, Buchanan, *supra* note 36, at 590.

115. *See, e.g.*, McNally, *supra* note 50 (advocating the adoption of a modified selective waiver doctrine).

116. *See, e.g.*, Michael Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761 (2006) (arguing in favor of selective waiver based on notions of fairness).

117. *See, e.g.*, Mitchell, *supra* note 3, at 691.

useful in many situations);[118] it is often difficult to remember the people involved when formulating policy. As executives make human choices for the corporation, however, they face a series of Hobson's choices when deciding whether to assert or waive the attorney-client privilege.[119] Fiduciary duties require corporate executives to act in the best interest of the company and its shareholders. However, in cases in which the executive is also implicated in the alleged wrongdoing, the risk of personal liability may sufficiently distract the executive from duties to the corporation. This may create a perverse incentive for the executive to act in ways counter to the company's interests by exposing the entity to greater liability in order to minimize personal liability.[120]

The government's escalating demands for waiver of the attorney-client privilege in investigations have become particularly problematic for corporate agents.[121] It is not inherently wrong for corporations to waive the attorney-client privilege to demonstrate cooperation in exchange for obtaining incentives in government investigations, but problems occur when waiver is against the shareholders' best interest. Conflicts between the corporation and the

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118. *See* CHARLES R. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 141 (5th ed. 2006).

119. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 636, 641 (2006):

> Currently, the process of an internal investigation may well force executives and employees into a series of Hobson's choices. As a practical matter, executives and employees must participate in the investigation interviews or else lose their jobs. Then, having participated - or having considered participating - in the interviews, an executive or employee may decide he wants outside counsel to guide him through the process. While the employee might reasonably expect his company to help pay the legal bills associated with an inquiry into the work he did for the company - and most companies do so - the DOJ or the SEC policies often disfavor such support, depending upon how the government views the individual's conduct. These individuals may be left in the difficult position of paying their own legal fees or else forfeiting legal representation. . . .
>
> A related casualty of this new trend of waiver demands peculiar to public corporations is its effect on the willingness of business leaders to assume board positions. Facing increased administrative responsibilities and costs as well as decreased nimbleness in managing companies that results from this imbalance of prosecutorial power, the most qualified candidates now often refuse board positions - a trend that hurts our markets by draining the most qualified human capital and thereby decreasing the efficiency of public corporations.

120. *Id.* at 641–42.

121. *Id.* at 636.

managing executives occur even where the executives act with the good-faith belief that their actions were appropriate and in the company's best interests.[122] When directors and executives face individual indictment, they are less likely to look out for the shareholders' best interests or "reason through to a sound decision."[123] The government pressures on executives to waive privilege erode the traditional commitment of a company's fiduciaries to the corporate enterprise.[124] The executive's first instinct is to protect himself, not to defend the company from third-party litigants or government oppression.[125] This may place an executive of the company in a diametrically opposed position relative to the corporation, aligning his interests with those of the government instead of the corporation.

B. Potential Solutions Posited to Relieve the Tension Between Corporations and the Government Regarding Selective Waiver

Several solutions have been advanced to resolve the uncertain nature of selective waiver. These solutions, however, may have significant implications for the fiduciary relationship. This Note evaluates these potential solutions from the perspective of the officers and directors of the corporation, for whom the incentives and disincentives are created and who may be subject to individual criminal liability.

1. Governmental Cooperation Without Waiver—Culture of Waiver Concerns

Recognizing the pervasive culture of waiver, the DOJ ostensibly attempted to eliminate the privilege waiver through a series of official memoranda. A 1999 DOJ memorandum, later known as the "Holder Memo," considered, *inter alia*, "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product

122. *Id.* ("[T]he Government frequently seeks internal investigation reports authored by legal counsel, witness interviews conducted by counsel in connection with internal investigations, notes made by counsel, and documents that evidence the legal advice provided by counsel during the internal investigation." (citing MARC I. STEINBERG, ATTORNEY LIABILITY AFTER SARBANES-OXLEY § 7.03 (2005))).

123. McLucas, *supra* note 119, at 641.

124. *Id.*

125. *Id.*

privileges."[126] Similarly, in 2001 the SEC published considerations for adequate cooperation, asking such questions as: "Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? [And d]id the company voluntarily disclose information [to] our staff . . . [that we] otherwise might not have uncovered?"[127] The SEC further clarified that "in some cases the desire to provide information to the Commission may cause companies to consider waiving their attorney-client privilege rights."[128] Although they do not explicitly require waiver of attorney-client privilege, these memoranda provided DOJ and SEC attorneys with administrative support for requesting waiver during negotiations with corporate officers to obtain their "cooperation." Rather than representing any true shift in policy, these memoranda made the pressure to waive more surreptitious.

