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**Voluntary Disclosure to the Government and  
the Resulting “Litigation Dilemma”**

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**I. INTRODUCTION**

The decision whether to voluntarily disclose information to a governmental agency requires a meticulous risk-benefit analysis. On the one hand, cooperation with the Government may, in the criminal context, yield favorable treatment in its decisions whether to initiate prosecution, in plea negotiations, and at sentencing. In the civil context, False Claims Act (FCA)<sup>1</sup> liability may be diminished. On the other hand, voluntary disclosure to the Government involves very significant downside risks. Foremost among these risks is the likelihood that voluntary disclosure to the Government will be deemed a waiver of the attorney-client and work product privileges as to adverse parties in subsequent litigation. The “litigation dilemma” is what an individual or organization faces when weighing the benefits of voluntary disclosure, such as leniency and reduced liability, against the risk of waiver of privileges in collateral litigation with third parties. This Briefing will explore the basics of the attorney-client

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<sup>1</sup> 31 U.S.C. § 3729 *et seq.*

privilege, work product doctrine, and the self-evaluative privilege, describe the litigation dilemma in the healthcare context and in other contexts, offer practical advice for dealing with the dilemma, describe voluntary disclosure programs employed by various federal agencies, and discuss possible legislative solutions to the litigation dilemma.

## **II. FUNDAMENTALS OF THE ATTORNEY-CLIENT PRIVILEGE, THE WORK PRODUCT DOCTRINE, AND THE SELF-EVALUATIVE PRIVILEGE**

The three primary privileges that may protect information and documents from disclosure during the course of litigation are the attorney-client privilege, the work product doctrine, and the self-evaluative privilege. All three of these privileges may be waived if the holder of the privilege voluntarily discloses the otherwise privileged information or documents to any third party, including the Government. The basics of these three privileges are discussed below.

### **A. The Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an individual and his or her attorney.<sup>2</sup> Organizations also may assert the attorney-client privilege to protect communications between the organization's agents and its attorney.<sup>3</sup> The Supreme Court upheld an organization's assertion of the attorney-client privilege in *Upjohn Co. v. United States*.<sup>4</sup> There, the general counsel of Upjohn investigated claims that certain improper payments had been made to foreign governmental officials to win business.<sup>5</sup> The general counsel began the investigation by sending a questionnaire to all employees who might have relevant information.<sup>6</sup>

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<sup>2</sup> The attorney-client privilege applies if the following four elements are satisfied: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is an attorney acting as such in connection with the communication; (3) the communication relates to a fact of which the attorney was informed by his or her client in confidence for the purpose of securing either an opinion on law, legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by the client. See, e.g., *United States v. Cohn*, 303 F. Supp. 2d 672, 679 (D. Md. 2003).

<sup>3</sup> *Upjohn v. United States*, 449 U.S. 383 (1981).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 386.

<sup>6</sup> *Id.* at 387.

Upjohn then voluntarily submitted a preliminary report to the Securities & Exchange Commission (SEC) and the Internal Revenue Service (IRS).<sup>7</sup> The IRS issued a summons demanding production of all files of the general counsel's investigation.<sup>8</sup> Upjohn declined to produce these materials, arguing that they were covered under the attorney-client privilege and constituted work product.<sup>9</sup> The IRS disagreed because the questionnaires were sent to low level employees.<sup>10</sup> The Supreme Court held that the communications at issue were "[c]onsistent with the underlying purposes of the attorney-client privilege . . . [and] must be protected against compelled disclosure."<sup>11</sup>

The attorney-client privilege applies only to communications from a client seeking legal advice on an issue. The attorney-client privilege will not protect communications that are a part of the regular activities of a compliance committee or all information presented to or prepared by a compliance committee.<sup>12</sup> This is because much of the work of a compliance committee is done without attorney oversight, and is not the type of work that is necessary for the purposes of rendering legal advice. However, an organization may consider using an attorney to investigate allegations the organization feels may lead to litigation or a government investigation, so that the communications made during the course of the investigation may be protected by the attorney-client privilege.

Even where all the elements of the privilege are met, the privilege will not apply if waived. Waiver is the disclosure of privileged materials to third parties who are not retained for the purpose of providing legal advice.<sup>13</sup> Waiver may be purposeful or inadvertent. Moreover, with very few exceptions, once an attorney-client privileged document is disclosed, the privilege will not protect the document from other

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 387-88.

<sup>9</sup> *Id.* at 388.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 395.

<sup>12</sup> See *United States ex. rel. Fields v. Sherman Health Sys.*, 2004 U.S. Dist. LEXIS 7297 (N.D. Ill. April 28, 2004) (finding that documents from compliance committee were not privileged when there was no evidence that a lawyer was involved in the activities of the committee).

<sup>13</sup> *United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 336-37 (4th Cir. 2003) (client waived attorney-client privilege by disclosing attorney's advice to FBI agent during non-custodial interview).

disclosures.<sup>14</sup> Indeed, once one privileged document is disclosed, other documents with the same subject matter may also lose their protected status.<sup>15</sup>

## **B. The Work Product Doctrine**

The work product doctrine is based on strong “public policy underlying the orderly prosecution and defense of legal claims.”<sup>16</sup> As the Supreme Court explained:

Proper preparation of a client’s case demands that [an attorney] assemble information, sift what [the attorney] considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.<sup>17</sup>

The Court reasoned that the work product doctrine was necessary to prevent the situation in which “an attorney’s thought, heretofore inviolate, would not be his own.”<sup>18</sup> This policy was substantially incorporated in Federal Rule of Civil Procedure 26(b)(3) and various state statutes.<sup>19</sup>

*Hickman v. Taylor* is the seminal case addressing the work product doctrine. In *Hickman*, the plaintiffs sought discovery of interviews the defendants’ lawyer conducted of witnesses to an accident immediately after the accident.<sup>20</sup> The defendants refused to disclose this information claiming that the discovery requests called “for privileged matter obtained in preparation for litigation” and constituted “an attempt to obtain indirectly counsel’s private files.”<sup>21</sup> On the other hand, the plaintiffs claimed that they were at a disadvantage because they did not have the legal resources to investigate the accident immediately after it occurred.<sup>22</sup>

The Court rejected plaintiffs’ arguments, noting that plaintiffs had ample access to public statements of the witnesses.<sup>23</sup> The Court found that plaintiffs made no

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<sup>14</sup> See *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997) (expressing the view of a majority of courts that disclosure to a federal agency waives the attorney-client privilege as to third parties); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295-304 (6th Cir. 2002) (discussing various courts’ positions on selective waiver and noting that the majority of courts have rejected the doctrine).

