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A MATTER OF FAIRNESS: THE NEED FOR A NEW LOOK AT SELECTIVE WAIVER IN SEC INVESTIGATIONS

MICHAEL H. DORE*

As it has made abundantly clear, the Securities and Exchange Commission (“SEC”) values “cooperation” in its investigations of potential violations of the federal securities laws.¹ At the same time, the SEC looks very unfavorably on a perceived lack of cooperation, threatening targets of investigations with penalties and more serious charges.² “Cooperation” may include the decision not to assert attorney-client privilege and work-product protection for various materials that are then produced to the SEC. But when a corporation produces materials to the SEC that otherwise would be protected by the attorney-client privilege or work-product doctrine, does it waive those protections as to everyone else, including civil litigants? Right now, the answer depends on what court you are in. Going forward, however, this Article argues that courts can and should rely on notions of fairness and congressional intent to find only the most limited waiver.

A few courts, principally the Eighth Circuit,³ have recognized “selective waiver,” under which the corporation waives the attorney-client privilege and/or work-product protection only in relation to the government agency that received the otherwise protected materials. Most other courts—including the First, Second, Third, Fourth, Sixth, Seventh, and D.C. Circuits—have rejected selective waiver, holding that waiver as to one generally is waiver as to all.⁴

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1. See Report of Investigation and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), <http://www.sec.gov/litigation/investreport/34-44969.htm> [hereinafter *Seaboard Report*].

2. See, e.g., Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud, Exchange Act Release No. 2004-67 (May 17, 2004) (“As part of the settlement, Lucent agreed to pay a \$25 million penalty for its lack of cooperation.”).

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

4. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686-87 (1st Cir. 1997); *Permian*

But even these courts disagree about whether a confidentiality agreement between the producing party and the government agency is effective to maintain the attorney-client privilege and work-product protection.⁵ Thus, corporations and their attorneys face a great deal of uncertainty in determining the extent to which the attorney-client and work-product protections apply after disclosure to the SEC, and it is extremely difficult to predict how undecided courts, like the Ninth Circuit, will resolve the issue.⁶

Without question, the trend at the circuit level is to reject selective waiver. The Eighth Circuit case that endorsed selective waiver, *Diversified Industries, Inc. v. Meredith*,⁷ is now an outlier, continually rejected by other circuits since it was decided. But *Diversified* recognized selective waiver for one reason and one reason only: "To hold otherwise would 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."⁸ Courts that have rejected *Diversified*, and thus rejected presumptive selective waiver, generally have focused only on the Eighth Circuit's rationale that cooperation with the government should be encouraged.⁹ But there are different and more compelling reasons for selective waiver that have gone largely, if not entirely, unaddressed by the courts.

First, selective waiver does much more than merely encourage disclosure to government agencies. In fact, it guarantees fairness. Several courts that have rejected selective waiver have cited the perceived *unfairness* of allowing a party to manipulate the application of the privilege in a self-serving manner, arguing that the attorney-client privilege "is not designed for such tactical

Corp. v. United States, 665 F.2d 1214, 1222 (D.C. Cir. 1981).

5. Compare *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) ("Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."), with *In re Columbia*, 293 F.3d at 302 ("[A]ny form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.") (quotations omitted).

6. *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005) ("Whether the sort of selective waiver McKesson seeks is available in this Circuit is an open question.").

7. 572 F.2d 596 (8th Cir. 1978) (en banc).

8. *Diversified*, 572 F.2d at 611; see also *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) ("The Eighth Circuit's sole justification for permitting selective waiver was to encourage corporations to undertake internal investigations.").

9. See, e.g., *Mass. Inst. of Tech.*, 129 F.3d at 685 ("The primary argument in favor of the Eighth Circuit position is that loss of the privilege may discourage the frank exchange between attorney and client in future cases, wherever the client anticipates making a disclosure to at least one government agency.").

employment.”¹⁰ But the SEC takes just such a strategic approach to privilege when it forces corporations to choose between the Commission’s wrath and wholesale disclosure to suing shareholders. In effect, the Commission has instituted a policy that does everything but force parties to produce privileged materials to the Commission. This self-serving approach to privilege is a prerequisite for its perceived tactical use by corporations, and the effect is to create a disincentive for clients to confide in their attorneys. Moreover, the scope of the waiver is rarely addressed by courts, so corporations have no idea just how much they are sacrificing by “cooperating” with government agencies.

Second, beyond simply being unfair, total waiver also conflicts with Congress’s intent in creating the discovery stay contained in the Private Securities Litigation Reform Act of 1995 (“PSLRA”).¹¹ One purpose of the PSLRA discovery stay, described in the legislative history, is to prevent “fishing-expedition” lawsuits by plaintiffs hoping to use discovery to bolster their case.¹² If the privilege is waived by production to the SEC, plaintiffs have all the more reason to sue, since they may improperly piggyback on a government investigation to obtain information that otherwise would remain confidential. This problem is magnified by some recent decisions (district courts are divided) saying that the discovery stay should be lifted for relevant documents produced to the government.¹³ This threatens to streamline the delivery of otherwise protected documents to civil plaintiffs, and gives them even greater incentive to sue. The PSLRA was designed to prevent such a situation.¹⁴

Part I of this Article provides general descriptions of the attorney-client privilege and the work-product doctrine and describes the background of the SEC’s approach to cooperation in its investigations of possible federal securities law violations. Part II describes the state of the law regarding waiver of the attorney-client privilege and work-product protection by virtue

10. *See, e.g.,* *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

11. 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B) (2000).

12. *See* S. REP. NO. 104-98, at 14 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 693; H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 748.

13. *See, e.g.,* *Singer v. Nicor, Inc.*, No. 02-C-5168, 2003 U.S. Dist. LEXIS 26189, at *5 (N.D. Ill. Apr. 24, 2003).

14. S. REP. NO. 104-98, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693; *see also* *Faulkner v. Verizon Commc’ns, Inc.*, 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001) (“History has proven that plaintiffs sometimes file lawsuits in order to conduct discovery in the hopes of finding a sustainable claim not alleged in the complaint. The PSLRA was therefore designed to deter the abusive practices committed in private securities litigation which includes the routine filing of lawsuits . . . with only faint hope that the discovery process might lead eventually to some plausible cause of action.”) (citations and quotations omitted).

of disclosure to government agencies like the SEC. Finally, Part III argues in favor of selective waiver, based on notions of fairness and the consequences of waiver that clearly conflict with an underlying purpose of the PSLRA.

I. WAIVING THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION TO COOPERATE WITH THE SEC

A. *Background of the Attorney-Client Privilege and Work-Product Doctrine*

The attorney-client privilege and work-product doctrine serve different purposes. The attorney-client privilege is meant 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."¹⁵ One comprehensive definition of the privilege states the following:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹⁶

The privilege, which applies to corporations,¹⁷ typically is waived "by voluntary disclosure of private communications by an individual or corporation to third parties."¹⁸

The work-product doctrine protects "the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation."¹⁹ Unlike the attorney-client privilege, "a disclosure to a third party does not necessarily waive the protection of the work-product doctrine."²⁰ Rather, "[m]ost courts hold that to waive the protection of the work-product doctrine, the disclosure

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

16. *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton rev. 1961)).

17. *Upjohn Co.*, 449 U.S. at 389-90.

18. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

19. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991).

20. *Id.*

must enable an adversary to gain access to the information.”²¹ Accordingly, courts generally recognize that the work-product doctrine is “broader than the attorney-client privilege.”²²

B. The SEC’s Policy on Cooperation

1. The SEC’s Voluntary Disclosure Program

As noted above, in *Diversified Industries, Inc. v. Meredith*, the Eighth Circuit expressed its view that selective waiver should be used to encourage “the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.”²³ This “procedure,” however, was developed under unique circumstances in the mid-1970s and has limited application to today’s SEC investigations. Thus, the reasons for selective waiver extend far beyond anything discussed in *Diversified* and rejected by other courts.

Diversified involved the SEC’s “Voluntary Disclosure Program,” which was implemented to address the “political ‘slush fund’ practices” of some corporations.²⁴ According to one court describing the program, “[i]nitially the SEC staff carried out its own investigations, but as the scope of the payments problem became apparent, extending to foreign as well as domestic payments, the SEC realized that it did not have the resources to investigate each case carefully.”²⁵ Accordingly:

In several 1974 enforcement actions, the SEC thus sought and obtained consent decrees in which corporate defendants agreed to appoint special committees of their boards of directors—composed entirely of directors unaffiliated with management—to carry out independent investigations of the defendants’ payments practices. These investigations were to be performed by outside counsel hired for that purpose and

21. *Id.*

22. *In re Columbia*, 293 F.3d at 304 (quotations omitted). *But cf. Westinghouse Elec. Corp.*, 951 F.2d at 1429 (“[T]he standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege.”).

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

24. *See id.* at 607-08, 611; *see generally Westinghouse Elec. Corp.*, 951 F.2d at 1426 n.12 (describing Voluntary Disclosure Program); *In re Sealed Case*, 676 F.2d 793, 800-01 (D.C. Cir. 1982) (same).

