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Keeping Half the Cat in the Bag: Selective Waiver of Privileged Materials Pursuant to 1828(x)

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The authors of this article cover the legal landscape of selective waiver, and focus on potential developments in the law. The authors believe that a carefully crafted selective waiver provision can provide a significant benefit to banks and other entities subject to government scrutiny.

Entities subject to federal and state prosecutions, investigations, or supervisory proceedings often face pressure to share materials protected by attorney-client privilege or the work product doctrine with prosecutors or regulators.[1] Entities subject to day-to-day supervision by regulators with statutory authority to conduct onsite examinations may have even greater difficulty preventing their regulators from viewing privileged materials that they maintain on their premises. But sharing privileged materials with the government typically waives any otherwise applicable privileges. In most instances, the waiver benefits not only the requesting agency or prosecutor, but also the rest of the world. That includes potential private civil plaintiffs who may wish to use the formerly privileged information to facilitate claims

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against the entity that revealed it.[2]

On the other hand, the government may deem uncooperative entities that rely upon privilege to refuse to produce requested materials or to refuse to share documents with onsite examiners. The government may hold that perceived recalcitrance against the entity invoking privilege — either formally, as an enumerated factor in assessing the degree of leniency a party is afforded after an infraction, or informally, in determining the scope or tenor of an investigation or examination. For example, from 2003 to 2006, the Department of Justice ("DOJ") expressly considered, in making charging determinations, whether a business had waived the attorney-client and attorney work product doctrine protections for any internal investigation concerning the potential violations at issue.[3] The DOJ gradually revised its position, and today maintains that "prosecutors should not ask for such waivers and are directed not to do so."[4] The policy of the Securities and Exchange Commission ("SEC") is similar to the DOJ's.[5] But critics fervently contend that, notwithstanding these stated policies, corporations continue to feel pressure to waive privilege.[6] And although the DOJ improved its written policy, some governmental authorities maintain policies that expressly demerit entities for invoking privilege. The Commodity Futures Trading Commission ("CFTC"), for example, lists, as one of the factors that bears on its decision whether to impose sanctions in enforcement actions, whether the company at issue "waive[d] corporate attorney-client privilege and work product protection" for internal investigation reports, corporate documents and employee testimony.[7]

Thus, entities under government scrutiny may be faced with a Hobson's choice between preserving privilege, on one hand, and preserving the good will of interested prosecutors or supervisors, on the other.

Banks — specifically, those financial institutions supervised by the FRB, the Office of the Comptroller of the Currency (the "OCC"), the FDIC, state banking regulators, and, in certain instances, non-U.S. regulators as well — also face pressure to share privileged materials with the government, both in the context of enforcement actions aimed at suspected wrongdoing and during routine regulatory oversight.[8] In the context of enforcement actions, "the bank regulator conducting the investigation has the authority to determine if it is necessary to take formal actions against a bank and affiliated parties.

It is through this exercise of discretion that bank regulators can 'reward' the banks and affiliated parties for waiving the privilege and fully disclosing all requested information at the outset of the investigation."[9] In the context of examinations and other ongoing regulatory oversight, bank supervisors conducting onsite examinations can be less than receptive to assertions of privilege. The FRB, for example, notes that "[a]n argument can be made that [the FRB's] statutory authority to conduct on-site examinations overrides any legal privilege the financial institution may have not to disclose the information [on its premises]," and requires its examiners immediately to advise its general counsel if a financial institution asserts privilege over documents that the examiner believes are necessary to carry out an effective examination.[10] The OCC advises national banks that their "counsel should review," *inter alia*, "new products, services, systems, or processes that are developed or purchased by a bank to ensure their full compliance," and allows OCC examiners to "request these privileged materials," but "only when the bank's capital and earnings are exposed to material risk, or when the bank's exposure is otherwise considered significant."[11]

While banks face many of the same, if not more, pressures than other types of institutions to divulge privileged materials, for financial institutions, there is an important difference: as a statutory matter, sharing privileged materials with bank supervisors results in a waiver of privilege *only* with respect to those supervisors; it does not waive applicable privileges with respect to third parties. Under 12 U.S.C. § 1828(x):

> submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.

This approach, *i.e.*, limiting the scope of a waiver of privilege, so that privilege is waived only as to a select party receiving the documents (here, the bank regulator) and is not waived as to others, is known as "selective waiver."

Section 1828(x), and its companion, 12 U.S.C. § 1785(j), which applies the same rule to credit unions, are groundbreaking because they are the first and only federal statutes that provide for selective waiver.

Advocates of the selective waiver doctrine — especially when advocating for rulemaking implementing selective waiver outside of the 1828(x) context — have lauded the doctrine for enhancing transparency, facilitating law enforcement objectives, and minimizing the exposure that privilege holders would otherwise suffer upon choosing to share privileged information with the government.[12] Critics of selective waiver have faulted it for encouraging supervisors to seek privileged information, affording the government an argument in favor of demanding the production of privileged materials, and otherwise furthering a "culture of waiver."[13] As well, critics argue that selective waiver undercuts a fundamental justification for the attorney-client privilege: encouraging frank and open communication between counsel and client by preventing outside scrutiny, something critics believe is less likely to occur when a selective waiver provision opens a window through which the government more easily and frequently may view privileged materials.[14]

This article concludes that, although many of the concerns critics have raised are valid, on balance, a carefully crafted selective waiver provision can provide a significant benefit to banks and other entities subject to government supervision and scrutiny. Of course, it would be best if the government would not seek or expect to receive privileged information, either during investigations or examinations. But given that the government likely will anticipate obtaining privileged information, particularly in the context of onsite regulatory examinations, and given that in some instances banks or other parties may wish to volunteer it, then the producing party should enjoy the benefit of selective waiver protection.

The first part of this article covers today's legal landscape of selective waiver, including: (1) the common law concerning selective waiver that is applicable outside of the bank regulatory context (and that was applicable in the bank regulatory context before Section 1828(x) was enacted); (2) the enactment of Section 1828(x); (3) the interpretation of Section 1828(x); and (4) practical considerations and recommendations for lawyers whose clients are making disclosures pursuant to Section 1828(x). The second part of this article focuses on potential developments in the law, including: (1) how Sec-

tion 1828(x) might be improved and (2) how Section 1828(x), if improved, could serve as a model for new legislation governing disclosures of privileged materials to other agencies — such as the SEC, the CFTC, the Internal Revenue Service (the "IRS"), the Office of Foreign Assets Control ("OFAC") and the Financial Crimes Enforcement Network ("FinCEN") — that frequently coordinate with bank regulators already covered by Section 1828(x).

THE LEGAL LANDSCAPE OF SELECTIVE WAIVER

The Common Law of Selective Waiver

As a general rule, disclosure of materials shielded by the attorney-client privilege to any third party, even a non-adversary, operates as a waiver of the attorney-client privilege.[15]

By contrast, the protection afforded by the work product doctrine is not waived merely because protected materials are disclosed to a third party.[16] Rather, a waiver occurs if the third party to which the documents were disclosed was an adversary, a potential adversary or "stood in an adversarial position" with respect to the disclosing party.[17] Responding to a "benign request to assist [a government entity] in performing routine regulatory duties," therefore, may not result in a work product waiver, whereas producing documents in the course of a government investigation into suspected wrongdoing, even if the investigation does not ultimately lead to a prosecution or an enforcement, likely will.[18]

In any event, once a party has waived attorney-client privilege or work product protection by disclosing its confidential materials to the government, the general rule is that the ensuing waiver is applicable in all contexts. In other words, the general rule is that, having disclosed documents to the government, a party waives its right to assert privilege against other parties (*e.g.*, securities fraud class members, competitors, activist shareholders, former employees) seeking the documents in the context of civil litigation. The selective waiver doctrine operates as an exception to the general rule. It permits the disclosing party to waive its privilege exclusively as to certain persons or entities, such as a government agency, while preserving privilege as against everyone else.[19]

At common law, U.S. courts have taken varied approaches to the selective waiver doctrine, with most of the courts to have addressed the issue declining to adopt a selective waiver rule. The First, Third, Sixth, Tenth, and District of Columbia Circuits, for example, flatly have rejected selective waiver of attorney-client privilege with regard to documents produced to the government.[20]

On the other hand, the Eighth Circuit, in *Diversified Industries, Inc. v. Meredith*,[21] embraced a selective waiver rule:

> We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred.... To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

Thus, under *Diversified*, at least in some circumstances, production of documents in a SEC investigation waives privilege only as to the SEC.[22]