In 2003, the DOJ reaffirmed its position on waiver of the attorney-client privilege in the Thompson Memorandum:

> 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. . . . [Privilege waivers] are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.[129]

Critics protested that these DOJ policies made waivers a de facto prerequisite for being considered "cooperative." This prerequisite has led to a culture of waiver in which waiver of the attorney-client privilege by corporations is almost automatic and is viewed by corporate counsel as an unspoken prerequisite for receiving the benefits associated with "cooperation." To combat this criticism, the DOJ issued the McNulty Memorandum, which attempted to mitigate concerns about the seemingly imperative nature of the waiver requirement by requiring only the "least intrusive waiver necessary to conduct a complete and thorough investigation."[130] In theory,

126. Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (June 16, 1999), *available at* www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.

127. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

128. *Id.*

129. Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Jan. 20, 2003), *available at* www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

130. Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys 9 (Dec. 12, 2006), *available at* www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

therefore, the DOJ could investigate corporate malfeasance aggressively while exercising discretion in requesting waiver of the attorney-client privilege.

However, the nature of white collar criminal investigations almost invariably requires waiver of the attorney-client privilege, proving that in practice waiver will not merely be requested when "necessary," as the DOJ has previously stated.[131] Furthermore, the inertia created by the culture of waiver makes it hard to believe that corporate counsel would suddenly feel no pressure to waive the privilege, even if the DOJ does not define it as strictly necessary. The danger of the DOJ's iterative and remedial steps is that these steps create an illusion of a policy shift without following through in practice.[132] Critics of this "evolving" DOJ policy on waiver therefore have reviled the McNulty Memorandum as "but a modest improvement," arguing that the revised DOJ statement "falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege" during government investigations."[133]

2. Attorney-Client Privilege Protection Act Legislation

Congress, noting the problem with attorney-client privilege waiver in the government's corporate investigations, put forth its own proposed solution to the problem of selective waiver: the Attorney-Client Privilege Protection Act[134] ("ACPPA").[135] The ACPPA is endorsed by the ACLU,[136] the Association of Corporate Counsel,[137] and

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131. *Id.* at 7.

132. *See* Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, 5 A.B.A. J. EREPORT 49, 49 (2006) ("The Justice Department's new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product and employee protections during government investigations." (quoting ABA President Karen J. Mathis)).

133. *Id.* The ABA continues to urge passage of the Attorney-Client Privilege Protection Act of 2006, which is basically an echo of the ABA position on the issue. *Id.*

134. For the language of the Act, see S. 186, 110th Cong. (2007), *available at* http://thomas.loc.gov (search "Attorney-Client Privilege Protection Act"; then follow "S.186.IS" hyperlink).

135. On January 4, 2007, Senator Specter reintroduced the Attorney-Client Privilege Protection Act of 2007. The legislation was originally introduced on December 7, 2006. *See* Carrie Johnson, *Higher Hurdles Set in Corporate Crime Cases: Business Pressure Spurs Change*, WASH. POST, Dec. 13, 2006, at D1.

136. Press Release, Am. Civil Liberties Union, ACLU Welcomes Attorney-Client Privilege Protection Act, Says Bill Would Safeguard Constitutional Right to Counsel (Dec. 7, 2006), *available at* http://www.aclu.org/crimjustice/gen/27637prs20061207.html.

137. Press Release, Ass'n of Corporate Counsel, What Does the DOJ's Issuance of the "McNulty Memorandum" Mean for You and Your Client (Dec. 13, 2006), *available at* http://www.acc.com/public/attyclientpriv/mcnulty-tp.pdf.

American Bar Association ("ABA") President Karen Mathis.[138] Its stated purpose is to "place on each agency clear and practical limits designed to preserve the attorney-client privilege and work-product protections available to an organization and protect the constitutional rights and other legal protections available to employees of such an organization."[139] The organizations that advocate for the proposed legislation believe it would remove attorney-client privilege waiver from considerations of "cooperation" altogether.[140] However, this argument fails to consider the provisions of the ACPAA that still allow for voluntary waiver of the attorney-client privilege.

The ACPPA lays out a bright-line rule regarding the waiver of attorney-client privilege by corporations and other organizations during government investigations. Under the ACPPA, the United States may not "demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work-product."[141] Agents or attorneys of the United States also may not "condition a civil or criminal charging decision relating to a [sic] organization, or person affiliated with that organization, on . . . any valid assertion of the attorney-client privilege or privilege for attorney work-product."[142] To justify its bright-line rule, Congress listed its policy findings within the ACPPA, explaining that the ACPPA could be the solution to the plethora of problems associated with waiver during government investigations.[143]

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138. Press Release, ABA, Statement by ABA President Karen J. Mathis Regarding Revisions to the Justice Department's Thompson Memorandum (Dec. 12, 2006), *available at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59.