25. *In re Sealed Case*, 676 F.2d at 800.

responsible only to the special committee. The results of the investigation would be embodied in a report to the special committee, *which would also be shared with the SEC staff*.²⁶

The SEC recognized the benefits of this approach, and thus "began to encourage corporations to come forward voluntarily and perform the same type of independent investigation that the consent decrees had required."²⁷ "In return . . . the SEC offered leniency for past abuses and a chance to avoid extended formal investigation and litigation."²⁸ As the D.C. Circuit noted in *In re Sealed Case*, "This effort to induce corporate self-investigation became known as the voluntary disclosure program."²⁹

The SEC publicized its program in congressional hearings and at various conferences, and SEC Chairman Roderick Hills made clear that cooperation entailed four major steps.³⁰ In *In re Sealed Case*, the D.C. Circuit described these steps, citing congressional testimony by Chairman Hills, which stated the following:

First, a corporation's board of directors should declare an end to all payments of doubtful legality and practices involving maintenance of inaccurate books and records;

Second, the board should authorize a special committee composed primarily of independent directors to perform a thorough investigation of the corporation's practices, using independent counsel and auditors to prepare a report to a full board;

Third, information on the commencement and progress of the investigation should be lodged with the SEC on its Form 8-K, and a copy of the final report should be filed with the SEC; and

Fourth, "[i]t must be understood that the staff of the Commission will have access to any information that is discovered or developed during the investigation."³¹

26. *Id.* (emphasis added); see also *id.* at 819 n.104 ("Ultimately, the information discovered in these investigations was to be turned over to the stockholders of the participating companies and to the investing public.").

27. *Id.*; see also *Westinghouse Elec. Corp.*, 951 F.2d at 1426 n.12 (describing Voluntary Disclosure Program).

28. *In re Sealed Case*, 676 F.2d at 801.

29. *Id.* at 800.

30. *Id.* at 801 & n.13.

31. *Id.* at 801 & n.15 (quoting *Abuses of Corporate Power: Hearings Before the Subcommittee*

This fourth step demonstrated that the internal investigations were initiated without the slightest pretense of confidentiality. In fact, at the same 1976 congressional hearings in which Chairman Hills described the contours of the Voluntary Disclosure Program, the director of the SEC's Enforcement Division added that "[t]he thing that the program has as a key part is that . . . when the final report comes in, we will have access to both the report and the underlying data."³²

Most courts to address selective waiver have done so in the context of this Voluntary Disclosure Program.³³ But cooperation with the SEC today is guided by a more recent policy, which even the SEC considers to be distinct from the voluntary disclosure initiative that it implemented in the 1970s.

2. The 2001 "Seaboard Report"

In its October 23, 2001 *Seaboard* Report,³⁴ the SEC articulated a policy whereby it would grant leniency for cooperation with SEC investigations.³⁵ The report's immediate purpose was to explain why the Commission was not taking action against the Seaboard Corporation ("Seaboard") for its "apparent misconduct."³⁶

The SEC had found that the controller of Seaboard's Miami-based division booked, and later tried to conceal, improper entries in the division's books and records that overstated assets and understated expenses.³⁷ Seaboard became aware of this wrongdoing and, within a week, "the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee, that [the controller] had caused the company's books and records

on *Priorities and Economy in Government of the Joint Economic Committee*, 94th Cong., 1st & 2d Sess. 9-10 (1976) (testimony of Rod Hills, Chairman, SEC) (emphasis added)).

32. *Id.* (quoting *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 94th Cong. 23 (1976) (testimony of Stanley Sporkin, Director, SEC Enforcement Division)).

33. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 n.7 (6th Cir. 2002) (describing Voluntary Disclosure Program and noting that "[i]t is against this background that many of the reported cases discussed herein arose"); see also, e.g., *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426, n.12 (3d Cir. 1991); *In re Sealed Case*, 676 F.2d at 800-01; *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607-08 (8th Cir. 1978) (en banc).

34. *Seaboard* Report, *supra* note 1.

35. *Id.* at 1.

36. *Id.*

37. *Id.*; see also *In re Gisela de Leon-Meredith*, Exchange Act Release No. 44970, Accounting and Auditing Enforcement Release No. 1471 (Oct. 23, 2001).

to be inaccurate and its financial reports to be misstated.”³⁸ The full Board, having been advised of what happened, authorized the company to hire an outside law firm to conduct an inquiry, the details of which were produced to the SEC.³⁹ Throughout this process, the company “did not invoke the attorney-client privilege, work-product protection or other privileges or protections with respect to any facts uncovered in the investigation.”⁴⁰ Based on Seaboard’s cooperation, the SEC chose not to seek any penalties against the company.⁴¹

In absolving Seaboard, the Report noted more generally that “[w]hen businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.”⁴² Accordingly, the Commission

set forth . . . some of the criteria [it] will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [it] use[s] to announce and resolve enforcement actions.⁴³

The list of criteria relate to a company’s internal investigation of alleged wrongdoing. Among the inquiries listed in the Report are the following:

Did the company commit to learn the truth, fully and expeditiously?

Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?

Did management, the Board or committees consisting solely of outside directors oversee the review?

Did the company promptly make available to our staff the results of its review and provide sufficient documentation

38. *Seaboard Report*, *supra* note 1, at 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2.

43. *Id.* at 5. These criteria were not meant to be an exhaustive list. *Id.* at 4-5 (“[W]e do not limit ourselves to the criteria we discuss below.”).

reflecting its response to the situation?

Did the company produce a thorough and probing written report detailing the findings of its review?

Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?⁴⁴

In a footnote, the Report added a more detailed discussion of this “voluntary disclosure” inquiry, noting that “[i]n some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work-product protection and other privileges, protections and exemptions with respect to the Commission.”⁴⁵ The Commission then professed to “recognize[] that these privileges, protections and exemptions serve important social interests,” and thus “the Commission does not view a company’s waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.”⁴⁶

3. Why Selective Waiver in the Context of the Voluntary Disclosure Program Should Be Viewed Differently from Disclosure After the *Seaboard* Report

On its face, the *Seaboard* Report seems very similar to the Voluntary Disclosure Program. In both situations, companies are encouraged to use outside directors and counsel to conduct investigations of wrongdoing. And in both situations, the SEC offers inducements to waive the attorney-client and work-product protections and to produce the results of those internal investigations to the Commission. But in practice they are very different.

The *Seaboard* Report now is used as a template to induce cooperation even outside the context of internal investigations to be made public. That is, the SEC asks for documents protected by the attorney-client and work-product protections that the Company never otherwise contemplated giving to the SEC.⁴⁷ This is in sharp contrast to the Voluntary Disclosure Program, under

44. *Id.* at 7-8.

45. *Id.* at 8 n.3.

46. *Id.*

47. *See, e.g.*, In the Matter of Monsanto Co., Exchange Act Release No. 50978 (Jan. 6, 2005) (recognizing cooperation by Monsanto that included “declining to assert its attorney-client privilege with respect to communications during the relevant time period”); In the Matter of BJ Servs. Co., Exchange Act Release No. 49390 (Mar. 10, 2004); *cf.* Memorandum from United States Deputy Attorney Gen. Larry D. Thompson to Heads of Dep’t Components (Jan. 20, 2003), http://www.usdoj.gov/dag/cfff/corporate_guidelines.htm (including “waiver of corporate attorney-

which work-product was created for the express purpose of production to the Commission.⁴⁸

Another difference is that under the *Seaboard* regime, a perceived lack of cooperation itself can result in serious penalties. Under the Voluntary Disclosure Program, the lack of an internal investigation could result in an SEC investigation and charges for wrongdoing, but the lack of a “voluntary” internal investigation itself was not something to be penalized. Today, though, just as “cooperation” can bring leniency from the SEC, a perceived lack of cooperation can result in severe penalties.⁴⁹

Thus, under the Voluntary Disclosure Program in the 1970s and 1980s, companies effectively acted as investigatory arms of the government. This arrangement was the product of the government’s lack of sufficient resources, and such investigations were undertaken with the understanding that any findings would be produced to the SEC. Now, however, cooperation generally becomes an issue at a later stage. The *Seaboard* Report itself arose from circumstances preceding an SEC-initiated investigation, but in practice the government generally seeks cooperation *with* its investigation, not in place of it.⁵⁰ Such cooperation may include the production of privileged materials

client and work-product protection” as a factor to be considered in determining whether a federal prosecutor should charge a corporation, and noting that this waiver applies “both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel”).

48. See *In re Sealed Case*, 676 F.2d 793, 818-19 (D.C. Cir. 1982) (“As the many cases concerning companies that participated in the [voluntary disclosure] program attest, the program involved a unique use of private lawyers and the adversary system to accommodate the joint needs of government and the private sector.”).