Courts have differed in their understanding of *Diversified*'s rationale and holding. In *Spencer v. Comserv Corporation*,[23] for example, the Minnesota district court — which was bound by the Eighth Circuit's holding in *Diversified* — concluded that *Diversified* was animated by a "willingness to permit corporations to hire special independent counsel for the purpose of corporate house cleaning," and accordingly took a limited view of its scope: "this Court holds that if information protected by the attorney/client privilege is disclosed in a non-public SEC proceeding, then any such privilege is waived unless the information was communicated to independent outside counsel hired specifically for the purpose of assisting the client in investigating its own alleged wrongdoing."[24] In *Danielson v. Superior Court*,[25] by contrast, the court cited *Diversified* for the proposition "that, in order to encourage cooperation with government investigations, normal waiver principles should be applied only if a ruling that the disclosing parties have waived the privilege would not

adversely affect the government's ability to investigate." In *In re Grand Jury Subpoena Dated July 13, 1979*,[26] the court relied on *Diversified* to hold that the corporation did not waive privilege when reports prepared by its attorneys were disclosed to entities including the SEC, a New York grand jury, and the IRS. The court reasoned that "[i]t is apparent that voluntary cooperation with the Securities and Exchange Commission or with an Internal Revenue Service or grand jury investigation would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege."[27] Similarly, in *In re LTV Securities Litigation*,[28] the court understood that *Diversified* required "tak[ing] cognizance" of how requiring discovery in a subsequent civil proceeding may negatively impact cooperation between the government agency and the subject of its investigation.[29] Indeed, courts that allow selective waiver often cite public policy considerations, such as the benefits of the rule to the government as well as to the public.[30]

In *In re Steinhardt Partners, L.P.*,[31] a civil securities fraud class action, the Second Circuit, declined to follow *Diversified*, and rejected defendant Steinhardt Partners' argument that selective waiver should apply to allow Steinhardt to assert a privilege as against class plaintiffs with respect to documents that Steinhardt earlier produced to the SEC. In so holding, the court expressed sympathy for the concern that "the selective waiver doctrine allows a party to manipulate use of the privilege through selective assertion," saying:

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.[32]

In addition, to rebut the argument that selective waiver should be embraced because it fosters cooperation with the government, the court argued that "the protection of privilege is not required to encourage compliance with SEC requests for cooperation with investigations"[33] because corporations have ample incentive to cooperate that even they will waive privilege in so doing. Moreover, "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship."[34] In other words, the court viewed

the policy concerns identified in *Diversified* as inapposite to the objective of ensuring open conversation between attorney and client, and therefore insufficient to justify a selective waiver rule.

Notwithstanding the foregoing, *In re Steinhardt Partners* left open the door for the possibility of selective waiver in certain cases:

> [W]e decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection…. Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.[35]

Following the foregoing dicta from *In re Steinhardt Partners*, a number of lower courts, particularly in the Second Circuit, have adopted a selective waiver doctrine applicable if the producing party and the government have entered into a confidentiality agreement limiting disclosure of the materials produced.[36] For example, in the banking context, in *Maruzen Co., Ltd. v. HSBC USA, Inc.*,[37] the Southern District of New York allowed certain defendants (the "Republic Bank Defendants") to avail themselves of the selective waiver doctrine with respect to materials disclosed to the SEC, the U.S. Attorney, the CFTC, the FRB, and the New York State Banking Department (the "NYSBD"), given that the Republic Bank Defendants and the government agencies had previously executed confidentiality agreements governing the documents at issue.[38] On the other hand, a number of courts in the Second Circuit have refused to allow selective waiver even in cases in which the government and the producing party entered into a confidentiality agreement.[39] Further muddying the waters, some courts requiring a confidentiality agreement as a requisite to selective waiver have gone one step farther, to examine the nature of the confidentiality agreement to determine whether sufficient steps were taken to maintain privacy and restrict the government's use of the materials.[40] Under this approach, a confidentiality agreement that by its terms fails to adequately restrict the government's use of the material or that, in practice, is loosely followed, may vitiate selective

waiver.[41] Whereas a confidentiality agreement that restricts the government's dissemination of the information except as required by federal law or in furtherance of its duties likely will not.[42]

Finally, a few courts have been more willing to afford selective waiver for work product materials. The Fourth Circuit, for example, recognized selective waiver for opinion work product, based on its view that opinion work product is entitled to the higher level of protection than other privileges and protections, and because there is "little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as a shield."[43] The D.C. Circuit has recognized selective waiver for work product where there was a confidentiality agreement between the disclosing party and the agency.[44] Other courts, such as the Sixth Circuit, however, have declined to apply the selective waiver doctrine even in the work product context.[45]

In sum, the common law on selective waiver is, as one court aptly stated, in a state of "hopeless confusion."[46] Some jurisdictions allow it, some do not, and some are unsettled. Some allow selective waiver for opinion work product, but not other privileges. Of those that embrace the selective waiver doctrine, some require a confidentiality agreement and some do not, and standards for adequate confidentiality agreements vary.

The Enactment of Section 1828(x)

Starting in 2006, Congress began to consider several alternative mechanisms either to afford selective waiver protection to privileged materials shared with the government or to curb the government from exerting undue pressure on subjects of governmental scrutiny to disclose privileged materials. The approach that Congress ultimately adopted was Section 1828(x), enacted as an amendment to the Federal Deposit Insurance Act ("FDIA") pursuant to the Financial Services Regulatory Relief Act of 2006, which President Bush signed on October 13, 2006.

The explanation of Section 1828(x) in the House Report closely tracks the statutory language:

> This section provides that when a depository institution submits information to a Federal, State, or foreign regulator as part of the supervisory or regulatory process, the institution does not waive any privilege it may

> claim with respect to that information as to any person or entity other than the regulator to which the information was disclosed.[47]

The legislative history of Section 1828(x) says little other than the quotation above and thus does not provide significant insight into the purpose and function of Section 1828(x), beyond what is already discernable from the face of the statute.

Measures that Congress considered, but ultimately did not enact, shed light on other possible approaches either to curtail the culture of waiver or to mitigate the damage that sharing privileged material with the government may cause the privilege holder.

For example, one measure that Congress considered contemporaneously with Section 1828(x) was a proposed revision to the Federal Rules of Evidence to embrace broadly the selective waiver doctrine. On January 23, 2006, the Chairman of the House Judiciary Committee sent a letter to the Judicial Conference of the United States — the body authorized to recommend new federal rules of procedure and evidence to be prescribed by the Supreme Court,[48] subject to congressional review and approval[49] — urging the Judicial Conference to proceed with a rulemaking that would allow persons and entities to cooperate with government agencies by turning over privileged information without waiving any privileges as to other parties in subsequent litigation.[50] In response, the Judicial Conference proposed a new Federal Rule of Evidence 502(c),[51] setting forth a broad selective waiver rule applicable to all disclosures to federal agencies:

> In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney-client privilege or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work product protection in favor of any person or entity other than [the] federal agency.[52]

Subsequently, following a maelstrom of comments largely objecting to the proposed implementation of the putative Federal Rule of Evidence 502(c) selective waiver doctrine,[53] and notwithstanding support for the rule from the

SEC and CFTC,[54] the Judicial Conference decided not to include the selective waiver provision in its proposal for the revision of Rule 502(c).[55] The Judicial Conference concluded that the decision was one better left to Congress, and expressly noted that Congress was considering the selective waiver provision that ultimately was enacted as Section 1828(x).[56]

Another measure that Congress considered contemporaneously with Section 1828(x) was a bill that Senator Arlen Specter introduced to eliminate altogether the government's ability to seek privilege waivers: the Attorney-Client Privilege Protection Act of 2006.[57] It provided in relevant part that

> In any Federal investigation or civil or criminal enforcement matter, an agent or attorney of the United States shall not —
>
> > (1)demand, request or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by attorney-client privilege or any attorney work product.[58]

The 2006 act was referred to the Senate Judiciary Committee but never enacted.[59] In contrast to 1828(x) and the contemplated, but rejected, omnibus selective waiver proposal in Rule 502(c), the 2006 act was limited to enforcement actions and would not have afforded financial institutions any protection with regard to materials shared with regulators as part of routine regulatory functions and examinations. Moreover, whereas 1828(x) and the proposed Rule 502(c) are premised on the understanding that the government will obtain privileged information, and, in light of that understanding, seek to protect such materials from third parties, the 2006 act was meant to stop the government from seeking and obtaining privileged information in the first place. Thus, the 2006 act, if enacted, would have obviated the need for selective waiver provisions, but only in the context of enforcement actions and prosecutions.

Interpretation of Section 1828(x)

Although there does not yet appear to be any case law addressing the proper interpretation of Section 1828(x), the statute's meaning largely is clear

based upon its plain language and the definitions contained in the FDIA.[60] On its face, Section 1828(x) limits the waiver of (1) "any privilege" applicable to (2) "any information" that (3) "any person" submits to (4) "any Federal banking agency, State bank supervisor, or foreign banking authority" for (5) "any purpose" in the course of (6) "any supervisory or regulatory process."

The term "Federal banking agency" is defined in the FDIA to include "the Comptroller of the Currency,…the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation."[61] The term "State bank supervisor" is defined as "any officer, agency, or other entity of any State which has primary regulatory authority over State banks or State savings associations in such State."[62] The term "foreign banking authority" is undefined, but consistent with tenor and purpose of the statute, should be interpreted broadly, to include foreign central banks insofar as they are functioning as bank supervisors and any other non-U.S. agencies (*e.g.*, the Financial Services Authority in the U.K., the Swiss Financial Market Supervisory Authority ("FINMA") in Switzerland, the Federal Financial Supervisory Authority ("BaFin") in Germany) with regulatory authority over banks.

