Selective Waiver of Privileges

by David M. Greenwald and Matthew J. Thomas

Corporations have been conducting internal investigations for decades. Internal investigations became prominent in the 1970s during the SEC sensitive payment investigations. In the 1980s, new scandals emerged that put further pressure on corporations to police themselves. With the enactment of the Sarbanes-Oxley Act and after the Enron collapse, however, the incentive for officers and directors to turn to audit committees and independent counsel to conduct internal investigations at the first sign of trouble has never been greater.
And the federal government encourages internal investigations by offering leniency when corporations disclose their internal findings. For example, the 1999 Department of Justice guidelines provide that a corporation’s voluntary disclosure of wrongdoing and cooperation with the government is one factor that will influence prosecutorial decision-making. “Cooperation,” however, often means waiver of applicable privileges, at least as to the federal government.

Corporations — now more than ever — need to be cognizant of the pitfalls associated with such disclosure to the government. Recent federal court decisions make clear that voluntary disclosure of otherwise privileged material to the government now, even with a signed confidentiality agreement in hand, may mean compelled disclosure to private litigation opponents later. Although there are several steps that corporations can take to maximize the protection afforded by applicable privileges, it would be prudent for directors and officers to proceed with the understanding that disclosure to the federal government risks the waiver of privileges as to all adversaries, private or public, present or future.

The Rise and Fall of Selective Waiver

As a general rule, disclosure of a privileged communication to a person outside of the attorney-client relationship waives the protection of the attorney-client privilege as to all parties. Similarly, disclosure of work-product to an adversary or potential adversary generally waives the work-product protection as to all parties.

But beginning in the late 1970s, some federal courts departed from these traditional waiver doctrines and created an exception that allowed corporations to disclose privileged materials to government agencies for the limited purpose of a pending investigation, while maintaining the privilege as to other adversaries, such as private litigants. And thus was born the doctrine of “selective waiver.” The seminal case on selective waiver is Diversified Industries, Inc. v. Merrill, 572 F.2d 596 (8th Cir. 1977). There, a corporation responded to allegations that it had paid bribes to obtain business by forming an independent audit committee and retaining outside counsel to prepare an internal report on the issue. The internal report was subsequently produced to the SEC. The Eighth Circuit held that this disclosure constituted only a “limited waiver” which did not preclude the corporation from withholding the report from private litigants on the grounds of attorney-client privilege. Id. at 611. The court reasoned that “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.” Id.

Relying upon this newly minted, policy-based exception of selective waiver, corporations subsequently divulged privileged information to the government with the expectation that, if needed, they could still assert the relevant privileges as to private litigants. But as additional circuits began to address the issue, some companies found the protections of selective waiver to be illusory.

Indeed, one by one, the federal appellate courts that addressed this issue in the 1980s and 1990s chipped away at the selective waiver doctrine. The D.C. Circuit struck first, holding that disclosure of documents to the SEC waived the attorney-client privilege (but not work-product protection) in the case of Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). Within three years, the D.C. Circuit had expanded its position, holding that voluntary disclosure to the SEC also waived work-product protections. In its holding in In re Subpoena Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984), the D.C. Circuit made clear that attorney-client privilege and work-product protection would be “available only at the traditional price.” Id. at 1370. The court elaborated that when a corporation elects to disclose privileged information to the government, it necessarily “forgoes some of the traditional protections” of privileges in order to avoid some of the “traditional burdens” of a government investigation. Id. at 1372.

Since the D.C. Circuit first rejected selective waiver, the First, Second, Third, Fourth and Sixth Circuits have weighed in on the issue — and all have rejected the selective waiver doctrine to varying degrees. Other than the Eighth Circuit, no federal appellate court has upheld the invocation of selective waiver where documents have been disclosed to the government.

Confidentiality Agreements: False Hope or Saving Grace?

Although the rule allowing selective waiver of the privileges per se, as announced by the Eighth Circuit 25 years ago, is essentially on life support, a much more lively debate remains over whether disclosure to the government waives privileges when the disclosing party has entered into a confidentiality agreement with the government. On this issue, the courts are much less uniform.

In the early 1990s, the Second and Third Circuits, while both rejected application of the selective waiver doctrine in the cases before them, expressed vastly differing views on the utility of confidentiality agreements. In Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991), the Third Circuit held that disclosure to the government waived privileges, even when the disclosing party had entered into a confidentiality agreement with the government agency receiving the privileged materials. In that case, the SEC and the DOJ had investigated allegations that Westinghouse had obtained a contract to build a nuclear power plant in the Philippines by bribing foreign officials. After entering into a confidentiality agreement with the DOJ, and in reliance on SEC regulations

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stating that materials furnished during an investigation were non-public and confidential, Westinghouse provided internal investigation reports to the agencies.