49. See Securities & Exchange Commission Press Release 2006-4 Concerning Financial Penalties (Jan. 4, 2006), <http://www.sec.gov/news/press/2006-4.htm> (“The degree to which a corporation has self reported an offense, or otherwise cooperated with the investigation and remediation of the offense, is a factor that the Commission will consider in determining the propriety of a corporate penalty.”); see, e.g., Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud, Exchange Act Release No. 2004-67 (May 17, 2004) (“As part of the settlement, Lucent agreed to pay a \$25 million penalty for its lack of cooperation.”); In the Matter of Am. Int’l Group, Inc., Exchange Act Release No. 48477 (Sept. 11, 2003) (imposing \$10 million fine on AIG for failing to turn over documents pursuant to subpoenas and “voluntary requests”); see generally Russell G. Ryan, Wash. Legal Found., *Cooperation in SEC Enforcement: The Carrot Becomes the Stick*, LEGAL BACKGROUNDER Vol. 19, No. 33 (Oct. 1, 2004), available at <http://www.wlf.org/lupload/100104LBRYAN.pdf> (noting recent penalties for lack of cooperation, and that “although the SEC has not explicitly stated, in practice such cooperation typically is expected to include sharing some degree of investigative work-product with the SEC and bearing the associate risk that such disclosure will later be deemed a broad waiver of applicable privileges”).

50. In a recent amicus brief, the SEC argued that “[p]roduction of work-product materials to a government agency under a confidentiality agreement should not result in waiver of work-product protection because preserving work-product protection in such circumstances is in the public interest and is consistent with the policies underpinning the work-product doctrine.” Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellants, *United States v. Bergonzi*, 403

created long before the prospect of government action arose.

While a company that refused to take part in the Voluntary Disclosure Program risked losing only the potential benefits of cooperation, today a perceived lack of cooperation can result in millions of dollars in penalties. The SEC has not penalized a company solely for its refusal to waive the attorney-client privilege and/or work-product protection. Nevertheless, the Commission's focus on "cooperation" unquestionably creates an incentive for a company to waive those protections. Thus, there is an entirely different dynamic from what was described in *Diversified*. Limited waiver now is necessary to do more than encourage cooperation with the government.⁵¹ It is needed as a matter of fairness to companies that feel pressure to cooperate but have no way to calculate the repercussions of agreeing or refusing to do so.

II. THE VARIED APPROACHES TAKEN BY FEDERAL COURTS REGARDING WAIVER

In rejecting selective waiver, the D.C. Circuit noted in *In re Sealed Case* that "[w]hen a corporation elects to participate in a voluntary disclosure program like the SEC's, it necessarily decides that the benefits of participation outweigh the benefits of confidentiality for all files necessary to a full evaluation of its disclosures."⁵² *In re Sealed Case* again involved the SEC's Voluntary Disclosure Program and thus was distinct from the situation in which a company must decide whether to cooperate with an ongoing SEC investigation by waiving privilege. But the court's statement reflects a key

F.3d 1048 (9th Cir. 2005) (No. 03-10511) [hereinafter Brief for the Securities and Exchange Commission]. The Commission took no position on the applicability of the attorney-client privilege to the documents at issue, *id.* at 4 n.3, but it did distinguish the Voluntary Disclosure Program from the issues presented in that case. *Id.* (distinguishing *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991), because "the reports at issue in *Westinghouse* had been produced under a Voluntary Discovery Program," and such reports "were usually created in lieu of, not in furtherance of, a Commission investigation").

51. In fact, the government's threats to companies that do not cooperate lead to cooperation even where it results in total waiver. See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993):

The SEC's amicus brief argues convincingly that the protection of privilege is not required to encourage compliance with SEC requests for cooperation with investigations. The SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible.

Id. (citation omitted).

52. 676 F.2d 793, 822 (D.C. Cir. 1982).

fallacy used to reject limited waiver. That is, the notion that a company has any ability to quantify the risks and benefits of cooperation. Right now, the case law addressing selective waiver is "in a state of hopeless confusion."⁵³ And very few courts have addressed the issue of the waiver's scope. Quite simply, there is no transparent choice. Companies that cooperate arguably are meeting only the immediate threat of government action, not making a calculated decision between known alternatives.

A. Decisions Regarding the Existence of Selective Waiver

Courts have taken three general positions regarding the existence of waiver due to cooperation with the government: (1) selective waiver is permissible; (2) selective waiver is not permissible under any circumstances; and (3) selective waiver is permissible where the government enters into a confidentiality agreement with the producing party.⁵⁴ Determining where courts stand is complicated, however, by the subtle distinction between waiver of the attorney-client privilege and waiver of the work-product doctrine (i.e., work-product protection is waived only by disclosure to an "adversary"). Even the Sixth Circuit, in its comprehensive analysis of selective waiver case law, confused the holdings of various cases, incorrectly attributing to them a holding regarding waiver of attorney-client privilege when a different privilege or protection was at issue.⁵⁵ Nevertheless, this distinction appears to be relevant mainly to the third category of cases noted above.

Of the federal courts of appeals to address the selective waiver issue, only the Eighth Circuit has adopted selective waiver. The First, Second, Third, Fourth, Sixth, Seventh, and D.C. Circuits have rejected the Eighth Circuit's approach, and in doing so have rejected outright selective waiver of the attorney-client privilege and work-product protection, or else allowed it only as to work-product protection when there is a confidentiality agreement.

53. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002) (quotations omitted).

54. *See generally id.* at 295-302 (describing these three views and reviewing cases following them).

55. *See id.* at 300-01 (discussing *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) in the context of attorney-client privilege when that decision solely related to the work-product doctrine); *see also In re Steinhardt*, 9 F.3d at 236 ("Steinhardt's voluntary submission of the memorandum to the Enforcement Division waived the protections of the work-product doctrine as to subsequent civil litigants seeking the memorandum from Steinhardt.").

1. Selective Waiver Is Permissible

The Eighth Circuit was the first court to recognize selective waiver, though the court addressed only waiver of the attorney-client privilege and not work-product protection.⁵⁶ In *Diversified Industries, Inc. v. Meredith*, The Weatherhead Company sought an internal report prepared by outside counsel for Diversified's independent audit committee.⁵⁷ Diversified had formed the committee when it became apparent that the company was paying bribes to obtain business, and the resulting report was produced to the SEC pursuant to a subpoena.⁵⁸ The Eighth Circuit recognized the benefits of the nascent Voluntary Disclosure Program, holding that production to the SEC resulted in "only a limited waiver of the [attorney-client] privilege."⁵⁹ According to the court, "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."⁶⁰

After *Diversified*, "several district courts held that disclosures to government agencies (typically the SEC in a voluntary disclosure program situation) do not waive the protections of the attorney-client privilege."⁶¹ Notwithstanding these isolated district court opinions, however, courts generally have rejected the Eighth Circuit's decision.

2. Selective Waiver Is Not Permissible

Federal courts of appeals that have addressed selective waiver generally have viewed the rationale of *Diversified* and the reasons for selective waiver to be synonymous, and *Diversified* to have been wrongly decided.

56. See *In re Steinhart*, 9 F.3d at 235 ("The en banc opinion in *Diversified* addressed [the selective waiver] question in the context of the attorney-client privilege, rather than in the context of the work-product doctrine.").

57. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607-08 (8th Cir. 1978) (en banc).

58. See *id.* at 607-08, 611.

59. *Id.* at 611. But see *In re Grand Jury Proceedings*, 841 F.2d 230, 234 (8th Cir. 1988) (stating that "[v]oluntary disclosure is inconsistent with the confidential attorney-client relationship and waives the privilege," and citing *Diversified* as contrary authority with a "but cf." signal).

60. *Diversified*, 572 F.2d at 611; see also *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) ("The Eighth Circuit's sole justification for permitting selective waiver was to encourage corporations to undertake internal investigations.").

61. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 299 (6th Cir. 2002); see, e.g., *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis. 1979) (rejecting waiver because "I believe that such cooperation [with the SEC] should be encouraged").

In *Permian Corp. v. United States*, for example, the D.C. Circuit found the “‘limited waiver’ theory wholly unpersuasive.”⁶² According to the court:

The Eighth Circuit’s “limited waiver” rule has little to do with [the] confidential link between the client and his legal advisor. Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a “friendly” agency.⁶³

Permian’s review of selective waiver “was limited to . . . discussion of the attorney-client privilege,”⁶⁴ though cases also addressing the work-product doctrine have largely echoed its analysis.⁶⁵

In *Westinghouse Electric Corp. v. Republic of the Philippines*,⁶⁶ for example, the Third Circuit rejected selective waiver in relation to both the attorney-client privilege and work-product protection.⁶⁷ According to the court, the “Eighth Circuit’s sole justification for permitting selective waiver was to encourage corporations to undertake internal investigations.”⁶⁸ Thus, “selective 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 [attorney-client] privilege beyond its intended purpose.”⁶⁹ The

62. 665 F.2d 1214, 1220 (D.C. Cir. 1981).

63. *Id.* at 1220-21.

64. *In re Steinhardt*, 9 F.3d 230, 235 (2d Cir. 1993).

65. *See id.* at 235 (“[M]uch of the reasoning in *Diversified* has equal, if not greater, applicability in the context of work-product doctrine.”); *see also* *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) (“Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option.”); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because “[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage”); *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988) (“Thus, Martin Marietta has impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed.”).

66. 951 F.2d 1414 (3d Cir. 1991).

67. *See id.* at 1423-30.

68. *Id.* at 1425.