139. S. 186.

140. Richter, *supra* note 35, at 146–48.

141. S. 186 § 3(a).

142. *Id.*

143. These findings by Congress include:

> (1) Justice is served when all parties to litigation are represented by experienced diligent counsel.
>
> (2) Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law.
>
> (3) To serve the purpose of the attorney-client privilege, attorneys and clients must have a degree of confidence that they will not be required to disclose privileged communications.
>
> (4) The ability of an organization to have effective compliance programs and to conduct comprehensive internal investigations is enhanced when there is clarity and consistency regarding the attorney-client privilege.

The ACPPA is intended to significantly alleviate the pressure on corporations to waive their attorney-client privilege under the DOJ policy and the Sentencing Guidelines.[144] The ACPPA provides maximum protection for corporations seeking to assert the attorney-client privilege in a government investigation. Under the ACPPA's bright-line rule, prosecutors may not consider corporations' willingness to waive the privilege either in making a charging decision or in determining cooperation, thereby quashing selective waiver—even in jurisdictions that recognize it.

Most of the ACPPA's critics focus on the effect it has on investigations. Because cooperation agreements are important law enforcement tools, any inhibition of the creation of these agreements would be costly for government agencies. Enactment and codification of the ACPPA would do little to encourage cooperation and, as such, the ACPPA is not in the best interests of federal prosecutors.[145] Although the ACPPA may allow for a free flow of honest communication between corporate employees, it may inhibit any flow

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> (5) Prosecutors, investigators, enforcement officials, and other officers or employees of government agencies have been able to, and can continue to, conduct their work while respecting attorney-client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations.
>
> (6) Despite the existence of these legitimate tools, the Department of Justice and other agencies have increasingly employed tactics that undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment or other sanctions.
>
> (7) An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive postindictment or to dispute the charges against it at trial.
>
> (8) Waiver demands and other tactics of government agencies are encroaching on the constitutional rights and other legal protections of employees.
>
> (9) The attorney-client privilege, work product doctrine, and payment of counsel fees shall not be used as devices to conceal wrongdoing or to cloak advice on evading the law.

id. §§ 2(a)(1)–(9).

144. *See supra* Part II.B.

145. *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 902 (2006) (emphasizing the importance of cooperation for prosecutors in light of the time and cost involved with investigations).

of information from the corporate entity to the government because waiver may no longer be requested but merely volunteered. Relatedly, investigators may be forced to garner information from other sources, such as costly investigations or extended discovery.[146]

At first blush, the ACPPA is potentially an effective solution to the waiver problems. On its surface, it is the solution most conceptually similar to the majority of courts' interpretations of *Upjohn* because it adheres to the traditional notions of the attorney-client privilege. Its enactment would settle the issues surrounding selective waiver by dispensing with requests for attorney-client privilege waiver altogether. Proponents assert that under the auspices of the ACPPA, waiver of the attorney-client privilege would not be utilized in the tactical way that is so often criticized in the selective waiver doctrine. Corporations would not be able to utilize waiver of the privilege for their own benefit, and the government would not be able to compel waiver of a traditional protection. The ACPPA, in accordance with *Upjohn*, would provide predictability because codification of the rule would make it explicit that government agencies could not request waiver of the attorney-client privilege. The predictability of a statutory rule ostensibly could reduce or eliminate the perverse incentive for corporate officers to waive the privilege in order to be deemed cooperative for purposes of their personal civil or criminal liability because the executives no longer would be exposing the corporation to uncertain third-party liability.

In practice, however, the ACPPA actually undermines *Upjohn* policy goals. The Act does not proscribe voluntary disclosures; in fact, it explicitly allows them.[147] Allowing a voluntary waiver would be more clandestine than allowing an open request that may be subject to judicial oversight, making it more difficult for courts to determine whether it was unreasonably compelled by government agencies. A corporate executive may still be personally motivated to relinquish the corporation's privilege to the government voluntarily, even when it is not in the corporation's best interest, in order to reduce his personal risk of liability. Government agencies could still offer selective waiver

146. *See In re* Columbia/HCA Healthcare Corp. Billing Litig., 293 F.3d 289, 303 (recognizing that when a corporation waives the privilege, "[c]onsiderable savings are realized to the government, and through it to the public, in time and fiscal expenditure related to the investigation of crimes and civil fraud"); Brown, *supra* note 145, at 902 (suggesting that DOJ policy supporting privilege waivers is driven by a desire for "efficiency and cost savings").