Almost a decade after the confidentiality agreement, the Philippines brought suit against Westinghouse and sought the reports Westinghouse had disclosed to the government. The Third Circuit held that, by disclosing the reports to the government years earlier, Westinghouse had waived its privileges as to all litigation adversaries, despite the terms of the confidentiality agreement and SEC regulations.

The Second Circuit, however, adopted a somewhat softer position. In In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993), the court, while refusing to acknowledge selective waiver in that particular case, expressly declined to adopt a per se rule against selective waiver, and left the door open where the parties entered into a confidentiality agreement:

[W]e decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection.... Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government … have entered into an explicit agreement that the [government agency] will maintain the confidentiality of the disclosed materials.

Subsequent federal appellate court decisions have been aligned with the Third Circuit’s per se rejection of selective waiver. In United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997), the parties had not entered into a confidentiality agreement, but the court disposed of the selective waiver doctrine with such a broad stroke, it seems that the existence of a confidentiality agreement would have made little difference. In holding that disclosure to the federal government waived privileges, the court reasoned (id. at 685):

[T]he general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration. Following the Eighth Circuit’s approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty.

And this past summer, the Sixth Circuit struck the most decisive blow yet to the selective waiver doctrine with its holding in In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002). There, the DOJ had investigated Columbia/HCA Healthcare Corporation in the mid-1990s for possible Medicare and Medicaid billing fraud. As part of its investigation, the DOJ sought to obtain several internal audits Columbia/HCA had conducted of its Medicare patient records. Although Columbia/HCA initially refused to disclose the audits on the grounds that they were protected by the attorney-client privilege and the work-product doctrine, Columbia/HCA later agreed to produce the documents after the DOJ signed a confidentiality agreement. The agreement, in addition to setting forth stringent confidentiality limitations, expressly provided that “[t]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work product doctrine.” Id. at 292 (emphasis added).

Subsequently, several private plaintiffs brought suit against Columbia/HCA alleging that they, like the government, had been fraudulently billed by Columbia/HCA. The plaintiffs sought the internal audits that Columbia/HCA had disclosed to the DOJ. Columbia/HCA rebuffed the request, arguing that its confidentiality agreement with the DOJ expressly reserved its right to assert privileges. Thus, Columbia/HCA reasoned, the disclosure of the audits to the DOJ was a “selective waiver” of applicable privileges, and was of no consequence to the private litigation at hand.

The Sixth Circuit, however, rejected “the concept of selective waiver in any of its various forms,” and affirmed an order compelling the release of the audits. Id. at 302. Although the court acknowledged that a selective waiver exception could encourage the cooperative exchange of information between corporations and the government, and thus further the “truth-finding process,” the court ultimately concluded that a corporation cannot pick and choose among its opponents with respect to privileges - waiver as to one is waiver as to all. Id. at 303-07.

While the trend is clearly against the recognition of selective waiver — even where the parties have entered into valid confidentiality agreements — the issue is not fully resolved. Indeed, the dissent in Columbia/HCA was of the view that “the circuit courts of appeal are deeply split on whether a disclosure of privileged information to the government, in the course of an investigation and with a confidentiality agreement, waives the privilege as to all other parties.” Id. at 308. Several federal district courts, including those in New York, California, and Colorado, have suggested that selective waiver is permissible if the disclosing party enters a confidentiality agreement and expressly reserves its rights to assert privileges against third parties. And the SEC recently filed an amicus brief in a state court proceeding arguing that the disclosure of privileged information to the Commission pursuant to a confidentiality agreement did not waive privileges as to third parties. See McKesson HBOC, Inc. v. Adler, 254 Ga.App. 500, 562 S.E.2d 809 (2002).

### Voluntary disclosure

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With the circuit courts deeply split on whether a disclosure of privileged information to the government waives the privilege as to all other parties, the most common context in which privileges are found to be waived is when corpora-
tions disclose privileged information during the course of a pending government investigation. Government agencies have not been shy about "encouraging" full disclosure. For nearly three decades, the SEC has promoted its voluntary disclosure program that offers wrongdoers more lenient treatment in exchange for thorough self-investigation and complete disclosure of the results. In October 2001, the SEC articulated, in both a Report of Investigation and in a press release, the specific criteria it considers when determining whether to show a self-policing company leniency. Among the criteria was whether the company had conducted a thorough review of the conduct at issue, and whether the company promptly made available to the Commission the results of that review and all supporting documentation, including information that was not directly requested. In an October 23, 2001 press release, the SEC announced:

Credit for cooperative behavior may range from the extraordinary step of taking no enforcement action at all to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents the Commission uses to announce and resolve enforcement actions.

