THE POWER OF PRIVILEGE AND THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT: HOW CORPORATE AMERICA HAS EVERYONE EXCITED ABOUT THE EMPEROR'S NEW CLOTHES

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Corporate America has come under increased attack in the last decade, weathering high-profile scandals such as those at energy giant Enron and facing aggressive federal oversight of corporate activities. Most recently, fraud in the sub-prime mortgage market has damaged the entire U.S. economic outlook and has set off a federal probe of more than seventeen firms in the mortgage industry. Of late, corporate America has begun fighting back, selecting the attorney-client privilege as its battleground against federal oversight of corporate misconduct. The corporate lobby has complained loudly regarding federal requests for corporate internal investigation materials protected by the attorney-client privilege and work-product doctrine. By characterizing federal investigative practices as intruding upon the sanctity of the time-honored attorney-client relationship, corporate groups have attracted widespread support for their cause, most recently in Congress. The Attorney-Client Privilege Protection Act of 2007 (the "ACPPA") was designed to respond to these complaints about federal enforcement practices and was passed by the House of Representatives on November 13, 2007. It remains pending in the Senate and has a broad base of powerful support. The Act presents difficult questions of interpretation and oversight. More importantly, however, the Act would give corporate defendants increased leverage in federal investigations not enjoyed by average blue-collar defendants that could lead to devastating consequences for U.S. markets. Examined closely, this legislation is not justified by any of the accepted traditional or contemporary theories driving decisions concerning privilege and waiver. When the appealing rhetoric regarding the attorney-client privilege is stripped away, it appears that the ACPPA is the child of the politically powerful corporate lobby trying to regain ground in a post-Enron environment. Contrary to its name, therefore, the legislation would damage the integrity of privilege and waiver

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doctrine by granting it to the most vocal and powerful at the expense of the public interest.

INTRODUCTION

Corporate America has come under increased attack in the last decade, weathering high-profile scandals, such as those at Enron, WorldCom, and Adelphia to name but a few.[1] Most recently, fraud in the subprime mortgage market has damaged the entire U.S. economic outlook and has set off a federal probe of more than seventeen firms in the mortgage industry.[2] Rocked by the Bush administration's Corporate Fraud Task Force and the passage of the Sarbanes-Oxley Act, corporate America has begun fighting back.[3] Of late, corporate groups appear to have adopted the theory that the best defense is a good offense and have launched an attack of their own on the practices of federal authorities that oversee corporate misconduct on both the criminal and civil sides.[4] These groups have publicly challenged federal efforts to commandeer the corporate entity and its legal counsel as partners with the government in

1. *See* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 587 (2004) (describing "the most prominent scandals . . . involving Enron, Arthur Andersen, WorldCom, Tyco International, and Adelphia Communications"); Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 3 (2008) (noting the remarkably successful efforts of the federal government in prosecuting corporate criminals between 2002 and 2006).

2. *See* Randall Mikkelsen, *FBI Mortgage Probe Examining 1 Large Firms,* REUTERS, Mar. 19, 2008, http://www.reuters.com/article/bankingFinancial/idUSN1822815420080319?pageNumber=1&virtualBrandChannel=10003&sp=true (noting that hundreds of FBI agents are "looking at issues including all phases of the process of securitizing loans, insider trading and whether firms disclosed the value of their assets").

3. President Bush created the "Corporate Fraud Task Force" in 2002. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002). Congress passed the Sarbanes-Oxley Act on July 30, 2002. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2002)). The legislation increased accountability of corporate officers and directors by increasing criminal sanctions against them in connection with certification of company financial reports, securities fraud violations, and retaliation against corporate whistleblowers. *Id.* at 810.

4. This Article refers to the battle waged against federal oversight practices by "corporate America." Although this moniker is necessarily vague and potentially overbroad, it is adopted to reflect the vocal and almost uniform opposition to current federal practices by actors associated with corporate entities. It may very well be that there is a silent faction of corporate actors that are not supportive of the positions taken by the vocal corporate opponents of government policies.

investigating and eradicating fraud at the corporate level.[5] Specifically, the corporate lobby has complained loudly regarding federal requests for corporate internal investigation materials protected by the attorney-client privilege and work-product doctrine.[6] By characterizing federal investigative practices as intruding upon the sanctity of the time-honored attorney-client relationship, corporate groups have attracted widespread support for their cause, most recently in Congress.

The Attorney-Client Privilege Protection Act of 2007 (the "ACPPA") was designed to respond to these complaints about federal enforcement practices and was passed by the House of Representatives on November 13, 2007.[7] The ACPPA would contravene bedrock principles of privilege and waiver, as well as recent federal successes in investigating corporate fraud, by flatly prohibiting authorities from requesting waiver of the corporate attorney-client privilege or work-product protection in any federal investigation.[8] In addition, the Act would prohibit federal authorities from conditioning civil or criminal charging treatment of cooperating corporations on disclosures of privileged information.[9] This legislation would establish systemic disparate treatment by endowing powerful white-collar offenders with favored protected status in federal investigations not enjoyed by the average individual blue-collar offender.[10] Most importantly, it would give corporate defendants increased leverage in federal investigations that could lead to devastating consequences for U.S. markets.

The proposed legislation remains pending in the Senate.[11] The legislation has support from a broad coalition of powerful players, including the American Civil Liberties Union, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the United States Chamber of Commerce, and the National Association of Manufacturers.[12] With this broad base of

5. *See infra* note 61 and accompanying text.

6. *See, e.g.*, ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1030–31 (2005) [hereinafter *ABA Task Force Report*]; American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 308 (2003) [hereinafter *American College of Trial Lawyers Report*].

7. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

8. *Id.* § 3(b)(1).

9. *Id.* § 3(b)(1)–(2)(A).

10. *See infra* Part III.A–B. and accompanying notes.

11. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (1st Sess. 2007).

12. *See Examining Approaches to Corporate Fraud Prosecutions and the*

support, the ACPPA appears poised for success.[13] But, examined closely, this legislation is not justified by any of the accepted traditional or contemporary theories driving decisions concerning privilege and waiver. When the appealing rhetoric regarding the attorney-client privilege is stripped away, it appears that the ACPPA is the child of the politically powerful corporate lobby trying to regain ground in a post-Enron environment. Contrary to its name, the legislation would damage the integrity of privilege and waiver doctrine by granting it to the most vocal and powerful at the expense of the public interest.

To be sure, there is a legitimate ongoing debate about the appropriate degree of regulatory and criminal oversight of business in a competitive global market.[14] The ACPPA does not respond to

Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 71 (2007) [hereinafter *September 18, 2007 Senate Hearing*] (statement of The Coalition to Preserve the Attorney-Client Privilege) (noting that the Coalition "strongly endors[ed]" S. 186 and H.R. 3013).

13. *See* Senate Judiciary Committee Hears Testimony on Corporate Fraud Prosecutions and Attorney-Client Privilege, http://wolfs2cents.wordpress.com /2007/09/20/senate-judiciary-committee-hears-testimony-on-corporate-fraud-prosecutions-and-attorney-client-privilege (Sept. 20, 2007) (noting that both the Senate and House bills embodying the Attorney-Client Privilege Protection Act "appear to have traction and remain hot on the agenda of national, state and local bar associations"). The corporate lobby has succeeded in its past efforts to oppose the Department of Justice ("DOJ") waiver policy. In 2006, this group opposed certain language in Application Note 12 to U.S. Sentencing Guidelines Manual Section 8C2.5 because it conditioned credit for cooperation at sentencing, in part, upon privilege waiver. In response to the criticism, the Sentencing Commission amended the Note to delete the language complained of because "the sentence at issue could be misinterpreted to encourage waivers." Sentencing Guidelines for the United States Courts, 71 Fed. Reg. 28,063, 28,073 (May 15, 2006). Similarly, efforts to defeat a selective waiver provision in proposed Federal Rule of Evidence 502, which was designed to facilitate corporate cooperation through waiver, succeeded in 2007 with the removal of the provision from the final rule. *See* Liesa L. Richter, *Corporate Salvation or Damnation?: Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 155–57 (2007). The ACPPA represents the newest front for the corporate battle against federal practices and appears likely to yield similar results.

14. *See* U.S. CHAMBER OF COMMERCE, COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY: REPORT AND RECOMMENDATIONS (2007), *available at* http://www.uschamber.com/publications /reports/0703capmarketscomm.htm; Richard A. Booth, *What is a Business Crime?*, 3 J. BUS. & TECH. L. 127, 127 (2008) (arguing for decreased criminalization of business misconduct because private civil remedies are much more efficient at addressing business and financial crimes); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporations*, 44 AM. CRIM. L. REV. 1343 (2007); Robert Prentice,

these concerns regarding overly burdensome substantive regulation of corporate entities, however. Rather, the ACPPA represents an attack on the efficacy of procedures used to enforce the substantive regulations that retain the force of law at the culmination of that debate. By passing the ACPPA, Congress will forever damage the *process* used to police the corporate obligations our society deems appropriate for healthy markets.[15]

This Article argues against adoption of the ACPPA in three parts. Part I describes the operation of the attorney-client privilege in the corporate context. In addition, Part I explains the inherent challenges confronting regulators overseeing malfeasance at the corporate level. It describes federal policies designed to overcome these challenges that utilize waiver of the corporate attorney-client privilege and work-product protection in some circumstances and the increased success of corporate investigations under those policies. Finally, Part I outlines the concerns regarding corporate-privilege protection and the legal rights of individual corporate employees generated by these federal policies, and how those concerns led to the ACPPA proposal.

Part II describes the Act itself, including the congressional findings that support it and its stated purpose. Part II also examines the specific provisions of the Act relating to the attorney-client privilege and analyzes their potential impact on the investigation and prosecution of corporate fraud. Finally, Part II highlights problematic issues certain to arise regarding the oversight, enforcement, and interpretation of the Act's prohibitions, which are unresolved by the current proposed legislation. Part II suggests possible alternative approaches to these potentially thorny issues.

Part III analyzes the ACPPA under accepted theories that have been used by courts, rule makers, and legislators to support existing rules of privilege and waiver. First, Part III identifies the potential costs to the public from the ACPPA and measures them against the Act's stated benefits. Part III posits that the benefits Congress seeks to achieve with the legislation are significantly eclipsed by the identifiable costs to the public, reflected in excessive and unnecessary expenditure of public resources in the investigation of corporate fraud and in terms of unchecked corporate malfeasance. Part III also examines the proposed legislation under a fairness paradigm, finding that fundamental principles of fairness fail to justify the Act's restrictions on federal authorities. In addition, Part

Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404, 29 CARDOZO L. REV. 703 (2007).

15. *See infra* Part III.D and accompanying notes.

III notes that the Act is inconsistent with historical principles of privilege and waiver that permit a holder to share freely protected materials and that reflect no ban on requests by third parties for privileged information. Finally, Part III concludes that, however well-intentioned, the ACPPA can be explained only by a "political" or "power" theory of privilege, noting the behemoth power of the lobby actively pushing the legislation. Part III posits that this explanation is an inadequate and inappropriate rationale for the privilege legislation currently pending in Congress or for rules of privilege generally. The Article concludes that the ACPPA, designed to "protect" the attorney-client privilege, embodies the ultimate irony in that it will work a net harm to the fundamental integrity of the attorney-client privilege and privilege law generally.

I. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND FEDERAL INVESTIGATIVE METHODS

The ACPPA proposal evolved because federal investigative and regulatory agencies increasingly have employed new methods to address the growing contemporary crisis created by fraudulent schemes in corporate America.[16] Following the Enron scandal at the turn of the century, federal agencies began to realize that they would be unable to police intricate corporate schemes effectively or efficiently without the help of insiders at corporate targets.[17] These federal agencies have encouraged corporate targets to partner with the government to uncover internal wrongdoing by offering leniency in charging the corporate entity in exchange for corporate cooperation with an investigation.[18] Because corporations commonly

16. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 2(a)(5) (2007) (finding that "the Department of Justice and other agencies have increasingly employed tactics that undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work-product protections to avoid indictment or other sanctions").

17. The SEC first encouraged target companies to make "voluntary disclosures" of wrongdoing back in the mid-1970s in connection with widespread overseas bribery scandals. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 295 n.7 (6th Cir. 2002) (describing the SEC program). Other federal departments and agencies have since adopted similar policies, pressuring entities to cooperate to obtain leniency. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1107–33 (2006) (describing numerous cooperation policies in federal agencies and departments).

18. *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo] (emphasizing the importance of authentic

utilize counsel to perform internal corporate investigations of malfeasance, corporations increasingly were asked to cooperate with federal agents by sharing information protected by the corporate attorney-client privilege or work-product doctrine.[19] It is this waiver of the corporate attorney-client privilege that led to the ACPPA proposal.

A. The Corporate Attorney-Client Privilege

The law of privilege that allows protected parties to withhold relevant information from the fact-finding process is an exception to the general rule that "the law is entitled to every man's evidence."[20]

One of the oldest privileges at common law is the privilege protecting communications between a lawyer and client.[21] The commonly accepted contemporary justification for cloaking these communications is that the privilege will encourage clients to make full and confidential disclosures they would not otherwise make without privilege protection.[22] This free and open exchange of information between lawyer and client is thought to serve the greater public good by affording thorough and effective legal representation.[23] Although it is the professional status of the lawyer

corporate cooperation in making organizational charging decision).

19. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 2 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) ("In 2003, the Department of Justice made it easier for prosecutors to pressure corporations to waive the attorney-client privilege, the bedrock of our whole legal system.").

20. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 72.1 (6th ed. 2006); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.8 (3d ed. 2003); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961). An attorney's ethical obligations provide even broader protection to the client than privilege doctrine does and forbid a lawyer from disclosing confidential client communications even outside the context of legal proceedings where the attorney-client privilege applies. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) (providing that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent").

21. S*ee In re* Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961) ("In the eighteenth century, when the desire for truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained . . . ."), *aff'd,* 306 F.2d 633 (2d Cir. 1962).

22. *Id.* (noting a "new theory" supporting the attorney-client privilege—"that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter properly to advise the clients" and concluding that "[t]his is the basis of the privilege today").

23. Commentators have noted the lack of any empirical support for this assumption about client behavior, and many have suggested that clients would share the same information without privilege protection due to client incentives to be well-represented. *See, e.g.*, Melanie B. Leslie, *The Costs of Confidentiality*

that provides the basis for the privilege, the client is the "holder" of the privilege and is empowered to preserve or waive it at will.[24]

Generally speaking, the client may waive the protection of the attorney-client privilege by disclosing protected information outside the attorney-client relationship.[25] A client may decide to disclose protected information if such disclosure is in his best interests. Once the confidential communications are disclosed outside the protected attorney-client relationship, the privilege generally is lost.[26] A client also may waive the privilege by inadvertently disclosing protected communications to parties outside the attorney-client relationship.[27] Finally, a client may impliedly waive the protection of privilege by injecting issues into litigation that require an inquiry into the protected relationship.[28]

Translating this individual privilege into the organizational context presents several difficult issues of interpretation.[29] When

and the Purpose of Privilege, 2000 WIS. L. REV. 31, 31 ("Clients want the best legal advice. Most are therefore strongly motivated to tell lawyers the truth . . . . When seeking legal guidance, smart corporate actors come clean."); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) (noting that the theory that the attorney-client privilege promotes disclosure to counsel rests on "sheer speculation"); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1619 ("There has never been empirical evidence that the privilege's existence actually promotes disclosure by clients, and there are intuitive reasons for doubting that it often does so."); Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases:* Garner *Revisited*, 12 HOFSTRA L. REV. 817, 822 (1984) (noting that the justification for the attorney-client privilege is based upon an "educated guess about behavior").

24. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5487 (1986) (noting that the right to invoke or waive the privilege belongs to "the client").

25. *See generally id.* § 5507 (describing procedures used in preserving and waiving the attorney-client privilege).

26. Indeed, such a strategic voluntary disclosure may result in a waiver over all other protected attorney-client communications dealing with the same subject matter.

27. *See* 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5722 ("Once the holder has 'abandoned the secrecy to which he is entitled' under the privilege, he or she shows that they did not require the incentive of the privilege to reveal the secret to their lawyer.").

28. *Id.* § 5730 (explaining that courts have found "fictional waivers" where exceptions to privilege are necessary to support a holder's cause of action and proposing that courts should refer to such implied or fictional waivers as cases where holders are "estopp[ed] to assert" privilege rather than as true waiver cases).

29. WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (characterizing the question as to "whether and to what extent an artificial entity . . . needs and

the client to be represented by counsel is not a natural person, but a corporation or other organization recognized by law, several issues arise. First, do such artificial entities deserve the protection of privilege at all? If so, which of the many communications made to corporate counsel by hundreds of corporate employees enjoy the privilege? Finally, in an organizational environment controlled by groups of individuals, who is regarded as the holder of the privilege entitled to insist upon its protection or waive it?