69. *Id.*

Westinghouse court further held that such disclosures “waived the protection of the work-product doctrine because they were not made to further the goal underlying the doctrine.”⁷⁰ The court thus entirely rejected the notion of selective waiver, and while the issue was not squarely presented in that case, it further noted that the existence of a confidentiality agreement would not have changed its analysis.⁷¹

More recently, the Sixth Circuit noted in *In re Columbia/ HCA Healthcare Corp. Billing Practices Litigation*⁷² that “[t]he selective waiver doctrine stems from the *Diversified* opinion.”⁷³ According to the court, however, selective waiver does not serve the purpose of the attorney-client privilege because, “[a]s pointed out by the Third Circuit in *Westinghouse*, the *Diversified* approach ‘merely encourages voluntary disclosure to government agencies.’”⁷⁴ And “[o]ther than the fact that the initial waiver must be to an adversary, there is no compelling reason for differentiating waiver of work-product from waiver of attorney-client privilege.”⁷⁵ The existence of a confidentiality agreement did not change the court’s view because the attorney-client privilege “is not a creature of contract, arranged between the parties to suit the whim of the moment,”⁷⁶ nor did the court feel there was reason to transform the work-product doctrine into “a sword rather than a shield.”⁷⁷

3. Selective Waiver When There Is A Confidentiality Agreement

i. Preserving the Attorney-Client Privilege

A few federal district courts have held that a confidentiality agreement preserves the attorney-client privilege as to third parties when a company produces documents to the government. This approach “has its roots in

70. *Id.* at 1429.

71. *Id.* at 1430 (“Even if we had found that the agencies had made such an agreement [to keep produced documents confidential], it would not change our conclusion.”) (internal citations omitted). As to the work-product protection, the court held that “had the DOJ and the SEC not been *Westinghouse*’s adversaries, and had we concluded that *Westinghouse* reasonably expected the agencies to keep the material that it disclosed to them confidential, we might reach a different result.” *Id.* at 1431.

72. 293 F.3d 289 (6th Cir. 2002).

73. *Id.* at 298.

74. *Id.* at 302 (quoting *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991)).

75. *Id.* at 306 (quotations and footnotes omitted).

76. *Id.* at 303.

77. *Id.* at 307.

Teachers Insurance & Annuity Ass'n of America v. Shamrock Broadcasting Co.,"⁷⁸ which "[a]s with many other cases on this subject . . . involved the investigation, during the 1970s, of alleged improper dealings by a corporation."⁷⁹ In *Teachers Insurance*, the court was "of the opinion that disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made."⁸⁰

In its comprehensive review of the case law addressing selective waiver in *In re Columbia/Healthcare Corp.*, the Sixth Circuit suggested that this approach had greater support than was actually the case.⁸¹ The court suggested, for example, that *In re Steinhardt Partners, L.P.*⁸² endorsed the use of a confidentiality agreement to preserve the attorney-client privilege.⁸³ But that decision related solely to the work-product doctrine.⁸⁴

The *In re Columbia/Healthcare Corp.* court also discussed *Dellwood Farms, Inc. v. Cargill, Inc.*,⁸⁵ in the attorney-client privilege section of its selective waiver review.⁸⁶ Judge Posner's opinion did note that "[i]n the case of selective disclosure, the courts feel, reasonably enough, that the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further."⁸⁷ But *Dellwood Farms* involved the "law enforcement investigatory privilege," not the attorney-client privilege.⁸⁸ One perhaps may use Judge Posner's statement to argue for limited waiver of the work-product protection where there is a confidentiality agreement. But nothing in the Seventh Circuit's opinion suggests that the court was straying from the principle that "under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to

78. 521 F. Supp. 638 (S.D.N.Y. 1981).

79. *In re Columbia*, 293 F.3d at 299.

80. *Teachers Ins. & Annuity Ass'n of Am.*, 521 F. Supp. at 644-45; see also *Fox v. Cal. Sierra Fin. Servs.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) ("I find that where, as here, information has been voluntarily and selectively disclosed to the SEC without steps to protect the privileged nature of such information, fairness requires a finding that the attorney-client privilege has been waived as to the disclosed information and all information on the same subject.") (citations omitted).

81. See *In re Columbia*, 293 F.3d at 304.

82. 9 F.3d 230 (2d Cir. 1993).

83. See *In re Columbia*, 293 F.3d at 304 (noting in parenthetical that *Steinhardt* discussed "the ability of using an agreement with the SEC to protect work-product and attorney-client privilege").

84. See *In re Steinhardt*, 9 F.3d at 233-36.

85. 128 F.3d 1122 (7th Cir. 1997).

86. See *In re Columbia*, 293 F.3d at 301.

87. *Dellwood Farms*, 128 F.3d at 1127.

88. *Id.* at 1125.

disclose the communications to anyone else.”⁸⁹

The Sixth Circuit itself recognized that the attorney-client privilege is “not a creature of contract” and rejected the *Teachers Insurance* approach.⁹⁰ Indeed, it seems intuitive that a confidentiality agreement signed by a third party cannot negate the fact that the otherwise confidential attorney-client communication has been disclosed to that third party. Either way, the link between the attorney and client has been broken, and the privilege waived.⁹¹

ii. Preserving Work-Product Protection

The more difficult issue is the effect of a confidentiality agreement on the work-product doctrine. As noted above, the Sixth Circuit in *In re Columbia/Healthcare Corp.* and the Third Circuit in *Westinghouse* rejected selective waiver of the work-product doctrine because they considered selective waiver to be inconsistent with the underlying purpose of the work-product doctrine. These courts also rejected the argument that a confidentiality agreement could somehow preserve the work-product protection that otherwise would be lost.⁹²

In a recent amicus brief filed in the Ninth Circuit, the SEC argued that this aspect of *In re Columbia/Healthcare Corp.* was wrongly decided and that the portion of *Westinghouse* addressing confidentiality agreements was merely dicta.⁹³ The SEC relied heavily on Judge Boggs’s dissent in *In re Columbia/Healthcare Corp.* to support its contention that a confidentiality agreement should preserve work-product protection as to third parties.⁹⁴ According to the SEC, “[a]llowing parties to produce work-product to the

89. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991) (citing, *inter alia*, 8 JOHN HENRY WIGMORE, EVIDENCE § 2327 (John T. McNaughton rev. 1961)).

90. See *In re Columbia*, 293 F.3d at 303.

91. For attorney-client communications that post-date an SEC confidentiality agreement, waiver might not even be an issue, since the communications arguably would be made with the expectation that such information would be produced to the government. As a result, the attorney-client communication would not be made in confidence, and there would be no privilege to waive. See *In re McKesson HBOC, Inc. Sec. Litig.*, No. C-99-20743, 2005 U.S. Dist. LEXIS 7098, at *27 (N.D. Cal. Mar. 31, 2005) (holding that “the communications were not protected by the attorney-client privilege when made because McKesson had clearly agreed to disclose attorney-client communications to third parties before the communications had occurred,” and thus that it was “irrelevant that the government agreed to keep the communications confidential once disclosed because the attorney-client privilege never attached”).

92. *In re Columbia*, 293 F.3d at 293, 307 (finding waiver of work-product protection despite existence of confidentiality agreement); see also *Westinghouse Elec. Corp.*, 951 F.2d at 1430.

93. Brief for the Securities and Exchange Commission, *supra* note 50, at 18.

94. *Id.*; see generally *In re Columbia*, 293 F.3d at 307-14 (Boggs, J., dissenting).

Commission without waiving work-product protection serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors."⁹⁵ The SEC also relied heavily on *In re Steinhardt*, in which the Second Circuit, purportedly at the SEC's urging,⁹⁶ noted the following:

In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work-product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.⁹⁷

But *In re Steinhardt* did not explain how such an agreement would preclude the government from being considered an "adversary," which is key because of the "prevailing rule that disclosure to an adversary, real or potential, forfeits work-product protection."⁹⁸ In fact, in *In re Steinhardt*, the court "agree[d] with the district court's conclusion that the SEC stood in an adversarial position to Steinhardt when it requested assistance."⁹⁹

In its amicus brief, the SEC also failed to explain how a confidentiality agreement would render an investigated party a non-adversary. Instead, the SEC seemed to credit a confidentiality agreement only as a sort of Commission seal-of-approval showing the genuineness of a company's desire to maintain work-product protection:

95. Brief for the Securities and Exchange Commission, *supra* note 50, at 23-24 (citing *In re Columbia*, 293 F.3d at 311-13 (Boggs, J., dissenting)).

96. *Id.*

97. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (citations omitted); *see also In re Natural Gas Co.*, No. 03 Civ. 6186 (VM) (AJP), 2005 U.S. Dist. LEXIS 11950, at *35-39 (S.D.N.Y. June 21, 2005) (following *Steinhardt* and holding that work-product protection was not waived in part "because defendants had explicitly written confidentiality and non-waiver agreements with the governmental agencies").

98. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997).

99. *In re Steinhardt*, 9 F.3d at 234; *see also id.* ("The fact that the request came from the SEC's Enforcement Division further supports the conclusion that this was an adversarial relationship.").