The demand for "full disclosure" to the government extends well beyond the ambit of the SEC. Other agencies, including the EPA and the Department of Health and Human Services, have adopted similar voluntary disclosure programs. See 63 Fed.Reg. 58,399; 65 Fed.Reg. 19,618. The Federal Sentencing Guidelines actually spell out a formula for the reduction of penalties where a corporation has been deemed to have cooperated fully during an investigation. Sentencing Guidelines §8C2.5(g). And the 1999 DOJ guidelines relating to prosecution of corporations provide that voluntary disclosure of wrongdoing and cooperation with the government's investigation, including a waiver of the attorney-client and work product protections, is one factor that will influence prosecutorial decision-making. The guidelines (set forth in a DOJ memorandum from Eric Holder, Jr., dated June 16, 1999) state:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.

Waiver through disclosure to the government is not limited to particular industries. Indeed, companies in disparate industries have been found to have waived privileges by disclosing otherwise protected information, in the course of pending investigations, to a variety of federal and state government agencies. The following are just a sample.

- McRae v. Denny's, Inc., 2000 Westlaw 307315 (D.Kan.) (furnishing opinion letters to a state human rights commission in the course of a discrimination investigation waived work product protections).

Moreover, the pitfalls of waiving privileges by disclosing to the government not limited to the context of pending investigations. Companies in regulated industries that are periodically audited or examined by government agencies also may run the risk of a general waiver of privileges with respect to information disclosed to the government. For example, in U.S. v. Massachusetts Institute of Technology, supra, MIT, as a defense contractor, was periodically required to submit information to the Defense Contracting Audit Agency (DCAA), the auditing arm of the Department of Defense. As part of an examination of MIT's tax-exempt status, the IRS sought the production of certain documents that MIT had provided the DCAA in the course of a routine audit. MIT refused, claiming the requested materials were protected by the attorney-client privilege and the work-product doctrine, and that its disclosure of such documents to the DCAA operated only as a selective waiver of such protections. The court disagreed, and ordered that the documents provided to the DCAA be furnished to the IRS.

Likewise, in Frankford Trust Co. v. Advest, Inc., 1995 Westlaw 491300 (E.D.Pa.), Frankford Trust was found to have waived work product protections as to private litigants regarding documents it had previously disclosed to the Federal Deposit Insurance Corporation (FDIC) and a state department of banking as part of a periodic examination. Citing the Third Circuit's decision in Westinghouse Electric v. Philippines, supra, the court held:

Although the work product of Frankford Trust's counsel was not given to the FDIC and the Department pursuant to an investigation into any specific wrongdoing, and although the FDIC and the Department's examinations were conducted pursuant to a statutory mandate rather than because of some independently occurring event, these facts do not yield a contrary conclusion.

And remarkably, even companies that are neither in regulated industries nor the subject of government investigation run the risk of waiving privileges by interacting with the government. In Information Resources, Inc. v. Dun & Bradstreet Corp., 999 F.Supp. 591 (S.D.N.Y. 1998), a company had voluntarily submitted work product to the Antitrust Division of the Department of Justice and analogous foreign governmental agencies in an attempt to persuade those agencies to initiate antitrust actions against its competitor. The company then brought a private antitrust lawsuit against its competitor, in which it invoked the work product doctrine to protect those

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documents from discovery. The court found that, at the time the documents were submitted to the government agencies, the company was neither under investigation nor in any other adversarial relationship with the agencies. Nonetheless, the court held that work product protections were “waived for materials submitted voluntarily to stimulate beneficial official action.” Id. at 593.

Practical Advice on Navigating the Pitfalls of Selective Waiver

As the case law demonstrates, companies face substantial risk of waiver when disclosing information to the federal government. And while a corporation may rue having to share with the world the documents it shares with the government, this may be just the tip of the iceberg. Depending on the circumstances, a court may determine that the corporation has waived the privilege not just as to the specific documents disclosed, but also as to the general subject matter of those documents. In a worst case scenario, a single disclosure to an agency could lead to a subsequent litigation opponent discovering all related privileged communications.