<sup>15</sup> See, e.g., *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 288-89 (E.D. Va. 2004); *Murray v. Gemplus Int’l, S.A.*, 217 F.R.D. 362, 366-67 (E.D. Pa. 2003).

<sup>16</sup> *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

<sup>17</sup> *Id.* at 511.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Wis. Stat. § 804.01(2)(c) (providing protection from discovery for trial preparation materials).

<sup>20</sup> *Hickman*, 329 U.S. at 498-99.

<sup>21</sup> *Id.* at 499.

<sup>22</sup> *Id.* at 506-07.

<sup>23</sup> *Id.* at 509.

“showing of necessity or . . . claim that denial of such production would unduly prejudice the preparation of [plaintiffs’] case or cause [them] any hardship or injustice.”<sup>24</sup> The Court concluded that in general, attorney work product is protected from disclosure. This protection may be overcome by a showing of a substantial need for the information in the protected material.

Unlike the attorney-client privilege, attorney work product protection is not absolute. A party requesting discovery can overcome the doctrine by demonstrating substantial need for those materials and the inability, without undue hardship, to obtain the equivalent of those materials.<sup>25</sup> However, the attorney work product doctrine provides more stringent protection of work product containing an attorney’s legal opinions.<sup>26</sup> Courts protect opinion work product more stringently than fact work product, shielding it from disclosure barring “very rare and extraordinary circumstances.”<sup>27</sup>

Another limitation on work product protection is that it only covers materials prepared “in anticipation of litigation.” Documents created in an internal investigation, even if prepared by a lawyer, do not automatically fall into this limitation. Indeed, some courts have found that investigative materials were not generated in anticipation of litigation, even when the investigation could have resulted in litigation.<sup>28</sup> In general, however, the more serious the allegations under investigation, the more likely a court are to find the materials generated therein are protected by the attorney work product doctrine.<sup>29</sup>

Even if the work product doctrine applies, its protections may be waived in one of three ways. First, the protection will be waived if the information is disclosed to anyone who lacks a common interest with the individual or organization asserting work product protection.<sup>30</sup> Second, the protection will be waived if the information was prepared to further a crime or fraud.<sup>31</sup> Finally the protection will be waived if the information is used

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<sup>24</sup> *Id.* at 509.

<sup>25</sup> *Id.*

<sup>26</sup> *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999).

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., *Iowa Prot. & Advocacy Servs. v. Rasmussen*, 206 F.R.D. 630, 641 (S.D. Iowa 2002).

<sup>29</sup> Thomas R. Mulroy & Eric J. Munoz, THE INTERNAL CORPORATE INVESTIGATION, 1 DePaul Bus. & Comm. L.J. 49, 72 n.19 (2002).

<sup>30</sup> *In re Leslie Fay Co., Inc. Sec. Litig.*, 152 F.R.D. 42, 44-45 (S.D.N.Y. 1993).

<sup>31</sup> *In re Murphy*, 560 F.2d 337-39 (8th Cir. 1977).

to refresh a witness's recollection under Rule 612 of the Federal Rules of Evidence, either before or during trial.<sup>32</sup>

### C. Self-Evaluative Privilege

The self-evaluative privilege:

[P]rotects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability. The self-[evaluative] privilege is analogous to, and based on, the same public policy considerations as Rule 407 . . . [of the Federal Rules of Evidence] . . . which excludes evidence of subsequent remedial measures.<sup>33</sup>

The privilege has been codified by most states in the context of physician peer review proceedings.<sup>34</sup> Courts have also applied the privilege in other contexts, including: a defense contractor's confidential assessment of its equal employment opportunity practices;<sup>35</sup> accounting records;<sup>36</sup> securities law;<sup>37</sup> academic peer reviews;<sup>38</sup> railroad accident investigations;<sup>39</sup> product safety assessments;<sup>40</sup> and products liability.<sup>41</sup>

However, courts have refused to apply the self-evaluative privilege in FCA cases, citing

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<sup>32</sup> *United States v. Nobles*, 422 U.S. 225, 239 (1975).

<sup>33</sup> *Reichhold Chem., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994).

<sup>34</sup> David P. Leonard, CODIFYING A PRIVILEGE OF SELF-CRITICAL ANALYSIS, 25 Harv. J. on Legis. 113, 119-20 (1988).

<sup>35</sup> *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

<sup>36</sup> *New York Stock Exchange v. Sloan*, 22 Fed. R. Serv. 2d (Callaghan) 500 (S.D.N.Y. 1980).

<sup>37</sup> *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992).

<sup>38</sup> *Keyes v. Lenoir Rhyne Coll.*, 552 F. 2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977).

<sup>39</sup> *Granger v. Nat'l R.R. Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987).

<sup>40</sup> *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977).