The United States Supreme Court answered these questions in 1981 in the case of *Upjohn Co. v. United States*.[30] First, the Court held that corporate entities indeed need and deserve the protection of the attorney-client privilege and the work-product doctrine.[31] The Court found that, like individual clients, corporate clients need a zone of protection and privacy within which to investigate and develop the entity's legal rights and options.[32] In addition, the Court rejected the "control group" theory of the corporate attorney-client privilege adopted by some circuit courts at the time that would have extended privilege protection only to communications made by certain members of the corporate "control group" to corporate counsel.[33] Instead, the Court found that the privilege could attach to communications to counsel by corporate employees at any level so long as those communications were made for the purposes of securing the legal rights of the entity.[34] Finally, the Court held that the entity itself should be the holder of the corporate attorney-client privilege and that the decision to insist upon its protection or to waive it should rest with the corporation alone acting through empowered officials.[35] The Court similarly found corporate entities entitled to the protection of the work-product doctrine.[36]

By endowing the entity with the sole right to waive the corporate privilege, the Court deprived the individual corporate employees doing the communicating with corporate counsel of control over the ultimate dissemination of their confidential

deserves a power to suppress information" as "one of the most perplexing issues in the law of privilege").

30. 449 U.S. 383 (1981).

31. *Id.* at 390.

32. *Id.*

33. *Id.*

34. *Id.* at 390–91.

35. *Id.* at 390–97.

36. *Id.* at 397–98. While the attorney-client privilege protects only the confidential communications between a client and his attorney, the work-product doctrine provides additional protection for the work product of an attorney made in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495, 508, 511–12 (1947); *see also* FED. R. CIV. P. 26(b)(3); FED. R. CRIM. P. 16(b).

communications with corporate counsel. This deprivation represented a distinct departure from privilege doctrine in the individual context where the individual control over waiver and dissemination is thought to encourage and create the confidential communications necessary to effective legal representation.[37]

The justification for this distinction in the corporate context is two-fold. First, it would be unworkable and inconsistent with the legal interests of the entity to give each individual employee control over the corporate privilege.[38] Second, such individual control is unnecessary to encourage the communications of those employees where the natural incentive to satisfy employment obligations with the entity would adequately encourage employees to assist corporate counsel.[39] Thus, while confidential communications between individual employees and corporate counsel enjoy the protection of the corporate attorney-client privilege, the privilege belongs exclusively to the company, and the individual employees doing the communicating have no power to prevent the dissemination of their communications by the company.[40]

B. Federal Policies Counting Waiver as Cooperation

Corporate entities in the United States are subject to significant and complex regulatory obligations.[41] In addition, they bear broad responsibility for all of the criminal acts of their agents (a)

37. *See supra* note 24 and accompanying discussion of rights of individual privilege holders; *see also* WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting that "a well-advised employee is not likely to be moved to disclose adverse information by the existence of a privilege whose assertion or waiver is in the hands of the very corporate officials he fears may betray him").

38. WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting that "corporations would not be very happy with a rule that all of the persons who can make confidential communications for the corporation are also capable of waiving the privilege," and that courts are unlikely to allow "corporate employees [to] claim the privilege when their superiors decide to make them the scapegoats for corporate wrongdoing").

39. *Id.* (noting the possibility of discipline within the corporation as an incentive for employees to speak to corporate counsel); s*ee also* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 381, 415 (1989) (concluding that a free flow of information would continue between corporate executives and corporate counsel absent an absolute corporate attorney-client privilege).

40. *See In re* Grand Jury Subpoena, 415 F.3d 333, 336 (4th Cir. 2005) (describing appropriate corporate disclosures regarding the privilege that explain that "the privilege belongs to the company and the company decides whether to waive it").

41. *See generally* Wray & Hur, *supra* note 17, at 1107–35 (describing the broad range of regulatory obligations imposed upon contemporary corporate actors).

committed within the scope of the agents' employment and (b) intended to benefit the corporation, at least in part.[42] Monitoring compliance with intricate regulatory schemes and policing the criminal malfeasance of corporate employees traditionally has presented significant challenges to government enforcement agencies.[43] Corporate schemes that violate both regulatory and criminal standards often involve complex issues of accounting and traverse a lengthy and intricate document trail. In addition, such cases are rarely straightforward and permit defenses unique to the white-collar arena such as reliance upon advice of counsel.[44] Navigating this territory is almost always costly and time-consuming for government entities. One commentator has described the challenges in investigating corporate schemes as follows:

> The prosecution of white collar crime can be slow, resource-intensive work. There are numerous reasons for this tediousness. First, the crime itself is often very complex. Indeed, sophisticated white collar criminals frequently do all they can to add to the complexity of their crime by disguising what they did beneath layers of accounting tricks, false or fraudulent transactions, deleted records, and second sets of books. In a case of any significance, investigators might face hundreds of thousands—if not millions—of pages of documents, increasingly in electronic form, that they must sort through to unravel criminal behavior. This work might take a team of investigative agents, at least some of whom are

42. *See, e.g.*, N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493 (1909); United States v. Automated Med. Lab., 770 F.2d 399, 406 (4th Cir. 1985) (adopting a respondeat superior theory of corporate liability for criminal misconduct of its employees); United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982). This rule of vicarious criminal culpability is "considerably broader than in most other countries." *See* V.S. Khanna, *Corporate Liability Standards: When Should Corporations be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1242–43 (2000); Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381, 382 (1996) (noting that "the United States virtually stands alone in the world on its approach" to criminal responsibility for corporations).

43. *See* Seigel, *supra* note 1, at 13 (noting traditional obstacles to the investigation of white-collar crime); *see also* JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE: UNDERSTANDING WHITE COLLAR CRIME 172–73 (5th ed. 2002).

44. *See* Seigel, *supra* note 1, at 14 (noting the difficulty of overcoming such defenses unique to the white-collar arena). Professor Seigel provides a very thorough explanation of the obstacles confronting the federal government at every stage of a corporate investigation. *Id.* at 13–20.

> trained accountants, and one or more prosecutors years to carry out.[45]

Some companies have responded to government investigations with a "circle-the-wagons" approach, asserting representation of all employees, instructing employees to refrain from assisting investigators, and burying investigators with voluminous documentary evidence.[46] These tactics have created extensive delays in investigating corporate fraud, as well as wasteful expenditure of public resources.[47] In some cases, the circle-the-wagons approach has resulted in failed investigations of corporate wrongdoing.[48]

Recently, federal authorities increasingly have employed methods designed to improve the efficiency and effectiveness of corporate investigations on both the regulatory and criminal sides.[49] Several federal departments and agencies have encouraged corporate entities to discontinue the circle-the-wagons approach and to cooperate with federal authorities by promising leniency for the entity in exchange for assistance with the federal investigation that reveals the individual corporate offenders.[50] Under this system, companies assist the government to minimize the risk of indictment or other negative treatment of the organization itself. Corporate insiders intimately familiar with the company's internal operations can quickly and effectively navigate document trails necessary to uncover malfeasance. Companies can encourage employees to assist with the investigation. Furthermore, companies can conduct their own internal investigations and share their findings with federal

45. *Id.* at 13 (citations omitted).

46. *See id.* at 15 (noting that companies and their employees are represented by excellent and sophisticated counsel specializing in white-collar crime that have the "ability to slow down an investigation to a considerable extent if they so choose").

47. *Id*. (noting the specific tactics used by corporate counsel that "can slow an investigation to a snail's pace, and perhaps even cause it to stall altogether," including repeated objections to subpoenas and advice to employees not to cooperate with government investigators on a widespread basis).

48. *See* COLEMAN, *supra* note 43, at 172–73 (5th ed. 2002) (describing tactics used by corporate counsel as the "delaying game" and noting that "the government openly admitted that it gave up [in pursuing antitrust violations against Exxon] because the case would take too long to pursue").

49. Although these methods are not new, federal agencies have employed them more broadly and more frequently in recent years. *See* Wray & Hur, *supra* note 17, at 1107–08 (detailing widespread nature of cooperation policies throughout all federal departments and noting that the DOJ policy that has drawn so much criticism represents "the Justice Department's embrace of a distinct philosophy of corporate enforcement that has steadily gained favor throughout the government").

50. *Id.* at 1108.

authorities. Several commentators have noted that this partnership between corporations and federal authorities has allowed for efficient "real time" investigation of corporate fraud that catches problems before they damage the entity, its investors and employees, or the market.[51] In addition, this partnership model has allowed for government pursuit of broad corporate scandals, such as the 2007 scandal involving the back-dating of officer stock options, which would otherwise go unchecked due to their widespread nature.[52] In sum, these federal cooperation policies have allowed federal investigators to wrap up complex corporate investigations that put a stop to corporate misconduct and provide restitution to its victims in a matter of months, in sharp contrast to the prolonged and sometimes unsuccessful investigations prior to such cooperation policies.[53]

Because organizations typically rely upon counsel to conduct internal investigations, much of the information gathered by companies in this endeavor is protected by either the corporate attorney-client privilege or work-product doctrine.[54] Interviews of company employees by corporate counsel as part of an internal investigation qualify as communications made to assist the company in obtaining legal advice. Memoranda and reports by counsel summarizing findings represent protected attorney work product. In order to cooperate fully with federal authorities and receive lenient treatment, companies have been asked to waive the

51. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 5 (statement of Karin Immergut, U.S. Att'y, Dist. of Or.) (noting that the DOJ has obtained more than 1200 corporate fraud convictions since 2001 and has recovered "billions of dollars" for investors and shareholders); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2–4 (2006) (statement of Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice) (detailing successful prosecutorial history under cooperation policies); Wray & Hur, *supra* note 17, at 1097 (same).

52. *See* James Bandler & Kara Scannell, *In Options Probes, Private Law Firms Play Crucial Role*, WALL ST. J., Oct. 28, 2006, at A2 (noting the government's improved capability to address widespread corporate abuses that would otherwise go unchecked through cooperation policies in which companies "feed" investigators information in a "real time" manner).

53. *See* Seigel, *supra* note 1, at 4 (noting that the sharing of internal investigation materials enables the government to uncover the facts of a case far more quickly than it would under traditional methods, and that federal cooperation policies allow prosecutors to "bring prompt charges against those criminally responsible and then move on to the next case").

54. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (finding reports of interviews between corporate employees and corporate attorneys investigating bribery scheme protected by the corporate attorney-client privilege and work-product doctrine).

attorney-client privilege and work-product protection and to provide the government with these internal materials and reports.[55] Indeed, several federal departments and agencies have adopted cooperation policies in recent years that count waiver of privilege as one method of cooperation that may justify lenient treatment.[56]

The implementation of this partnership model at the Department of Justice ("DOJ") has drawn the most significant attention and criticism in recent years. Breaking with traditional practices of keeping charging criteria closed, in 1999 then-Deputy Attorney General Eric Holder published the factors to be used by federal prosecutors in deciding whether to charge organizations criminally for the first time.[57] The DOJ charging policy counted organizational cooperation as one of many factors weighing against charging and expressly recognized waiver of the corporate attorney-client privilege and work-product protection as one method of cooperation.[58] The charging policy was updated in 2003 by then-Deputy Attorney General Larry Thompson in what came to be known as the Thompson Memo.[59] On its face, the DOJ policy regarding corporate privilege waiver did not change with this update.[60] Critics of the policy claimed that its implementation did

55. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 5 (statement of Karin Immergut, U.S. Att'y, Dist. of Or.) (noting that "sometimes a corporation must waive its work product or attorney-client privileges in order to cooperate . . . fully").

56. *See* Wray & Hur, *supra* note 17, at 1107–32 (discussing in detail the various policies in place across the federal government to encourage cooperative partnership between the federal government and those business organizations and industries it regulates); *see also* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

57. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to Component Heads and U.S. Attorneys (June 16,1999), *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html [hereinafter Holder Memo].

58. *Id.* at 3–4 (listing eight factors to be considered by prosecutors in making organizational charging decisions, including the nature and severity of the alleged misconduct, the pervasiveness of wrongdoing throughout the organization, the history of similar misconduct by the entity, the compliance mechanisms in place internally to detect and prevent such misconduct, and the effects of organizational indictment on a company's constituencies). The Holder Memo specifically considered "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges" as a factor affecting a charging decision. *Id.* at 3.

59. Thompson Memo, *supra* note 18.

60. *Id.* A comparison of the two memoranda does reveal one minor change in the language regarding waiver of the attorney-client privilege. Where the

change, however, complaining that federal prosecutors routinely began to demand corporate waivers in order to qualify companies as "cooperative" under the policy.[61]

These critics complained that the operation of the DOJ charging policy and of similar cooperation policies in other departments created a "culture of waiver" that operated to undermine the sanctity of the attorney-client relationship in the corporate context.[62] These groups further argued that privilege waivers were compelled under the DOJ charging policy and that such compulsion had collateral consequences that ultimately damaged effective oversight of corporate compliance and infringed upon rights of individual employees. Critics complained that routine corporate privilege waivers would stop the flow of important information to corporate counsel from employees fearful of revelation to the government. In addition, opponents of the DOJ policy argued that corporate counsel would document important internal investigations less meticulously to avoid handing sensitive information over to federal regulators. These downstream effects of the waiver policy would actually impair effective oversight of corporate compliance according to these groups. Furthermore, opponents argued that the rights of individual corporate employees were unfairly compromised by

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Holder memo stated that the waiver by the corporation would be considered as "*only* one factor" in evaluating the corporation's cooperation, the Thompson memo deleted the modifier "only" and provided that waiver would be considered as "one factor" in evaluating corporate cooperation. *Compare* Holder Memo, *supra* note 57, at 7 (emphasis added), *with* Thompson Memo, *supra* note 18, at 5.

61. The American Bar Association, the American College of Trial Lawyers, the U.S. Chamber of Commerce, the Association of Corporate Counsel, and the American Civil Liberties Union have been among the most vocal critics of the policy. *See Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of the Coalition to Preserve the Attorney-Client Privilege) [hereinafter *Coerced Waiver*]; American College of Trial Lawyers, *supra* note 6. In 2004, the ABA created a task force dealing solely with the issue of corporate waiver of attorney-client privilege and issued a report criticizing the DOJ charging policy. *See ABA Task Force Report*, *supra* note 6, at 1044–45. In 2006, several former high-ranking DOJ officials sent a letter to then-Attorney General Alberto Gonzales objecting to the Thompson Memo's treatment of waiver, stating that it was "seriously flawed." *See* Letter from Griffin B. Bell, Former Att'y Gen. et al., to Alberto Gonzales, Att'y Gen., Dep't of Justice (Sept. 5, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/thompson_memo_letter_sept_5_2006.pdf. Recently, the ABA and the Coalition to Preserve the Attorney-Client Privilege offered statements in support of the ACPPA raising similar concerns. *September 18, 2007 Senate Hearing*, *supra* note 12, at 71–72.

62. *See Coerced Waiver*, *supra* note 61, at 11–12.

corporate waivers to the government because companies were producing potentially damaging disclosures that those employees made internally to trusted corporate lawyers. Finally, the cooperation policy's detractors complained that companies were unduly damaged by disclosing privileged information to the government because those disclosures resulted in a waiver of the privilege to all parties under traditional waiver precedent, thus exposing the entity to increased liability from private litigants.[63]

These widespread and highly publicized attacks on the federal partnership and cooperation policies attracted the attention of Congress. On December 7, 2006, Senator Arlen Specter first introduced the Attorney-Client Privilege Protection Act, designed to respond to these vocal critics by prohibiting government lawyers from requesting or considering waiver of the attorney-client privilege or work-product protection in assessing cooperation in connection with any federal investigation or criminal or civil enforcement matter.[64]

Although the federal agencies utilizing such cooperation policies, including the DOJ, had declined to alter course in the face of the vocal criticism up to this point, the DOJ finally modified its policy regarding the use of privilege waiver as a form of cooperation in the wake of the proposed legislation.[65] On December 12, 2006,

63. *See ABA Task Force Report*, *supra* note 6, at 1048. Despite complaining of the problem of third-party waivers, some corporate groups actively opposed a version of proposed Federal Rule of Evidence 502 that would have provided cooperating corporations with "selective waiver" protection. Under the draft rule, corporate entities could have disclosed privileged information voluntarily to federal authorities without working a waiver in favor of private third-party plaintiffs. *See* Richter, *supra* note 13 (emphasizing negative effects of third-party waiver and advocating legislative adoption of corporate selective waiver allowing sharing with federal officials without waivers as to third-party litigants).

64. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006).