The statute's repeated use of the word "any" is noteworthy because, as the Supreme Court has recognized, "any" is a word that confers an expansive meaning upon any term it precedes.[63] Thus, the use of the word "any" to modify "privilege" means that selective waiver protection applies not just to federal privileges, but also state law privileges.[64] In some instances, state courts recognize privileges, such as the accountant-client privilege or the self-critical analysis privilege, that their federal counterparts may not recognize or may recognize only in more limited circumstances.[65] The conclusion that Section 1828(x) affords protection to privileges arising under state law is strengthened by the fact that Section 1828(x) covers disclosure to state banking regulators as well as federal banking regulators. Congress had good reason to consider carefully whether selective waiver should extend to disclosures directed to state regulators, as similar issues were at the same time being debated in the context of the proposed new Federal Rule of Evidence 502(c).[66] Indeed, by the time 1828(x) cleared Congress, the Advisory Committee on Evidence Rules had "unanimously agreed that the suggested statutory language [in proposed Rule 502(c)] should cover disclosures made to federal agencies only," reasoning "that the federalism issues attendant to controlling

disclosures to state agencies are extremely serious."[67] Congress's decision to opt for a broader approach — covering state privileges and agencies — in Section 1828(x) was therefore by no means accidental or uninformed.

Similarly, the phrase "any privilege" should be interpreted broadly to extend selective waiver protection not just to attorney-client privilege, but also to the work product doctrine. The word "privilege" is generally used as an umbrella term that covers the work product doctrine,[68] notwithstanding that work product is, technically, a "protection" or a "discovery rule," rather than a "privilege."[69] In any event, relying on a technical distinction to exclude work product from the statute's ambit would be contrary to the plain meaning of the word "any."

Finally, the term "any person" likewise should be interpreted to cover not just financial institutions making disclosures of privileged materials, but also their employees, officers, directors and shareholders, and any other person sharing privileged information with a bank regulator.[70]

One area that Section 1828(x) does not expressly address is what duties regulators have to preserve privileges applicable to documents that have been shared with them pursuant to 1828(x), and whether regulators may, without violating 1828(x), share materials produced pursuant to Section 1828(x) with other government agencies or non-governmental third parties.

Because Section1828(x) was designed to protect information shared with the government from third party discovery, it would undermine Section 1828(x), and therefore would be inappropriate, for bank regulators to share privileged materials provided pursuant to Section 1828(x) with any non-governmental third parties. To the extent such information is sought through the Freedom of Information Act (the "FOIA"), the bank regulator in possession of the privileged materials, in order to best effectuate Section 1828(x), should (1) deny production of the information under FOIA Exemption 4 (applicable to any "commercial or financial information obtained from a person and privileged"), as well as other applicable FOIA exemptions[71] and (2) alert the financial institution that produced the privileged materials in sufficient time to afford it an opportunity to assert its privilege rights and seek judicial relief, if necessary. The bank regulator also may wish to assert its own rights to preserve the confidentiality of the materials sought to the extent that revealing them could reveal the regulator's own views concerning its internal decision

making.[72] Similarly, a financial services regulator that receives a subpoena directed to it, seeking material protected by Section 1828(x), should both refuse production on grounds of privilege and afford the original producing party notice in sufficient time for it to intervene with the relevant court and move to quash the subpoena. Although Section 1828(x) does not expressly require bank regulators to implement these steps, a duty to undertake such reasonable measures to preserve the confidentiality of Section 1828(x) material from members of the public can reasonably be inferred from the text and objective of the statute. For similar reasons, bank regulators should, insofar as possible, avoid sharing 1828(x) materials with other government agencies and prosecutors that are not covered by Section 1828(x)[73] and whose receipt of Section 1828(x) materials could therefore result in a privilege waiver.[74] Moreover, the party providing the information would have a legal argument under Section 1828(x) — one that should be compelling — that if its regulator shared privileged material in any of the foregoing manners, otherwise applicable privileges should not be deemed waived and a court should order measures to enforce the non-waiver.

Sharing among and between banking regulators who all are under the Section 1828(x) umbrella[75] is the least problematic scenario for cross-agency information exchange of privileged materials produced pursuant to Section 1828(x), although it still raises some concerns. The bank regulator that initially collected the information may have a closer relationship with the financial institution that produced it and a better understanding of the facts and circumstances than an agency that receives the information secondhand. Therefore, the bank regulator that first collected the information may have a stronger desire to preserve the information's confidentiality or may be less likely to take information out of context. Additionally, as written, Section 1828(x) protects the privilege belonging to a financial institution when the financial institution itself shares the privileged material with its regulator, but Section 1828(x) does not clearly address the situation in which one bank regulator passes the information to another. In that circumstance, continued Section 1828(x) protection would make the most sense — 1828(x) is meant to cover all bank regulators and, if the financial institution produced the same information a second time to a second bank regulator, Section 1828(x) clearly would apply.[76] Interpreting 1828(x) to withhold selective waiver protection

on materials transferred between different bank regulators all of which are covered by Section 1828(x) misses the point of the statute and would elevate form over substance.[77]

Practical Recommendations for Production of Documents Under Section 1828(x)

Although Section 1828(x), standing alone, offers strong protections for privileged documents disclosed to bank regulators, there nevertheless are several steps that banking institutions may wish to consider to better ensure the continued confidentiality of privileged materials that they plan to produce to the government, *i.e.*, to protect against or minimize the risk of the government inadvertently or deliberately sharing such materials with third parties or other government agencies.

First, the producing bank should consider requesting that its disclosure be made pursuant to a confidentiality agreement with the receiving bank regulator that would: (1) acknowledge the disclosing institution's view that the materials produced are privileged and, if possible, reflect the government's commitment not to take a contradictory position; (2) contain a provision restricting the government from disclosing the information to any private third party absent legal compulsion specifically addressing and overriding the applicable privileges on an established basis (*e.g.*, the crime-fraud exception to the attorney-client privilege), and requiring the government to notify the bank whenever a third party has sought disclosure (*e.g.,* pursuant to FOIA, a subpoena, or otherwise), so that the bank has an opportunity to object based on 1828(x) and, if appropriate, seek judicial relief; and (3) contain certain restrictions on sharing the 1828(x) information with any other government entities.

In sum, although Section 1828(x) is best fulfilled if the bank regulators, on their own initiative, adhere to reasonable restrictions on the dissemination of 1828(x) materials, financial institutions can benefit from the added certainty an express agreement concerning the treatment of 1828(x) materials affords. An agreement with the government will help ensure that banks sharing privileged information will not be exposed to what could be viewed as any number of "loopholes" in Section 1828(x) that may allow regulators on their own initiative to share privileged information that the selective waiver

doctrine would otherwise protect.

Case law provides examples of instances in which bank regulators have provided disclosing parties with confidentiality agreements governing the treatment of their privileged materials once the banks have shared such materials with the government, so a bank's request to memorialize its agreement with its regulator on the treatment of privileged information in the 1828(x) context would not be unprecedented.[78] Nor would such a request be unreasonable, as a confidentiality agreement along the terms described above better implements Section 1828(x), and nothing more.

In certain instances, an entity may be disinclined to request, or the bank regulator may be unwilling to enter into, such an agreement. In the event that the bank regulator refuses to enter into such an agreement, its stated reasons for so doing may provide the regulated entity with some insight into the government's plans for the 1828(x) information and some sense of the extent to which the bank may rely on the regulator to maintain the confidentiality of its documents. If the bank cannot secure a confidentiality agreement but still wishes to produce documents pursuant to 1828(x), the bank may wish to consider providing its privileged documents pursuant to a cover letter laying out its understanding of which documents are privileged, its expectation that the government will maintain the confidentiality of such documents and deny requests from private parties and other agencies not covered by 1828(x) for the information, and its expectation that the government will provide it with notice and an opportunity to object before sharing the documents produced with others.

In all instances, documents produced pursuant to 1828(x) should be clearly labeled (in addition to any other appropriate stamps) as "privileged" and "protected under FDIA § 1828(x)," or similar language to that effect.

POTENTIAL DEVELOPMENTS IN THE LAW

Improving Section 1828(x)

As the discussion above suggests, there are several modest changes that could clarify and better effectuate the objectives of Section 1828(x), *i.e.*, ensuring that privileges that shield materials produced to government regulators are waived *only* as to the intended government recipients.

First, Section 1828(x) should be clarified expressly to explain that federal banking agencies, state bank supervisors, and foreign banking authorities may share information protected by 1828(x) with one another without undermining the selective waiver protection that the statute affords. Second, and conversely, Section 1828(x) should be clarified expressly to prohibit federal banking agencies and state bank supervisors from sharing materials protected by Section 1828(x) with any government entity that is not covered by Section 1828(x), absent compulsory legal process that specifically requires the production of materials protected by the attorney-client privilege and/or work product doctrine.