[T]he Commission emphasizes the use of confidentiality agreements because confidentiality agreements help prevent companies from making unnecessary or frivolous claims that production of work-product did not waive work-product protection. If a corporation discloses documents without obtaining a confidentiality agreement from the government, third-parties should be able to obtain the documents because the corporation has not provided evidence of an intent to protect the documents—and has not shown that it was unwilling to disclose the documents without protection from third-party plaintiffs.¹⁰⁰

This stance is disingenuous. The public policy and principle on which the SEC relies arguably should apply to selective waiver generally, but the Commission opposes this. The SEC's position seems designed only to give the Commission increased power; it can refuse to enter into a confidentiality agreement if it deems a company's position "frivolous," and thus put added pressure on the company to cooperate. Moreover, the SEC likely will not agree to unconditional confidentiality.¹⁰¹ Thus, a company never could be sure that a court would find the requisite desire to keep the documents confidential.¹⁰²

100. Brief for the Securities and Exchange Commission, *supra* note 50, at 27 (citing *In re Columbia*, 293 F.3d at 313 n.3 (Boggs, J., dissenting)).

101. For example, Stephen Cutler, the former Director of the SEC's Enforcement Division, noted in congressional testimony the SEC's support for proposed legislation to create selective waiver, but added:

Of course, the Commission must always be free to disclose in an enforcement proceeding the documents produced to it (even pursuant to a confidentiality agreement) if the Commission determines that it is necessary in furtherance of the discharge of its duties and responsibilities. This would be true even if such use (as distinct from the mere production of documents) resulted in a waiver of the privilege.

Testimony Concerning the Securities Fraud Deterrence & Investor Restitution Act: Hearing on H.R. 2179 Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises (2003) (statement of Stephen Cutler, SEC Dir., Div. of Enforcement); *see, e.g., In re Syncor ERISA Litig.*, 229 F.R.D. 636, 646 (C.D. Cal. 2005) (finding confidentiality agreement under which SEC could disclose documents as required by law or in furtherance of its discharge of its duties and responsibilities to be "conditional" and thus "inconsistent with those cases . . . allowing selective waiver").

102. Courts even have attributed varying degrees of significance to the *same* confidentiality agreements. For example, where documents were produced to the SEC and U.S. Attorney's office in relation to government investigations of a merger agreement between McKesson Corporation and HBO Corporation, some courts found waiver of work-product protection and some courts found no waiver. *Compare* *United States v. Bergonzi*, 216 F.R.D. 487, 496 n.10 (N.D. Cal. 2003) (noting that

Whatever the Commission's motives, however, the "adversary" problem seems to undermine its position. Courts generally have held that cooperation with an investigating agency does not render the relationship between the investigated company and the agency non-adversarial.¹⁰³ Consequently, an agreement between a company and the SEC—especially where the SEC is investigating that company—does not change their relationship. Regardless of whether the government intends to share the disclosed materials with other adversaries, that government agency itself is an adversary. Thus, it seems that disclosure to the government adversary can result in complete waiver of work-product protection regardless of whether there is a confidentiality agreement.

B. Scope of the Waiver

Whether disclosure leads to complete waiver rather than selective waiver is not the only issue companies must consider. Another major variable, for

"the agreement made by the Government to keep the documents was not unconditional," and that the court thus "rejects McKesson HBOC's argument that the Agreements protect its privilege"), and *McKesson Corp. v. Green*, 610 S.E.2d 54, 57 (Ga. 2005) (affirming decision finding waiver of work-product protection in part because "McKesson's confidentiality agreement with the SEC was far from airtight[, since i]t allowed the SEC to give the documents to others if it deemed that course of action to be 'in furtherance of the [SEC's] discharge of its duties and responsibilities'" (brackets in original), and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1239 (Ct. App. 2005) (finding waiver despite confidentiality agreements and noting that "[t]he agreements did not bind the government to maintain confidentiality under all circumstances"), with *In re McKesson HBOC, Inc. Sec. Litig.*, No. C-99-20743, 2005 U.S. Dist. LEXIS 7098, at *48 (N.D. Cal. Mar. 31, 2005) (finding no waiver and noting that the confidentiality agreements' "re-disclosure provisions are logical preconditions for the government's agreeing to treat the materials as privileged and confidential"), and *Saito v. McKesson HBOC, Inc.*, No. 18553, 2002 Del. Ch. LEXIS 125, at *40 (Del. Ch. Oct. 25, 2002) ("McKesson HBOC had a reasonable expectation of privacy in its disclosure of work-product to the SEC under the protection of a confidentiality agreement.").

103. See, e.g., *Mass. Inst. of Tech.*, 129 F.3d at 687 ("MIT doubtless hoped that there would be no actual controversy between it and the Department of Defense, but the potential for dispute and even litigation was certainly there."); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1431 (3d Cir. 1991) ("[H]ad the DOJ and the SEC not been Westinghouse's adversaries . . . we might reach a different result."); *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988) ("[W]e note that the federal government's and Martin Marietta's interests were decidedly adverse during the proceedings at issue."); *Bergonzi*, 216 F.R.D. at 496 ("Indeed, the Company and the Government did not have a true common goal, as it could not have been the Company's goal to impose liability onto itself, a consideration always maintained by the Government."); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) ("[E]ven if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement"); *In re Worlds of Wonder Sec. Litig.*, 147 F.R.D. 208, 211-12 (N.D. Cal. 1992) (holding that "[w]aiver of work-product to the SEC also waives work-product to others," and that the company could "not pick and choose to which adversaries [it would] reveal documents") (citations omitted).

which courts have provided little, if any, guidance, is the scope of the waiver. That is, to what extent does production of an otherwise-protected document waive any protections as to other documents that were not produced?

Courts addressing selective waiver have been careful to distinguish “selective” waiver from the issue of “partial” waiver, “where disclosure of a part of a privileged document or set of such documents is argued to waive privilege in the rest of it.”¹⁰⁴ As the Third Circuit explained in *Westinghouse*:

Although the rule in *Diversified* is often referred to as the “limited waiver rule,” we prefer not to use that phrase because the word “limited” refers to two distinct types of waivers: selective and partial. Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications.¹⁰⁵

But courts grappling with selective waiver generally have gone no further than simply identifying the partial waiver issue. As the First Circuit noted in *United States v. Massachusetts Institute of Technology*,¹⁰⁶ “Nothing in this opinion is intended to be directed to the different and difficult question when disclosure of one document warrants forfeiture of protection for a different but related document.”¹⁰⁷

Indeed some courts have suggested that producing one privileged document to the government may lead to waiver of protection for all materials related to the same subject matter. For example, in *In re Sealed Case*, the D.C. Circuit held that “[w]hen 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.”¹⁰⁸ Likewise, in *In re Martin Marietta Corp.*,¹⁰⁹ the Fourth Circuit

104. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997).

105. *Westinghouse*, 951 F.2d at 1423 n.7.

106. 129 F.3d 681 (1st Cir. 1997).

107. *Id.* at 688; *see also Dellwood Farms*, 128 F.3d at 1127 (“Partial waiver is not in issue here.”).

108. 676 F.2d 793, 818 (D.C. Cir. 1982). According to the court, “the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.” *Id.* (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (J. McNaughton rev. 1961)).

109. 856 F.2d 619 (4th Cir. 1988).

found broad subject matter waiver pursuant to the “rule of implied waiver,” under which “any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter.”¹¹⁰

In re Martin Marietta involved a former employee of Martin Marietta, William Pollard, who was under indictment for, among other things, conspiring to defraud the Department of Defense (“DOD”).¹¹¹ Pollard subpoenaed Martin Marietta for various documents, and the company promptly moved to quash the subpoena.¹¹² Martin Marietta acknowledged that portions of some documents it sought to withhold had been quoted in disclosures the company made to the United States Attorney and the DOD.¹¹³ Nevertheless, the company argued that the documents at issue were protected from disclosure by either or both the attorney-client privilege and work-product doctrine, and that a subpoena should be quashed when it calls for privileged matter.¹¹⁴ The Fourth Circuit court found that “[t]here can be no dispute but that otherwise privileged materials were disclosed to the United States Attorney and the DOD,” and thus “[t]he issue is the extent of the implied waiver thereby created.”¹¹⁵

As noted above, the implied waiver created by the disclosure was expansive. The court held, for example, that a position paper submitted to the United States Attorney arguing why Martin Marietta should not face indictment, “as well as the underlying details,” were “no longer within the attorney-client privilege.”¹¹⁶ In addition, “Martin Marietta [had] impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed.”¹¹⁷ The only limitation imposed by the court related to opinion work-product, to which the concept of subject matter waiver did not apply.¹¹⁸ According to the court, “the underlying rationale for

110. *Id.* at 623.

111. *Id.* at 620.

112. *Id.*

113. *Id.* at 621.

114. *Id.* at 622.

115. *Id.*

116. *Id.* at 623.

117. *Id.* at 625.