147. S. 186 § 3(a) ("Voluntary Disclosures- Nothing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization.").

to those corporations that voluntarily relinquish their attorney-client privilege. Furthermore, the culture of waiver would not be "dispelled"—the government would not be allowed to *request* it, but could *accept* it. Even without an explicit request, the result would be similar to that described by the DOJ memoranda: the culture of waiver would still prevail, but it would be less transparent, and consequently, even more difficult for the judiciary to scrutinize. There would be little chance that the corporation would *not* voluntarily waive the privilege. The only way to avoid this result completely would be to disallow waiver altogether in these investigations, which is not feasible since waiver is often necessary to investigate and prosecute corporate crimes.

C. Proposed Federal Rule of Evidence 502

The Standing Committee on Rules of Practice and Procedure published proposed Federal Rule of Evidence 502 as a solution to the selective waiver problem ("Proposed Rule 502").[148] This is the only solution that not only allows for selective waiver, but also codifies it, aligning all of the federal courts. The Proposed Rule 502 was a response to escalating concerns in Congress over the risk of third-party liability posed by the failure of most courts of appeals to recognize selective waiver. The proposed rule's language was not limited to treating the problem of selective waiver to government entities,[149] but also increased predictability that was lacking in attorney-client privilege jurisprudence.[150] The most controversial provision of Proposed Rule 502[151] was its "selective waiver" provision,

148. *See generally* Memorandum from the Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Report of the Advisory Committee on Evidentiary Rules (May 19, 2007), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

149. *See id.* at 2. Risks include the fact that "significant amounts of time and effort are expended during litigation to preserve the privilege" and that "[p]arties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well." *Id.* Furthermore, "an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver." *Id.*

150. Richter, *supra* note 35, at 155 n.109. The provisions regarding privilege generally and its inefficiencies have been widely supported. *Id.* The proposed rule as a whole met two major purposes: to "resolve some longstanding disputes in the courts about the effect of certain disclosures" and answer to "the widespread complaint that litigation costs for review and protection of material that is privileged or work-product have become prohibitive." *Id.*

151. There has been a "mixed response to the concept of selective waiver." *Id.*

which provided that disclosure of protected information to a federal agency would not constitute a waiver as to any non-government entities.[152] The language of the rule published for comment reads:

> In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work-product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. . . . Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.[153]

The language of the proposed rule essentially adopts the doctrine of selective waiver created by the Eighth Circuit.[154] This proposed language, now withdrawn, would have established predictable selective waiver jurisprudence in favor of allowing corporations to selectively waive their privilege during government investigations.

The language of Proposed Rule 502 would help alleviate the risk of subject matter waiver of the attorney-client privilege or work-product protection. The Committee was concerned that companies may be deterred from cooperating with the government because court decisions are so unpredictable.[155] Recognizing that there is still significant uncertainty throughout the jurisdictions,[156] the Committee noted that "[a] rule protecting selective waiver [during government agency investigations or enforcement] furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."[157] Codifying selective waiver would both eliminate uncertainty regarding judicial recognition of the doctrine and provide the predictability necessary for corporate cooperation with government agencies.

The controversial selective waiver provision of proposed Rule 502 generated "almost uniformly negative" public comment from the legal community.[158] Many of these criticisms mirrored the courts' reasons for rejecting selective waiver.[159] "Ironically, corporate counsel

152. *See* SMITH, *supra* note 7, at 5–6.

153. *Id.*

154. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978).

155. SMITH, *supra* note 7, at 2.

156. *Id.* at 12.

157. *Id.* (citing *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting)). The Committee agrees with Judge Boggs's finding that "the 'public interest in easing government investigations' justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties." *Id.* at 12–13.

158. Richter, *supra* note 35, at 158.

159. *See supra* Part III.A.1.

who have long sought selective waiver protection in the courts opposed the proposed evidence rule because it would eliminate the most readily identifiable punitive consequence for corporations cooperating with the government."[160] Codifying selective waiver would eliminate the risk that these selective waiver agreements would be rejected by the courts. Corporations would no longer risk third-party liability if they waived the privilege. Therefore, the government would no longer accept the risk of litigation as a legitimate excuse. However, this argument neglects to acknowledge that the culture of waiver already exists.[161]

Looking at the *Upjohn* principles, it seems that most of these criticisms are missing the mark. Proposed Rule 502 as originally drafted is the only solution that expressly codifies selective waiver. Codification of this doctrine is the only way to adhere fully to the *Upjohn* principles. While *Upjohn* is widely cited as upholding the so-called "traditional attorney-client privilege," at its inception it was a change in the historical role of the privilege.[162] *Upjohn* focused on utility, predictability, and other pragmatic realities of the corporate structure, rather than just the attorney-client relationship.[163] Furthermore, rather than rely on historical precepts, the Court used policy reasons—incentivizing self-policing and compliance programs, protecting the attorney's fact-gathering role in the corporate context, and increasing predictability—to justify the privilege's extension.[164]

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160. Richter, *supra* note 35, at 158. In response to the "hue and cry," the Advisory Committee found the question of selective waiver "essentially political" and deleted the selective waiver provision from the proposed waiver rule. *Id.*

161. *See* Neil, *supra* note 132 ("[P]rivilege waivers have been commonplace . . . .").