Given the potentially devastating consequences of an unwitting waiver of privileges, and in light of the current trend in the law, perhaps the most valuable piece of advice we can offer is to proceed with the understanding that disclosing privileged materials to the government may waive privileges as to all parties — period. Although selective waiver still survives in the Eighth Circuit, and arguments can be made that some lesser forms of the exception exist in other circuits, the general trend is toward the rejection of selective waiver “in any of its various forms.” Thus, regardless of the jurisdiction, and despite the use of bullet-proof confidentiality agreements, there remains a real risk that providing privileged information to the government will trigger a general waiver. This risk should be weighed in the overall calculus of deciding how much information should be shared with the government and in what form.

That being said, if a corporation decides that disclosure of privileged materials is desirable despite the risks (and offers of leniency may dictate that conclusion), there are several steps that can and should be taken to maximize applicable privileges and minimize the risk of waiver.

Obtain a confidentiality agreement

First (and most importantly), a company should obtain a written confidentiality agreement between the government before disclosing any privileged information. Although the trend in the case law suggests that confidentiality agreements may amount to an exercise in futility, some jurisdictions may preserve privileges where a corporation has obtained a comprehensive confidentiality agreement prior to disclosure.

For starters, a confidentiality agreement should mandate that confidentiality be maintained and specifically prohibit the government from disclosing information to the public (i.e., to private litigants), and to other government agencies. As decisions such as U.S. v. MIT demonstrate, the detrimental effects of waiver are just as great when the adversary seeking production is another government agency rather than a private litigant.

Equally important, the agreement should expressly reserve the corporation’s right to assert all applicable privileges and protections with respect to any third party, even after the pending investigation has been concluded. The agreement should make clear that the privileges extend not only to the disclosed documents, but to the underlying notes, documents, and communications upon which they are based. The agreement should further provide that the corporation is disclosing information in reliance on the confidentiality agreement. If applicable, the agreement should state that the agency and the corporation are acting cooperatively, and not as adversaries.

Carefully consider what to disclose

Even in jurisdictions that recognize selective waiver, obtaining a valid confidentiality agreement should not be construed as a green light to charge forward with reckless abandon. Often deciding what to disclose can be just as critical as deciding whether to disclose.

When possible, a corporation should disclose only the underlying, non-privileged information that forms the basis for a privileged report, rather than disclose the report itself. To the extent disclosure of privileged materials is judged necessary, a corporation should disclose those materials that are at least likely to lead to waiver. To that end, a corporation should be particularly careful not to disclose attorney-client privileged communications whenever possible. Generally, it requires more to waive the work product protection (disclosure to an adversary or potential adversary) than it does to waive the attorney-client privilege (disclosure to anyone outside of the protected attorney-client circle). A company may prefer to produce its work product, and later argue that the government was not an adversary, rather than produce attorney-client privileged materials.

Carefully consider how to disclose

When it comes time to disclose carefully chosen privileged materials, we offer two additional recommendations.

First, if possible, maintain custody and control of privileged documents rather than giving custody of the documents to the government. That is, let the government review documents in the corporation’s offices or that of its attorneys, but do not give copies of the documents to the government.

Second, have counsel handle the disclosure. This will reduce the likelihood that something will be said or done during the disclosure process that might undermine or narrow the protections the company has worked so hard to obtain in its confidentiality agreement.

Record non-disclosures

A company should document, in a privilege log or otherwise, privileged materials that it does not disclose to the government. Then, when the company later asserts a privilege over those documents, it will be able to meet its burden of proving that it has maintained the documents in confidence. This rule is vividly illustrated in U.S. v. MIT, where the court ordered that MIT produce certain audit committee minutes because MIT could not prove that they had been withheld from the government. 129 F.3d at 686.

Safeguard against inadvertent disclosure

Finally, it should go without saying that, in light of the devastating consequences that can accompany the disclosure of privileged materials to the federal government, companies should exercise caution not to inadvertently produce privileged documents during a government investigation or audit. To reduce the likelihood of inadvertent disclosure, a corporation should clearly mark all privileged docu-
ments and remind all involved in an investigation or audit to maintain the confidentiality of privileged information (and that the privilege belongs to the company).

**Conclusion**

When a company is weighing the costs and benefits of offering an agency of the federal government unfettered access to its files, company decision-makers should be mindful that disclosing privileged materials can adversely affect later litigation, even when disclosure is made pursuant to a confidentiality agreement. Companies can take steps to minimize the risk of waiver by obtaining confidentiality agreements, carefully choosing what is disclosed and controlling how it is disclosed. But in the end, given the current trend in the law, companies should be cognizant that disclosure to the government could result in disclosure to the rest of the world as well.