65. On October 21, 2005, then-Acting Deputy Attorney General Robert D. McCallum, Jr. issued a memorandum entitled "Waiver of Corporate Attorney-Client and Work Product Protection" in response to the outcry against the Thompson Memo, which directed each federal district and component to establish a "written waiver review process" to help "ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*." Memorandum from Robert McCallum, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com /whitecollarcrim_blog/files/attorneyclientwaivermemo.pdf. This memo failed to appease critics of the Thompson Memo, however. *See* Letter from Michael S. Greco, President, ABA, to Alberto Gonzales, Att'y Gen., U.S. Dep't of Justice, at 2 (May 2, 2006), *available at* http://www.abanet.org/buslaw/attorneyclient

then-Deputy Attorney General Paul McNulty superseded the long-criticized Thompson Memo with yet another revision to the DOJ charging policy.[66] The McNulty Memo stood firm on the importance of corporate cooperation with government investigations and maintained that privilege and work-product waivers can be important tools in corporate prosecutions.[67] It sought to allay concerns about overly aggressive prosecutorial demands for privilege waivers, however, by requiring a "legitimate need" for privileged corporate information and the "least intrusive waiver necessary to conduct a complete and thorough investigation."[68] The memo also provided that federal prosecutors could request sensitive information, including attorney notes, memoranda or reports containing counsel's mental impressions and conclusions, legal determinations reached as a result of internal investigations, or legal advice given to the corporation, only in "rare circumstances."[69]

/materials/stateandlocalbar/20060502000001.pdf (claiming that McCallum's memo would exacerbate the existing problem for corporate clients by allowing and even encouraging "numerous different waiver policies throughout the country").

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

67. *Id.* at 8.

68. *Id.* at 8–9. The memo outlines a balancing test to be used in determining the existence of a "legitimate need" for protected information, including:

> (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternate means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver.

Id. at 9.

69. *Id.* at 10. The memo created a "step-by-step approach" to department requests for privileged information, dividing corporate information into "Category I" and "Category II" information. *Id.* at 9–10. The memo described "Category I" information as "purely factual information, which may or may not be privileged, relating to the underlying misconduct" such as interview memoranda, organizational charts created by corporate counsel, factual chronologies, factual summaries, or reports containing investigative facts documented by counsel. *Id.* at 9. Category I information should be requested first if there is a legitimate need for it. Only in "rare circumstances should prosecutors seek 'Category II' information, including attorney notes, memoranda or reports containing counsel's mental impressions and conclusions, legal determinations reached as a result of internal investigations, or legal advice given to the corporation." *Id.* at 10; *see also September 18, 2007 Senate Hearing*, *supra* note 12, at 5 (noting that government wants the "facts" in corporate investigations and is rarely seeking legal advice or opinion work

Furthermore, the McNulty Memo prohibited prosecutors from using a corporate refusal to provide such sensitive materials as a factor in a corporate charging decision, but provided that prosecutors "may always favorably consider a corporation's acquiescence."[70] Finally, the revision also required consultation with Main Justice and approval by the United States Attorney prior to a prosecutor's request for privileged corporate information.[71] Thus, while the revised charging criteria impose a more stringent standard on prosecutors seeking to request waivers, prohibit negative charging decisions based upon refusals to provide the most sensitive privileged information, and add procedural hurdles to overcome, prosecutors continue to utilize privilege waiver as a potential avenue of corporate cooperation in some cases.[72] Under the McNulty Memo, therefore, federal prosecutors may continue to request corporate waivers under some circumstances and may consider corporate waiver as a factor affecting cooperation status for the entity.

The harshest critics of the DOJ charging policy have declared the McNulty Memo to be "but a modest improvement," finding that the new policy "fall[s] far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product and employee protections during government investigations."[73] These groups continue to advocate legislation like the ACPPA that would eliminate the use of privilege waivers all together in connection with government cooperation policies.[74] In keeping with this position, the

product) (statement of Karin Immergut, U.S. Att'y, Dist. of Or.).

70. McNulty Memo, *supra* note 66, at 10 (providing that a corporate refusal to provide Category II information shall not be considered against a corporation in the charging decision, but that prosecutors "may always favorably consider a corporation's acquiescence").

71. *Id.* at 9, 11. The United States Attorney must consult with the Assistant Attorney General for the Criminal Division prior to granting or denying a prosecutor's request to seek Category I information, while the United States Attorney must receive written authorization from the Deputy Attorney General prior to approving a request for Category II information. *Id.* at 9–10.

72. *See supra* notes 66–71 and accompanying text.

73. Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, 5 A.B.A. J. EREPORT 49, 50 (2006) (quoting ABA President Karen J. Mathis); *see also* Edward Hayes, *Congress Eyes Regulators' Claim on Atty/Client Privilege*, COMPLIANCE 360, *available at* http://www1.cchwallstreet.com/ws-portal /content/c360/04-04-2007/container.jsp?fn=c360.main (reporting Senator Specter's comments that "[a]lthough the new McNulty memorandum makes some improvements, the revision continues to erode the attorney-client relationship by allowing prosecutors to request privileged information backed by the hammer of prosecution if the request is denied").

74. *September 18, 2007 Senate Hearing*, *supra* note 12, at 71–72.

ACPPA was reintroduced in the 110th Congress on January 4, 2007.[75]

II. THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT

On November 13, 2007, the House of Representatives passed the Attorney-Client Privilege Protection Act of 2007.[76] The Act remains pending in the Senate.[77] With a broad base of powerful support, the Act is alive and well and could pass the Senate.[78]

A. Congressional Findings and Purpose Supporting

The congressional findings supporting the proposed legislation and the stated purpose of the Act echo many of the concerns and criticisms voiced publicly by opponents of the federal cooperation policies. The stated purpose of the ACPPA is to "place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization."[79]

The Act includes several congressional findings that purport to demonstrate the need for legislation with this purpose. Specifically, the legislation includes findings regarding: the importance of experienced diligent legal representation in our adversarial system of justice, the need for a clear and consistent privilege to promote internal corporate investigations, the need for protection from compelled disclosure of privileged communications, the devastating consequences of a corporate indictment, and the importance of preserving the constitutional and other rights of individual corporate employees.[80] Based upon these findings, the ACPPA

75. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

76. Attorney-Client Privilege Protection Act of 2007, H.R. 3010, 110th Cong. (2007).

77. S. 186. According to the ACPPA's sponsor, Senator Arlen Specter, the bill has been held up in the Senate by chairman of the Senate Judiciary Committee Senator Patrick Leahy for the purported purpose of allowing Attorney General Michael Mukasey to review it. *See* Gina Passarella, *Specter's Talk on Attorney-Client Privilege Highlights Other Attacks on Civil Liberties*, LEGAL INTELLIGENCER, Apr. 23, 2008. According to Senator Specter, "there is no reason . . . to give Mukasey any more time." *Id.* at 2.

78. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 24 (statement of the Honorable Arlen Specter) ("I think this is a matter for congressional judgment, and I intend to press it."). Senator Specter has also opined that the "votes are there in Congress" to pass the legislation once it gets out of committee. *See* Passarella, *supra* note 77.

79. H.R. 3013 § 2(b).

80. *Id.* § 2(a).

proposes to alter current federal practices.

B. Provisions of the ACPPA

The ACPPA proposes to change current federal practices with respect to corporate attorney-client privilege and work-product waivers in two chief ways.[81] First, the Act would prohibit federal agents from "demand[ing]" or "request[ing]" the "disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product."[82] In other words, the ACPPA would create a "don't ask" rule for federal authorities when it comes to materials protected by the corporate attorney-client privilege or work-product doctrine.

Second, the Act provides that federal authorities "shall not . . . condition treatment" on such privileged disclosures or "condition a civil or criminal charging decision relating to a organization" or "use as a factor in determining whether an organization . . . is cooperating with the Government" any "valid assertion of the attorney-client privilege or privilege for attorney work product."[83] Put simply, federal authorities may not give leniency for privileged disclosures, may not base charging decisions on refusals to waive privilege, and may not use assertions of privilege as a factor in such charging decisions.[84] These prohibitions on requesting protected

81. *Id.* § 3(a)(1)–(2). In regulating these practices, the Act contains two definitional sections defining the terms "attorney-client privilege" and "attorney work product." *Id.* It is noteworthy that the proposed new Federal Rule of Evidence recently passed by the Senate regarding waiver of the attorney-client privilege and work-product protection also contains definitions of these two terms. FED. R. EVID. 502(g)(1)–(2). Although it is unlikely that Congress intends any difference between the definitions of these two terms for purposes of the two statutes, the current language used to define them in the ACPPA differs from that used in proposed Rule 502. *Compare* H.R. 3013 § 3(a)(1)–(2), *with* S. 2450 § 502(g)(1)–(2). Although the difference in the definitions is unlikely to lead to any substantive distinction in interpretation under the two statutes in the vast majority of cases, it would seem prudent to adopt the same language for both provisions. The definitions included in Proposed Rule 502 have been subjected to significant commentary through the rule-making process that resulted in alterations in the language used, most notably with respect to the definition of work-product protection. *See* Memorandum from the Honorable David F. Levi, Standing Comm. on Rules of Practice & Procedure, to the Honorable Jerry E. Smith, Advisory Comm. on Evidence Rules (May 15, 2007), *available at* http://www.uscourts.gov/rules/Reports/EV08-2007.pdf. Congress should conform the definitions in the ACPPA to those in proposed Rule 502 if the Act is ultimately passed.

82. H.R. 3013 § 3(b)(1).

83. *Id.* § 3(b)(1)–(b)(2)(a).

84. *Id.* In addition to these provisions regarding waivers of corporate

information and on conditioning treatment on its disclosure apply to all federal agents and attorneys in "any Federal investigation or criminal or civil enforcement matter."[85] Thus, the Act would govern DOJ officials overseeing criminal conduct at the organizational level, as well as federal authorities at the Securities and Exchange Commission who routinely utilize civil enforcement mechanisms to ensure corporate compliance with important regulatory measures designed to protect the public.

Despite the "don't ask" policy created by the Act, the proposed legislation expressly permits organizations to make "voluntary and unsolicited" offers to share internal investigation materials with federal authorities.[86] This provision authorizes agents or attorneys of the United States to "accept" such voluntary offers of protected information without running afoul of the Act's mandate.[87] In sum,

privileges, the Act prohibits federal authorities from making demands regarding organizational support of individual employees and from using any such support as a factor in a criminal or civil charging decision. *Id.* § 3(b)(2)–(3). Specifically, the Act prohibits authorities from penalizing the organization for providing counsel or defense fees to individual employees, for entering joint defense, information sharing, and common interest agreements with employees, or for refusing to terminate or otherwise sanction employees for insisting on constitutional or other legal rights. *Id.* § 3(b)(2)(B)–(E). Critics of the DOJ charging policy have complained that companies are penalized for assisting individual employees with representation and that companies are pressured to take punitive action against employees that refuse to cooperate with a government investigation. Indeed, one court recently found that government pressure under the policy to deny payment of legal fees for individual targets of the government investigation was unconstitutional. United States v. Stein, 435 F. Supp. 2d 330, 356–73 (S.D.N.Y. 2006). Some corporate employees have been charged with obstruction of justice for lying to corporate counsel knowing that their lies would be passed on to the government. *See* Wray & Hur, *supra* note 17, at 1147–48. These issues are beyond the scope of this Article dealing with waiver of corporate privileges. It is important to note, however, that the McNulty Memo specifically provides that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment" in assessing corporate cooperation. McNulty Memo, *supra* note 66, at 11. In light of this change to the government charging policy, at least one commentator has suggested that "the attorneys' fees issue appears to be off the table." *See* Seigel, *supra* note 1, at 50. That said, government pressure on companies to terminate or otherwise sanction employees that refuse to cooperate with corporate counsel could raise continuing problems, and some advocate a change to the federal policy that would, likewise, prevent this tactic. *Id.* at 49–50 (arguing for a change of DOJ policy to prevent pressuring corporations to sanction employees who invoked their Fifth Amendment rights).

85. H.R. 3013 § 3(b).

86. *Id.* § 3(d).

87. *Id.*

the Act creates a one-way street for privileged disclosures, prohibiting federal authorities from seeking privileged corporate information, but allowing corporate entities to make such disclosures whenever they see fit.

Finally, the proposed ACPPA makes clear that it does not prevent federal agents or attorneys from requesting or seeking material from an organization if those agents "reasonably believe" that material is not entitled to the protection of the attorney-client privilege or work-product doctrine.[88]

C. Operation of the ACPPA

1. Effect on Federal Investigations

The provisions of the ACPPA that prohibit government requests for privileged information or rewards for privileged disclosures would alter the procedures through which federal authorities monitor corporate compliance with regulatory obligations and criminal prohibitions. Although the ACPPA continues to allow purely "voluntary" and "unsolicited" corporate offers to share internal investigation materials, it appears to eliminate all incentive for companies to make such offers by prohibiting federal authorities from "condition[ing] treatment" of an organization on "the disclosure . . . of any communication protected by the attorney-client privilege or any attorney work product."[89] This statutory language removes the carrot of leniency in exchange for privileged revelations to federal authorities. If corporations are unable to receive cooperation credit at charging for making such disclosures, the benefits of doing so will be eliminated. Therefore, rational corporate actors will cease making unsolicited disclosures of protected information that carry no corresponding benefit.[90] As it is intended to, therefore, the ACPPA will significantly decrease, if not cease, the flow of helpful internal investigation materials to federal authorities.

Some commentators have suggested that the current version of the ACPPA would continue to permit federal authorities to reward purely voluntary disclosures of protected corporate information.[91] Under this interpretation of the Act, corporate entities could not be

88. *Id.* § 3(c).

89. *Id.* § 3(b)(1).

90. *See* Wray & Hur, *supra* note 17, at 1187 ("Corporations are perhaps the most rational targets in the criminal justice system and adjust their behavior accordingly.").

91. *See, e.g.*, SEC ACTIONS, http://www.secactions.com (Nov. 14, 2007, 12:51 EST) (opining that the Act "as presently written . . . would permit issuers to waive privileges and receive cooperation credit").

asked to make privileged disclosures. Nor could federal authorities take the absence of such disclosures into account in deciding how to treat the corporate entity. Still, federal authorities would remain free to reward companies that decide to make voluntary and unsolicited disclosures of privileged information.

First, this interpretation of the proposed ACPPA is at odds with the plain language of the Act. Subsection (b)(1) of the Act prohibits federal authorities from "condition[ing] treatment" in "any Federal investigation or criminal or civil enforcement matter" on privileged disclosures "by an organization" or any "person affiliated with that organization."[92] If federal authorities provide leniency of any kind and in any degree to an organization as a result of its cooperation, those authorities have altered their "treatment" of the organization by granting this reward. If federal authorities provide this leniency or reward based upon even *voluntary* disclosures of privileged corporate information under subsection (d) of the Act, authorities have altered or "conditioned" treatment on disclosures of protected information. This is expressly forbidden by subsection (b)(1) of the Act. Thus, the plain language of the Act appears to prevent organizations from receiving cooperation credit or leniency in exchange for purely voluntary disclosures of protected corporate information.[93]

Second, interpreting the Act to allow federal authorities to offer incentives for voluntary disclosures of privileged information would likely do little to appease the critics of current federal policies, while at the same time diminishing the amount of helpful information available to the government in some cases. Critics of current federal policies would argue that a voluntary disclosure benefit would simply serve to drive the "culture of waiver" underground.[94] These critics would suggest that federal authorities would be careful to document that they have not asked for, solicited, or otherwise encouraged any disclosures of privileged corporate information.

92. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(b)(1) (2007).

93. Interpreting the ACPPA to permit credit for voluntary disclosures also appears to be at odds with the legislative history of the pending Act. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 12 (statement of former Att'y Gen. Dick Thornburgh) (arguing that allowing any cooperation credit for a privilege waiver of any kind was fundamentally flawed and advocating passage of the ACPPA to correct this fundamental flaw in the McNulty memo); H.R. REP. NO. 110-445, at 4 (2007) ("There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.").

94. H.R. REP. NO. 110-145, at 1–2.

Nonetheless, these authorities would remain free to signal to corporate counsel that they had yet to reach a determination regarding treatment of the organization itself. They would remain free to suggest that multiple options of varying degrees of harshness regarding treatment of the organization were under consideration—all without any reference to privileged materials. Fully aware that leniency would be available for the corporation should it choose voluntarily to disclose helpful but protected corporate information, corporate counsel faced with such close cases might rush to share protected information "voluntarily."[95] In this scenario, therefore, the Act would fail to eliminate federal leverage to secure protected corporate information.

On the other side of the coin, federal authorities could be deprived of crucial information in close cases, even with a voluntary disclosure benefit available. To the extent that organizations would be willing to consider truly self-initiated disclosures of helpful, but protected, corporate information, they should have significant concerns about subject matter waivers that may prevent them from limiting disclosure to the information actually revealed voluntarily. Under newly adopted Federal Rule of Evidence 502, such selective disclosures to an adversary for the strategic benefit of the privilege-holder are the very disclosures that are most likely to trigger the fairness concerns requiring broad subject matter waiver.[96] An organization should not be permitted to pick and choose the protected information it wants to disclose, while holding back other damaging information on the same subject matter.[97] With the ACPPA in place, federal authorities would be prohibited from requesting any privileged information or from holding a failure to provide privileged information against an entity. A rational corporate entity could find the potential benefits of making a voluntary disclosure of privileged information far outweighed by the likely costs in terms of the potential wholesale opening of corporate files to the government.

95. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 11 (statement of former Att'y Gen. Dick Thornburgh) (stating that any policy that rewards waivers of any kind would create "overwhelming temptations to target organizations"); SEC ACTIONS, *supra* note 91 (opining that targets of investigation "facing the pressure of a charging position and reaching for any avenue that may score an additional cooperation point, will surely continue to waive any and all rights under these circumstances").

96. FED. R. EVID. 502(a)(1)–(3); Amendment to the Federal Rules of Evidence, S. 2450, 110th Cong. (2d Sess. 2008).

97. It is unclear whether the ACPPA's prohibition on federal demands for privileged corporate information would prevent the government's assertion of subject matter waiver under the Act. *See infra* Part III.B.

Similarly, rational corporate entities may avoid self-initiated disclosures of privileged information to federal authorities in some cases in the absence of selective waiver protection. Under current privilege doctrine in the majority of federal circuits, entities that voluntarily disclose privileged information outside the confidential attorney-client relationship or that disclose work-product material to an adversary, have waived the privilege and protection for all purposes and as to all parties. An entity who reveals its privileged information to the federal government will then have to reveal the same information to its private adversaries in following civil litigation.[98] Where the ACPPA prohibits federal authorities from requesting privileged information or from holding its absence against a target corporation, the specter of third-party waiver is likely to discourage voluntary disclosures.[99]

Even if the Act is interpreted to eliminate the reward for voluntary disclosures, some might argue that corporations will continue making some voluntary privileged disclosures regarding rogue employees in the hope that federal authorities will be unlikely to ignore such helpful and voluntary cooperation in assessing potential action against the organization itself. This illustrates the inherent and potentially insurmountable difficulties in attempting to legislate prosecutorial decision making with respect to charging. Prosecutors are not required to spell out for any target, individual or organization, the specific factors that led to the chosen course of prosecutorial conduct. Deprived of specific information regarding such charging decisions, corporate actors will surmise that helpful privileged disclosures will continue to have an effect despite the Act and may, under some circumstances, continue to share such information. Under this analysis, the ACPPA will succeed in driving charging decisions regarding organizations back underground consistent with traditional norms. This result appears contrary to the interests of the corporate entities that become the targets of investigation and is at odds with prosecutorial best practices.[100]

98. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002).

99. *See, e.g.*, Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 148 (2007).

100. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2 (4th ed. 2004) ("What is needed is for each prosecutor's office to develop a statement of general policies to guide the exercise of prosecutorial discretion, particularizing such matters as the circumstances that properly can be considered mitigating or aggravating. . . .").

In sum, the ACPPA's blanket prohibition of federal requests for privileged corporate information and its blanket prohibition of federal authorities conditioning treatment on privileged disclosures will deprive authorities of necessary tools for effective corporate enforcement in some class of cases. It is true that federal authorities will retain the ability to provide leniency in charging for corporate cooperation other than the disclosure of privileged or protected information. This reality will prevent entities from stonewalling federal investigative efforts completely and will encourage some level of continued corporate cooperation. Still, the ACPPA will permit corporate entities to engage in tactics that hinder the efficiency and efficacy of federal investigations that are foreclosed under current practice. The Act would permit companies to provide limited assistance to federal investigators in the form of unprotected information and access to witnesses and claim full cooperation. Without access to protected internal investigation materials illuminating the entity's knowledge of the relevant issues, it would be difficult for authorities in some cases to assess the authenticity of such purported cooperation. Should the government decide to indict or otherwise reprimand the entity, the ACPPA would enable the entity to claim that the negative treatment was based upon its failure to come forward with privileged information. Where the McNulty Memo creates guidelines that permit federal authorities to distinguish between organizational cases with a "legitimate need" to share protected materials and eliminates any sanction for corporate refusals to disclose sensitive attorney work-product and legal advice,[101] the ACPPA proposes an inflexible ban that will operate to foreclose access to such information in many cases.[102]

2. Overseeing Violations of the ACPPA

The ACPPA, as currently drafted, contains no mechanism for overseeing federal investigators' compliance with its provisions and no stated remedy for its violation.[103]

Although the Act prohibits specific conduct by federal authorities, both in discussions with corporate counsel and in traditionally closed charging decisions, it is not clear how government behavior would be monitored or remedied. Should the ACPPA become law, policing its provisions promises to raise thorny issues regarding standing to raise violations, a forum for resolving

101. *See supra* notes 65–68 and accompanying text.

102. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(b)(1) (2007).

103. *See generally* H.R. 3013.

them, and a remedy for a proven federal transgression under the Act. Before proceeding further with the proposed legislation, Congress should explore these potential problems of oversight and possible solutions.

a. *Standing to Raise ACPPA Violations.* It appears that corporate targets of investigation would monitor requests for protected information and accuse investigators of ACPPA violations. For accusations that investigators requested or demanded protected information, the ACPPA will doubtless lead to difficult credibility disputes, with the corporation accusing federal authorities of making a prohibited demand and those authorities insisting that no such request was made.[104] Government officials could attempt to avoid this by maintaining meticulous written documentation of each and every communication with corporate counsel. This would not only consume valuable government resources, but it could also inhibit the process of investigating and negotiating with a corporate target by eliminating discussions and other informal meetings that could advance the process. Even if all interactions were papered, it would still be possible for a corporate lawyer to accuse the government of making such a demand "off the books,"[105] thus triggering a dispute despite the written documentation.

Any accusation that a federal prosecutor has conditioned a charging decision on a company's refusal to provide protected information would be similarly difficult to police. An indicted company could accuse the government of such a violation in any case in which it had not provided privileged information. To unearth

104. The existing survey data regarding the frequency of corporate waivers of attorney-client and work-product protections demonstrates the conflict likely to arise under the Act. According to an ABA survey of over 1200 corporate counsel, almost seventy-five percent of respondents believe that waiver requests are routine. *See* AM. CHEM. COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT 3 (2006), *available at* http://www.acca.com/Surveys/attyclient2.pdf. In 2002, the United States Sentencing Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines conducted a survey to ascertain the frequency of federal requests for waivers from organizational defendants. *See* U.S. SENTENCING COMM'N AD HOC ADVISORY GROUP, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 98 (2003), *available at* http://ussc.gov/corp/advgrprpt/AG_Final.pdf. This survey suggested infrequent waiver requests by prosecutors. *Id.*; *see also* Buchanan, *supra* note 1, at 597–98 (discussing survey results).

105. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 624–26 (2006) (making reference to the corporate scandals of Enron, WorldCom, Adelphia, Tyco, and HealthSouth that involved nondisclosure of financial transactions).

such a violation would require intrusion into the discretionary and traditionally private realm of prosecutorial charging decisions.[106]

Furthermore, it is not clear which parties or entities would have standing to raise violations of the ACPPA.[107] It certainly appears from the language of the statute dealing with "organizational" disclosures that a target corporation, pressed for information protected by the corporate attorney-client privilege or federally charged, could complain.[108] It is also possible, however, that individual employees of a target company, who are compromised by corporate disclosures to the government, could have standing to complain. Protecting the rights of individual corporate employees is expressly articulated as a justification for the Act.[109] Allowing those protected employees to press complaints appears to be consistent with the Act's purpose and intent.

b. *Forums for Resolving ACPPA Violations and Remedies for Proven Violations.* The current version of the ACPPA is silent as to the forum for resolving allegations of misconduct under the ACPPA and as to the appropriate remedy for a proven violation of the Act. There are several possible forums for resolving the disputes sure to arise if the Act is passed, as well as several possible remedies that could be available within those forums. First, allegations that federal authorities violated the Act during an investigation could be resolved exclusively within the judicial proceedings that result when federal authorities file criminal or civil charges against a corporation or its individual employees. Another alternative would be a parallel proceeding outside any pending judicial proceeding against a company or its employees to challenge conduct by federal authorities that runs afoul of the ACPPA.[110] Finally, violations of

106. *See* What Does the Attorney-Client Protection Act of 2006 Do?, http://lawprofessors.typepad.com/whitecollarcrime_blog (Dec. 9, 2006) [hereinafter Attorney-Client Protection Act of 2006] (noting a unique feature of the Act that has the "Legislative Branch direct[ing] the Executive Branch in the exercise of its authority to decide who to prosecute on the basis of investigatory considerations" and noting potential "separation of powers questions" raised by the legislation).

107. *Id.* (raising the question of "[w]ho can challenge the government if there is a belief that such a 'demand, request or condition' has occurred").

108. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(b)(1) (2007) (referring to disclosures by "an organization, or person affiliated with that organization").

109. *Id.* § 2(a)(8) (supporting legislation with a finding that "[g]overnment agencies are encroaching on the constitutional rights and other legal protections of employees").

110. If Congress wanted to authorize a private right of action under the ACPPA, it would have to amend the current statutory language to make that

the ACPPA simply could serve as grounds for an ethics complaint against a federal lawyer or investigator to be resolved internally within the federal agency.

Resolving allegations of governmental misconduct under the Act in civil or criminal cases ultimately brought against corporate entities and their employees will present varying difficulties depending on the type of governmental misconduct alleged. With respect to allegations that federal authorities have conditioned civil or criminal charging decisions on the valid assertion of corporate privilege, it is unclear how defendants will prove such allegations.[111] To resolve this accusation, the court would necessarily have to delve into the government's reasons for bringing a case and make a credibility determination based upon the representations of government lawyers.[112] Although courts could use selective prosecution cases as a model for assessing this type of charge, proving such a claim would be problematic.[113]

Even if a defendant could prove that federal authorities had based a decision to file criminal or civil charges, in part, on a company's valid assertion of privilege, it may be difficult to strike the proper balance between the Act and the public interest in designing an appropriate remedy. A prosecutor's decision to charge, in part, due to a valid assertion of privilege in no way eliminates or mitigates underlying criminality or civil violations by the corporation or its employees. Therefore, any dismissal of or reduction of charges for this type of violation would not appear to be a proportionate response that serves the public interest in eradicating corporate criminality or other regulatory missteps.

Resolving allegations of improper, but successful, demands for privileged information in judicial proceedings against a company or its employees will present another set of problems. These allegations will almost certainly involve a direct credibility dispute

intent clear. A federal statutory cause of action will only be implied where Congress has clearly indicated a desire to provide for one. *See* Touche Ross & Co. v. Reddington, 442 U.S. 560, 571 (1979). The current version of the ACPPA is silent as to its enforcement. *See* H.R. 3013 § 3(b)(1).

111. It seems that this allegation would signal another violation of the Act —the improper but unsuccessful demand for privileged corporate information. *Id.*

112. *See* Attorney-Client Protection Act of 2006, *supra* note 108 (noting the difficulties presented if criminal targets are permitted discovery of the government's decision-making process).

113. *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (finding a "presumption of regularity" with respect to charging decisions arising out of "judicial deference" due to the "relative competence of prosecutors and courts" in charging and requiring a defendant to present "clear evidence to the contrary" to overcome that presumption).

between the government and corporate lawyers, with the corporate lawyers claiming that improper pressure was brought to bear and government lawyers hotly contesting that any such demands were made. Judges routinely resolve such credibility disputes in preliminary rulings on the admissibility of evidence, as well as in bench trials where they serve as fact finders.[114]

Still, fashioning an appropriate remedy after finding such improper and successful demands could be more problematic. One potential effect of a violation could be modeled upon the Supreme Court's Fourth Amendment jurisprudence, eliminating from the federal agency's evidence (in any civil or criminal action) any information improperly obtained through undue pressure exerted on a corporate official in contravention of the ACPPA.[115] For example, suppose individual employee Brown of the XYZ Corporation was charged with accounting fraud and that the government had demanded and obtained privileged interview memoranda of XYZ in-house counsel reflecting conversations with Brown regarding her involvement in the accounting irregularities. Individual employee Brown could seek to prohibit the government from utilizing this information and any other corporate information accessed as a result of these privileged memoranda at trial. Thus, the government could be denied the benefit of any improperly requested corporate information, as well as any "fruit of the poisonous tree" in the individual prosecution of employee Brown. This approach could similarly be applied in civil enforcement actions brought by federal authorities.

Although this approach strikes a better balance between the public's interest and the goals of the ACPPA, implementing it in the context of a complex corporate scheme could be challenging. It may be difficult to trace unprivileged information that exists outside the internal investigation back to such protected memoranda with any precision. This approach could deprive the government of unprotected discoverable corporate information to the extent an individual can argue that privileged information led to its discovery. Such an allegation could be difficult to disprove in the context of complicated corporate schemes and document trails.

114. Under the Federal Rules of Evidence, for example, the trial judge is vested with the authority to resolve "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." FED. R. EVID. 104(a). In exercising this authority, federal judges are required routinely to resolve credibility disputes.

115. *See* Nardone v. United States, 308 U.S. 338, 340–41 (1939) (holding that all evidence directly obtained in violation of constitutional rights should be suppressed and that all other evidence tainted by the violation that constitutes the "fruit of the poisonous tree" should likewise be suppressed).

Furthermore, the corporate entities and employees that the ACPPA is designed to protect may argue that resolving ACPPA violations in underlying judicial proceedings provides inadequate protection by allowing redress only in cases where the government ultimately files criminal or civil charges against the company or its employees. In addition, there would be no available relief during an investigation prior to a charging decision. If the sole avenue of relief occurs in connection with an ongoing judicial proceeding, there will be no protection in the cases where the government has improperly, but successfully, demanded disclosure of protected information in the course of an investigation and ultimately chosen not to charge the entity as a result of this prohibited cooperation. Indeed, the corporate proponents of the ACPPA would argue that companies that continue to cave in to demands for privileged material during an investigation would never be charged due to their excellent cooperation. The "culture of waiver"[116] would still be permitted to operate under the radar in the vast majority of cases where there is no charge against the company. Thus, these companies improperly pressured in violation of the Act would have no forum in which to raise a claim under the Act because the government's prohibited conduct would serve effectively to eliminate that forum. Although a charged employee of the company still could raise an ACPPA violation in his own case (if one were brought), the company may be insufficiently motivated to provide the employee with the necessary information from corporate counsel to prove the claim when the entity has avoided any charge as a result of its disclosures.[117] Therefore, policing compliance with the ACPPA in federal civil or criminal cases brought by federal authorities against companies and their employees may be inadequate to meet the purported goals of the Act.

Allowing companies and their employees to initiate federal proceedings to raise allegations of misconduct under the ACPPA could afford protection during an ongoing federal investigation and outside the confines of a judicial proceeding initiated by the federal authorities.[118] If such a suit were authorized by the Act, most of the

116. AM. CHEM. COUNCIL ET AL., *supra* note 104, at 5.

117. Indeed, critics of federal cooperation policies have accused federal authorities of actively discouraging corporate assistance of individual corporate employees who are targets of the government investigations. *See supra* note 84.

118. One commentator has suggested that ACPPA violations could be resolved using contempt proceedings available under Federal Rule of Criminal Procedure 6(e)(7) relating to grand-jury secrecy. *See* Attorney-Client Protection Act of 2006, *supra* note 108 ("A procedure similar to raising a Rule 6(e)(7) contempt challenge to improper disclosure of grand jury information might be used."). Rule 6(e)(7) provides that a "knowing violation of Rule 6 . . . may be

cases would require mini-trials to resolve the conflicting stories of government and corporate lawyers regarding government requests for information. Allegations regarding banned charging decisions under the Act would require in-depth discovery[119] into the specific factors leading to traditionally discretionary and closed charging decisions that may be inappropriate for judicial review.[120]

Although the possibility of a separate proceeding could alleviate some of the concerns raised by allowing relief only in cases initiated by the government, this possible mechanism raises similar concerns regarding an appropriate remedy. First, it seems unlikely that Congress would authorize the award of monetary damages against

punished as a contempt of court." FED. R. CRIM. P. 6(e)(7). The Supreme Court has been reluctant to allow civil claims against prosecutors personally in connection with charging decisions out of "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Imbler v. Pachtman, 424 U.S. 431 (1976) (finding a prosecutor absolutely immune from a federal civil rights action involving actions taken in "initiating a prosecution and in presenting the State's case"). Prosecutors enjoy only qualified immunity for conduct at other stages of the investigatory process. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 496 (1991) (holding that a prosecutor has only qualified immunity when he gives legal advice to police regarding probable cause to arrest).

119. Indeed, courts may be reluctant to allow such intrusive discovery until a corporate target or individual employee makes a strong showing of an ACPPA violation. *See* United States v. Armstrong, 517 U.S. 456, 464, 468 (1996) (imposing a "rigorous standard" for discovery of prosecutorial decision making to support a selective prosecution claim and noting that discovery itself will "divert prosecutors' resources" and that a rigorous standard for obtaining discovery would impose a "significant barrier to the litigation of insubstantial claims").

120.