<sup>41</sup> *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992).

the overriding public policy interest in full disclosure and the statute's provisions that reward voluntary disclosure with reduced liability.<sup>42</sup>

The following elements must be met for the self-evaluative privilege to apply. First, the information must result from a critical self-analysis undertaken by the party seeking protection.<sup>43</sup> Second, the public must have a strong interest in preserving the free flow of the type of information sought.<sup>44</sup> Third, the information must be of a type whose flow would be curtailed if discovery were allowed.<sup>45</sup> Finally, some jurisdictions require that the material must have been prepared with the expectation that it would be kept confidential, and was in fact kept confidential.<sup>46</sup> The self-evaluative privilege does not protect the facts uncovered during the course of an internal investigation, but only the conclusions—the critical self-analyses—that flow from those facts. For example, in an investigation of possible Medicare fraud, the facts detailing how a doctor billed for inpatient services would not be shielded from disclosure by the self-evaluative privilege.<sup>47</sup> However, if the investigation concluded that the doctor's billing practice was fraudulent, that conclusion would be privileged. Additionally, any plan for prevention of similar incidents would also fall within the privilege.

There are also statutory and regulatory protections for organizations' self-evaluative materials. These protections are often limited by the subject of the investigation and vary from state to state. For example, self-evaluative privilege claims often arise in the context of physician peer review proceedings. Peer review is the process by which physicians evaluate the care and treatment provided to patients.<sup>48</sup> However, physicians may be unwilling to participate in peer review and candidly critique their colleagues if such evaluations were subject to disclosure. In recognition of the value of peer review, most states have laws protecting medical peer reviews from disclosure.<sup>49</sup> These statutes protect the conclusions of the peer review committee.<sup>50</sup>

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<sup>42</sup> See, e.g., *United States ex rel. Sanders v. Allison Engine Co.*, 196 F.R.D. 310, 314-15 (S.D. Ohio 2000); *United States ex rel. Falsetti v. Southern Bell Tel. & Tel. Co.*, 915 F. Supp. 308, 312-13 (N.D. Fla. 1996).

<sup>43</sup> *Reichhold Chem.*, 157 F.R.D. at 527.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (citing *Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992)).

<sup>47</sup> See, e.g., *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. at 204.

<sup>48</sup> *Reichhold Chem.*, 157 F.R.D. at 525.

<sup>49</sup> See *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138 n.3 (Pa. 1987).

The statutes do not protect the factual materials presented to the peer review committee from discovery.<sup>51</sup>

Another area in which several states recognize a self-evaluative privilege is environmental audits.<sup>52</sup> The fundamental premise behind these statutes is that every environmentally sensitive business must be encouraged to conduct internal audits.<sup>53</sup> The environmental audit privilege is supported by three main policies. First, the audits serve an important public interest by reducing state regulatory and enforcement costs, because organizations are engaged in self-policing.<sup>54</sup> Second, the audits serve the public interest because they foster a better environment, promote increased product safety, more conscientious hiring practices, and more candid evaluations of internal activities.<sup>55</sup> Third, the audits, if unimpeded by threats of liability, provide organizations an opportunity to engage in “interactive compliance,” a process through which the government and the organization work together to find solutions to compliance problems.<sup>56</sup>

The statutes creating an environmental audit privilege typically protect materials arising from an environmental audit, and not materials from an independent source (like independent monitoring).<sup>57</sup> However, many of the statutes require that the organization remedy the problems identified in an audit.<sup>58</sup> Moreover, many of the statutes provide that this privilege can be waived by continued non-compliance, present or impending danger to public health, fraud, or other compelling circumstances.<sup>59</sup>

Finally, Illinois has an Insurance Compliance Self-Evaluative Privilege statute.<sup>60</sup> This law protects self-evaluative insurance compliance documents and testimony about

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<sup>50</sup> See, e.g., Wis. Stat. § 146.38(2) (2003-2004) (protecting the record of a peer review committee’s investigations, inquiries, proceedings, and conclusions).

<sup>51</sup> *Id.*

<sup>52</sup> See Michael Goldsmith & Chad W. King, POLICING CORPORATE CRIME: THE DILEMMA OF INTERNAL COMPLIANCE PROGRAMS, 50 Vand. L. Rev. 1, 32 (1997) (recognizing that 14 states have laws protecting environmental self-audit materials).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 33-34.

<sup>56</sup> *Id.* at 34.

<sup>57</sup> *Id.* at 34-35.

<sup>58</sup> *Id.* at 37.

<sup>59</sup> *Id.* at 37-39.

<sup>60</sup> Michelle R. Mosby-Scott & Michael Todd Scott, PROTECTING EVIDENCE OF SELF-CRITICAL ANALYSIS FROM DISCOVERY IN ILLINOIS, Ill. B.J. 648 (Nov. 2000); see also 215 ILCS 5/155.35 (1999).

insurance compliance audits.<sup>61</sup> The law was designed to encourage insurance companies to conduct voluntary internal audits of their compliance programs and management systems to improve compliance with various state and federal laws.<sup>62</sup> Like the environmental audit privilege, this privilege has limits. The privilege will be lost if asserted for a fraudulent purpose, if the organization did not comply with a law, or if the company failed to take reasonable corrective action within a reasonable time frame.<sup>63</sup> Additionally, the government can overcome the privilege by showing a compelling need and that the information is otherwise unavailable except by incurring “unreasonable cost and delay.”<sup>64</sup>

Despite the wide variety of cases and statutes that apply it, the self-evaluative privilege has not been widely adopted.<sup>65</sup> Indeed, many commentators conclude that this privilege is “of little value.”<sup>66</sup> Moreover, even in jurisdictions that recognize the privilege, the privilege has limited and uncertain application.<sup>67</sup> Courts have described the privilege as a qualified privilege, which can be overcome by a showing of extraordinary circumstances or special need.<sup>68</sup> Indeed, an organization should avoid relying solely upon this privilege even when the organization’s self-evaluative activities are specifically protected by a statute or regulation.<sup>69</sup>

Even when information is protected by the attorney-client, work product, or self-evaluative privilege, these privileges may be waived if the privilege holder voluntarily discloses the privileged information to the Government. The following sections discuss this dilemma in the healthcare context and in other contexts.