162. *Upjohn* reflected a willingness to interpret the privilege in terms of the realistic needs of corporations. *See* Upjohn Co. v. United States, 449 U.S. 383, 391–92 (1981):

> In the corporate context, however, it will frequently be employees . . . who will possess the information needed by the corporation's lawyers . . . . [E]mployees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications via E-mail and the Internet - From* Upjohn Co. v. United States *and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553, 570 (1998) (noting that, after *Upjohn*, "[i]t was no longer necessary to consider the rigid, narrow, and formalistic approach taken by the court of appeals because it simply did not work in the context of the complex dynamics of a large corporation").

163. *See supra* note 162.

164. *See supra* Part II.A.

Selective waiver's pragmatic resolution of the conflict is supported by *Upjohn*.[165]

Selective waiver may promote internal compliance investigations—an *Upjohn* policy—because it combats the riskiness of gathering the information that may be used later.[166] Having the option to keep the fruits of investigations confidential would, within this culture of waiver, allay fears of creating third-party liability; thus, a corporation could investigate without risking that work would be "leaked" by waiving the privilege. While the lack of third-party liability may decrease financial punishment of misdeeds, the ease and efficiency of government investigations would help prevent harm to the public that results from corporate malfeasance.

Upjohn also tried to protect attorneys' fact-finding role by promoting cooperation and efficiency. If corporations are permitted to cooperate with government investigations by selectively waiving the privilege, they will have a greater incentive to encourage frank communication between employees and attorneys because the fruits of internal investigations are less likely to haunt the corporation in subsequent civil litigation.[167] Promoting government access to information through the corporation's own internal investigation[168] would disincentivize corporate malfeasance, aid government investigations, and increase incentives for internal compliance checks.

Finally, codifying selective waiver would engender the same amount of predictability that is present with the ACPPA, if not more. The Committee Note for Proposed Rule 502 explains that "[p]arties to litigation need to know . . . that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable."[169] This would increase predictability for corporate

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165. *See* Weiss, *supra* note 19, at 538:

> If the Court seeks to uphold the values set forth in *Upjohn*, it should resolve the current circuit conflict by recognizing selective waiver of the attorney-client privilege because selective waiver would still permit the government to investigate wrongdoing in the most efficient way possible, while recognizing the realities of competing incentives and practical application of the privilege in the corporate context.

166. *See id.* at 536 ("[A]cceptance of the doctrine of selective waiver could eliminate a disincentive for self-policing and promote the performance of internal investigations."). Furthermore, a "mere request for a governmental privilege waiver may result in release of sensitive information to adverse private litigants, thus exposing the corporation to extensive liability." *Id.*

167. *See id.* at 533 (finding as speculative the argument that "officers and employees might be less forthcoming with information if they knew that the employer could disclose the privileged information to the government").

168. *See supra* notes 119–22 and accompanying text.

169. SMITH, *supra* note 7, at 9.

attorneys because they would know that third parties would not be able to access privileged information.[170] As one scholar noted:

> [A] bright-line approach serves to discourage cooperation with the government, thus failing to promote the public interest in efficient prosecutions of corporations through cooperative efforts. Selective waiver provides a more favorable type of predictability because it encourages government cooperation and allows corporations to be more certain about the impact of disclosure in terms of private litigation.[171]

Unpredictability breeds tension between a corporate officer's personal liability and that of the company. Taking the risk of civil liability out of the equation by allowing corporations to waive their privilege just to the government would eliminate the perverse incentive of the corporate executive to abrogate his fiduciary duties.

Proposed Rule 502 is the best way to reduce the tension that the unpredictability of selective waiver causes, and to further the policy principles making selective waiver an effective way to promote compliance. However, Rule 502 extends waiver to other government agencies, which is problematic.[172] Under Proposed Rule 502, a waiver to the DOJ about one act may lead to SEC investigations of related actions. The officer making the decision may in time become aware of this and make decisions to reduce or eliminate incarceration risks, incurring fines not only from the investigating agency but potentially from other agencies as well. Thus, the corporate executive may take his personal stake in *all* government investigations into account when making waiver decisions. Overall, this loophole creates the same problem for the corporation as does the threat of third-party liability, perhaps to an even greater extent. Any government indictment against a corporation would affect the corporation's reputation, which may alter stock prices and create an even greater incentive for an officer to protect his own interests instead of those of the corporation. Also, Proposed Rule 502 may promote collusion between different

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170. *See* Raymond E. Watts, Jr., Comment, *Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a Comprehensive Limited Waiver Doctrine*, 39 MERCER L. REV. 1341, 1348 (1988) (noting the limited waiver theory in *Diversified* furthers the same goal of predictability encouraged in *Upjohn*).