> [T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systematic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitate to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607–08 (1985); *see also Armstrong*, 517 U.S. at 465 (noting concern in selective prosecution cases "not to unnecessarily impair the performance of a core executive constitutional function").

federal executive officials under the Act when it appears that monetary damages would be inadequate to provide the relief the Act seeks to afford.[121] The ACPPA is designed to take certain government tools off the table and monetary awards would be unequal to the task. Rather, allowing injunctive relief appears best suited to achieve this goal. A corporate entity or its employees could bring suit seeking an order enjoining federal authorities from making future requests for privileged information or from charging as a result of assertions of corporate privilege. Policing a judicial order that prohibits charging on the basis of valid assertions of privilege would again present challenges in uncovering the basis for any ultimate federal charging decision.[122] Yet, such injunctive relief would be necessary to provide meaningful protection to an entity facing a negative charging decision on a basis prohibited by the Act. Without injunctive relief, the entity would be forced to await the charge and to contest it in the criminal case. Indeed, the ACPPA acknowledges and seeks to prevent the consequences that an indictment alone can have on an entity in the market regardless of the outcome of the prosecution.[123] Therefore, injunctive relief appears the most suited to satisfy the goals of the proposed legislation, even though it is fraught with problematic issues regarding the appropriate remedy and its enforcement.

The final and most appropriate potential forum for resolving violations of the ACPPA is within the context of internal federal ethics investigations against offending officials. This approach would allow target organizations and their employees to challenge specific misconduct under the Act in the course of a federal investigation by filing an official complaint with a federal agency or

121. In 1997, Congress enacted legislation that permits prevailing defendants in federal criminal cases to collect attorney's fees and litigation expenses from the regular budget of the prosecuting agency where they can prove that the prosecution was "vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A (2000); *see also* United States v. Campbell, 134 F. Supp. 2d 1104, 1106–07 (C.D. Cal. 2001); United States v. Gardner, 23 F. Supp. 2d 1283, 1286–87 (N.D. Okla. 1998) (discussing the Hyde Amendment). Congress may be reluctant to allow a similar remedy for a violation of the ACPPA, however, where requesting privileged materials or conditioning treatment, in part, on the refusal to provide privileged information would not make the underlying prosecution vexatious, frivolous, or in bad faith. Thus, defendants' expenditure of attorney's fees would not necessarily result solely from the violation of the ACPPA.

122. *See supra* note 113.

123. *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 2(a)(7) (2007) ("An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive post-indictment or to dispute the charges against it at trial.").

department regarding conduct of specific federal authorities. Such complaints could be referred to the internal federal departments charged with overseeing official ethical or other misconduct.[124] Because these internal processes are already in place within the federal government, this remedy appears the most workable and the least costly to implement. Furthermore, such an internal solution eliminates concerns regarding judicial oversight of a core executive function.[125]

Under this approach, federal departments would investigate ACPPA complaints, interviewing witnesses and reviewing federal investigative files.[126] Because of their internal power within the federal agency or department, these bodies would likely have greater ease of access to critical information regarding the conduct of the federal investigation at issue.[127] After investigating, these departments could issue official findings in connection with specific complaints, ranging from findings of intentional violations of the ACPPA, to poor judgment, to no misconduct at all.[128] Findings other than those of complete innocence could lead to a range of internal reprimands ranging from termination, to administrative leave, to written notation of impropriety in a federal employee's permanent record.[129] As all such official actions could lead to serious career consequences both within and outside the federal government, such a procedure could serve as an effective deterrent to ACPPA violations.[130]

This potential remedy also has drawbacks, however. The champions of the ACPPA may not accept an internal ethics investigation by the federal government as an adequate response to

124. For example, the Office of Professional Responsibility ("OPR") currently serves this function within the DOJ for purposes of overseeing department lawyers. *See* OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, POLICIES AND PROCEDURES § 2, http://www.usdoj.gov/opr/polandproc.htm [hereinafter OPR, POLICIES AND PROCEDURES]. OPR was created in 1975 in response to alleged misconduct by DOJ officials in connection with the Watergate scandal. *Id.* § 1.

125. *See supra* note 118 (citing cases discussing judicial reluctance to review such issues).

126. OPR, POLICIES AND PROCEDURES, note 124, at §§ 6–7 (detailing the process for investigation of complaints).

127. Indeed, DOJ employees have a duty to cooperate with OPR investigations upon penalty of formal discipline, "including removal." *Id.* § 6.

128. *Id.* § 9 (describing potential OPR findings regarding DOJ attorney misconduct).

129. *Id.* § 10 (discussing that possible consequences of OPR findings of misconduct include written reprimand, suspension, demotion, or removal).

130. *Id.* § 12 (explaining circumstances in which OPR findings may be publicly disclosed).

their concerns. Given the recent outcry against sharp prosecutorial practices and the federal "culture of waiver," companies may lack confidence in any remedy that ultimately is policed by the offender. Indeed, the McNulty Memo was designed to place internal controls and restrictions on prosecutors' waiver requests within the DOJ, and the corporate bar was not satisfied by these internal compliance mechanisms.[131] Furthermore, utilizing an enforcement mechanism that generates internal findings and consequences against federal violators of the Act satisfies only a deterrent purpose of preventing future violations, but gives the entity or individual injured by the Act's violations no immediate relief. Therefore, this option may be the least palatable to the beneficiaries of the Act's protection.

c. *Interpretive Dilemmas.* Finally, policing the ACPPA in any of these forums is likely to raise substantive issues of interpretation as well. The Act prohibits "request[s]" or "demand[s]" for privileged information.[132] Although one commentator has suggested that this provision would "instantly end the debate regarding if and when the government could request privileged information," the governmental conduct that runs afoul of this mandate is certain to be the subject of debate.[133] At the extremes, the interpretation of the Act should present few challenges. For example, it is clear that a federal lawyer who says to corporate counsel, "we need your privileged internal investigation material before we can decide whether charges against the entity are appropriate," has violated the ACPPA.[134] At the other extreme, it is clear that a government lawyer who has never asked a company for any information at all has not violated the Act. In between these two poles lies a vast gray area. If a government lawyer requests "greater cooperation" or "more information" from a corporate target,[135] has she violated the Act if the corporate official interprets this as a demand for privileged information? Will resolution of these disputes be governed by a subjective standard that assesses the actual intent of the federal authority, or will it be subject to an objective standard that asks

131. *See supra* note 73 and accompanying text (describing dissatisfaction with the McNulty Memo).

132. *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(b)(1) (2007).

133. Robert Zachary Beasley, *A Legislative Solution: Solving the Contemporary Challenge of Forced Waiver of Privilege*, 86 TEX. L. REV. 385, 418–19 (2007) (espousing the adoption of the ACPPA, as well as a federal rule of evidence allowing for selective waiver of corporate privilege to government authorities).

134. *See* H.R. 3013 § 3(b)(2)(A)–(D).

135. *See id.* § 3(b)(1).

how reasonable participants in a meeting at which an alleged violation took place would view the government conduct? Will monitors of government conduct under the Act look to "course of dealing" evidence[136] to ascertain the meaning of certain inquiries by federal authorities?

The voluntary disclosure provision of the Act also appears likely to present interpretive dilemmas. In the event that a corporate entity elects to provide "unsolicited" privileged information on a purely "voluntary" basis, does that permit federal authorities to request additional, related privileged materials beyond those already provided?[137] On one hand, the statutory language and intent suggest that the government would not be entitled to press for additional privileged disclosures under these circumstances. The language of the ACPPA prohibits all "requests" or "demands" for privileged disclosures by federal authorities and clearly is intended to eliminate all government pressure for this type of information.[138] Furthermore, an interpretation of the Act that allowed the government to make such requests following voluntary disclosures would create a significant disincentive to provide voluntary assistance of this sort that would likely eliminate any such cooperation remaining under the Act. On the other hand, an interpretation of the ACPPA that prohibits government requests for additional privileged information following voluntary disclosures presents serious fairness concerns.[139] Corporate entities would be free to select only the most favorable internal investigation material for presentation to federal authorities, secure in the knowledge that they are immune from further pressure to disclose the full picture.

Alleged violations of the Act in connection with federal charging decisions will raise similar problems of interpretation. It is hard to imagine a government lawyer testifying that he made a charging decision solely as a reprisal for corporate assertions of privilege following passage of the ACPPA. The evidence is likely to be much less clear. Has a government lawyer violated the ACPPA if he admits *thinking* about the fact that the company could have been more helpful in providing internal investigation materials prior to charging? Any court or department that oversees compliance with the ACPPA will have to grapple with these questions regarding what constitutes a violation of the ACPPA, as the proposed

136. *See, e.g.*, BRIAN A. BLUM, CONTRACTS: EXAMPLES AND EXPLANATIONS 367 (4th ed. 2007) (defining "course of dealing" evidence).

137. *See* H.R. 3013 § 3(d).

138. *See id.* § 3(b)(1). In other words, corporate targets could argue convincingly that government assertions of subject matter waivers are "demands" for privileged corporate information prohibited under the Act.

139. *See infra* Part III.B and accompanying notes.

legislation provides little guidance.

In sum, the current version of the ACCPA sets up blanket prohibitions of certain conduct by federal authorities during federal investigations of corporations or their employees, but contains no mechanism or guidance regarding oversight of these mandates. Before deciding whether to join the House in erecting these barriers for federal authorities, the Senate should, at the very least, amend the legislation to clarify the appropriate forum, procedures, and remedies for implementing them.

III. JUSTIFYING THE ACPPA

Even if Congress were to include necessary provisions dealing with enforcement of the ACPPA, its core restrictions on federal authorities are not justified under any accepted theory used to support privilege and waiver rules generally. To be sure, the ACPPA is markedly different from traditional rules regarding privilege and waiver in that the Act does not seek to define circumstances under which a privilege will be recognized or waived. Still, the primary purpose of the Act is to "protect" the attorney-client privilege, and it purports to do so by restricting requests for waiver.[140] It is appropriate, therefore, to examine accepted justifications for rules of privilege and waiver in assessing the desirability of the Act's increased privilege protection.

A. Applying a Cost/Benefit Approach

The traditional and most commonly accepted justification for the attorney-client privilege is that the privilege encourages and creates socially beneficial communications that would not otherwise occur without its protections.[141] In essence, this rationale is the familiar cost/benefit rationale that supports most of the decision making under our democratic system of government. The costs of the privilege in terms of information lost to the truth-seeking endeavor are justified by the gains to the attorney-client relationship and the public generally.

In contrast to this cost/benefit approach to the recognition of privileges, waiver of privilege historically has been governed by rather rigid rules designed to apply and interpret the privilege narrowly to minimize evidence lost.[142] Recently, however, scholars,

140. *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007) (styling legislation as an Act "to provide appropriate protection to attorney-client privileged communications and attorney work product").

141. *See supra* notes 21–22 and accompanying text.

142. *See generally* WRIGHT & GRAHAM, JR., *supra* note 24, § 5487 (discussing waiver of the attorney-client privilege generally); *see also* Marcus, *supra* note

judges, and legislators have noted the significant costs imposed by these rigid rules regarding waiver and have begun to apply a cost/benefit analysis to the rules regarding waiver as well.[143] On February, 27, 2008, the Senate approved new Federal Rule of Evidence 502, which replaces traditional rigid waiver rules with more flexible standards that minimize wasteful costs of privilege protection.[144] Thus, a traditional cost/benefit approach has found its way into waiver analysis.

1. Costs Imposed by the ACPPA

A cost/benefit analysis does not support the ACPPA's proposed rules regarding waiver of the corporate attorney-client privilege and work-product protection, however. The costs that the Act will impose are significant.

First, by prohibiting federal authorities from "conditioning treatment" of corporate targets on their disclosure of protected information, the Act would remove the "carrot" for corporate cooperation.[145] Without an available reward for cooperative disclosures, corporations will have little incentive to make such disclosures. There will be no penalty for refusing to give up these protected internal investigation reports. Nor will there be any reward available for doing so. The altered incentive system set up by the ACPPA will inevitably lead to less information sharing with federal authorities, which will lead to fewer successful complex investigations of white-collar offenders.[146] The ACPPA will largely

23, at 1607.

143. *See* SEN. REP. NO. 110-264, pt.1, at 1 (2008) (finding that "[t]he costs of discovery have increased dramatically in recent years" and that "[o]utdated law" regarding waiver of privilege is largely to blame); FED. R. EVID. 502 introductory cmt. (noting that the rule "responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information"), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf#page=16; Marcus, *supra* note 23, at 1607 (describing litigation costs generated by traditional waiver doctrine).

144. S. 2450, 110th Cong. (2008) (amending the Federal Rules of Evidence "to address the waiver of the attorney-client privilege and the work product doctrine"). Congress must enact Proposed 502 directly because rules of privilege cannot take effect through the ordinary rule-making process. *See* 28 U.S.C. § 2074(b) (2000).

145. *See supra* Part II.C and accompanying notes.

146. *See* Seigel, *supra* note 1, at 4 (noting the significant gains in efficiency and productivity produced by corporate sharing of protected internal investigation materials: "prosecutors are able to bring prompt charges against those criminally responsible and then move on to the next case"); *see also*

turn back the clock to the "circle-the-wagons" days of corporate defense when investors and employees had to trust companies to police themselves because the federal government was unable to act as an effective watchdog.[147] With the adoption of the ACPPA that deprives federal authorities of such information, the enforcement climate will again be ripe for scandals like Enron and WorldCom.[148] This cost is particularly significant when placed in the context of the current fraud investigations in the mortgage industry. This corporate scandal promises to hit harder and more broadly than Enron.[149] Not only will the federal government likely be involved in bailing out banks, it will face increasing costs and inefficiencies in investigating the widespread fraud already projected to consume years of investigation time for hundreds of agents without the restrictions of the ACPPA.[150]

Not only will the ACPPA impose costs to the system by returning to the circle-the-wagons days of corporate defense, it also threatens to introduce new costs that will sacrifice effective corporate oversight. By prohibiting federal authorities from

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LAFAVE ET AL., *supra* note 100, § 13.2(f) (noting that "[m]ore detailed background information about the offender is needed" to make prosecutorial charging discretion more structured and rational).

147. *See September 18, 2007 Senate Hearing*, *supra* note 12, at 20 (statement of Professor Michael Seigel) (opining that companies currently cooperating in any way they can to expedite a federal investigation would "realize that an alternative potentially successful strategy would be to stonewall" under the ACPPA). As one author has explained it:

> As citizens need information if they are to exercise any sort of democratic control over municipal corporations, so must we have information if we are to prevent business corporations from becoming masters of the state that created them. We will never get that information if courts let the anthropomorphic model of the corporation mislead them into supposing that fictional persons must necessarily have the same privileges as human beings.

WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (citations omitted).

148. It is well-established that prosecutors with charging discretion are less likely to initiate proceedings where the costs of prosecution would be excessive. *See supra* note 47 (discussing government abandonment of Exxon investigation in light of the extensive resources and time necessary to pursue it); LAFAVE ET AL., *supra* note 100, § 13.2 (noting that "[d]ecisions not to prosecute, when not motivated by doubts as to the sufficiency of the evidence, usually fall within one of . . . three broad categories," including "[w]hen the costs of prosecution would be excessive, considering the nature of the violation").

149. *See* Mikkelsen, *supra* note 2.

150. *Id.*; *see also September 18, 2007 Senate Hearing*, *supra* note 12, at 13 (statement of Professor Daniel Richman) (noting the range of "spectacularly expensive" techniques government will need to employ to obtain information following passage of ACPPA and opining that Congress should "be putting a lot more money into white collar enforcement").

"requesting" privileged information, the Act could chill legitimate prosecutorial efforts to pursue *unprivileged* information. Depending upon the sanction for violating the Act, prosecutors and other federal investigators could shy away from requesting any information a corporate target may wish to argue is protected by the attorney-client privilege or work-product doctrine. Disputes over the limits of privilege protection are age-old.[151] Some corporate information, such as e-mails routed through counsel, could present close questions of privilege. If federal authorities face a penalty for aggressively demanding information and challenging privilege claims under the ACPPA, the Act could prevent the appropriate pursuit of corporate information that is not protected.

The Act seeks to avoid this chilling effect by clarifying that it does not prohibit a federal agent from seeking material he "reasonably believes" to be unprotected.[152] While this provision may diminish this potential chilling effect in theory, it protects federal authorities with a malleable standard of reasonableness.[153] Given the tenor of the recent debate between federal authorities and corporate representatives over government practices, it is clear that there is a significant gap among competing views of what is "reasonable." By including a provision in the ACPPA addressing pursuit of unprivileged information, Congress has acknowledged the danger of chilling legitimate federal requests. The provision it has adopted to deal with the potential chilling effect of the ACPPA is inadequate to afford federal authorities with meaningful protection that will allow full pursuit of unprivileged corporate information, however. Thus, the Act could deter some legitimate attempts to uncover unprivileged information. The potential loss of unprivileged corporate information represents another significant cost imposed by the Act.

Finally, the ACPPA will not only generate costs by undermining partnership between federal authorities and target companies, it will create a new offense that can be implemented by corporate targets and their individual officers and employees to thwart investigations. It would certainly contravene the spirit and purpose of the proposed legislation to prohibit corporate targets and employees from raising violations of the Act during an ongoing investigation.[154] Although the proposed legislation is silent as to a

151. *See, e.g.*, NLRB v. Harvey, 349 F.2d 900, 903–06 (4th Cir. 1965) (reviewing the history of attorney-client privilege).