118. *Id.* at 626. The *In re Martin Marietta* court recognized that “the line between opinion and non-opinion work-product can be a fine one.” *Id.* As an example of the distinction, the court indicated that transcripts of interviews conducted by counsel would be non-opinion work-product, while an attorney’s notations in the margins about litigation strategy would be opinion work-product. *Id.* at 626 n.2; see also *In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 250 (4th Cir. 2005) (“Fact work-product . . . consists of documents prepared by an attorney that do not contain the attorney’s mental impressions,” while “[o]pinion work-product . . . contains[s] the fruit of an attorney’s mental processes.”).

the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion.”¹¹⁹ The court thus affirmed the district court order requiring Martin Marietta to produce the documents sought by subpoena, except for the documents over which Martin Marietta claimed work-product protection; the district court was instructed to review those documents *in camera* to determine whether they were opinion or non-opinion work-product.¹²⁰

While *In re Martin Marietta* was a criminal case that did not involve the SEC, it does reveal the true depth and complexity of the selective waiver issue. Quite simply, the fight between companies and third parties seeking documents may extend beyond what a company produced to the Commission in its effort to cooperate. That is, waiver as to one document may start a chain reaction of waiver for related documents that were never produced to the SEC. Thus, it is simply wrong to say that total waiver, rather than selective waiver, creates “a reduction of uncertainty” for companies deciding whether to produce privileged materials to the government.¹²¹ There would be far more transparency if a company knew that production of privileged materials to the government waived only protections covering *those documents* and only in relation to *the one government entity* that received those documents.

III. WHY SELECTIVE WAIVER IS PREFERABLE TO TOTAL WAIVER

The inability to quantify risk, to analyze the costs and benefits of producing documents to the SEC, is antithetical to the proper functioning of a market in general and a business in particular. Yet companies continue to “cooperate” with government investigations. One might argue that this is simply their choice, and that these companies must live with the repercussions of their self-serving decision to aid investigations against them. But for men and women facing the threat of imprisonment, the effective end of their professional careers and financial well-being, and the weight of lining up against the United States Government, it is not much of a choice.¹²² In many

119. *In re Martin Marietta*, 856 F.2d at 626.

120. *Id.*

121. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002). Indeed, the *Seaboard* Report, for example, notes only that “*in certain circumstances*, the Commission staff has agreed that a witness’ production of privileged information would not constitute a subject matter waiver that would entitle the staff to receive further privileged information.” *Seaboard* Report, *supra* note 1, at n.3 (citing Brief of SEC as Amicus Curiae, McKesson HBOC, Inc., No. 99-C-7980-3 (Ga. Ct. App. Filed May 13, 2001) (emphasis added)). And, of course, whatever the SEC’s position is in a given case, that will not prevent third parties from arguing in favor of the broadest subject matter waiver.

122. Indeed, Judge Boggs (now the Chief Judge of the Sixth Circuit) was incorrect in his *In re*

ways, cooperation must feel like the only option.

This coercion is relevant because "fairness" is at the heart of many decisions that have rejected selective waiver. Courts have held that it is simply unfair for a company to pick and choose when it can invoke the attorney-client privilege and work-product protection. But if courts are going to view selective waiver through the prism of "fairness," the pressure that the government places upon companies to waive their protections, which predates any "selective" disclosure, is far more unfair. This, combined with Congress's professed desire to prevent private fishing-expedition lawsuits dependent on the fruits of discovery, justifies selective waiver.

A. Considerations of Fairness Justify Selective Waiver

Abstract notions of "fairness" have guided most of the courts that have rejected selective waiver of the attorney-client privilege and work-product protection. In *Permian Corp. v. United States*,¹²³ for example, the first circuit court opinion to reject the Eight Circuit's recognition of selective waiver, the D.C. Circuit noted the following:

The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . *The attorney-client privilege is not designed for such tactical employment.*¹²⁴

Columbia/HCA Healthcare dissent when he stated that "[r]ealistically speaking, the choice before this court today is not between narrower and wider disclosure, but between a disclosure only to government officials and *no disclosure at all.*" *In re Columbia*, 293 F.3d at 307 (Boggs, J., dissenting) (emphasis added). Companies have continued to disclose even where courts have found that disclosure results in total waiver. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) ("The SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible."); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 648 (C.D. Cal. 2005) ("[T]here is absolutely no evidence demonstrating that the disallowance of selective waiver would impede the voluntary cooperation of a corporation with the Government.").

123. 665 F.2d 1214 (D.C. Cir. 1981).

124. *Id.* at 1221 (emphasis added). The lone circuit to have rejected the fairness analysis in relation to selective waiver is the Third Circuit. In *Westinghouse*, the court recognized that "[i]n *Permian* and its progeny, the D.C. Circuit has taken the view that it is inherently unfair for a party to selectively disclose privileged information in one proceeding but not another." *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426 n.13 (3d Cir. 1991). The *Westinghouse*

Echoing this reasoning, the Second Circuit would later hold in *In re Steinhardt* that “selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”¹²⁵ The Sixth Circuit recently also held that “[l]ike attorney-client privilege, there is no reason to transform the work-product doctrine into another ‘brush on the attorney’s palette,’ used as a sword rather than a shield.”¹²⁶ And the First Circuit has noted that “[f]airness is . . . a concern where a client is permitted to choose to disclose materials to one outsider while withholding them from another.”¹²⁷ These cases all embody the view expressed by the D.C. Circuit in *In re Sealed Case* that privileged documents need not be produced “unless an ‘objective consideration’ of fairness requires disclosure to prevent undue manipulation of the privilege.”¹²⁸

But the nature of the SEC’s current approach to cooperation suggests that it is the government that is “manipulating” the privilege. The SEC is the one coercing companies to waive their protections “or else.” And it is the SEC that is trying to link selective waiver to confidentiality agreements, which would give the Commission even greater leverage over companies facing penalties for non-cooperation. The true control, and thus the true tactical employment, is being effected by the government, not the respective companies it chooses to investigate.

Indeed, even if the Second Circuit and SEC were correct in *In re Steinhardt*, and “cooperation” with the government continues even where courts reject selective waiver,¹²⁹ the attorney-client privilege still suffers. Whether or not the company secures benefits from disclosing documents to the government along the way, such a policy can dissuade employees from discussing legal issues with counsel.¹³⁰ Quite simply, an employee will not feel like he or she is speaking to an attorney in confidence when the substance of that communication likely will be one of the first things that the government, and then private plaintiffs, want to know. As a result, that employee might feel, for example, that it simply is not worth putting his or her

court “hesitate[d] to rely on this rationale, however, for in our view, when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred.” *Id.*

125. *In re Steinhardt*, 9 F.3d at 235.

126. *In re Columbia*, 293 F.3d at 307 (quoting *In re Steinhardt*, 9 F.3d at 235).

127. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1997).

128. *In re Sealed Case*, 676 F.2d 793, 808 (D.C. Cir. 1982) (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (John T. McNaughton rev. 1961)).

129. See *In re Steinhardt*, 9 F.3d at 236.

130. See Leonard Post, *Eroding Privilege Hurts Corporate Compliance*, NAT’L L. J., Apr. 15, 2005, at 6.

name on an email that might prove to be the prime evidence against both the employee and the company.¹³¹

The government's policy of pressuring companies to waive their attorney-client and work-product protections is the real manipulation of the privilege. In the days of the Voluntary Disclosure Program, the playing field was more even; corporate disclosure was a more transparent decision before an SEC investigation began. Now, however, the company already is a target facing penalties for perceived non-cooperation (on top of whatever added sanctions may be imposed in an enforcement action).

The SEC has no way to compel disclosure of privileged materials to aid its investigation.¹³² But its approach to cooperation makes clear to companies that things will go better for them if they agree to waive the attorney-client and work-product protections. Thus, this is far more than a "difficult" decision.¹³³ It is an unfair exploitation of power by the federal government that has adverse effects on both the attorney-client privilege and work-product doctrine. Selective waiver therefore is justified.¹³⁴

131. See *id.* (quoting one general counsel's opinion that efforts by federal prosecutors to pressure companies to waive the attorney-client privilege and work-product protection "are having the perverse opposite effect on our efforts to promote accountability and transparency," since employees are "not going to seek out their lawyer anymore when their lawyer could well become Exhibit A for the prosecution").

132. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting) ("The only way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it.").

133. See *In re Steinhardt*, 9 F.3d at 236 ("Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the 'Hobson's choice' argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.").

134. This Article does not address the impact of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000), on the selective waiver issue. It has been argued that "even when a corporation refuses an adverse party access to its voluntary SEC reports under the limited waiver rule, the SEC may be obliged to disclose the same reports under the FOIA." Beth S. Dorris, Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 807 (1984). Ms. Dorris did acknowledge, however, that one of the exemptions to public access under FOIA applies to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); see generally Dorris, *supra*, at 807-09, 809 n.93. To the extent materials provided to the SEC remain otherwise privileged or confidential, this exemption should apply.

In addition, FOIA provides an exemption for disclosure of "records or information compiled for law enforcement purposes," where such production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7), (7)(A). In her widely-cited note, Ms. Dorris suggested that this exemption would not apply in the selective waiver context because "it is not clear the reports submitted under the voluntary disclosure program are 'investigatory records,' since the voluntary reports [submitted under the voluntary disclosure program] are not the product of an agency investigation." Dorris, *supra*, at 810. She added: "Nor is it clear that they are 'compiled for law enforcement purposes,' since the SEC promises not to bring an enforcement action against the

B. Congress's Intent in Enacting the PSLRA Also Justifies Selective Waiver

If disclosure to the government waives the attorney-client privilege and work-product protection as to third parties, then third parties have an incentive to file suit against the company and to obtain those sensitive materials through discovery. Private litigants have greater reason to sue because they will see, or at least hope to see, the results of attorney-led internal investigations into wrongdoing and potentially incriminating documents that otherwise would have been withheld. This is the type of fishing expedition through discovery that the Private Securities Litigation Reform Act of 1995¹³⁵ was designed to stop.