171. Weiss, *supra* note 19, at 532 (internal citations omitted).

172. *See In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (finding broad subject matter waiver pursuant to the "rule of implied waiver," where "any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter"); *see also In re* Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) ("When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter . . . .").

government agencies.[173] Allowing selective waiver via the proposed language of the Federal Rule may be the proverbial swallowing of the spider to catch the fly.

D. Newly Enacted Federal Rule of Evidence 502

In place of the now-withdrawn Rule 502, Senator Patrick Leahy introduced a new version of the rule on December 11, 2007 ("New Rule 502").[174] However, the focus of the new legislation seems to be upon protecting information covered by the attorney-client privilege in the wake of inadvertent disclosure.[175] Notably absent from the New Rule 502 is a provision for the doctrine of selective waiver.[176] In its stead is section (d): "[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."[177] Essentially, the judge decides on a case-by-case basis whether privileged information divulged pursuant to a government cooperation agreement is selectively waived as to third parties.[178]

As the circuits currently are divided over recognition of the doctrine of selective waiver and some districts have already embraced a case-by-case analysis, it is uncertain what, if any, remedial or ameliorative impact this law may have on selective waiver. Entrusting to courts particularized determinations about implementation of a controversial doctrine likely would result in little change. District courts in "settled" jurisdictions may tailor their analyses to that of the presiding circuit court's interpretation out of fear of reversal, and in unsettled jurisdictions, judges still may find the same precedent persuasive. Such individualized determinations would not generate the predictability necessary to eliminate perverse incentives, and they would further justify waiver of the attorney-client privilege by corporate executives in abdication of their fiduciary duty.

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173. While it is easy to see the government enforcement agencies as a "whole" promoting corporate actions in compliance with the law, government agencies, for the most part, may also have differing objectives.

174. Act of Sept. 19, 2008, Pub. L. No. 110-322, § 1(d), 122 Stat. 3537 (2008), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-2450.

175. Posting of Brendan Smith to The BLT: The Blog of LegalTimes, http://legaltimes.typepad.com/blt/2007/12/voyage-of-disco.html (Dec. 13, 2007, 12:25 EST).

176. White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/congress/index.html (Dec. 15, 2007).

177. § 1(d), 122 Stat. at 3537.

178. *Id.*

IV. CODIFICATION OF SELECTIVE WAIVER AS A PRAGMATIC RE-ALIGNMENT OF INCENTIVES

Three potential solutions to the uncertainty surrounding the waiver of attorney-client privilege pursuant to government agency investigations are still viable: the DOJ memoranda principles, the ACPPA, and the newly enacted Federal Rule of Evidence 502. However, none of these potential solutions passes muster in light of the culture of waiver and the practical realities of the corporate world. Each of these proposed solutions, by failing to properly account for the negative externalities imposed by its respective "remed[y]," either sidesteps the problem of selective waiver or, in attempting to solve the problem, creates equally threatening pressures on the attorney-client privilege doctrine. Codifying selective waiver is the only way to: (1) eliminate the perverse incentives for executive decision-making caused by current unsettled waiver jurisprudence; (2) serve public and penal policies regarding corporate crime and malfeasance; and (3) preserve the traditional values underlying the policies recognized by the attorney-client privilege. Although such a codification is similar to the Advisory Committee's Proposed Rule 502,[179] a revised version would protect against waiver to other government agencies and private parties.

A. Available Solutions Fail to Remove the Perverse Incentives for Corporate Executives

1. DOJ Memoranda and the ACPPA

Neither the DOJ memoranda nor the ACPPA provides a workable solution because neither creates predictability. The guidance provided by the DOJ[180] to restrict requests for waiver to cases in which it is strictly necessary has done little to weaken the pervasive culture of waiver. The inertia of this culture increases the pressure on corporate executives to waive the privilege; all the while, the executives can cite cooperation with the government as an additional defense to legitimize their decisions to waive the corporation's privilege. Relatedly, the ACPPA's efforts to eliminate the request of such waivers altogether are also based on a legal fiction of voluntariness, which assumes that these executives actually have a

179. *See supra* Part III.C.
180. *See supra* Part III.B.2.

choice in waiving the privilege. While the ACPPA disallows explicit requests for waiver or the receipt of government benefits conditioned on such waiver agreements, the allowance for "voluntary" (i.e., not agency requested) waiver provides corporate executives who face individual liability with an implicit motivation to waive the privilege. Additionally, while the ACPPA would proscribe *directly* benefiting from such cooperation, in practice such waiver would still occur. Thus, executives would continue to value protection from their own liabilities over their companies' privilege with shareholders who are bereft of the judicial scrutiny available when waiver is made pursuant to clear government cooperation agreements.