152. *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(c) (2007).

153. *Id.*

154. *See supra* Part II.C and accompanying notes.

remedy for its violation, companies and individual employees will certainly be permitted to complain of prosecutorial abuses during ongoing investigations.[155] Not only will federal authorities get less help from companies during investigations, they will likely be forced to respond to allegations of misconduct that will detract from and further delay those investigations.[156]

Eliminating corporate rewards for privileged disclosures also threatens to damage corporate entities under some circumstances. As some commentators have noted, "real-time" partnership with federal authorities through privileged disclosures may be the only remaining avenue open to allow an organization to avoid indictment in some cases.[157] In a case where corrupt senior management has been ousted and new officers strive to clean up the corporation, all factors traditionally affecting a corporate charging decision, other than cooperation, may favor indictment.[158] The corporate culture under prior management may have become pervasively corrupt.[159] The most recent misconduct may represent the last in a series of corporate misdeeds.[160] Internal compliance measures may have been ill-designed and executed under the previous management.[161] All of these factors may signal an appropriate case for indictment, and all of them may be beyond the reach of new management to alter once the federal investigation is under way.[162] The only remaining method for demonstrating meaningful change that will alter the formerly corrupt corporate culture may be partnership between new

155. *See supra* Part II.C and accompanying notes.

156. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."); *September 18, 2007 Senate Hearing*, *supra* note 12, at 13 (statement of Professor Daniel Richman) (noting that under ACPPA "[e]very time a corporation is charged, no matter what happened in the U.S. Attorney's Office, corporate counsel will claim that the decision was made . . . by improper consideration of their failure to waive").

157. *See* Wray & Hur, *supra* note 17, at 1171 (noting the opportunities that the DOJ charging policy presents for corporations when many of the more traditionally accepted Thompson factors are out of the company's control by the time the investigation arises: "[a] company's commitment to cooperation can dramatically enhance its chances of weathering such a crisis . . . unscathed").

158. *See* McNulty Memo, *supra* note 66, at 4 (listing numerous factors to be evaluated in charging an organization).

159. *Id*.

160. *Id.*

161. *Id*. In addition to "authentic" corporate cooperation, the Thompson Memo placed emphasis on effective corporate compliance mechanisms. *See* Thompson Memo, *supra* note 18.

162. *See* Wray & Hur, *supra* note 17, at 1171.

management and federal authorities to clean up the company. The type of partnership that will signal such meaningful change often will involve the feeding of internal investigation material to federal authorities.[163] Thus, the ACPPA will remove the only tool still available to some corporate entities to avoid indictment under other factors.

All of this assumes that the core traditional and transparent factors used across the country to make federal organizational charging decisions remain intact. Another potential cost of the ACPPA may be the loss of transparency and consistency in both civil and criminal charging decisions. Federal authorities faced with potential sanctions for charging on certain grounds may cease providing any information to potential targets about charging decisions.[164] Policies like those embodied in the McNulty memo will disappear. Federal authorities will provide no general guidelines regarding charging for all corporate entities to use as a roadmap. Nor will federal authorities attempt to give specific justifications of particular charging decisions. There are few restrictions on the executive branch that would prevent this rational response to the potential sanction under the ACPPA.[165] Thus, the Act could signal a return to charging decisions that are completely hidden from public view. Different federal authorities could emphasize different factors in these closed decisions. The loss of transparency and consistency ultimately would harm good corporate citizens trying to conform organizational conduct to federal requirements.[166]

In sum, the ACPPA not only threatens to eliminate the flow of information regarding complex corporate schemes to federal law and regulatory enforcement agencies and to return to the circle-the-

163. *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship*," 76 ST. JOHN'S L. REV. 979, 999 (2002) (discussing the Boesky trading scandal and other corporate scandals of the mid-1980s and early 1990s and the critical importance of corporate cooperation to companies that avoided indictment).

164. LAFAVE ET AL., *supra* note 100, § 13.2(f) (noting the problems presented by publication of charging criteria, including that prosecutors will be reluctant to formulate such structured policies and that such publication "will inevitably result in more frequent attempts to invoke judicial review of prosecution policy . . . thereby further clogging an already overburdened court system").

165. *Id.* ("What is needed is for each prosecutor's office to develop a statement of 'general policies to guide the exercise of prosecutorial discretion,' particularizing 'such matters as the circumstances that properly can be considered mitigating or aggravating.'") (citations omitted).

166. *See* McNulty Memo, *supra* note 66, at 1 (noting that "our corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals").

wagons days of corporate defense, but also to introduce new obstacles to law enforcement. Companies and white-collar defendants armed with this legislation will gain leverage that they may use to delay and even undermine investigations by crying foul and triggering inquiry into federal techniques. Prosecutors and other federal investigators will not only be left with a higher mountain to climb offensively to prepare a case without the cooperation of the corporation, but also will be placed on the *defensive* to prove compliance with statute. Furthermore, the Act will impose costs to the corporate entities under federal investigation by depriving them of tools of cooperation and information regarding charging decisions. The ACPPA will, thus, generate significant costs in terms of federal resources expended on corporate investigations and in terms of corporate schemes left unchecked.

2. The Purported Benefits of the ACPPA

On the other side of the scale, there are insufficient corresponding benefits, if any, to justify enactment of the ACPPA. The version of the ACPPA passed by the House contains numerous findings that demonstrate the purported need for the legislation. These findings include the need to safeguard attorney-client communications from "compelled disclosure," the need to protect the adversarial system of justice, and the need to protect the "constitutional . . . and other legal protections" of individual employees.[167] Upon careful examination, the ACPPA's waiver provisions appear unnecessary to protect these interests and, in any event, are inadequate to do so.

First, it is simply erroneous to suggest that federal authorities have the ability to *compel* disclosure of information protected by the corporate attorney-client privilege or the work-product doctrine.[168] The Supreme Court in *Upjohn* made it clear that corporations enjoy the protection of an attorney-client privilege and that the government has no right to enforce a demand to produce information within its coverage.[169] Corporate privilege holders can refuse to disclose such information. When those actors do disclose protected information, it is because they have performed a

167. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 2(a) (2007).

168. *See* Upjohn v. United States, 449 U.S. 383 (1981). Of course, the work-product doctrine is distinct from the attorney-client privilege in that it is not absolute. Courts may order production of some materials protected by the work-product doctrine under certain circumstances. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947).

169. *Upjohn*, 449 U.S. at 389–90.

cost/benefit calculation and determined that disclosure is in the best interests of the organization.[170]

Drawing upon the well-established dynamic in non-organizational prosecutions also demonstrates that corporate entities are not improperly "compelled" to disclose privileged information. Prosecutors have long pressured individual defendants to waive constitutional rights like the Fifth Amendment right against self-incrimination and to come clean in order to receive lenient treatment at either charging or sentencing.[171] Despite the obvious leverage that the prosecutorial authority has in that individual context, the Supreme Court has routinely found such bargaining voluntary and constitutional.[172] The federal policies that led to the ACPPA proposal represent the same technique applied in the organizational context. Corporations can avoid indictment altogether by assisting the government in uncovering the crime. If it is not "coercive" to bargain in this way with individuals' constitutional rights, it cannot be coercive to deal with sophisticated corporate giants in the same manner. If adopted, the Act would create a double standard that protects the corporate giant from the tactics routinely employed with respect to lower-level individual offenders.[173]

Critics of the DOJ policies argue that companies faced with

170. Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002).

> There is a balance in place already—whether the corporation should air its dirty laundry in exchange for mercy or whether to force the law enforcement agency to do its own legwork (and possibly overlook or fail to discover some of the incriminating evidence) at the cost of more stringent treatment.

Id. at *10; *see also* Richter, *supra* note 13, at 162–66 (discussing a rational choice made by corporate targets to disclose privileged information).

171. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'") (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)); *see also* Richter, *supra* note 13, at 164–65 nn.140–42.

172. *See Bordenkircher*, 343 U.S. at 363; *see also* LAFAVE ET AL., *supra* note 100, § 13.2(a) ("Nonprosecution is used as an inducement to make informants out of offenders, and also as an inducement for present informers to take on additional duties.").

173. *September 18, 2007 Senate Hearing*, *supra* note 12, at 6 (statement of Karin Immergut, U.S. Att'y, Dist. of Or.) (opining that the Act would "establish rules for the investigation of corporate suspects which are different from those applicable to every other type of suspect"; "[t]hat simply is not fair").

disclosure requests have no meaningful option to refuse because of the specter of indictment of the corporation in reprisal for a refusal. Indeed, the congressional findings supporting the ACPPA note that an indictment of an organization can have "devastating consequences" on that organization's ability to survive. Although references to corporate indictment as a "death penalty" pervade the criticism of federal enforcement practices, some commentators have suggested that the consequences of a charge against a corporation are not always so dire.[174] Even accepting that the repercussions of an organizational indictment may be severe, the assumption that federal authorities will indict solely because a corporation refuses to share protected information is flawed for three principal reasons.

First, the DOJ charging policy on its face, and in all of its forms, relies upon numerous factors in deciding whether to charge an organization—not only cooperation and certainly not only cooperation through waiver.[175]

In addition to assessing the nature and pervasiveness of the criminal conduct at the organization, its internal compliance mechanisms, and cooperation, the charging policy specifically considers the "collateral consequences [of indictment], including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution."[176] A devastating indictment of the entity could deprive victims of restitution by unnecessarily damaging the entity in the market. Thus, the DOJ policy considers as a relevant factor the devastating consequences of an organizational indictment and does not authorize or encourage indictment in reprisal for refusal to waive privilege.[177]

174. *See, e.g.*, Seigel, *supra* note 1, at 18 (noting the "huge number of corporations that have been charged (or have settled charges) over the years that have lived on to produce their widgets for another day" and the unique status of Arthur Andersen as a public accounting firm that led to its demise following indictment).

175. *See* McNulty Memo, *supra* note 66, at 4 (listing nine factors to be considered).

176. *Id.*; *see also* LAFAVE ET AL., *supra* note 96, § 13.2 (noting that prosecutors generally exercise their discretion to decline prosecution in cases where "the mere fact of prosecution would . . . cause undue harm to the offender").

177. Indeed, while corporate interests bemoan the specter of indictment under current DOJ policy, others criticize current DOJ practices for being "soft on corporate crime," complaining that the department routinely enters deferred prosecution agreements and non-prosecution agreements and *fails* to indict organizations when it should. *See* Editorial, *Going Soft on Corporate Crime*, N.Y. TIMES, Apr. 10, 2008 ("[D]uring the last three years, the department has put off prosecuting more than 50 corporations on charges ranging from bribery

Second, a federal prosecutor could not indict an organization in reprisal for a refusal to waive privilege unless that prosecutor already had sufficient evidence without the refused privileged disclosures to support an indictment of the company.[178] Thus, the automatic indictment that critics fear can only occur in a case where the government already has sufficient evidence to proceed without the help of the organization. This reality prevents the government from "fishing" for information from a target company against whom it has little evidence with the leverage created by the possibility of corporate indictment and then using the company's refusal as an excuse to bring charges. The only corporate target subject to indictment leverage is one with nothing left to lose because the government has the evidence necessary to justify indictment already.

Cynics would likely respond by pointing out that the respondeat superior standard for organizational criminal liability in this country is so easily satisfied that a federal prosecutor could get a grand jury to indict in almost any case where a single entity employee has committed a crime and that, for this reason, the leverage produced by the specter of indictment looms large in every case.[179] This critique ignores the potentially devastating consequences of a high-profile backlash against an improvident and irresponsible charging decision, particularly with respect to a publicly traded corporation. The probability of such an outcry when employees are displaced and pension plans lost serves as a natural disincentive for the government to bring a case solely because of a refusal to waive privilege.[180] Indeed, the indictment and prosecution of Arthur Andersen that led to its dissolution has generated significant debate and criticism of federal authorities.[181]

Finally, it is important to note that the ACPPA prohibitions apply in connection with all federal investigations, both criminal

to fraud.").

178. *See* McNulty Memo, *supra* note 66, at 4, 10.

179. *See supra* note 42 and accompanying text (describing the respondeat superior standard for corporate criminal liability).

180. *See* Mikkelsen, *supra* note 2 (stating that the government has been "wary of prosecuting an entire company, after accounting firm Arthur Anderson [sic] shut down in 2002 as a result of its prosecution" and noting increased reliance on deferred prosecution agreements).

181. *See, e.g.*, Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 327, 329, 340–42 (2007) (discussing the Arthur Andersen case and arguing that the Supreme Court's reversal of the conviction suggested a lack of fairness in the "war on corporate crime").

and civil.[182] The potentially devastating consequences of a *criminal indictment* fail to explain the need to restrict the government in all civil contexts as well.

While the sharing of protected corporate information may often appear to be the most prudent course under existing DOJ policy, corporations retain the ability to weigh their alternatives rationally and to resist the federal requests when it remains in the company's best interests to do so.[183] Thus, the proposed ACPPA would confer no needed benefit in terms of corporate coercion, as companies are not "coerced" under existing law and policies.[184]

The second purported benefit to be gained from the ACPPA is increased fairness to individual corporate employees and protection of their rights. When examined closely, it appears that this double standard, which protects only companies from waivers routinely demanded of individual offenders, is designed for the benefit of the individual white-collar company employee.[185] Critics of existing practices argue that the rights of individual corporate employees are sacrificed when the statements of those employees to trusted corporate counsel are turned over to the government for use in their prosecutions.[186] The ACPPA would significantly reduce this practice by forbidding federal authorities from requesting such information and from conditioning corporate treatment on its disclosure.[187] Thus, some argue that the ACPPA would provide a significant benefit in terms of the protection of individual employee rights by drastically diminishing the frequency of such disclosures.[188]

182. Attorney-Client Privilege Protection Act of 2007, H.R. 3010, 110th Cong. § (3)(b) (2007) (noting the application of the Act in "any Federal investigation or criminal or civil enforcement matter").

183. Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622, at *10 (Del. Ch. Oct. 25, 2002).

184. *See* WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting the fundamental distinctions between a privilege belonging to a human and that belonging to an entity and opining that "the corporation is more likely to see its secrets as commodities available for sale if the price is right;" and that "[t]he privilege is claimed, not because it would require the attorney to betray another human, but because it has tactical advantages to the corporation in the instant litigation") (citations omitted).

185. H.R. 3013 § 2(a)(8) (expressing concern over government practices encroaching on constitutional and other legal protections of individual employees).

186. *See supra* note 61 and accompanying text (detailing criticisms of DOJ policy).

187. *See supra* Part II.C.

188. This alleged benefit of the ACPPA acknowledges its chief cost by definition. If the Act will protect employees, it is only because it will significantly reduce the flow of information to government authorities. This demonstrates the loss of valuable cooperation that the Act will cause.

Examining the position of the individual corporate employee communicating with corporate counsel reveals little real benefit to those employees from the ACPPA. First, the current system, which allows federal authorities to request such protected communications from corporate targets, does not violate the rights of individual employees by duping them into talking with false promises of confidentiality, only to turn their statements over to the government. If this were permitted or encouraged, there would be a legitimate concern over employee rights that would need to be corrected.[189] Under existing ethical standards controlling organizational representation, however, corporate counsel are required to inform individual corporate employees that counsel represents the interests of the entity.[190] Furthermore, corporate counsel routinely explain to employees that the entity has the right to reveal communications to outsiders, including the government, whenever it is in the entity's best interests to do so.[191] Thus, corporate counsel are obligated to inform individual employees that they have no personal control over dissemination of their statements made to corporate lawyers. So long as corporate counsel responsibly carry out their ethical obligations in this regard, the rights of individual company employees are not unfairly compromised.[192]

If corporate counsel are failing in this obligation, there are two possible solutions that would effectively serve employee interests, neither of which involves the legislation proposed in the ACPPA. First, the ethical obligations of corporate counsel could be strengthened to improve upon the disclosures given to individual employees. Improved disclosures to individual corporate employees could ensure that they understand the specific possibility that the

189. *See* Seigel, *supra* note 1, at 41–42 (discussing the importance of full disclosures to individual employees regarding waiver of corporate privilege and obligations of corporate counsel to the entity).

190. MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2008).

191. *See* Association of the City of New York, Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-02 (2004).

> [I]t is typical for the [corporate] attorney to advise the employee that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties.

Id.; *see also* Wray & Hur, *supra* note 17, at 1183 (explaining that such warnings are not a new practice).

192. *See* Seigel, *supra* note 1, at 40 (opining that current ethical obligations in this regard are "weak" because they are triggered only when a corporate attorney has "reason to believe" adverse interests exist between the entity and the employee, something that may be apparent only after damaging individual disclosures have been made).

company could reveal their communications outside the entity. Armed with this information, these employees could elect to keep silent if their individual interests so dictate.[193]

The second possible method for providing true protection to individual corporate employees from unwanted disclosures outside the entity would be to alter the *Upjohn* formulation of the attorney-client privilege to give those employees some control over disclosure of their communications. This could prevent disclosure of employee communications to government actors in the absence of employee consent. Indeed, much of the current controversy over federal investigative practices reveals widespread concerns directly traceable to the *Upjohn* formulation of corporate privilege. Although many commentators have noted flaws in the *Upjohn* model over the years, it appears unlikely that it will be altered given its longstanding acceptance.[194] Reducing the effectiveness of corporate prosecutions through the ACPPA, however, is unnecessary to protect individual employee rights.