Similarly, Section 1828(x) should expressly prohibit a financial services regulator that receives information protected by Section 1828(x) from sharing such information with any private third party, absent compulsory process that specifically requires the production of materials protected by attorney-client privilege and/or the work product doctrine. Such a provision also should make it expressly clear that such materials are exempt from production pursuant to FOIA. Finally, a clarified Section 1828(x) should ensure that a financial institution that produces materials pursuant to Section 1828(x) has an opportunity to intervene to oppose any attempt — whether by another government agency not under the 1828(x) umbrella or by a private civil party — to pierce privilege and obtain the 1828(x) materials. One way to accomplish this would be to afford the receiving government agency standing to assert the producing party's privilege in the first instance and instruct it to do so, require that the receiving government agency provide notice to the producing financial institution, and provide the financial institution a reasonable grace period to intervene with the courts before any of its materials are released pursuant to compulsory process requiring their production.

None of these changes should be particularly controversial, as they merely clarify Section 1828(x). As discussed above, Section 1828(x) already should be understood to mean that production by a regulator to a third-party not covered by Section 1828(x) does not constitute a waiver, and courts should afford any institution aggrieved in that manner with a remedy forbidding any effect of the improper production. That said, spelling out the points above would help avoid unnecessary litigation and confusion. And, even if none of the foregoing clarifications were adopted in the 1828(x) context, Congress

would do well to consider them if it enacts sister legislation expanding selective waiver into other contexts.

In addition to the foregoing, we advocate that Section 1828(x) be modified to instruct financial services regulators conducting enforcement actions not to seek privileged materials that were created in response to the matters giving rise the enforcement action, nor to consider privilege waivers when determining how to punish infractions. Much has been written about the growth of the culture of waiver — in which the production of privileged materials, particularly internal investigation reports, has become *de rigueur* — and the damage this wreaks upon the ordinary function of the attorney-client privilege, which is meant to provide a veil to foster frank and open communication between attorney and client.[79] As written, Section 1828(x) does not attempt to curtail the culture of waiver: it anticipates that bank regulators will obtain privileged materials — either in the context of ongoing examinations or pursuant to enforcement actions — and works to curtail the scope of the ensuing loss of privilege. But there is no good reason why Section 1828(x) should not additionally limit the ability of the bank regulators to seek privileged materials and to penalize banks that stand on their rights when the bank regulator is conducting an enforcement action. In the context of day-to-day supervision, bank regulators may well argue that they should be permitted broader access to privileged materials to help fulfill their mandate of ensuring the safety and soundness of the banking system. But once the regulator steps into a prosecutorial role by bringing an enforcement action, those arguments should yield to the policies favoring the attorney-client privilege and work product protections as a means to ensure systemic fairness.

In the context of bank regulators' examination authority, to help ensure that the review of privileged materials, especially in the context of onsite examinations, is not conducted casually or unnecessarily, Congress also should require bank regulators covered by Section 1828(x) to report annually on the frequency with which they have reviewed privileged materials during their onsite exams, the instances in which regulated entities objected on privilege grounds, and how those disputes were resolved.

Expanding on the Section 1828(x) Model

Based on the modified Section 1828(x) model described above, we urge

the expansion of Section 1828(x) to provide selective waiver protection to cover the production of privileged materials to certain other regulators beyond the bank regulators already listed in 1828(x). Specifically, those regulators that, like the bank regulators already covered by Section 1828(x), often investigate the conduct of banks and other financial services institutions should be covered. Section 1828(x) should be amended to include, at a minimum, documents produced to the SEC, the CFTC, OFAC, FinCEN and the IRS. All of these regulators routinely cooperate with bank regulatory authorities already covered by Section 1828(x) — *i.e.*, the FRB, the OCC, the FDIC, as well as state and foreign bank supervisors — particularly in the investigation of, and imposition of penalty and remedial provisions upon, financial institutions that have committed or are suspected of committing infractions.[80] Given the commonplace coordination among these regulators, and the trend toward increased inter-agency action,[81] it makes sense that these agencies should be able freely to share Section 1828(x) information amongst one another, without undermining the goal of Section 1828(x). Doing so not only will promote efficient and coordinated law enforcement and regulatory efforts, but moreover will help to ensure fair and consistent treatment of regulated and supervised entities.

From the perspective of the regulated and supervised parties, such an expansion of selective waiver also makes sense. For example, it may put a financial institution in an awkward position, to say the least, if it must refuse to produce information to one regulator that is not covered by Section 1828(x) in order avoid waving its privileges, while at the same time, the financial institution is freely sharing the same information with another regulator that is covered by Section 1828(x). The regulator who is not covered by Section 1828(x) might balk at what it perceives as disparate treatment, notwithstanding the underlying statutory justification for it. Nor, as a practical matter, can a financial institution subject to parallel or otherwise interrelated actions by multiple regulators enjoy any comfort that the information will not be shared amongst them. In light of that reality, ensuring that the shared documents are protected only makes sense.

Another advantage of including within the 1828(x) framework a wider range of regulators with congruent duties and overlapping authority is that doing so eliminates the uncertainty and inconsistency of selective waiver at

common law and provides instead a bright-line rule. As things currently stand, having a clear selective waiver rule for documents produced to bank regulators, but a muddled patchwork of common law rules for documents produced to other regulators cooperating with the bank regulators, is confusing and may undermine the ability of banks comfortably and openly to share documents with bank regulators as 1828(x) was meant to promote. Moreover, clarity in the rule of law is a hallmark of a mature market that nurtures economic growth and commerce.[82]

Yet another advantage: as *Diversified* noted when adopting a selective waiver rule, a finding of waiver could "thwart[ ] the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[83] Expanding the selective waiver tent better facilitates this goal, not only for outside counsel (as flagged by *Diversified*), but for in-house counsel as well, and not only for investigations (as flagged by *Diversified*), but also for ongoing regulatory advice, all of which inures to the benefit of stockholders and customers. In today's world of increased interagency collaboration, it is unrealistic to expect that the partial protection of a selective waiver rule that only covers bank regulators will be sufficient. Absent broader selective waiver protection, institutions may be chilled for seeking advice of counsel that would help them avoid errors and guard against misconduct in the first instance, to everyone's benefit.

Finally, it is fair to anticipate the proposed expansion of Section 1828(x) would be met with open arms by many of the affected regulators (although the proposed companion provision barring waiver requests in the enforcement context, less so). The SEC, for example, was one of the most prominent advocates of incorporating a selective waiver provision in proposed FRE 502.[84]

The IRS also provides a good example of an agency that is currently seeking to obtain more information and cooperation from taxpayers, but that may face hurdles because of the underlying privilege waiver concerns inherent to the information the IRS seeks. Not long ago, the IRS finalized rules that will require large corporate taxpayers to report uncertain tax positions on a "Schedule UTP" attached to their returns.[85] The IRS says that it is seeking this information to increase efficiency in audits, but many taxpayers are con-

cerned that disclosure of their uncertain positions will effect a broad subject matter waiver[86] of their underlying workpapers and opinions that support their tax treatment of the uncertain positions, and that as a result, they will now be required to disclose their work papers and opinions to the IRS and/or to any interested third party based on the subject matter waiver. The IRS has attempted to mitigate these concerns by announcing a new policy applicable to documentation relating to uncertain tax positions. Under the new policy, the IRS will generally not assert during an examination that the taxpayer has waived privilege by disclosing otherwise privileged materials to its independent auditor as part of a financial audit.[87] While the IRS has recently clarified that the policy will continue to apply during certain internal post-audit procedures such as IRS Appeals, there is still lingering unrest among taxpayers because it is uncertain how the policy will apply during litigation, where such an assertion of waiver would likely do the most harm.[88] Further, the IRS policy is not binding on any other third parties, including other federal agencies such as the DOJ, which represents the United States in tax refund litigation actions. Amending Section 1828(x) as described above, and expanding it to the IRS, would largely solve this problem. The IRS would be able to obtain the information it wants on uncertain tax positions, while taxpayers would enjoy a selective subject matter waiver exemption that would enable them to maintain their privilege — both vis-à-vis the IRS and vis-à-vis unrelated third parties — on the underlying work papers and opinions that were not shared with the IRS.

In determining whether to expand Section 1828(x) as set forth above, several concerns raised by critics of selective waiver bear discussion.