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., *United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990) (rejecting self-evaluative privilege in the context of environmental enforcement case); *Reich v. Hercules, Inc.*, 857 F. Supp. 367 (D.N.J. 1994) (rejecting privilege in workplace safety concern).

<sup>66</sup> Jason M. Healy, William M. Altman & Thomas C. Fox, CONFIDENTIALITY OF HEALTH CARE PROVIDER QUALITY OF CARE INFORMATION, 40 Brandeis L.J. 595, 630 (2002); see also Goldsmith & King, *supra* note 52, at 32 (“[T]he self-evaluative privilege has not enjoyed widespread application.”).

<sup>67</sup> *Reichhold Chem.*, 157 F.R.D. at 526 (“A number of limitations have been placed on the self-critical analysis privilege.”).

<sup>68</sup> See, e.g., *Mao-Shiung Wei v. Bodner*, 127 F.R.D. 91 (D.N.J. 1989).

<sup>69</sup> See, e.g., *Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981) (concluding that Illinois’ peer review privilege statute did not protect the findings of a peer review committee when doctor alleged that hospital and doctor group used peer review to exclude the doctor from the hospital medical staff and effectively destroy his practice).

### III. THE LITIGATION DILEMMA IN THE HEALTHCARE CONTEXT

The litigation dilemma was vividly demonstrated in the healthcare context in *In re Columbia/HCA Billing Practices Litigation*.<sup>70</sup> The case involved a Department of Justice (DOJ) investigation of Columbia/HCA's billing practices. In the midst of the investigation, Columbia/HCA (the Company) decided to voluntarily disclose certain information to the DOJ, including the results of several internal audits. The Company attempted to preserve the privileged nature of the disclosed documents by entering into a written confidentiality agreement with the DOJ that provided that "the 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."<sup>71</sup> The Company ultimately settled the billing dispute with the Government for \$840 million.

After learning of the DOJ investigation and settlement, numerous insurance companies and patients brought suits against the Company, claiming that it had also over billed them for various services. The private litigants sought discovery of the internal audits and other documents the Company had voluntarily disclosed. The Company moved for a protective order, claiming that the documents were privileged and the voluntary disclosure to the DOJ did not constitute a waiver of its attorney-client privilege and work product protections. The Company further argued that it had expressly reserved the right to assert these privileges in any later proceedings by entering into the confidentiality agreement with the DOJ.

Both the district court and the Sixth Circuit Court of Appeals squarely rejected the Company's arguments. The Sixth Circuit first noted the general rule that "the attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties" and "that once a client waives the privilege to one party, the privilege is waived *en toto*."<sup>72</sup> The Sixth Circuit dismissed Columbia/HCA's assertion that voluntary disclosure to the Government pursuant to a confidentiality agreement constituted a selective waiver of applicable privileges that did not extend to third parties. After noting that only the Eighth Circuit had recognized the

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<sup>70</sup> 293 F.3d 289 (6th Cir. 2002).

<sup>71</sup> *Id.* at 292.

<sup>72</sup> *Id.* at 294.

selective waiver doctrine,<sup>73</sup> the Sixth Circuit joined with the First,<sup>74</sup> Second,<sup>75</sup> Third,<sup>76</sup> Fourth,<sup>77</sup> Federal,<sup>78</sup> and D.C. Circuits<sup>79</sup> in “reject[ing] the concept of selective waiver, in any of its various forms.”<sup>80</sup>

Although encouraging cooperation with the Government may be a laudable goal, the Sixth Circuit reasoned that it was not the purpose of the attorney-client privilege, which instead is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>81</sup> As the court noted, “[t]he attorney-client privilege was never designed to protect conversations between a client and the Government.”<sup>82</sup>

The existence of the confidentiality agreement between the Company and the DOJ did not change the court’s analysis. As the Sixth Circuit explained, the attorney-client privilege “is not a creature of contract, arranged between the parties to suit the whim of the moment.”<sup>83</sup> In fact, the Sixth Circuit questioned “whether the Government should assist in obfuscating the truth-finding process by entering in to such confidentiality agreements at all.”<sup>84</sup> In the end, the Sixth Circuit adopted a bright line rule that voluntary disclosure of otherwise privileged materials to the Government, even

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<sup>73</sup> The Eighth Circuit was the first federal court to recognize the selective waiver doctrine in *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). However, *Diversified* is distinguishable from other cases dealing with voluntary disclosure because the disclosure in *Diversified* was compelled by an SEC subpoena, and therefore, was not truly “voluntary.” *Id.* at 611.

<sup>74</sup> See *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver doctrine, “which has no logical terminus”).

<sup>75</sup> See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (“[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”).

<sup>76</sup> See *Westinghouse Elec. Corp. v. Republic of 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”).

<sup>77</sup> See *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

<sup>78</sup> See *Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

<sup>79</sup> See *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (“we believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality”).

<sup>80</sup> *In re Columbia/HCA Billing Practices Litig.*, 293 F.3d at 302.

<sup>81</sup> *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 303.

<sup>84</sup> *Id.*

pursuant to a confidentiality agreement, constitutes a waiver of both the attorney-client privilege and work product protections.<sup>85</sup>

#### IV. THE LITIGATION DILEMMA IN OTHER CONTEXTS

*McKesson HBOC, Inc. v. Superior Court*<sup>86</sup> illustrates how the litigation dilemma arises outside of the healthcare context. McKesson HBOC publicly disclosed that the company's auditors had discovered improperly recorded revenues at the company's subsidiary.<sup>87</sup> The day of the disclosure, shareholder suits were filed against the company.<sup>88</sup> The U.S. Attorney's Office and the SEC also began investigations.<sup>89</sup>

McKesson retained attorneys to represent the company in the shareholder suits and to perform an internal investigation.<sup>90</sup> The attorneys began interviewing employees, preparing an interview memorandum for each employee.<sup>91</sup> The attorneys then prepared an audit report and provided the report to the company.<sup>92</sup> The attorneys also offered to share the report with the U.S. Attorney's Office and the SEC, subject to agreements to maintain the report's confidentiality.<sup>93</sup> These agreements stated that the company did not intend to waive attorney-client or work product protections, instead the company recognized that it had a common interest with the U.S. Attorney and the SEC in obtaining information about the improperly recorded revenue.<sup>94</sup> The agreements recognized that either government office might disclose the information received in certain circumstances.<sup>95</sup>

Ultimately, neither the U.S. Attorney's Office nor the SEC took action against McKesson.<sup>96</sup> However, the shareholder suits persisted. During the course of one of those suits, the shareholder plaintiffs requested access to the information McKesson

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<sup>85</sup> *Id.* at 306-07.