It is equally unrealistic, given the nature of criminal investigations in the corporate context, to allow either the DOJ Memoranda or the ACPPA to significantly erode or eliminate the doctrine of selective waiver. Attorney-client privilege waiver is too important to the truth-seeking process in these investigations, which provide deterrence and retributive justice for corporate crime and malfeasance. These policies cannot, and must not, yield in their entirety under the banner of the attorney-client privilege. Better solutions are needed to reconcile these competing imperatives.

2. New Federal Rule 502

The newly enacted language of the New Rule 502[181] does nothing to remedy the predictability problem of selective waiver, although the unsettled nature of selective waiver is the crux of the tension between a corporate executive's personal liability and his fiduciary duties. New Rule 502 would cause unpredictability; courts would still be forced to wrestle with questions regarding the application of selective waiver on a case-by-case basis. In practice, provision (d)[182] of the New Rule 502 would actually increase unpredictability because jurisdictions that had previously rejected the doctrine of selective waiver would be forced to reconsider the doctrine. Of course, courts could continue to reject the doctrine in its entirety on a case-by-case basis, but the *possibility* of selective waiver that would result would undermine the major policy reason posited by rejecting courts—that selective waiver is not encompassed by traditional attorney-client privilege.

Under the auspices of the New Rule 502, executives waiving corporate attorney-client privilege in the face of significant personal

181. § 1, 122 Stat. at 3537.

182. *Id.*

liability would have an additional shield to bolster their defense of the reasonableness of that decision if such waiver resulted in third-party liability for the corporation. Executives could point to the New Rule 502 as a justification for their decision to waive the privilege while recognizing that the courts in that jurisdiction are unlikely to exercise their discretion to allow selective waiver.

B. A New Proposal to Codify Selective Waiver

Corporations that waive the privilege in the culture of waiver often have their previously privileged documents requested by private plaintiffs.[183] In the corporate world, with the increasing importance of government investigations and a persistent culture of waiver, waiver of the attorney-client privilege will occur. These practical considerations must be addressed given the reality of corporate decisionmaking, and selective waiver allows for a more pragmatic approach to dispel the negative externalities associated with attorney-client privilege waiver pursuant to government investigations. This practicability is supported by *Upjohn's* pragmatic alteration of the traditional attorney-client privilege in the corporate context. As was the case before *Upjohn*, the goals of the ACPPA, the DOJ Memoranda, and even the New Rule 502 do not allow for a realistic application of the attorney-client privilege in the corporate environment.

For the most part, opponents of selective waiver generally tout the traditional rationale for the attorney-client privilege: protecting privileged communications and facilitating the attorney-client relationship. These courts and commentators condemn the tactical use of selective waiver as working against this traditional focus. They fear that the waiver of attorney-client privilege would be used as a "sword" in litigation rather than as a shield of confidentiality.[184] Contrary to these concerns, however, selective waiver would not have any effect on the litigation for which the material was waived but would merely prevent additional litigation. Selective waiver would not effectively deny third parties any cognizable right because their potential suits

183. *See* Letter from Susan Hackett, Senior Vice President & Gen. Counsel, Ass'n of Corporate Counsel, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (June 20, 2006), *available at* http://www.acc.com/public/attyclientpriv/502acc.pdf ("Given this 'culture of waiver,' situations are common in which private plaintiffs seek the disclosure of privileged documents which a company previously was coerced to provide to government enforcers.").

184. For example, a party may choose only to disclose two documents out of ten, the two best for that party, and resulting in those two documents being the only evidence on that particular issue available for trial. This practice would have a direct effect on the litigation process itself.

could not be prosecuted absent the requested disclosure of privileged documents during government investigation.

Not only is selective waiver necessary in the corporate context, but *codification* of a selective waiver rule is necessary for predictability. Commentators agree that such predictability is necessary, and many have advanced sound policy considerations in support of selective waiver clauses.[185] The uncertainty surrounding selective waiver is the primary reason an executive faces a perverse incentive when deciding whether to waive the privilege during investigations. The only workable solution to this dilemma is to codify selective waiver, allowing for predictable judicial recognition and protection from third-party liability.