First, certain critics, particularly plaintiffs' attorneys, complain that denying them access to privileged information by affording defendants the benefit of the selective waiver rule, is unfair to them or denies their clients the benefit of valuable information in the hands of the government.[89] This argument lacks merit. Plaintiffs have no legitimate interest in obtaining privileged information in the first instance, so they can hardly be heard to complain that a rule that continues to deny them access to such information is unfair. Among other things, prosecutorial discretion and the principle of proportionality at sentencing serve as checks against misuse of information provided to the government; whereas in the civil arena, plaintiffs' lawyers have no comparable

precepts to guide them.[90] Nor is there anything novel or objectionable about the concept that the governmental authorities would have access to information that private civil plaintiffs do not.[91] Examples abound. Bank examination materials are routinely kept exclusively to the government.[92] Grand jury testimony is available to prosecutors but generally is not available to private civil plaintiffs.[93] This includes testimony that would be privileged (*e.g.*, under the Fifth Amendment), but that is uniquely available to the grand jury because the government can compel a waiver (*e.g.*, through the grant of immunity) that civil plaintiffs cannot.[94]

Second, another similar criticism is that a producing party should not be permitted to use privileged communications as a "sword" (*e.g.*, revealing privileged communications to prevail on an argument, such as defense of counsel) and then use attorney-client privilege as a "shield," to prevent an opponent from fully exploring and testing the communications that the party put at issue through the adversary process.[95] But this argument does not make sense as applied to a party that uses its attorney-client material as a sword to defend itself against a government investigation, and then attempts to shield that information from disclosure in an entirely separate civil proceeding. The party to the civil proceeding is not in the unfair position of having the attorney-client material being invoked to defeat its claims, while at the same time, being unable to discover that material. If the defendant in the civil proceedings actually attempts to use its attorney-client materials to its advantage (*e.g.*, arguing against civil liability because "our internal investigation report found no wrongdoing," or "the government, after reviewing our internal investigation report, concluded there was no wrongdoing,") then at that point, the "sword and shield" argument might be a valid justification for finding that privilege was waived. That, however, is not a problem of selective waiver, but of an abusive litigation tactic that can be addressed (by compelling a waiver) if it arises.

Third, some argue that allowing selective waiver only encourages the government to demand production of privileged materials, thereby fueling the culture of waiver.[96] This is a valid concern, and it is why this article recommends that any expansion of Section 1828(x) be coupled with an express prohibition against seeking privilege waivers in the enforcement context and with safeguards (in the form of a sunshine report) meant to provide oversight

of the government's review of privileged materials in the examination context.

Fourth, some courts rejecting adoption of the selective waiver doctrine have concluded that selective waiver is unnecessary because subjects of government scrutiny already have ample incentive to cooperate by sharing their privileged materials.[97] But there is no way to know if this is true absent empirical evidence (*e.g.*, a survey of those who have refused to share privileged information with the government due to fear of adverse consequences in civil litigation once privilege is waived). And, even if selective waiver were not necessary to persuade regulated or supervised entities to share privileged materials with the government, it is certainly the most fair outcome if a party is able to obtain legal advice without having to weigh potential adverse civil consequences that are irrelevant and may have unwarranted repercussions, particularly in cases where the government ultimately gives the entity positive marks on its examination, or decides that no wrongdoing occurred, or determines that no penalty is appropriate.

Finally, there is the argument that selective waiver is inconsistent with the rationale for the attorney-client privilege because a communication that will (or likely may) be shared with the government will not be the type of open communication that the attorney-client privilege is meant to promote. Put another way, anticipated disclosure of attorney-client materials — even with selective waiver protection — will chill relations between corporations and their counsel, because corporate executives will restrain their comments.[98] This is a real danger that will persist — regardless of whether there is a selective waiver doctrine or not — so long as corporations believe that their documents may be shared with the government. The solution, therefore, is not to eliminate selective waiver, but rather to minimize the sharing of privileged materials with the government. For the reasons set forth above, we do urge appropriate limits on the sharing of privileged materials with the government.

CONCLUSION

In determining the future of selective waiver, it makes sense to look for guidance from the one selective waiver rule Congress has enacted. Experience shows that Section 1828(x) can be improved and expanded. For the reasons set forth above, we urge that Congress do both.

NOTES

[1] As former Deputy Attorney General McNulty explained, "there is still a pressure to waive attorney-client privilege if you have 'relevant factual information' covered by attorney-client privilege…[a]nd quite a bit of 'relevant factual information' is subject to privilege claims." Brian Baxter, "With Thompson Trashed & McNulty Moot, Filip Memo's Time Has Come," *The Am Law Daily*, Aug. 28, 2008, *available at* http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html.

[2] *See, e.g.*, *Schreiber v. Soc'y for Savings Bancorp., Inc.*, 11 F.3d 217, 219 (D.C. Cir. 1993) (plaintiff representative in shareholder class served subpoena on the Federal Deposit Insurance Company (the "FDIC") and the Federal Reserve Board (the "FRB") asking "the FDIC and the Board to produce all documents provided by Bancorp to the agency"); *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 232 (2d Cir. 1993) (plaintiffs in civil class action suit sought production of report that had been covered by work product, but was produced to the Securities and Exchange Commission (the "SEC")); *LaBelle v. Philip Morris*, Inc., No. 2-98-3235-23, 2000 WL 33957169 (D.S.C. Oct. 23, 2000) (Notwithstanding the general rule of grand jury secrecy in Federal Rule of Criminal Procedure 6(c), disclosure of documents pursuant to a grand jury subpoena may still result in waiver of attorney-client and work product privileges in subsequent civil action); *Bank of America v. Terra Nova Insurance Co.*, 212 F.R.D. 166 (S.D.N.Y. 2002) (granting bank's motion to compel internal investigation report that reinsurance company had voluntarily shared with the New York State Insurance Department, thereby waiving work product protections).

[3] Memorandum from Deputy Attorney Gen. Larry D. Thompson to Heads of Dep't Components and U.S.Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.

[4] *See U.S. Attorneys' Manual*, Ch. 9-28.000 Principles of Federal Prosecution of Business Organizations, § 9.28-710 (Aug. 2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.760.

[5] *See* SEC, Division of Enforcement, *Enforcement Manual* (the "Redbook"), at § 4.3 (Feb. 8, 2011), http://federalevidence.com/pdf/2008/10-Oct/SEC_Enforcement_Manual_Red_Book.pdf, (adopting a policy similar to the DOJ's, pursuant to which SEC attorneys are instructed not to seek waivers of attorney-client and work product doctrine materials and "[w]aiver of a privilege is not a pre-requisite to obtaining credit for cooperation. A party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation," but cooperation required disclosure of "all relevant underlying facts").

[6] *See* Nadia Malik, *et al.*, "Corporate Counsel Beware: Federal Government Still Wants You to Waive Attorney-Client Privilege," *Martindale.com* (July 7, 2009),

available at http://www.martindale.com/corporate-law/article_Faegre-Benson-LLP_760522.htm (arguing that corporations continue to feel pressure from the DOJ to waive privileged information notwithstanding DOJ's new policy); Mark J. Stein and Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. Law. J. (Sept. 11, 2008), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202424426861 ("The obvious problem is that the 'facts' uncovered in an internal investigation are actually an attorney's distillation of numerous interviews and documents and therefore work product. Moreover, in many instances, such as where different witnesses have provided contradictory accounts, any discussion of the 'facts' will involve disclosing what the various witnesses said — i.e., revealing attorney-client communications. Thus, under the Filip Memo, in many instances corporations will still need to waive privilege in order to provide the facts and receive cooperation credit."); Letter from Susan Hackett, Sr. Vice President and General Counsel, Association of Corporate Counsel to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 4 (June 20, 2006) ("Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment.") (quoting from survey of in-house and outside corporate counsel), *available at* http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16218); Association of Corporate Counsel & National Association of Criminal Defense Lawyers, *et al.*, *The Decline of the Attorney-Client Privilege in the Corporate Context*, at 3 (March 2006), *available at* http://www.acc.com/Surveys/attyclient2.pdf (noting that nearly 75 percent of respondents (comprised of both in-house and outside corporate counsel) reported that the government had created a "culture of waiver" in which it was routinely expected that a company under investigation would broadly waive legal privileges to demonstrate that the entity is cooperating with investigators and in order to secure favorable treatment).

[7] *See* U.S. Commodity Futures Trading Commission (the "CFTC"), Enforcement Advisory, "Cooperation Factors in Enforcement Division Sanction Recommendations" (Aug. 11, 2004), *available at* http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf; *see also* Environmental Protection Agency (the "EPA") Prosecution Guidelines — Section G, 18.1 (considering an "offender's willingness to make available to the EPA all relevant information (including the complete results of any internal or external investigation)"), *available at* http://www.environment.nsw.gov.au/legislation/prosguide/prosecutionguidelines_sectionG.htm; Department of Health and Human Services, Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399, 58,403 (Oct. 30, 1998) ("To facilitate the OIG's verification and validation processes, the OIG must have access to all audit work papers and other

supporting documents without the assertion of privileges…. In the normal course of verification, the OIG will not request production of written communications subject to the attorney-client privilege. There may be documents or other materials, however, that may be covered by the work product doctrine, but which the OIG believes are critical to resolving the disclosure. The OIG is prepared to discuss with provider's counsel ways to gain access to the underlying information without the need to waive the protections provided by an appropriately asserted claim of privilege.").