<sup>86</sup> 9 Cal. Rptr. 3d 812 (Ct. App. 2004).

<sup>87</sup> *Id.* at 814-15.

<sup>88</sup> *Id.* at 815.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 815.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

shared with the Government.<sup>97</sup> Both McKesson and the Government argued that this information was confidential, and the voluntary disclosure to the Government did not waive the applicable privileges.<sup>98</sup> McKesson and the Government relied on a provision of California's Evidence Code that allows disclosure without waiver of the attorney-client privilege "when disclosure is reasonably necessary for the accomplishment of the purpose" for which the lawyer was consulted.<sup>99</sup> McKesson and the Government maintained that they had a "common interest" in "investigating and rooting out the source of accounting improprieties at HBOC."<sup>100</sup> The court disagreed that McKesson and the Government shared any such "common interest," noting that the waiver exception only applied to "parties aligned on the same side in an investigation or litigation," such as parties to a joint defense agreement.<sup>101</sup> Because McKesson and the Government were plainly on opposite sides in the investigation, the court held that McKesson waived any applicable privileges by disclosing the information to the Government.<sup>102</sup> As a result, the court ordered McKesson to provide the shareholder plaintiffs with materials prepared by the company's attorneys for the purposes of preparing for litigation.<sup>103</sup>

## **V. PRACTICAL ADVICE FOR DEALING WITH THE LITIGATION DILEMMA**

The most important consideration in dealing with the litigation dilemma is to make any decision to voluntarily disclose information to the Government with your eyes wide open. Although the selective waiver doctrine has been recognized by courts on rare occasions, an entity deciding to voluntarily disclose privileged information to the Government should assume that the disclosed documents will no longer be protected by the attorney-client privilege or the work product doctrine. This is true even if the entity and the Government enter into a confidentiality agreement. Moreover, the disclosure may later be interpreted as a waiver that extends beyond the specific documents

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<sup>97</sup> *Id.* at 816.

<sup>98</sup> *Id.* at 817-820 n.10.

<sup>99</sup> Cal. Evid. Code § 912.

<sup>100</sup> 9 Cal. Rptr. 3d at 818.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 816, 821.

<sup>103</sup> *Id.* at 821.

disclosed to the Government to include any documents on the same general subject matter as the disclosed documents.<sup>104</sup> In some instances, an entity may be able to fully cooperate with the Government and receive credit for that cooperation without disclosing privileged material. However, in other instances, the Government may consider disclosure of privileged documents necessary in order for it to conclude that the company has fully and completely cooperated with its investigation.<sup>105</sup> In any event, the decision to voluntarily disclose privileged information to the Government in no way guarantees that the Government will refrain from bringing charges or taking other adverse action against the disclosing entity.<sup>106</sup> Therefore, the benefits that may result from a voluntary disclosure must be carefully weighed against the considerable risks, particularly the risk of waiving important privileges, before an entity decides to voluntarily disclose privileged information to the Government. There is no universal answer. Rather, the attorney will need to consider the scope of the potentially illegal activity at issue, the nature of the voluntary disclosure program at issue, and the concerns specific to the organization.

If an entity decides to voluntarily disclose information to the Government despite the risk of waiver, there are several steps that should be taken to minimize that risk. First, the disclosing entity should attempt to enter into a written confidentiality agreement with the Government. Although most jurisdictions will not enforce such agreements, some courts may hold that documents disclosed to the Government maintain their privileged status because of the existence of a confidentiality agreement. A confidentiality agreement with the Government should include the following:

- A statement that attorney reports and information collected during an internal investigation retain their privileged and/or protected nature. While a confidentiality agreement cannot guarantee to protect disclosed materials from future discovery by third parties, the agreement should expressly reserve the

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<sup>104</sup> See, e.g., *GFI, Inc. v. Franklin Corp.*, 265 F.3d 1268, 1272 (Fed. Cir. 2001); *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989).

<sup>105</sup> Memorandum from Deputy Attorney General Larry D. Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003).

<sup>106</sup> In the Arthur Andersen case, the decision to voluntarily disclose privileged memoranda led to prosecution, not leniency.

disclosing entity's right to assert the attorney-client privilege and work product doctrine against all third parties.

- A statement that the Government will handle all documents disclosed in a manner that is consistent with the disclosing entity's belief that the documents are protected by the attorney-client privilege and/or work product doctrine.
- If applicable, a statement characterizing the relationship between the Government and the disclosing entity as one of mutual dependency and cooperation, as opposed to adversarial.

Finally, the disclosing entity should manage the process of disclosure so as to minimize the inclusion of privileged materials whenever possible. To the extent that it can, the disclosing entity should try to fully cooperate with the Government by producing non-privileged materials. If it must disclose privileged materials, the disclosing entity should maintain a detailed privilege log of those documents that it chose not to disclose.<sup>107</sup> The decision to voluntarily disclose information to the Government must be made with full appreciation of the potential consequences. The next Section details the mechanics of voluntary disclosure with respect to different federal agencies.