Not only is the ACPPA unnecessary to protect individual employees, it is inadequate to do so. Importantly, the Act doesn't prevent placing an employee in the precise situation decried by critics because it continues to *allow* a *company* to disclose employee communications voluntarily without a government request.[195] Even under the ACPPA, a company remains free to turn in employees who disclosed damaging information to corporate counsel because they felt comfortable with these corporate insiders.[196] Employees whose communications with counsel are disclosed voluntarily are in the same position as those whose communications are disclosed upon request by the government. They are asked to talk to remain in good standing with the company, but remain subject to betrayal of those communications at the corporation's whim. As noted previously, after the passage of the ACPPA, corporations will have little incentive to make such disclosures without the promise of a quid pro quo from the government.[197] Still, the Act's continued

193. *Id.* at 41 (suggesting an ethical rule requiring a *Miranda*-type warning in writing and with the signature of the employee).

194. *See, e.g.*, WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting fundamental flaws in the *Upjohn* model and suggesting possible approaches to creating a theoretically sound version of corporate privilege); Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 306–08 (1984) (advocating increased protection for individual employees).

195. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(d) (2007).

196. *Id.*

197. *See supra* Part II.C and accompanying notes.

acceptance of voluntary corporate disclosures will allow some employees to be placed between the rock and hard place that the Act purports to avoid. Thus, individual employees potentially face the same exposure even under the ACPPA. Thus, the ACPPA does not confer a needed benefit in the form of improved individual employee rights.

Finally, many critics of current federal practices have argued for the Act by claiming that regulation of corporate activities suffers a net harm from corporate partnership with federal investigators. These critics have suggested that corporate lawyers and employees will be less likely to generate and communicate information relating to corporate misdeeds if they anticipate sharing it with federal regulators and investigators. According to this theory, corporate fraud will not be discovered at all, even internally, as a result of disclosures to government authorities, and corporate crime will go undetected and undeterred.[198] The scholars that have considered this concern have largely agreed that it is unrealistic in light of the incentives in place for companies to self-police apart from federal cooperation policies.[199] Regulatory obligations demand internal oversight and compliance reports that require internal policing and information-gathering. The common law fiduciary obligations of corporate directors similarly require internal efforts at compliance and oversight. Finally, the DOJ charging policy that has generated so much of the controversy that led to the ACPPA proposal counts effective internal compliance mechanisms as a separate factor counseling against charging an organization.[200] All of these mechanisms make it very unlikely that corporate actors will stop gathering internal information, even if federal authorities are

198. One of the purposes of the ACPPA is to promote "voluntary compliance with the law" by protecting privileged communications from compelled disclosure. H.R. 3013 § 2(a)(2). In addition, the Act finds that "[t]he ability of an organization to have effective compliance programs and to conduct comprehensive internal investigations is enhanced when there is clarity and consistency regarding the attorney-client privilege." *Id.* § 2(a)(4). These purposes reflect concerns that corporate partnership with federal authorities will discourage corporate self-policing.

199. *See, e.g.*, Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 900–01 (2006) (describing the "parade of horribles envisaged" including that "lawyers' internal investigations will become 'paperless'" and that "lawyers and clients will cease to conduct internal investigations altogether"); Seigel, *supra* note 1, at 33–37.

200. McNulty Memo, *supra* note 66, at 4 (weighing "the existence and adequacy of the corporation's *pre-existing* compliance program") (emphasis added).

permitted to request it.[201] Thus, the ACPPA provides no benefit in terms of increased internal corporate information-gathering and compliance.

In sum, a careful weighing of the societal costs imposed by the ACPPA in terms of ineffective and inefficient organizational oversight against the purported benefits of the Act reveals a significant imbalance. The benefits to be gained, if any at all, are eclipsed by the costs to the public in reducing the corporate partnership that has helped to clean up corporate America. Thus a cost/benefit paradigm fails to explain this legislation restricting the circumstances under which organizations may be asked to waive the attorney-client privilege.

B. Fairness Paradigm Applied to the ACPPA

In addition to weighing the costs and benefits of rules regarding privilege waiver, scholars and courts increasingly have looked to notions of fairness in crafting waiver doctrine. In rejecting traditional rigid waiver rules that sacrifice privilege protection upon any disclosure that eliminates true confidentiality, courts and commentators have suggested more flexible principles of waiver that also rely upon fairness in the adversarial process.[202] Commentators have suggested that privileged disclosures need not lead to waiver unless the maintenance of the privilege in the face of the disclosure will somehow prejudice third parties by distorting or garbling the truth.[203]

Federal Rule of Evidence 502, which was recently passed in the Senate, adopts this concept of fairness in stating a rule governing subject-matter waivers through privileged disclosures.[204] Under traditional concepts of waiver, the disclosure of a single privileged document or communication by a privilege holder could lead to a broad finding of waiver with respect to all other privileged documents or communications concerning the same subject matter.[205] Under the new rule, a waiver only extends beyond a disclosed communication to other privileged communications when

201. *See* Wray & Hur, *supra* note 17, at 1097, 1149 (noting increased attention to internal compliance programs under DOJ policy).

202. Marcus, *supra* note 23, at 1607 (1986) (opining that waiver determinations ought to turn on the "unfairness flowing from the act on which the waiver is premised").

203. *Id.*

204. FED. R. EVID. 502(a)(3).

205. S. REP. NO. 110-264, at 2 (2008) ("If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter.").

they concern the same subject matter, when the privilege holder intentionally has disclosed privileged material, *and* when the disclosed and undisclosed materials "ought in fairness" to be considered together.[206] Thus, contemporary waiver rules take into account the fundamental fairness to the adversarial process and to parties other than the privilege holder.

These notions of fairness to the adversarial process fail to support the provisions of the ACPPA. First, one potential interpretation of the Act's "don't ask" provisions would create the precise truth-garbling concerns that Federal Rule of Evidence 502 was designed to prevent.[207] The Act creates a one-way street for privileged disclosures, allowing corporate entities to provide them when they deem it in their best interests, but preventing government officials from seeking privileged information under any circumstances.[208] If the Act prohibits federal authorities from requesting additional related protected materials in the wake of a voluntary corporate disclosure, the legislation creates a significant risk of imbalance in the federal investigatory process. Companies would be free to present the most favorable results of internal investigations, while withholding damaging information on related topics. To the extent that the Act prevents the government from demanding all privileged materials that "ought in fairness" to be considered with those voluntarily provided, corporate entities would remain free to create a distorted picture of reality that would be an affront to the adversarial process and the public interest.[209]

Congress has also cited danger to the fundamental fairness of

206. FED. R. EVID. 502(a).

207. FED. R. EVID. 502 advisory committee's note.

208. *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(b)(1), (d) (2007).

209. Such a result would not only be inconsistent with Federal Rule of Evidence 502, it would be at odds with notions of balanced presentation that pervade the judicial process. For example, Rule 404(a) prohibits prosecutors from mounting a case by reference to a criminal defendant's character. FED. R. EVID. 404(a). The same rule allows a criminal defendant to rely upon his good character to mount a defense, however. *Id.* To the extent that a defendant takes advantage of this one-way opportunity, he opens the door to government rebuttal regarding his character. *Id.* Thus, a defendant who decides to open a door otherwise closed to the prosecution risks greater inquiry into forbidden areas. The ACPPA ought to be interpreted, similarly, to allow the government to seek balance through full disclosures following selective, voluntary ones. Indeed, this is the only fair reading of the Act. Importantly, this interpretation is sure to eliminate *all* disclosure of protected internal investigation material because rational corporate actors would not invite an inquiry into all protected matters where it cannot be demanded of them and where the treatment of the entity cannot be conditioned on a refusal to provide such information.

the adversarial system, presented by current federal techniques, as support for the ACPPA.[210] This fairness concern echoes the original justifications for the work-product doctrine articulated by the Supreme Court in *Hickman v. Taylor*.[211] In recognizing the work-product doctrine, the Court noted the importance of breathing room for competent counsel to develop strategies for effective representation of clients.[212] In addition, the Court noted the fundamental unfairness and impropriety of permitting an adversary to free-ride off of the hard work of opposing counsel in anticipation of litigation.[213] Detractors of current federal policies observe similar concerns of free-riding when government authorities pressure organizations to partner with the government and share internal investigation materials.

It is true that federal authorities operating without the restrictions of the ACPPA have asked companies to partner with the government by conducting internal investigations of corporate wrongdoing to be fed in a "real time" manner to the government.[214] Without a doubt, this approach allows government officials to capitalize on the skills and strategies of the corporation's lawyers. The government is not getting a "free ride" under these circumstances, however. It is paying its way through cooperation credit that inures to the benefit of the entity. Because such a partnership cannot be compelled, and because the entity receives a

210. H.R. 3013 § 2(a)(6).

211. 329 U.S. 495, 510–11 (1947); *see also* FED. R. CIV. P. 26(b)(3); FED. R. CRIM. P. 16(b).

212. Hickman v. Taylor, 329 U.S. 495, 511 (1947). In recognizing the work-product doctrine, the Supreme Court noted the need for a lawyer to "work with a certain degree of privacy." *Id.* at 510. As with attorney-client privilege, the Court adopted a partly instrumental justification for protecting attorney work product. The court noted the importance of competent legal representation to society as a whole and expressed concern that counsel would decline to record work product in an effort to conceal it from his adversary in the absence any protection from disclosure, resulting in inefficiency and less competent representation. *Id.*

213. *Id.* at 516. Furthermore, the Court found overtones of "unfairness" in allowing an adversary to free-ride off of the strategic efforts of his opponent. *Id.* at 511.

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id.

214. *See supra* Part I and accompanying notes.

benefit in exchange for its assistance, there is no fundamental unfairness or damage to the adversarial process in allowing the government to seek such a partnership. Private litigants certainly remain free to seek protected strategic work of their adversaries in resolving civil claims without working any damage to the adversarial process, and federal authorities should be permitted to continue doing the same.

Finally, there have been allegations that some federal authorities have implemented cooperation policies in an imprudent and unethical manner, insisting on full privilege and work-product waivers at the outset of any and all corporate investigations.[215] These allegations similarly fail to provide a persuasive fairness rationale for the blanket prohibitions on federal practices embodied in the ACPPA.

In the context of federal investigation of corporate misconduct, there will always be a risk that the party with the most power or leverage will engage in abusive or unethical practices. Under the current system, federal authorities have significant leverage to demand privileged information with the threat of indictment or other negative treatment of an organization. Abuse of this leverage will occur between government agents and their corporate adversaries. Corporate targets have the incentive and ability to publicize such abuses and to seek a remedy. Indeed, the McNulty Memo gives entities grounds to attack such practices in the course of an ongoing investigation. Under the existing paradigm, the corporate targets subject to such practices have proven themselves to be vocal advocates in opposition to them.[216] Furthermore, history demonstrates that such opposition can be effective in producing change. Indeed, the DOJ responded to corporate allegations of abuse under the Thompson Memo with the revision of its charging policy in the McNulty Memo, specifically designed to eliminate such implementation by individual federal investigators and attorneys.[217]

215. *September 18, 2007 Senate Hearing*, *supra* note 12, at 7 (statement of the Honorable Arlen Specter discussing a submission by E. Norman Veasey) (discussing claims that the McNulty Memo has been disregarded at the operational level).

216. *See supra* note 61 and accompanying text.

217. The McNulty Memo places procedural and substantive restrictions on waiver requests, recognizing them as justified only by a "legitimate need" and only through authorization of senior supervisory federal officials. *See* McNulty Memo, *supra* note 66, at 9; *see also supra* notes 66–72 (describing the McNulty Memo). Other federal departments and agencies could respond with similar changes to the extent they are necessary to protect regulated organizations. Indeed, there has been some suggestion that the SEC could alter its cooperation policies in similar fashion. *See* Posting of Ashby Jones to Wall Street Journal

The ACPPA would shift the balance of power and give significant leverage to corporate entities and their counsel. These actors would have the power to abuse the leverage created by the Act in the federal investigatory process under this construct. Some companies could choose half-hearted and incomplete cooperation with federal investigations, leaving government agents with an uphill battle in uncovering fraud or other improprieties. Indeed, such obstructionist tactics were commonplace in corporate investigations prior to contemporary cooperation policies.[218] In the face of potentially unfavorable treatment by federal authorities, these companies could loudly proclaim full cooperation and that the government's decision stemmed from failures to produce protected corporate material in violation of the Act. Such a tactic will be observable only internally at the corporation—without leverage for the government to verify the authenticity of corporate cooperation through access to some protected materials, such abuses will remain hidden from view and evade correction. The victim of such corporate abuse is, of course, the public. With risks of abuse by any party with power, a fairness analysis dictates placing the leverage where abuse will be most likely to come to light and be remedied. The government leverage existing under the current paradigm does just that. By opening the door to underground corporate abuses, therefore, the ACPPA threatens to undermine ultimate fairness in the adversarial process.

Proponents of the ACPPA would argue that the proposed legislation restricting the circumstances of corporate privilege waiver is consistent with more generalized principles of fairness to third parties because it is designed to protect the "constitutional rights and other legal protections of employees."[219] Supporters of the Act argue that pressuring a corporate entity to waive its protections is fundamentally unfair to the individual employees whose damaging disclosures are sacrificed by disclosure to the federal government in the process. While authorities may frequently pressure individual defendants to sacrifice their own personal rights, critics of the current federal practices would argue that it is fundamentally different to pressure one party to sacrifice the

Law Blog, http://blogs.wsj.com/law/2007/02/page/10/ (Feb. 9, 2007, 15:06 EST) (describing comments by SEC Commissioner Paul Atkins that the SEC should consider "tightening its policies to ensure that companies are not pressured into waiving basic privileges").

218. *See supra* notes 47–52 and accompanying text (describing the corporate "delaying game" prior to federal cooperation policies).

219. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 2(a)(8) (2007).

interests of another.[220] One could argue that it is appropriate to negotiate with an individual defendant about the waiver of his or her own rights, but that the government currently is allowing corporations to negotiate away the rights of their employees.

At first blush, attempting to distinguish the fairness to employees in negotiations with entities from that of traditional individual negotiations over rights has definite appeal. Individual corporate employees aren't bargaining freely with the government over waivers of rights in this context—they are being squeezed into conceding damning information to corporate counsel with the leverage of a third-party corporate entity. A closer examination of the traditional criminal case against an individual reveals tactics similar to, and arguably less transparent than, those employed in the organizational context, however. State and federal officials frequently demand that one individual target of investigation reveal damaging information about another participant in order to secure favorable treatment.[221] Government officials partner with paid confidential informants to unearth information about third parties. Government authorities wire targets or other willing witnesses to catch another individual criminal target making damaging concessions in confidence to a "trusted friend."[222] All of these practices are routine and accepted as "fair" in the individual context.[223] Requesting a corporate entity to reveal information about its individual employees similarly asks one potential target of an investigation to reveal helpful information about another potential target in exchange for lenience.

It is true that the communications between a confidential informant and an individual criminal target enjoy no privilege upon which the speaker relies. Importantly, individual corporate employees similarly enjoy no privilege upon which they can depend when speaking to lawyers that represent the entity under *Upjohn*. As noted above, if corporate counsel satisfy their ethical obligations by disclosing the operation of the corporate privilege to individual employees, the lack of protection will be open and obvious.[224] Indeed,

220. *See supra* notes 115–16 and accompanying text.

221. *See* LAFAVE ET AL., *supra* note 100, § 13.2 ("Nonprosecution is used as an inducement to make informants out of offenders, and also as an inducement for present informers to take on additional duties.").

222. *See, e.g.*, United States v. White, 401 U.S. 745, 751 (1971) ("[H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.").

223. *Id.* at 753.

224. *See supra* notes 101–02 and accompanying text.

it appears that individual white-collar offenders enjoy more protection in this context from being "tricked" than do blue-collar offenders caught by a wired informant. Therefore, the ACPPA provisions regarding corporate privilege waiver are not necessary to protect fundamental fairness to third-party individual employees.[225] If anything, these provisions represent an attempt to give such white-collar offenders an unfair degree of solicitude and advantage not enjoyed by the traditional blue collar defendant.

C. Traditional Privilege and Waiver Doctrine

As noted above, traditional privilege doctrine established fairly rigid rules regarding waiver. These rules were designed to provide a certain and consistent privilege and to withhold information from the truth-seeking process as infrequently as possible.[226] Resort to this traditional framework similarly fails to explain or justify the ACPPA.