[8] Jeffrey B. Kirschenbaum, "Defending Attorney-Client Privilege," *U.S. Banker* (October 2006), *available at* http://www.americanbanker.com/usb_issues/116_10/-291006-1.html ("The problem [of government agencies seeking privilege waivers] is particularly acute for financial institutions, which operate under complex regulatory and accounting rules and need unfiltered legal advice to make intelligent decisions about voluntary compliance and litigation.").

[9] Priscilla L. Walton, *Waiving the attorney-client privilege goodbye: the erosion of the privilege by federal financial regulatory agencies*, 10 N.C. Banking Inst. 397, 410 (Mar. 2006).

[10] Board of Governors of Federal Reserve System Memo, Access to Books and Records of Financial Institutions During Examinations and Inspections, SR 97-17 (SUP), June 6, 1997, available at http://www.federalreserve.gov/boarddocs/srletters/1997/SR9717.HTM.

[11] *See* Office of the Comptroller of Currency, Comptroller's Handbook: Litigation and Other Legal Matters, at 7-8 (Feb. 2000); *see also* Susan Beck & Michael Orey, "They Got What They Deserved," *Amer. Law.* (May 1992) (quoting Letter from B.J. Davis, Federal Home Loan Bank Board Director of Examinations, San Francisco, to Peter Fishbein, partner at Kaye, Scholer, asserting that "[a]n examination is *not* civil litigation discovery…. Unfettered access, including the ability to appear at [a thrift] without advance notice is essential to the fulfillment of [the regulators'] function.").

[12] *See, e.g.*, Letter from Daniel J. McAuliffe, President-Elect, State Bar of Arizona to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 4 (Dec. 19, 2006) ("It would certainly facilitate the conduct of federal regulatory investigations if those subject to them could provide the investigating agency with pertinent materials as to which they would ordinarily claim privilege, without waiving that privilege."); Letter from Kim J. Askew et al. (members of the ABA House of Delegates writing in their personal capacity) to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 3 (Feb. 14, 2007) (arguing for implementation of selective waiver because it "provides important countervailing protection to the party subjected to the coercive demand or request [from the government for privileged material]… There also may be instances when a client determines that truly voluntary

disclosure of otherwise privileged information is in its interests."); Letter from Liesa L. Richter, Assoc. Professor of Law, University of Oklahoma College of Law, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at 3-4 (Feb, 15, 2007) ("selective waiver will necessarily increase corporate cooperation with federal investigators.… A corporate entity facing multi-million dollar exposure in a securities fraud class action suit may…need such protection to secure its cooperative disclosures"); *id.* at 4 (arguing for selective waiver because it would "also preserve the integrity of corporate internal investigations…by giving companies meaningful control over the ultimate destination of information disclosed to the government").

[13] *See, e.g.,* Letter from Susan Hackett, Sr. Vice President and General Counsel, Association of Corporate Counsel, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 5, (June 20, 2006) (in comment on proposed amendments to Fed. R. Evid. 502, arguing adopting rule of selective waiver "might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances"); Letter from Paul R. Rice, Professor of Law, Director Evidence Project, American University, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 2 (Oct. 23, 2006) ("*selective waiver*…is inconsistent with the most fundamental principle of the attorney-client privilege — confidentiality"); Letter from John Vail, Vice President and Senior Litigation Counsel, Center for Constitutional Litigation, P.C., to Peter McCabe Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at 6 (Jan. 16, 2007) ("We hope that this horse is dead. Prosecutorial overreaching, not attorney-client privilege, is the problem."); Statement of Steven K. Hazen, Executive Committee, State Bar of California Business Law Section before the Advisory Committee on Evidence Rules of Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Jan. 12, 2007) (arguing, *inter alia*, that selective waiver would undermine candor in lawyer-client communications).

[14] *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C.Cir. 1981) ("[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship").

[15] *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,*293 F.3d at 314; *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1428 (3d Cir. 1991); *United States v. Ryans,* 903 F.2d 731, 741 n.13 (10th Cir. 1990) (citing *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979)); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972).

[16] *Westinghouse Elec. Corp.*, 951 F.2d at 1425; *In re Doe*, 662 F.2d 1073, 1081 (4th

Cir. 1981); *United States v. AT&T*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980).

[17] *See In re Steinhardt Partners*, 9 F.3d at 236.

[18] *Id.* at 234; *e.g.*, *Westinghouse Elec. Corp.,* 951 F.2d at 1429-30; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 192 F.R.D. 575, 580 (M.D. Tenn. 2000), *aff'd* 293 F.3d 289.

[19] *See* Jerold S. Solovy *et al., Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*, 805 PLI/Lit 81 (2009).

[20] *In re Qwest Commc'ns Int'l. Inc,* 450 F.3d 1179, 1199 (10th Cir. 2006) (no selective waiver despite presence of confidentiality agreement with government agencies); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302-04; *United States v. MIT,* 129 F.3d 681, 685-86 (1st Cir. 1997); *Westinghouse Elec. Corp.*, 951 F.2d at 1424-26; *In re Martin Marietta Corp.,* 856 F.2d 619, 623 (4th Cir. 1988); *Permian Corp.,* 665 F.2d at 1220.

[21] 572 F.2d 596, 611 (8th Cir. 1977) (internal citations omitted) (holding that documents voluntarily disclosed pursuant to an SEC subpoena effected a limited waiver of privilege and therefore was not obtainable by opposing private litigant in district court).

[22] *See also Boston Auction Co. v. W. Farm Credit Bank*, 925 F. Supp. 1478 (D. Haw. 1996) (bank's disclosure of documents to Farm Credit Administration (the "FCA") was not voluntary, and bank thus did not waive any attorney-client privilege attached to documents).

[23] Civ. No. 4-84-794, 1985 WL 17510 (D. Minn. Oct. 28, 1985).

[24] *Id.* at *3.

[25] 754 P.2d 1145, 1152 (Ariz. App. 1987) (holding that sharing physician-client privileged materials with the Arizona Board of Medical Examiners ("BOMEX") waived privilege only with respect to BOMEX).

[26] 478 F. Supp. 368 (E.D. Wisc. 1979).

[27] *Id.* at 372-73.

[28] 89 F.R.D. 595 (N.D. Tex. 1981).

[29] *Id.* at 618.

[30] In *In re McKesson HBOC, Inc.,* No. 99-CV-20743, 2005 WL 934331, at *10 (N.D. Cal. 2005), for example, the court, after a lengthy discussion of the differing views by other circuits on selective waiver, observed that the report prepared by attorneys for the company subject to an SEC investigation that were disclosed to the SEC "have resulted in significant benefits to the government: permitting the government to focus its investigation on the primary wrongdoers, filtering documents produced to the SEC, and permitting the government to deploy fewer employees." The court concluded that there was no waiver of work product after "taking into

consideration the benefit to the public of permitting disclosure of work product to the government." *Id.*

[31] 9 F.3d 235.

[32] *Id.* (quoting *Permian Corp.*, 665 F.2d at 1221.

[33] *Id.* at 236 (citing SEC Amicus Br. at 20-25).

[34] *Id.* at 235 (internal quotation marks omitted).

[35] *Id.* at 236 (internal citations omitted).

[36] *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412 (N.D. Ill. 2006) (recognizing selective waiver for both attorney-client privilege and work product protection for lender's disclosure of materials to the SEC where lender had insisted upon confidentiality agreement); *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (disclosure of documents to USAO under confidentiality agreement did not waive attorney-client privilege).

[37] No. 00 Civ. 1079, 2002 WL 1628782 (S.D.N.Y. July 23, 2002); *In re M & L Business Mach. Co.,*161 B.R. 689 (D. Colo. 1993) (same, where bank took substantial steps to ensure that its disclosures to U.S. Attorney would be kept confidential by stating in confidentiality agreement that the provision of information did not constitute a waiver of privilege as to any proceeding under state or federal law).

[38] *See also id.* (waiver of attorney-client privilege only extended to U.S. attorney to whom materials were disclosed; bank took substantial steps to ensure that its disclosures to U.S. attorney would be kept confidential by stating in confidentiality agreement that the provision of information did not constitute a waiver of privilege as to any proceeding under state or federal law); *In re Leslie Fay Cos.,* 161 F.R.D. at 284.

[39] *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *8 (S.D.N.Y. June 21, 2005) ("In this Court's view…*Steinhardt* does not create a 'per se' rule that if there is a confidentiality/non-waiver agreement with the government, the privilege is not waived.") (finding that no waiver occurred); *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 Civ. 8854, 2004 WL 2375819, at *5 (S.D.N.Y. Oct. 21, 2004) (finding that the privilege was waived notwithstanding the existence of a confidentiality agreement); *United States v. Wilson*, 493 F. Supp. 2d 348, 362 (E.D.N.Y. 2006) ("What I draw from the *Steinhardt* decision is that a question of selective waiver must be decided on a case-by-case basis, and that the existence of an express non-waiver agreement is a critical element of the analysis.") (finding that privilege was not waived).