## **VI. VOLUNTARY DISCLOSURE TO FEDERAL AGENCIES**

Once the decision to voluntarily disclose information has been made, the disclosing entity must consider the different disclosure mechanisms employed by different federal agencies. Various federal agencies adhere to varying statutory and regulatory disclosure programs. Moreover, federal agencies have different policies relating to the disclosure of privileged information and waiver of applicable privileges. These varying approaches are discussed below.<sup>108</sup>

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<sup>107</sup> *United States v. Massachusetts Inst. of Tech.*, 129 F.3d at 686.

<sup>108</sup> This section discusses voluntary disclosure mechanisms at the DOJ, the SEC, and the Department of Health and Human Services (HHS). Other federal agencies also employ voluntary disclosure programs. For example, the Department of Defense (DOD) instituted a voluntary disclosure program in 1986. Letter from William H. Taft IV, Deputy Secretary of Defense (July 24, 1986), reprinted in VOLUNTARY DISCLOSURE, A REPORT BY THE COMMITTEE ON VOLUNTARY DISCLOSURE, ABA Section on Public Contract Law, Exhibit 3 (1987). To benefit from the program, the contractor must not be prompted by knowledge that the government will soon discover the illegal behavior. Louis M. Brown, et al., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 7.60 (2003). The DOD has a standard disclosure agreement that includes a proviso that any information disclosed is subject to investigation and verification by the DOD. *Id.* As part of the voluntary disclosure process, the contractor must describe the investigation conducted,

## A. The Department of Justice

This Section addresses the DOJ's standard policy on cooperation and waiver and disclosure to the DOJ pursuant to the False Claims Act and the Antitrust Division's corporate leniency policy. Although the policies described herein apply to all DOJ attorneys, the manner in which the DOJ implements its policies may differ from district to district.

### (1) The DOJ's Policy on Cooperation and Waiver.

The DOJ views a target's "willingness to cooperate in the investigation or prosecution of others" as one among seven key factors in deciding whether to initiate prosecution of that target.<sup>109</sup> Cooperation is also a factor in the decision whether to offer a defendant a plea agreement and in the Government's sentencing recommendations.<sup>110</sup> Further, under the Federal Sentencing Guidelines,<sup>111</sup> courts may

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identifying the files, documents and persons interviewed and the facts that were found. However, voluntary disclosure to the DOD does not guarantee leniency. Rather, the DOD reserves the right to refer appropriate matters to the DOJ for investigation and civil or criminal prosecution.

The Environmental Protection Agency (EPA) also offers a voluntary disclosure program through its comprehensive audit policy. 65 Fed. Reg. 19618 (April 11, 2000). Participation in the program may qualify participants for reductions in civil penalties that would ordinarily be assessed by EPA. Under the program, participants must promptly disclose to EPA and expeditiously correct environmental violations, all in conformance with the nine enumerated conditions of the policy. Those conditions are: (1) Systemic Discovery. The violation is discovered through an environmental audit or a documented systemic procedure reflecting due diligence; (2) Voluntary Disclosure. The violation is identified voluntarily and not through legally mandated monitoring, sampling, or auditing; (3) Prompt Disclosure. The violation is promptly disclosed in writing in 21 days; (4) Discovery and Disclosure. The disclosure is made prior to: (a) a federal state or local agency inspection, investigation or information request, (b) a notice of civil suit, (c) an employee "whistleblower" report to the EPA or (d) imminent discovery of the violation by a regulatory agency; (5) Correction and Remediation. The violation is corrected, in most cases within sixty days; (6) Prevent Recurrence. The company commits, in writing, to take steps to prevent a recurrence including but not limited to improvements in its environmental auditing or due diligence efforts; (7) Repeat Violations. The same or a closely related violation has not occurred within the previous three years at the same facility and is not part of a pattern of violations; (8) Certain Violations Excluded. The violation did not result in serious harm or present imminent endangerment to human health or the environment and did not violate the specific term of an order or consent decree; and (9) Cooperation. The Company cooperates as requested by the EPA. *Id.*

<sup>109</sup> United States Attorneys Manual (USAM), § 9-27.230.

<sup>110</sup> USAM §§ 9-27.420, 9-27.730.

<sup>111</sup> In *United States v. Booker*, the United States Supreme Court ruled that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," and therefore, 18 U.S.C. § 3553(b)(1), which makes the United States Sentencing Guidelines mandatory, violates the Sixth Amendment right to a jury trial and must be severed from the Sentencing Reform Act of 1984. *United States v. Booker*, 543 U.S. \_\_\_, 2005 U.S. LEXIS 628 (2005). The result of the *Booker* decision is that the Sentencing Guidelines are now advisory for federal court judges. However, *Booker* should not have a great effect on the provisions of the Sentencing Guidelines that relate to cooperation and waiver of privileges for two reasons. First, *Booker* primarily

reduce a defendant's culpability score or grant a downward departure from the base offense level based upon the defendant's cooperation with authorities.<sup>112</sup> However, in order for DOJ to conclude that a defendant has fully cooperated with its investigation, the defendant may be required to disclose information that would otherwise be protected by the attorney-client privilege and the work product doctrine.

In 2003, DOJ articulated its policy on cooperation and waiver of the attorney-client privilege and work product protection in the context of the prosecution of entities in a memorandum from Deputy Attorney General Larry Thompson entitled, "Principles of Federal Prosecution of Business Organizations" (Thompson Memo).<sup>113</sup> The Thompson Memo provides that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."<sup>114</sup> According to the Thompson Memo, such waivers allow prosecutors to weigh the completeness of the corporation's disclosure and "to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements," thereby bringing the investigation to a conclusion more quickly.<sup>115</sup> Accordingly, the DOJ advises that prosecutors may request a waiver in "appropriate circumstances," although the waiver "should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue," as opposed to legal advice concerning the criminal investigation itself.<sup>116</sup> Although a waiver of these privileges is not an "absolute requirement," DOJ directs prosecutors to consider "the willingness of a

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relates to those provisions in the Sentencing Guidelines which have the effect of increasing sentences. Second, U.S.S.G. § 8C2.5(g), which allows for a reduction of the base offense level for cooperation and acceptance of responsibility, has always required a fact intensive inquiry that allows courts some discretion in reaching their findings. U.S.S.G. § 8C4.1, which allows courts to grant a downward departure for cooperation, is discretionary by its very terms. Finally, the Commentary to U.S.S.G. § 8C2.5(g), which articulates the Sentencing Commission's position on the requirement of waiver to receive credit for full cooperation, should still hold influence with federal judges and DOJ attorneys.