1. Background of the PSLRA

The PSLRA was enacted “to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries.”¹³⁶ To do this, the legislation placed “stringent procedural requirements” on plaintiffs who pursue private securities fraud claims.¹³⁷ These include the pleading requirement that the plaintiff in a private securities fraud suit “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”¹³⁸ In addition, the plaintiff must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”¹³⁹

The PSLRA also added identical provisions to the Securities Act of 1933 and the Securities Exchange Act of 1934 that created a “discovery stay.”¹⁴⁰ Section 21D(b)(3)(B) of the PSLRA provides that “in any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the

participating corporation.” *Id.* Again, this analysis is rooted in the unique nature of the SEC’s Voluntary Disclosure Program. Now, where production of privileged documents to the SEC generally is in furtherance of a government investigation, and not in place of one, a producing company likely could invoke this exemption to prevent public disclosure under FOIA.

135. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

136. *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000).

137. *Id.*

138. 15 U.S.C. § 78u-4(b)(2) (2000).

139. § 78u-4(b)(1).

140. § 78u-4(b)(3)(B); see § 77z-1(b)(1).

motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”¹⁴¹

Federal district courts have noted two reasons for this discovery stay: (1) to prevent private plaintiffs from using the high cost of discovery as leverage to induce settlement and (2) to prevent fishing-expedition lawsuits dependent on the fruits of discovery rather than the allegations contained in the complaint.¹⁴² As one district court noted:

The legislative history of the PSLRA indicates that Congress enacted the discovery stay to prevent plaintiffs from filing securities class actions with the intent of using the discovery process to force a coercive settlement. Congress also enacted the mandatory stay of discovery to prevent plaintiffs from filing securities fraud lawsuits as a vehicle in order to conduct discovery in the hopes of finding a sustainable claim[] not alleged in the complaint.¹⁴³

The first reason for a discovery stay described in the legislative history, relating to the cost of discovery, does not seem applicable in the context of documents already produced to the government. According to the House conference report, “[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions.”¹⁴⁴ But where documents already have been reviewed and compiled for production, producing them again would require little additional cost or effort.¹⁴⁵

The second reason for the discovery stay, that is, to prevent fishing-expedition lawsuits, is much more relevant to the selective waiver issue. The PSLRA was designed in part “to deter the ‘abusive practices committed in private securities litigation,’ which includes ‘the routine filing of lawsuits . . . with only faint hope that the discovery process might lead eventually to some plausible cause of action.’”¹⁴⁶ As the Ninth Circuit held in *Medhekar v.*

141. § 78u-4(b)(3)(B); see § 77z-1(b)(1).

142. See, e.g., *In re Labranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004) (citing cases).

143. *Id.* (citations and quotations omitted); see generally S. REP. NO. 104-98, at 14 (1995), as reprinted in 1995 U.S.C.C.A.N. 679, 693 (discussing purpose of PSLRA); H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 748 (discussing purpose of PSLRA).

144. H.R. REP. NO. 104-369, at 31.

145. See, e.g., *Singer v. Nicor, Inc.*, No. 02-C-5168, 2003 U.S. Dist. LEXIS 26189, at *5 (N.D. Ill. Apr. 24, 2003) (noting that since documents produced to the government “have already been found and compiled, and plaintiffs will pay the production costs, defendants would not be unduly burdened by producing them to plaintiffs now”).

146. *Faulkner v. Verizon Commc’ns, Inc.*, 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001) (quoting

United States District Court,¹⁴⁷ “Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed.”¹⁴⁸ But if plaintiffs know they can obtain attorney-client communications and attorney work-product through discovery, they have all the more reason to sue and to rely on this sensitive information to bolster, if not define, their allegations. Thus, a rejection of selective waiver creates incentives that directly conflict with a main purpose of the PSLRA.¹⁴⁹

2. Lifting the Discovery Stay Because of Production to the Government

This incentive to sue is heightened where courts lift the discovery stay to permit access to materials previously produced to the government. Cases addressing the PSLRA discovery stay are even less consistent than those addressing selective waiver, but the apparent trend is for courts to lift the discovery stay in such circumstances. As a threshold matter, this approach creates an unacceptable incentive for civil litigants to sue in hope that they will obtain relevant unprotected documents in the early stages of the case that were cherry-picked as part of a government investigation. It also threatens to streamline the delivery of once-privileged documents to private plaintiffs and

141 CONG. REC. H13699 (daily ed. Nov. 28, 1995) (statement of House Managers)); *see also id.* (stating that “testimony before the Senate from corporate executives included the following statement: ‘once the suit is filed, the plaintiff’s law firm proceeds to search through all of the company’s documents and take endless depositions for the slightest positive comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming’”) (quoting S. REP. NO. 104-98, at 14) (citations omitted).

147. 99 F.3d 325 (9th Cir. 1996).

148. *Id.* at 328.

149. In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), the Third Circuit noted that “the SEC unsuccessfully sought to have the Securities and Exchange Act of 1934 amended to include a specific provision establishing a selective waiver rule protecting corporate disclosures to the agency.” *Id.* at 1427 (citing *SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934* in 16 SEC. REG. & L. REP. at 461 (Mar. 2, 1984)). Similarly, in 2003, the Securities Fraud and Deterrence and Investor Restitution Act of 2003 was introduced in the House of Representatives and supported by the SEC. *See generally Testimony Concerning the Securities Fraud Deterrence & Investor Restitution Act: Hearing on H.R. 2179 Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises* (2003) (statement of Stephen Cutler, SEC Dir., Div. of Enforcement). Section 4 of the proposed legislation would have created selective waiver, rather than total waiver, of the attorney-client privilege and work-product protection for materials produced pursuant to a written confidentiality agreement between the SEC and the producing party. Securities Fraud Deterrence & Investor Restitution Act, H.R. 2179, 108th Cong. § 4 (2003). Like the 1984 proposed legislation, the 2003 bill was never signed into law, yet this provides no meaningful evidence of Congress’s position on the merits of one provision in the much larger bill. *See Westinghouse*, 951 F.2d at 1427 n.15 (“We do not infer an intention to prohibit the selective waiver rule from Congress’s inaction.”).

to even further disadvantage companies that “cooperated” with government investigations.

The true impact of case law lifting the discovery stay is unclear, however, because to this point courts generally have not grappled with the selective waiver issue in relation to the stay. In fact, two district courts in the Fourth Circuit have lifted the stay, but suggested that “privileged” information was exempt from disclosure to the plaintiffs.¹⁵⁰ This appears to be in stark contrast with the Fourth Circuit’s holding in *In re Martin Marietta Corp.*, which reiterated the “rule of implied waiver” under which “any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter.”¹⁵¹

As noted above, the discovery stay may be lifted only if the court finds “that particularized discovery is necessary to *preserve evidence* or to *prevent undue prejudice* to that party.”¹⁵² Unless there is a risk that evidence somehow will be lost due to delay,¹⁵³ the principal issue seems to be what constitutes “undue prejudice.” Once again, “fairness” is a major part of the analysis, since “district courts here and elsewhere have construed ‘undue prejudice’ to mean improper or unfair treatment amounting to something less than irreparable harm.”¹⁵⁴

But courts differ in their determination of what constitutes unfair treatment. Some courts have refused to lift the discovery stay even though the documents sought by the plaintiffs were produced to government agencies.¹⁵⁵

150. *In re Mutual Funds Inv. Litig.*, MDL-15863, 2005 U.S. Dist. LEXIS 3469 (D. Md. Mar. 7, 2005); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246 (D. Md. 2004).

151. 856 F.2d 619, 623 (4th Cir. 1988).

152. 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B) (2000) (emphasis added).

153. *See, e.g., In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003) (“Plaintiffs contend that the partial lift on the stay of discovery is necessary because defendants are liquidating certain subsidiaries or affiliates of the Vivendi corporation, and there is a risk that documents may be lost with the transfer of control over portions of defendants’ business.”); *cf. H.R. REP. NO. 104-369*, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 748 (citing as an example of when discovery may be necessary, “where the terminal illness of an important witness might require the deposition of the witness prior to the ruling on the motion to dismiss”).

154. *In re Vivendi Universal*, 381 F. Supp. 2d at 130 (quotations omitted); *see also In re CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d 1260, 1265 (N.D. Okla. 2001) (“‘Undue’ prejudice is prejudice that is improper or unfair under the circumstances.”).