[40] *Lawrence E. Jaffe Pension Plan,* 244 F.R.D. 412 (N.D. Ill. 2006) (allowing selective waiver of both attorney-client privilege and attorney work product based on language in confidentiality agreement providing that disclosing party intended to preserve privilege with regard to third parties to the agreement; in addition, no evidence that

confidentiality restrictions were loose in practice); *In re McKesson HBOC,* 2005 WL 934331, at *2 (permitting selective waiver where the confidentiality agreement allowed the SEC to disclose the confidential information only "to the extent that the [SEC] determines that the disclosure is otherwise required by federal law or in furtherance of the [SEC's] discharge of its duties and responsibilities." (internal quotations omitted)); *In re Leslie Fay Cos.,* 161 F.R.D. at 284 (permitting selective waiver where the confidentiality agreement allowed the government to disclose the confidential information only "as necessary to further law enforcement objectives").

[41] *See In re Qwest Commc'ns,* 450 F.3d at 1194 (no limited waiver because, *inter alia*, confidentiality agreements with government agencies did little to restrict the agencies' use of the materials; court held that confidentiality language did not preclude waiver because it "gave the [SEC and DOJ] broad discretion to use the Waiver Documents as they saw fit, and any restrictions on their use were loose in practice").

[42] *Lawrence E. Jaffe Pension Plan*, 244 F.R.D. 412 (N.D. Ill. 2006); *In re M & L Business Mach. Co.*,161 B.R. 689 (D. Colo. 1993).

[43] *See In re Martin Marietta Corp.*, 856 F.2d at 626*; see also id*. at 623 (rejecting selective waiver for attorney-client privilege and non-opinion work product, but finding that work product privilege had been maintained only as to opinion work product).

[44] *See Permian Corp.,* 665 F.2d at 1220 (holding that selective waiver doctrine did not apply to attorney-client privilege, but that work product immunity was not waived with respect to other adversaries after disclosure to government agencies based on existence of confidentiality agreement); *In re Martin Marietta Corp.*, 856 F.2d at 623 (also rejecting selective waiver for attorney-client privilege, but similarly finding that work product privilege had been maintained only as to opinion work product).

[45] *In re Columbia/HCA Healthcare Corp.* (client's waiver of attorney-client privilege by its release of otherwise privileged documents to government agencies during investigation also resulted in waiver of work product immunity) (disagreeing with result in *Permian*); *see also Westinghouse Elec. Corp.* (voluntary disclosures to agencies investigating companies waived attorney-client privilege and work product, exposing documents to discovery by party adversary, despite argument that companies reasonably expected SEC and DOJ would maintain confidentiality of information based on stipulated court order memorializing confidentiality).

[46] *In re M & L Business Mach. Co*., 161 B.R. 689 (D. Colo. 1993).

[47] *See* H.R. Rep. No. 109-356(I), at 90 (2005). On May 25, 2006, the Senate passed its version of this legislation, S. 2856, 109th Cong. (2006). The Senate Report did not add any significant insight.

[48] 28 U.S.C. § 2073(b).

[49] 28 U.S.C. § 2074(b).

[50] *See* Letter from F. James Sensenbrenner, Jr., Chairman, U.S. House of Representatives, Judiciary Committee, to Leonidas Ralph Mecham, Director, Administrative Office of the U.S. Courts (Jan. 23, 2006).

[51] In June 2006, pursuant to the request of the House Judiciary Committee Chair, the Standing Committee on Rules of Practice and Procedure approved a new proposed Rule 502(c) for notice and comment. *See* Advisory Committee on Evidence Rules, *Minutes of the Meeting of November, 16, 2006*, at 2, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV11-2006-min.pdf; Advisory Committee on Evidence Rules, *Evidence Rules Docket (Historical)* at 9 (July 16, 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008-Evidence-Suggestions-Docket-Historical.pdf; Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary and Arlen Specter, Ranking Member, U.S. Senate Committee on the Judiciary (Sept. 26, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Hill_Letter_re_EV_502.pdf; *see also* Memorandum from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (May 15, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2006.pdf (Standing Committee on Rules of Practice and Procedure approve proposed Evidence Rule 502).

[52] The brackets appear in the original version and reflect the Committee's open question on whether the rule should be applied in state proceedings. *See* note 55, *infra.*

[53] *See* Alexander F. Smith, *Should Congress Adopt Selective Waiver Legislation?*, 80 Temp. L. Rev. 595, 608-09 (Summer 2007) ("the public comment from the legal community…was almost uniformly negative" (internal quotation marks omitted)).

[54] *See* Letter from Brian G. Cartwright, General Counsel, Securities and Exchange Commission to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Feb. 16, 2007); Letter from Eileen Donovan, Acting Secretary to the Commission, Commodities Futures Trading Commission to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Feb. 15, 2007).

[55] *See* Report of Advisory Committee on Evidence Rules, Draft of Cover Letter on Congress on Selective Waiver, at 4 (announcing decision to drop selective waiver provision from proposed Rule 502), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/2007-05-Committee_Report-Evidence.pdf.

[56] *Id.* at 5.

[57] S. 30, 109th Cong. (2006).

[58] *Id.*

[59] It was reintroduced in the 110th Congress as the Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007) and the Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008), and in the 111th Congress as the Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009). On November 13, 2007, the House of Representatives passed H.R. 3013, 110th Cong. (2007), which would have precluded any federal agent or attorney of the United States from requesting disclosure by any organization of any communications protected by the attorney-client privilege or work product.

[60] *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) (holding that statute should be interpreted based on its plain language).

[61] 12 U.S.C. § 1813(z).

[62] 12 U.S.C. § 1813(r).

[63] *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) (holding that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" (quoting *Webster's Third New International Dictionary* 97 (1976)).

[64] *Id.* (holding that use of "any" to modify "term[s] of imprisonment," meant that terms of imprisonment imposed by state courts were included within the statute); *United States v. Alvarez-Sanchez,* 511 U.S. 350, 358 (1994) ("'any' law enforcement officer" means a federal, state, or local officer); *Collector v. Hubbard,* 79 U.S. 1, 10 (1870) ("any court" means state or federal court).

[65] *Compare* Fla. Stat. § 90.5055 (Florida statutory accountant-client privilege); Md. Code Ann., Cts. & Jud. Proc. § 9-110 (Maryland statutory privilege of accountants); Tex. O.C.C. § 901.457 (Texas statutory accountant-client privilege) *with Couch v. United States*, 409 U.S. 322, 335 (1973) ("no confidential accountant-client privilege exists under federal law, and no state created privilege has been recognized in federal cases"); *but cf.* 26 U.S.C. § 7525 (providing common law privilege of attorney-client privilege for communications between a taxpayer and any federally-authorized tax practitioner with respect to tax advice); *see Abdallah v. Coca-Cola Co.*, No. CIV A1:98CV3679RWS, 2000 WL 33249254, at *5 (N.D. Ga. Jan. 25, 2000) (self-critical analysis privilege "has been applied by some courts, it has been rejected by many others, and it is neither widely recognized nor firmly established in federal common law").

[66] *See* Advisory Committee on Evidence Rules, *Minutes of the Meeting of November 16, 2006*, at 12-13 (discussing whether federal law on selective waiver should apply where information previously disclosed to state regulators is sought in federal proceedings), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV11-2006-min.pdf; Advisory Committee on Evidence Rules, *Minutes*

of the Meeting of April 12-13, 2007, at 5-8, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2007-min.pdf (discussing, *inter alia*, application of putative federal selective waiver rule in state court proceedings).

[67] *Id. at* 16.

[68] *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 357 (1979) (comparing legislative support for one of the exceptions to FOIA to support "for the executive and attorney work product privileges"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (noting that among the privileges claimed by the petitioners were "the attorney-client and attorney work-product privileges generally available to all litigants"); *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005) (addressing one of the exemptions to FOIA that "encompasses traditional discovery privileges, such as the attorney-client and work-product privileges").

[69] *See In re Perrigo Co.,* 128 F.3d 430, 437 (6th Cir. 1997); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993); *Admiral Ins. Co. v. D. Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989) ("The work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things."); *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 463 n.8 (D. Md. 1998).

[70] The "rule of construction" set forth in Section 1828(x)(2) — which guards against misconstruing Section 1828(x) to in some way limit claims of privilege as to information shared with bank regulators — further underscores the conclusion that the statute should be read broadly.

[71] These may include FOIA exemption 3 that applies to statutory exemptions and therefore arguably applies in the Section 1828(x) context, as well as FOIA exemption 7 ("Information complied for law enforcement purposes") and FOIA exemption 8 ("Any matter that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, including a state financial institution supervisory agency). *See* 12 C.F.R. § 261.14 (setting for FOIA exemptions as applicable to the FRB); 12 C.F.R. § 4.12 (same, OCC).

[72] *See Schreiber*, 11 F.3d at 220 (discussing the "bank examination privilege," a qualified privilege that protects "agency opinions and recommendations from disclosure").

[73] In addition, under 12 U.S.C. § 1821(t), federal banking agencies and a few related federal agencies, such as the FCA and Federal Housing Finance Agency may share privileged information without waiving privilege. This provision does not, however, extend to state bank supervisors, federal or state prosecutors, the IRS, the SEC, the CFTC and many others.