<sup>112</sup> U.S.S.G. §§ 8C2.5(g), 8C4.1.

<sup>113</sup> Memorandum from Deputy Attorney General Larry D. Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003).

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.* at 7.

<sup>116</sup> *Id.* at 7 n.2.

corporation to waive the privileges when necessary to provide timely and complete information” as one of the relevant factors when evaluating the corporation’s cooperation.<sup>117</sup>

The Federal Sentencing Guidelines adopt the position of the DOJ with respect to the necessity of waiver in order to receive credit for full cooperation. The Commentary to U.S.S.G. § 8C2.5, Note 12, provides as follows:

Waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.<sup>118</sup>

Both the Thompson Memo and the Federal Sentencing Guidelines grant the individual prosecutor considerable discretion in deciding whether a waiver of the attorney-client privilege and work product protection is required before a corporation will be determined to have fully cooperated with authorities. In a November 2003 interview, Deputy Attorney General James B. Comey explained how prosecutors reach this decision:

[I]f critical witnesses won’t consent to interviews and, therefore, the Government cannot fully reconstruct the crime, or gather sufficient evidence to prosecute those who are culpable, the Government may turn to the corporation and seek the information imparted when those particular employees were interviewed. The corporation will then have to decide whether to waive its privileges. If it does not, and the investigation is stymied, or certain high level officials have to be immunized and go free, the Government will probably not view this as cooperation in evaluating charging decision factors.

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[W]e expect cooperating corporations to help us catch the bad guys. If a corporation can do that without a waiver, prosecutors

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<sup>117</sup> *Id.* at 7.

should give them the opportunity to do that. If the questions are fully answered without a waiver, prosecutors should consider that to be meaningful cooperation in evaluating all factors in making the charging decision. If a corporation wishes to go farther and share work product and privileged materials in order to enhance the Government's investigation, so much the better. Whether a corporation's failure to cooperate at all, or failure to waive if necessary to answer those questions, will result in a charge, is a separate issue that can only be answered by evaluating all the [charging] factors.<sup>119</sup>

Accordingly, while the DOJ does not expressly condition credit for cooperation on waiver of the attorney-client privilege and work product protection, it may require a waiver if the Department deems it necessary for the complete disclosure of all information relevant to its investigation.

(2) Voluntary Disclosure under the False Claims Act

The DOJ has the statutory responsibility for enforcing the FCA, which allows the United States to recover damages and civil penalties from defendants who knowingly submit false claims or fraudulent documentation to federal agencies for payment.<sup>120</sup> Section 3729(a) of the FCA entitles the Government to treble damages.<sup>121</sup> However, the FCA contains a voluntary disclosure provision<sup>122</sup> that allows the court to reduce the multiplier to double damages if all three of the following requirements are met:

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

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<sup>118</sup> U.S.S.G. § 8C2.5, comment. (n. 12).

<sup>119</sup> *Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, UNITED STATES ATTORNEYS' BULLETIN, November 2003, at 1, 2.

<sup>120</sup> 31 U.S.C. §§ 3729 *et seq.*

<sup>121</sup> 31 U.S.C. § 3729(a).

<sup>122</sup> 31 U.S.C. § 3729(a)(7)(A)-(C).

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation . . .

<sup>123</sup>

These criteria are stringently applied and may be difficult to meet.<sup>124</sup> There is little case law or other interpretive guidance on the FCA's voluntary disclosure criteria. Therefore, the outcome of any voluntary disclosure decision under the FCA is necessarily uncertain. Moreover, voluntary disclosure may expose the disclosing party to qui tam actions by persons participating in the internal investigation.<sup>125</sup>

(3) The DOJ Antitrust Division's Corporate Leniency Policy

The DOJ Antitrust Division's (the Division) Corporate Leniency Policy creates an amnesty program for companies that voluntarily disclose antitrust violations to the Division.<sup>126</sup> The amnesty program sets forth different criteria for obtaining amnesty depending on whether the Division has already initiated an investigation. If an investigation has not yet begun, the disclosing corporation will receive amnesty if it meets the following criteria:

- (a) it must be the first to come forward;
- (b) it must have taken prompt steps to terminate its participation in the violation;
- (c) it must cooperate fully in the Division's investigation;
- (d) it must accept responsibility for its participation in the violation;

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<sup>123</sup> *Id.* (emphasis added).

<sup>124</sup> *See, e.g., United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 415 (3d Cir. 1999) (finding that defendant failed to meet all three requirements necessary to qualify for double damages under voluntary disclosure provision).

<sup>125</sup> *But see United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (holding that voluntary disclosure to the government constituted a public disclosure barring later qui tam suits).

<sup>126</sup> The full text of the DOJ Antitrust Division's Corporate Leniency Policy is available online at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

- (e) it must make restitution to injured parties, where possible; and
- (f) it must not have been the ringleader of, or coerced others to participate in, the illegal activity.

If these criteria are met, the grant of amnesty is automatic. Moreover, if the disclosing corporation qualifies for amnesty under these circumstances, all of its officers, directors and employees who admit their involvement in the illegal antitrust activity and assist the Division in its investigation will also receive amnesty.<sup>127</sup>

If the Division is already investigating suspected antitrust violations, a disclosing corporation may receive amnesty if it meets the criteria set forth above, and the Division determines that:

- (a) at the time of the disclosure, the Division has not already developed evidence sufficient to obtain a conviction against the disclosing corporation; and
- (b) a grant of leniency would not be unfair to others, considering the nature of the illegal activity, the disclosing corporation's role in it, and the timing of the disclosure.