In 2006, the Judicial Conference drafted an initial proposal (now withdrawn) to codify selective waiver in the Proposed Rule 502. The proposal posited a rule for selective waiver, effectively generating predictability that would better align corporate executives' personal interests with those of the corporation and its shareholders. It accomplished this task by eliminating the risk of third-party liability created when executives waive a corporation's privilege in order to shield themselves from individual criminal sanctions.[186] However, the proposal's language did nothing to prevent secondary liability to the government itself. Thus, even if an executive gets "cooperation" incentives for one government investigation, it may be subject to a different investigation; this clearly does not eliminate the perverse incentive. While a corporate executive may be personally liable for conduct during one government investigation, he may waive the privilege for his benefit, and another government agency may use the privileged information to seek damages from the corporation akin to third-party liability. Additionally, potential collusion between agencies to obtain indictments may undermine executives' willingness to cooperate.

Codification is necessary to create a workable solution to the problems associated with selective waiver. By keeping the selective waiver viable and providing the requisite predictability through a codification of a selective waiver rule, there is the potential to eliminate the antithetical relationship between executives and the corporations whose interests they purport to protect. However, as

185. *See, e.g.*, Nancy C. Crisman & Arthur F. Mathews, *Limited Waiver of Attorney-Client Privilege and Work Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 AM. CRIM. L. REV. 123, 123 (1983) (questioning "whether legislation of a federal corporate 'self-evaluative' privilege would eliminate the existing confusion respecting limited waiver").

186. *See* discussion *supra* Part III.C.

mentioned, the loophole created through the "non-government entity" language of the Proposed Rule 502 imposes more potential negative externalities on the corporation from the risk of government liability than its drafters realized. To reconstruct the language in accordance with these goals and to close this remaining loophole, this Note proposes the following language for a pragmatic rule on selective waiver:

> **Selective Waiver.** In a federal or state proceeding, disclosure of a communication or information covered by the attorney-client privilege or work-product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of any person or entity other than that specific public office or agency, and only for the limited purposes of the specific regulatory, investigative, or enforcement action currently underway at the time when the disclosure is requested.

These amended concepts from the Judicial Conference's Proposed Rule 502 further the positive policies of selective waiver while reducing or eliminating its negative externalities. Thus, either the New Rule 502 should be amended in order to incorporate this essential language from the now-abandoned Proposed Rule 502 (as illustrated above), or, failing that, new legislation with the above language should be introduced to protect selective waiver and preserve its pragmatic approach to the realities of the corporate context.

Choosing to codify selective waiver as a federal rule admittedly would go against the holdings of a majority of the courts that have decided the issue. Courts denying corporations the option of selective waiver do so because it goes against the traditional notions and purpose for which the privilege is designed. They note that the privilege is not necessary for governments to conduct investigations and should not be used as a tactical litigation tool. However, these criticisms go against the practical realities of these investigations in this culture of waiver, where gaining the information would be expensive and time-consuming for government agencies, and corporate executives have perverse incentives for waiving the privilege. Only an adoption of selective waiver in a predictable, codified form as above works with the realities of corporate attorney-client privilege.

The New Rule 502, by leaving the language governing selective waiver ambiguous, in effect only codifies the unsettled nature of the law. This provides little certainty to selective waiver—only its unpredictability will be predictable. By codifying the doctrine of selective waiver as suggested here, Congress would further the policy goals of promoting corporate investigations while maintaining the traditional nature of the attorney-client privilege in accordance with

the precepts of *Upjohn*, thereby calibrating the alignment of a corporate executive's personal interests and fiduciary duties.

V. CONCLUSION: RECONCILIATION OF COMPETING IMPERATIVES

The principles enunciated in *Upjohn* require a reconciliation of competing policy imperatives to formulate the most effective, efficient, and pragmatic manner to apply attorney-client privilege waivers to government investigations. There are two important considerations to be balanced with the resolution of the potentially antithetical relationship between the decisionmaking of corporate executives and their fiduciary duties to the corporation: (1) the promotion of cooperation with government criminal investigations and (2) the preservation of the traditional doctrine of attorney-client privilege. Both government and internal investigations further the search for truth and protect the interests of shareholders and the general public from corporate crimes, but any proposed remedy must uphold the sanctity of the attorney-client privilege defined in *Upjohn*, while allowing for the pragmatic approach necessitated by the corporate environment.

The two considerations mentioned above must be reconciled with the perverse incentives created by the current unsettled jurisprudence of selective waiver and the resulting tension with executives' fiduciary duties. Codification of selective waiver as this Note proposes is the best resolution to alleviate this tension. It synthesizes these considerations, recognizes the fundamental realities of the corporate world in light of the inherent necessities of white-collar criminal investigations, and promotes predictability in the waiver decision. Overall, codification eliminates the perverse incentives created by judicial uncertainty while maintaining the principles of attorney-client privilege under *Upjohn* within a culture of waiver.

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