These traditional principles construed the attorney-client privilege narrowly and found waiver as a result of any disclosure that compromised the confidentiality of a protected communication, regardless of intent or care taken by the holder.[227] As noted above, some courts found broad waivers that extended beyond communications actually disclosed to all other communications on the same subject matter.[228] These less forgiving rules of waiver were designed to limit the loss of evidence caused by the recognition of privilege.[229] Privilege rules, it was thought, should be construed narrowly and, as a corollary, waiver rules should be construed liberally.[230] Consistent with these traditional rules, the holder of a privilege at common law was free to waive privilege and share

225. Other provisions of the proposed ACPPA would prevent federal authorities from pressuring corporations to withhold legal fees from or terminate employees unwilling to cooperate with an internal investigation. *See supra* note 81 (describing these provisions).

226. *See supra* Part I.A and accompanying notes.

227. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.28 (3d ed. 2003).

228. *See, e.g.*, *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver).

229. *See* Univ. of Pa. v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 189 (1990) (noting that privileges contravene the fundamental principle that the public "has a right to everyman's evidence" and, as such, must be "strictly construed") (citations omitted).

230. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.") (citations omitted).

otherwise protected information as he saw fit.[231] In other words, privilege was something the holder could insist upon or lose. Although there is obvious historical and contemporary protection from compelled waiver, there is no similar protection from "requests" for waiver.[232]

One possible analogy to be drawn to the "don't ask" policy of the ACPPA arises in the context of an individual criminal defendant's Fifth Amendment right against self-incrimination. It is well-established that the prosecution may not call a criminal defendant to the stand and force him to assert his Fifth Amendment right to remain silent before the jury.[233] Thus, in this limited context, the government can't "ask" a defendant to waive a right. Importantly, government authorities remain free before trial to request that a defendant waive this important constitutional right as frequently as they like after appropriate *Miranda* warnings until the defendant invokes his right to counsel or his right to remain silent.[234] By refusing to allow federal authorities to "request" waiver of privilege from organizations or individuals associated with them at any point in a federal investigation, the ACPPA would give these organizational actors greater protection from waiver of the common law attorney-client privilege than that afforded to individual criminal defendants with constitutional rights at stake.

Thus, the ACPPA's "don't ask" policy with respect to information protected by the corporate attorney-client privilege and work-product doctrine enjoys no historical support. If anything, the Act's restriction on requests for waiver is at odds with the historical suspicion of privilege doctrine and the traditional notion that it should be construed as narrowly as necessary to preserve information for the truth-seeking process. Litigants should remain free to request full information to provide support for their claims, and their adversaries should remain free to hand over privileged information to the extent that it serves their interests. In this way, the truth-seeking process benefits from fuller evidentiary development. In sum, there is no historic precedent for the ACPPA

231. *See* MUELLER & KIRKPATRICK, *supra* note 227, § 5.1 ("[O]nly the holder of the privilege . . . has the power to assert or waive the privilege.").

232. Indeed, at common law, some courts found the privilege waived when unauthorized eavesdroppers overheard confidential attorney-client communications. *See id.* § 5.3.

233. Brown v. United States, 356 U.S. 148, 155 (1958) (noting that a defendant may refuse to be called as a witness against himself).

234. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (allowing police to interrogate the suspect in custody after appropriate disclosures regarding Fifth and Sixth Amendment rights and requiring the government to cease the interrogation once the suspect invokes either of those rights).

restrictions or for protecting the holder of privilege from "requests" by outsiders for such information.[235]

D. The ACPPA Explained: "The Empire Strikes Back"

The ACPPA currently under consideration in Congress is not justified under accepted traditional or contemporary principles that have been used to craft rules regarding privilege and waiver. One theory that has been applied to *explain*, rather than justify, privilege law in the scholarship may provide the most accurate explanation for the ACPPA.

In a 1985 exposition of privilege doctrine and theory in the Harvard Law Review, scholars explored the possibility that power or political theory could be used to explain existing rules of privilege where other justifications failed to offer a coherent basis for the doctrine.[236] Under this theory, players such as lawyers, physicians, and journalists with sufficient power or political clout could succeed in gaining privileged status for their relationships with patients, clients, and sources. In other words, those privileged enough to have political power could be expected to enjoy the most comprehensive evidentiary privilege as well: "Indeed, what may be the most striking feature of privilege law is the transparency of the connection between legal doctrine and political influence."[237] The historical origins of privilege law may offer some support for this explanation of privilege law as well, in that early English courts limited privilege protection to the upper classes.[238] Although the power or political theory of privilege is ill-equipped to explain all of

235. Theorists have also attempted to justify and explain privilege rules with a privacy rationale. *See* MUELLER & KIRKPATRICK, *supra* note 227, § 5.1 ("[P]rivileges are also justified as necessary to safeguard the values of privacy, freedom, trust and honor important in personal and professional relationships."). While this rationale may have appeal in supporting marital, religious, and other privileges governing intimate relationships, it appears particularly ill-suited to the context of the corporate privilege that protects the entity. *See* WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting that courts should not "let the anthropomorphic model of the corporation mislead them into supposing that fictional persons must necessarily have the same privileges as human beings").

236. *See* Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1494 (1985) [hereinafter Harvard Note] ("Despite the radical overtones of the power theory, many mainstream commentators have acknowledged the role of political power in the development of privilege law.") (citations omitted).

237. *Id.* (noting that "[t]hose enjoying privileges today constitute some of the most politically powerful professions and institutions in America: lawyers, doctors, the Church, the news media, and the government").

238. *Id.*

modern privilege doctrine, it may be the most accurate explanation of the recent success of the ACPPA proposal.[239]

Corporate America has been hit hard in the last decade: from the policy of the Holder Memo and its interpretation under the Thompson Memo, to the Corporate Fraud Task Force and the Sarbanes-Oxley Act,[240] providing more and stiffer penalties for corporate malfeasance.[241] Despite this spate of recent restrictions on corporate interests, commentators have noted the increasing power and influence over legal decision-making of corporate groups, including the U.S. Chamber of Commerce.[242] The political power of the groups supporting the ACPPA is undoubtedly significant.

It is to be expected that a sophisticated and powerful group under this much public pressure would attempt to push back. Indeed, it would be irrational if it did not. It is perfectly appropriate for corporate America to argue that substantive regulation of organizations has become overly complex and burdensome in a way that will damage America's ability to compete in a global market.[243] Many commentators have made compelling arguments in this regard in the wake of Sarbanes-Oxley.[244] This Article recognizes the legitimacy of this debate, but does not seek to enter it.

Resolving the debate over appropriate substantive regulation of organizations is unnecessary in analyzing the ACPPA because the Act does not serve to diminish or affect in any way the existing quantum of regulation of corporate actors. Instead, the Act strikes at the fundamental process by which we monitor compliance with those substantive measures we deem appropriate to balance between the public interest in a fair market and the public interest in competing effectively on a global scale. By passing the ACPPA, Congress may indirectly ease burdens on corporate actors by forever

239. *See* Seigel, *supra* note 1, at 7 (conceding "skeptic[ism] toward the motives of those who seek to remove the powerful weapon of waiver requests from the prosecution's arsenal").

240. *See* Sarbanes-Oxley Act of 2002, H.R. 373, 107th Cong. (2002).

241. *See supra* notes 3–4 and accompanying text.

242. *See* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (MAG.), Mar. 16, 2008, at 41 (describing the U.S. Chamber of Commerce as "an imposing lobbying force" and reporting that the Chamber spent $21 million last year "lobbying the White House, Congress and regulatory agencies on legal matters").

243. *See* Posting of Matthew J. Franck to Bench Memos, http://bench.nationalreview.com (Mar. 16, 2008, 16:29 EST) (criticizing the Rosen article for "convey[ing] the sense that there is something malodorous about people organizing, focusing their efforts on legal affairs, hiring the best lawyers, developing successful litigation strategies, and persuasive arguments, and . . . winning").

244. *See supra* note 14 (citing articles).

damaging the efficacy of procedures used to oversee existing substantive regulations. To ease restrictions on corporate and other organizations in this indirect manner is ill-advised. The ACPPA threatens to make oversight of *all* corporate obligations uncertain. The more appropriate method for addressing complaints about overly burdensome obligations is to evaluate directly existing criminal and civil corporate obligations and liabilities to decide whether any should be scaled back or eliminated all together.[245]

By advocating for the ACPPA, some corporate lawyers and groups have taken aim at government procedures rather than substantive measures. In so doing, corporate America certainly cannot come out and announce: "We miss the flexibility we had to engage in creative and misleading accounting without the federal government looking over our shoulder through corporate counsel. We prefer to have greater leverage in defending corporate employees from criminal charges. We would like to undo some of the advances made in the organizational enforcement arena through legislation that would prevent the federal government from policing us so effectively." That would never sell.

Instead, the corporate lobby has wrapped itself in the cloak of the attorney-client privilege and has packaged its argument with stirring rhetoric regarding the sanctity of the attorney-client relationship.[246] The proposed ACPPA is the result. While the window dressing surrounding the Act is tempting indeed, the Act represents an attempt to undo many of the recent advances in corporate oversight. It gives white-collar criminals the benefits of special waiver protection not enjoyed by individual criminal defendants who are routinely required to waive important constitutional rights to obtain leniency from the government. The only explanation for this special protection is the corporate lobby's ability to muster broad and powerful support for its agenda.

Some might argue that using political power to obtain privilege is perfectly appropriate in our democratic system of government and that it can be beneficial. It is possible that political power could be used to obtain privilege protection for less powerful constituencies who can't protect themselves.[247] For example, when doctors lobby for a physician/patient privilege, that powerful group is seeking protection for patients—a group that may have less political capital

245. *See* U.S CHAMBER OF COMMERCE, *supra* note 14, at 6 (making direct recommendations regarding substantive oversight of organizational activity).

246. *See* Seigel, *supra* note 1, at 5–6 (noting that the business lobby was able to attract liberal groups such as the ACLU to its cause by framing the issue as an attack on fundamental rights by an overreaching federal government).

247. *See* Harvard Note, *supra* note 236, at 1498.

to pursue such protection on its own. The privilege won inures solely to the benefit of those patients, as they are the holders of the privilege with sole control over waiver decisions.[248] Thus the political sway of the powerful protects and serves the weak and underrepresented. Indeed, so long as the interests and concerns of the politically weak are adequately represented by more powerful players in the political discourse over privilege, it may be perfectly appropriate to allow the political process to drive privilege decisions.[249]

Corporations could try to argue that the ACPPA similarly uses the political power of organizational actors to protect individual employees caught in the crossfire of federal investigations and who cannot protect themselves. The ACPPA does not mirror the physician/patient example, however, for several reasons. First, the Act fails to provide any meaningful protection to individual employees because it continues the tradition of making the organization the holder of the corporate attorney-client privilege and continues to permit entities to disclose confidential employee communications to the government voluntarily at the entities' sole discretion.[250] Thus, the Act permits, but does not compel, the powerful corporate entity to protect individual employee communications. This distinguishes the ACPPA from the physician/patient construct where the patient retains sole power over waiver of the privilege.[251] Furthermore, the physician/patient analogy also breaks down in the corporate context due to the inescapable reality that the entity is the sum and substance of its employees. Therefore, the Act does not reflect one powerful group exercising its clout for the benefit of another weaker constituency. Rather, the individual corporate employees make up the corporation and collectively wield the significant power of the entity.[252] In

248. *Id.*

249. *See id.*

> In a liberal-democratic system that requires the state both to be responsive to political forces and to protect people from political abuses, it is this apolitical mode of discourse that permits courts and legislatures to straddle the inherent tension in their roles—roles that require them to allow the expression of political might while constraining its imposition on the less powerful.

Id.

250. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. § 3(d) (2007).

251. Under federal common law, there has been little support for a physician-patient privilege. The majority of states have adopted a physician-patient privilege by statute, however. *See* MUELLER & KIRKPATRICK, *supra* note 227, § 5.34.

252. WRIGHT & GRAHAM, JR., *supra* note 24, § 5476 (noting the fundamental

reality, therefore, the ACPPA reflects powerful white-collar offenders using the pull of the entity to obtain greater protection that inures directly to their own benefit.

Furthermore, it is not clear that the interests of the groups ultimately affected by this privilege law are adequately represented in the political discourse over the ACPPA. The weaker interests affected are those of the dispersed employees, pension-plan beneficiaries, shareholders, homeowners, and citizens who are damaged by unchecked corporate fraud. To be sure, federal authorities are responding to corporate efforts to push the ACPPA and represent the broad and collective interests of the public at large. While governmental power is undoubtedly significant, there remains an imbalance in the political discourse on the subject. The issue has been characterized as a rather esoteric one affecting a specific investigative technique of concern only to organizations. In reality, the ACPPA implicates all the diverse interests protected by all federal oversight of organizations.[253] While corporate lawyers testify in Congress to their very personal and individual experiences under current federal practices, there are no devastated homeowners testifying about the loss of their residences as a result of widespread fraud in the mortgage industry.[254] Therefore, it is not clear that the political debate over the ACPPA adequately represents and responds to the interests of the weak, who are sure to pay the ultimate price if the Act is passed.

Ironically, this proposed legislation designed to "protect" the attorney-client privilege will do it and other privileges more harm than good. Bestowing heightened privilege protection on the highest bidder at the expense of the public interest in law-abiding corporations sets a dangerous precedent and threatens the fundamental integrity of privilege and waiver law. Where the benefits of the legislation do not outweigh its costs to the public and where fairness and traditional waiver principles do not dictate its prohibitions, the ACPPA should not become law in any form.

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flaws of the "anthropomorphic model" of corporate entities that ignores the reality that a company consists of the "persons, management and employees, who make up the corporate enterprise" and referencing "an old advertising slogan: 'General Motors is people'").

253. *See* H.R. 3013 § 3(b) (making the Act applicable in "*any*" federal investigation) (emphasis added).

254. *September 18, 2007 Senate Hearing*, *supra* note 12, at 14 (statement of Professor Daniel Richman) (noting concern that under ACPPA, the Senate Judiciary "Committee and the Justice Department will not hear people from the other side where information was not turned over to the Government and shareholders' or workers' interests were hurt").

CONCLUSION

The provisions of the ACPPA largely will turn the clock back to the "circle-the-wagons" days of corporate defense. The incentive for corporations to cooperate by providing crucial but privileged information will be eliminated. Thus, companies will be less likely to partner with the federal government to uncover massive but intricate corporate schemes like those reflected in the backdating of stock options and the subprime mortgage scandals. None of the contemporary or traditional reasons for altering the law of privilege and waiver support passage of the ACPPA. When the compelling rhetoric regarding the sanctity of the attorney-client relationship is stripped away, it becomes evident that the proposed Act is stronger privilege protection for the privileged. Thus, contrary to its stated purpose to protect the attorney-client privilege, the ACPPA sends a dangerous message that threatens the integrity of privilege law: privilege protection can be purchased by groups with sufficient machinery to push it through, even where the benefits to society don't justify it and fairness does not require it. The corporate defense bar has the ACPPA all dressed up in lofty language—but it should have no place to go. The public will be the ultimate loser due to increasing costs of investigations and more unchecked corporate fraud. The Emperor is wearing no clothes and it is time that the people on the sidelines pointed that out.

Post-Script

On June 26, 2008, Senator Arlen Specter introduced a new version of the Attorney-Client Privilege Protection Act in the Senate.[255] *In its fundamental operation, the bill is similar to the version passed by the House of Representatives in 2007.*[256] *It continues to prohibit federal authorities from requesting privileged or protected information in connection with all federal organizational investigations—criminal or civil.*[257] *Furthermore, it still prohibits the federal government from rewarding entities with cooperation credit in exchange for the disclosure of privileged or protected information*

255. Attorney-Client Privilege Protection Act of 2008, S. 3217 110th Cong. (2d Sess. 2008).

256. *See* 154 Cong. Rec. S6294 (daily ed. June 26, 2008) (statement of Sen. Specter, member, S. Judiciary Comm.) (noting similarities between this bill and previous Senate Bill 186 designed to "protect the sanctity of the attorney-client relationship by prohibiting federal prosecutors and investigators from requesting waiver of attorney-client privilege and attorney-work product protections in corporate investigations").

257. Attorney-Client Privilege Protection Act of 2008, S. 3217 § (b)(1)(A) (2d Sess. 2008).

or from penalizing an organization for a failure to do so.[258] *The Senate version of the ACPPA appeared to be on a fast track to passage in July 2008 until the issuance of a new Department of Justice organizational charging policy on August 28, 2008, and other matters of national importance, served to slow the Act's momentum.*[259] *The determined supporters of the ACPPA continue to push for its passage, however, and the Senate version could make it through Congress in 2008 or early 2009.*[260]

258. *Id.* § (b)(1)(B)–(C).

259. *See* Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Components and U.S. Attorneys (Aug. 28, 2008) (attaching *Principles of Federal Prosecution of Business Organizations*, Title 9, U.S. Attorneys' Manual Chapter 9-28.000), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

260. *See, e.g.*, Mark J. Stein & Joshua A. Levine, "The Filip Memorandum: Does It Go Far Enough?", Law.Com In-House Counsel, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202424426861