Under these additional criteria, amnesty is discretionary. However, with both automatic and discretionary amnesty, the key factor in deciding whether to make a voluntary disclosure to the Division is timing. Amnesty is only available for the first corporation to come forward. With either automatic or discretionary amnesty, the Division retains the discretion to "expel an applicant after concluding that a company has made false representations to the Division or has otherwise not fully complied with the leniency policy requirements."<sup>128</sup> The disclosing corporation will also have to weigh the benefits of amnesty against the likelihood that voluntary disclosure to the Division will constitute a waiver of the attorney-client and work product privileges as to third parties with regard to the subject matter of the disclosure.

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<sup>127</sup> If the corporation does not qualify for automatic amnesty, its officers, directors and employees who come forward with the corporation will be considered for amnesty on the same grounds as if they approached the Division individually.

<sup>128</sup> March 22, 2004 Press Release, Department of Justice, Antitrust Division, available online at [http://www.justice.gov/atr/public/press\\_releases/2004/202940.htm](http://www.justice.gov/atr/public/press_releases/2004/202940.htm).

## **B. The Securities and Exchange Commission**

In a 2001 release, the SEC made clear that self-reporting and cooperation are key factors in its leniency decisions.<sup>129</sup> The SEC acknowledged that, in the course of self-reporting, waiver may be necessary “to provide relevant and sometimes critical information to the Commission staff.”<sup>130</sup> Nonetheless, the SEC has recognized that the attorney-client privilege and work product doctrine serve “important social interests.”<sup>131</sup> To protect the privilege while ensuring full disclosure, the SEC has strongly advocated adoption of the selective waiver doctrine, which would allow a party to provide privileged information to the SEC without also waiving the privilege as to third parties.<sup>132</sup>

In testimony before Congress, SEC Enforcement Director Stephen M. Cutler testified that the risk of waiving the attorney-client privilege as to third parties “creates a substantial disincentive for anyone who might otherwise consider providing protected information” to the SEC.<sup>133</sup> To counteract this disincentive, Director Cutler advocated the passage of a selective waiver provision in the Securities Fraud Deterrence and Investors Relations Act, which would allow a person to provide privileged information to the SEC without waiving the privilege as to any other person or entity.<sup>134</sup> The selective waiver doctrine, according to Director Cutler, would allow the SEC’s enforcement staff to gather information in a more efficient manner, leading to more prompt enforcement actions with a greater likelihood of recovery of assets to return to investors.<sup>135</sup>

## **C. Department of Health and Human Services/Office of the Inspector General**

The Department of Health and Human Services, Office of the Inspector General (OIG) issued a “Provider Self-Disclosure Protocol” in 1998 to encourage healthcare providers to combat fraud and abuse proactively by voluntarily disclosing suspected violations to the Government.<sup>136</sup> The Protocol creates a methodology for an effective

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<sup>129</sup> *In re Gisela de Leon-Meredith*, Securities Exchange Act Release No. 44969 (Oct. 23, 2001).

<sup>130</sup> *Id.* at n.3.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Testimony Concerning the Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179 Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, 108th Cong. (June 5, 2003) (testimony of Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities & Exchange Commission).*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Provider Self-Disclosure Protocol, 63 Fed. Reg. 58399 (Oct. 30, 1998).

investigative and audit work plan to detect instances of non-compliance.<sup>137</sup> Under the Protocol, “the OIG will not request production of written communications subject to the attorney-client privilege.”<sup>138</sup> If it determines that certain privileged information is critical to the appropriate resolution of the disclosure, the OIG will work with the provider’s counsel to discuss “ways to gain access to the underlying information without the need to waive the protections provided by an appropriately asserted claim of privilege.”<sup>139</sup>

For providers, the advantage of self-disclosure under the Protocol is the possibility of settling potential liabilities with the OIG without having to waive the attorney-client privilege and work product protections as to third parties. However, it should be noted that the OIG lacks independent prosecutorial authority, and must refer matters for civil or **criminal** prosecution to the DOJ.<sup>140</sup> Once a matter is referred to the DOJ, the DOJ’s policy on the requirement of waiver, as expressed in the Thompson Memo, will apply.

## VII. CONCLUSION

The litigation dilemma will continue to vex practitioners for some time to come. Even after successfully negotiating a confidentiality agreement with the Government, there is no guarantee that courts will not order disclosure of otherwise privileged materials to third parties if those materials have been voluntarily disclosed to the Government. Individuals and organizations considering voluntary disclosure to the Government will continue to face the predicament of weighing the benefits of potential leniency against the risks of costly follow-on litigation.

In the end, only legislative solutions may be able to solve the litigation dilemma. For example, the House Committee on Financial Services recently approved the Securities Fraud Deterrence and Investor Restitution Act (the Act).<sup>141</sup> If passed, the Act would amend § 24 of the Securities Exchange Act of 1934 to include the following new subsection:

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 58403.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 58401.

<sup>141</sup> H.R. 2179, 108th Cong., 2d Sess. (2004).

(e) Authority to accept privileged and protected information. Notwithstanding any other provision of law, whenever the Commission and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission.

Basically, the Act would codify the selective waiver doctrine solely with respect to disclosures to the SEC. Although the SEC has strongly advocated passage of the Act, there are currently no plans to bring the Act to the full House for a vote and there are no comparable bills pending in the Senate.

Even if the Act passed, it would provide no relief to healthcare providers struggling with the dilemma of whether to waive the attorney-client privilege to receive credit for cooperation with the DOJ. To ameliorate the problem for healthcare providers, the FCA<sup>142</sup> could be amended to include a selective waiver provision similar to that proposed in the securities context.

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<sup>142</sup> 31 U.S.C. §§ 3729 *et seq.*