155. *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, MDL No. 1500, 02 Civ. 5575 (SWK), 2003 U.S. Dist. LEXIS 12846, at *6-7 (S.D.N.Y. July 25, 2003) (“Lead Plaintiff has not demonstrated that exceptional circumstances are present in this case requiring production of documents previously produced to various government agencies, and the application to lift the PSLRA automatic stay of discovery pending resolution of the motion to dismiss is therefore denied.”); *Rampersad v. Deutsche Bank Sec. Inc.*, 381 F. Supp. 2d 131, 133 (S.D.N.Y. 2003) (denying motion to lift stay and noting that while “Plaintiff contends that the PSLRA stay of discovery does not apply when the information sought has already been provided to a governmental agency,” the plaintiff had “cited no authority for such a categorical exception to the PSLRA’s

By contrast, a slight majority of the cases addressing the issue and several of the more recent cases have held that the stay must be lifted. According to these courts, allowing the government to have materials produced by the defendant while preventing private plaintiffs from having the same information puts the plaintiffs at an unfair disadvantage.¹⁵⁶ As one court held:

In balancing the purpose of the PSLRA stay, the detriment to Defendant, the burden production would impose on Defendant, the detriment to Lead Plaintiff, and general principles of fairness, the Court finds that it would be unfair and unnecessary, and hence “undue,” to require Lead Plaintiff to suffer any prejudice as a result of the PSLRA stay as regards the information already produced to investigating governmental bodies.¹⁵⁷

If production to the government can be a basis for lifting the PSLRA discovery stay, then the leverage plaintiffs’ lawyers can exert over companies in search of a profitable settlement, and thus the incentive to sue, grows exponentially. This result is in clear conflict with the purpose of the PSLRA.

discovery stay provision”); *In re Vivendi Universal*, 381 F. Supp. 2d at 130-31 (denying motion to lift stay and noting that “I find no evidence that plaintiffs face the same prospect, as in *Worldcom* . . . , that they would be left without a remedy in light of settlement discussions or other intervening events, such as bankruptcy or attempt to take control over plaintiff by acquisition”).

156. See, e.g., *Seippel v. Sidley, Austin, Brown & Wood LLP*, 03 Civ. 6942 (SAS), 2005 U.S. Dist. LEXIS 2388, at *5-6 (S.D.N.Y. Feb. 17, 2005) (noting that court lifted stay as to documents produced to government because “[t]hese governmental investigations and lawsuits are ongoing, and the Seippels will be prejudiced if they lack access to documents which have been produced to others”); *In re Labranche Sec. Litig.*, 333 F. Supp. 2d 178, 183 (S.D.N.Y. 2004) (lifting stay because “the SEC and NYSE investigated and are continuing to investigate the precise schemes alleged by Lead Plaintiffs in the Complaint,” and “[i]f the stay remains in place, Lead Plaintiffs will be the only interested party without access to those documents and will be prejudiced by their inability to make informed decisions about their litigation strategy in this rapidly shifting landscape”); *Singer v. Nicor, Inc.*, No. 02-C-5168, 2003 U.S. Dist. LEXIS 26189, at *5 (N.D. Ill. Apr. 24, 2003) (lifting stay because “Plaintiffs here may well be unfairly disadvantaged if they do not have access to the documents that the governmental and other agencies already have, during the pendency of the motion to dismiss”); *In re Worldcom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002) (lifting stay because “[w]ithout access to documents already made available to the U.S. Attorney, the SEC, [and others] NYSCRF would be prejudiced by its inability to make informed decisions about its litigation strategy in a rapidly shifting landscape.”); *In re Enron Sec. Derivative & “ERISA” Litig.*, MDL-1446 et al., 2002 U.S. Dist. LEXIS 26261, at *1 (S.D. Tex. Aug. 16, 2002) (lifting stay as to materials already made available to numerous government agencies and others).

157. *In re Williams Sec. Litig.*, No. 02-CV-72H (M), 2003 U.S. Dist. LEXIS 24304, at *17 (N.D. Okla. May 22, 2003).

3. The Battle to Come: Reconciling Waiver with Lifting the PSLRA Discovery Stay

Curiously, none of the decisions lifting the discovery stay for documents produced to the government actually grapples with the selective waiver issue. Presumably, some of the materials produced to the government, and sought by the plaintiffs, once were subject to the attorney-client privilege and work-product protection. Yet most courts deciding whether to lift the stay and make these materials available to plaintiffs have not addressed whether private plaintiffs also should have access to the privileged documents. Indeed, none of these cases from the Southern District of New York has even cited, let alone discussed, the impact of the Second Circuit's decision in *In re Steinhardt Partners, L.P.*, which suggested that selective waiver of work-product protection might exist only if there was a confidentiality agreement.¹⁵⁸

In fact, two recent decisions from the District of Maryland apparently failed to consider the Fourth Circuit's holding in *In re Martin Marietta Corp.*, which imposed a broad subject matter waiver of the attorney-client privilege and non-opinion work-product after materials were produced to the government. In *In re Royal Ahold N.V. Securities & ERISA Litigation*,¹⁵⁹ private plaintiffs "requested permission to seek discovery of materials produced in connection with various external investigations of the defendants' alleged misconduct, as well as reports generated by the defendants' internal investigations."¹⁶⁰ In addition to the opposition filed by the defendants, the "United States government . . . intervened in the case and moved to prevent discovery of the investigative reports."¹⁶¹ Nevertheless, the district court granted the plaintiffs' motion "to the extent necessary to allow discovery of materials previously produced to outside agencies."¹⁶² As part of its holding, however, the court "recognize[d] that the defendants may need to review the documents for privilege."¹⁶³ Under *Martin Marietta*, such a review would seem unnecessary, since there would have been waiver as to all documents produced to the government.¹⁶⁴

158. 9 F.3d 230 (2d Cir. 1993).

159. 220 F.R.D. 246 (D. Md. 2004).

160. *Id.* at 247.

161. *Id.*

162. *Id.* at 248.

163. *Id.* at 250 n.11.

164. Indeed, several months after it agreed to lift the discovery stay, the *Royal Ahold* district court addressed *In re Martin Marietta*'s selective waiver holding for the first time when it granted

Likewise, in *In re Mutual Funds Investment Litigation*,¹⁶⁵ the court gave mixed signals regarding whether production to the government created waiver. On the one hand, the court lifted the PSLRA discovery stay and held that “[d]efendants should now produce to plaintiffs . . . all documents they have provided to the SEC that the SEC has identified for use as exhibits during administrative depositions of Fund personnel.”¹⁶⁶ There was no indication that this production could be limited by the attorney-client privilege or work-product protection. On the other hand, the court also ordered that “[d]efendants should now produce to plaintiffs all documents constituting or reflecting communications between them and regulatory agencies with regard to market timing or late trading.”¹⁶⁷ As to this production, as well as the production of materials pursuant to requests that did not involve documents produced to the government, the court noted the following:

A defendant may decline to produce particular documents . . . on the ground of privilege or confidentiality but shall provide to plaintiffs a log of all such documents. After conferring with the defendant, plaintiffs may move to compel any document they believe is being improperly withheld on the ground of privilege or confidentiality.¹⁶⁸

Again, under *In re Martin Marietta*, the attorney-client privilege and work-product protection would not seem to apply to documents previously produced to government agencies.

Waiver would not necessarily be the preferable course, but it is noteworthy that these decisions and others addressing the PSLRA discovery stay do not discuss selective waiver jurisprudence. As more courts consider whether production to the government should result in a lift of the discovery stay, this issue is likely to come to the forefront. Plaintiffs will invariably make a point of obtaining documents that the company seeks to withhold as

plaintiffs’ motion to compel ostensibly privileged materials that had been produced to the DOJ and SEC. *In re Royal Ahold N.V. Secs. & ERISA Litig.*, 230 F.R.D. 433, 437-38 (D. Md. 2005). The court offered several bases for granting plaintiffs’ motion, including that the subject matter of the contested materials was publicly disclosed in securities filings and other productions to the plaintiffs and that Royal Ahold’s confidentiality agreements with the government agencies gave those agencies discretion to disclose the materials. *Id.* at 437. Consequently, the court held that “Royal Ahold has not taken steps to preserve the confidentiality of its opinion work-product sufficient to protect the interview memoranda it already has disclosed to the government.” *Id.* at 438.

165. MDL-15863, 2005 U.S. Dist. LEXIS 3469 (D. Md. Mar. 7, 2005).

166. *Id.* at *3-4.

167. *Id.* at *4.

168. *Id.* at *3 n.2.

privileged or confidential. This will force courts to look again at the selective waiver issue and to weigh whether it is fair for plaintiffs' lawyers to piggyback on government investigations to improve their chances of obtaining a lucrative settlement at the expense of the company's existing shareholders.

IV. CONCLUSION

All things being equal, a company should not be able to waive privilege as to some and then invoke it as to others. But things are not equal. Today's circumstances are very different from the days of the SEC's Voluntary Disclosure Program, though courts rejecting selective waiver have not recognized this change. The federal government, in particular the SEC, is at least implicitly pressuring companies to waive the attorney-client privilege and work-product protection. The remarkably unsettled caselaw makes it impossible for a company to know exactly what it risks by producing materials to the government, yet it "cooperates" anyway and thereby erodes employees' willingness to consult with their counsel. This is not a business decision; it is a corporate reaction to an abuse of government power. And since fairness is the touchstone of the courts' analysis, selective waiver is both justifiable and necessary.

Courts like the Ninth Circuit that have not yet addressed selective waiver and courts that will face it again in the context of the PSLRA discovery stay should recognize that selective waiver will limit both the government's ability to manipulate the privilege and plaintiffs' lawyers' incentive to sue first and discover claims later. These courts should reverse the current trend and embrace the concept of selective waiver. But to ensure a fair and uniform result in all federal jurisdictions, Congress must enact legislation that will limit the effects of disclosure in government investigations and thus foster true cooperation between government and business.