[74] The SEC, for example, warns that materials voluntarily disclosed to it are vulnerable to further dissemination. *See e.g., Redbook* ("In the event a party voluntarily waives

the attorney-client privilege or work product protection, the staff cannot assure the party that, as a legal matter, the information provided to the staff during the course of the staff's investigation will not be subject to disclosure pursuant to subpoena, other legal process, or the routine uses set forth in the Commission's Forms 1661 and 1662.").

[75] *See, e.g.* 12 C.F.R. § 261.20 (setting forth the circumstances under which the FRB may share confidential supervisory information with other state or federal financial institution supervisory agencies).

[76] *Atkinson v. FDIC*, 79-CV-1113, 1980 U.S. Dist. LEXIS 17793, at *4 (D.D.C. Feb. 13, 1980) (interpreting FOIA Exemption 8 (5 U.S.C. § 552(b)(8)), which applies to protect federal bank examination materials from disclosure, to also protect state examination materials; the purposes of the exemption are plainly served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities).

[77] *Cf. Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978) (adopting a broad interpretation of FOIA Exemption 8 (5 U.S.C. § 552(b)(8)) — which exempts from disclosure exam, operating and condition reports of agencies that regulate financial institutions — consistent with Exemption 8's plain language and its concern that "[i]f details of the bank examinations were made freely available to the public and to banking competitors…banks would cooperate less than fully with federal authorities").

[78] *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 424 (N.D. Ill. 2002)(confidentiality agreement with the OCC); *Mut. of Omaha Bank v. Huntington*, 597 F. Supp. 2d 1213, 1215 (D. Nev. 2009) (confidentiality agreement with the FDIC).

[79] *See, e.g.,* Crystal Joy Carpenter, *Federal Prosecution of Business Organizations: the Thompson Memorandum and its Aftermath*, 59 Ala. L. Rev. 207, 219 (2007) (explaining that the "trend toward less-than-open attorney-client communication was part and parcel of the culture of waiver…executives and employees…were exceedingly apprehensive about disclosing information to corporate counsel which might later be used against them") (internal footnote omitted); Paul S. Atkins, Commissioner, SEC, Remarks before SEC on Feb. 9, 2007, 1609 PLI/Corp 179, 252 (June 2007) ("the attorney-client privilege and work product doctrine…serve 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' Unfortunately, we are experiencing now what has been dubbed the 'culture of waiver'"); Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized Counsel"*, 38 St. Mary's L.J. 1065, 1081-82 (2007) ("a coalition of diverse parties, including the NACDL, ACC, American Civil Liberties Union, and the U.S. Chamber of Commerce, has lobbied…in favor of legislation to

prohibit practices that erode the attorney-client privilege. These groups have argued that the practice of conditioning cooperation upon waiver of the attorney-client privilege has significantly eroded the principles underlying the privilege: full and frank communication with one's attorney") (internal footnote omitted); Nolan Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts*, 86 B.U. L. Rev. 691, 740 (June 2006) ("Only by striking at the 'culture of waiver' itself will attorneys and their corporate clients be able to engage in the sort of full and frank communication that the privilege contemplates.").

[80] *See, e.g.*, U.S. Dep't of Treasury, *Recent OFAC Actions — Aug. 18, 2010*, "Barclays Bank PLC Settles Allegations of Violations of Multiple Sanctions Programs" (announcing, *inter alia*, settlement between Barclays and OFAC and issuance of Cease and Desist Order by the FRB and the NYSBD, and plans for cooperation between the British Financial Services Authority, as the home country regulator of Barclays, OFAC and the U.S. bank supervisors in assuring proactive remediation), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20100818.shtml.aspx; FinCEN, "Civil Money Penalty Assessed Against Wachovia Bank" (March 17, 2010), *available at* http://www.fincen.gov/bsaviolations.html (explaining that "[t]he investigation and resulting civil money penalty by FinCEN was part of a coordinated effort with [among others]…the Office of the Comptroller of the Currency,…and Internal Revenue Service, Criminal Investigation Division"); FRB Press Release (Dec. 16, 2009), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20091216a.htm (describing coordinated action among OFAC, the FRB, and the Swiss Financial Markets Supervisory Authority with regard to Credit Suisse AG's violations of U.S. economic sanctions laws); FinCEN Joint Release, "FinCEN and OCC Assess Civil Money Penalties Against the New York Branch of Doha Bank" (Apr. 21, 2009), *available at* http://www.fincen.gov/news_room/nr/html/20090421.html; FRB Joint Press Release, "Civil money penalty against AmSouth Bank of Birmingham" (Oct. 12, 2004), *available at* http://www.federalreserve.gov/boarddocs/press/enforcement/2004/20041012/default.htm (describing coordinated action among, *inter alia*, FinCEN, the FRB, the Alabama Superintendent of Banks, and the IRS); SEC Press Release, "SEC Settles Enforcement Proceedings against J.P. Morgan Chase and Citigroup" (July 28, 2003), *available at* http://www.sec.gov/news/press/2003-87.htm ("The Commission also acknowledges the assistance of the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency, and the New York State Banking Department in connection with today's Enron-related actions.").

[81] Gary D. Anderson, "Foreign Corrupt Practices Act Compliance Issues, Leading Lawyers on Responding to Recent FCPA Enforcement Actions, Maintaining an Effective Compliance Program, and Navigating Risk in Emerging Markets, Strategies

for Effective FCPA Compliance in Today's Global Regulatory Environment," *Aspatore,* 2010 WL 2828315, at *2 (July 2010), ("the following transformative developments and events that have occurred in the last decade:… Enhanced cooperation among US regulators"). *See also* Chairman Ben S. Bernanke, Board of Governors of the Federal Reserve System, Speech, At the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition, Chicago, Illinois (May 17, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/Bernanke20070517a.htm ("To ensure consistent and effective enforcement, close cooperation and coordination among the regulators are essential. The Board remains committed to working closely with other regulators to achieve uniform and effective enforcement."); SEC Actions, *Series: SEC, Enforcement Program 2007, Projecting Trends and Key Issues (Part III)*, Thomas O. Gorman, Dorsey and Whitney LLP, *available at* http://www.secactions.com/?p=151 ("Two key issues that may have a significant impact on SEC investigations in 2007 and beyond are: 1) parallel proceedings, and 2) cooperation.").

[82] "The first concern of any international investor is that a system of predictable and enforceable rules be in place." U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 3 (Oct. 2008), *available at* http://investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf.

[83] 572 F.2d at 611.

[84] SEC comments regarding Proposed Rule of Evidence 502 (Feb. 16, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-062.pdf.

[85] *See* Internal Revenue Bulletin: 2010-41, Announcement 2010-75, *Reporting of Uncertain Tax Positions* (Oct. 12, 2010), *available at* http://www.irs.gov/irb/2010-41_IRB/ar11.html and the finalized Schedule UTP and instructions released on September 24, 2010, *available at* http://www.irs.gov/businesses/corporations/article/0,,id=221533,00.html.

[86] *See* Comments of American Bar Association, Governmental Affairs Office (May 28, 2010), reprinted in *Tax Notes Today*, 2010 TNT 105-19 (expressing the concern that disclosing privileged information pursuant to the Announcements "could expose taxpayers to total loss of the protections through broader subject-matter waiver"); a "subject-matter waiver" refers to the rule that a waiver of a particular privileged communication generally results in a waiver of all communications related to the same subject matter ("subject matter waiver"), *see In re EchoStar Commc'ns Corp.,* 448 F.3d 1294, 1299 (Fed. Cir. 2006) ("The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter." (quoting *Fort James Corp. v. Solo Cup Co.,* 412 F.3d 1340, 1349 (Fed. Cir. 2005)); *United States v. Cote*,

456 F.2d 142, 145 (8th Cir. 1972) ("Here, Cote, the accountant, testified that the information on his workpapers was later transcribed onto the amended returns which were filed by the taxpayers with the government. This disclosure effectively waived the privilege not only to the transmitted data but also as to the details underlying that information.").

[87] *See* Internal Revenue Bulletin: 2010-41, Announcement 2010-76, *Requests for Documents Provided to Independent Auditors, Policy of Restraint and Uncertain Tax Positions* (Oct. 12, 2010), *available at* http://www.irs.gov/irb/2010-41_IRB/ar12.html; the policy will not apply if the taxpayer has otherwise waived any applicable privileges, *id.*; the policy promulgated in Announcement 2010-76 is a modification to the IRS's pre-existing "policy of restraint," under which the IRS would refrain from requesting tax accrual workpapers during an examination, except if the taxpayer claims the benefits of a listed transaction, or if there is otherwise the presence of "unusual circumstances." Ann 2002-63, 2002-27 IRB 72 (June 17, 2001); Internal Revenue Manual 4.10.20.3.2.3 (January 15, 2005); Internal Revenue Manual 4.10.20.3 (July 12, 2004).

[88] In light of the widespread uncertainty created regarding the application of the newly announced policy of restraint post-examination, the IRS has recently issued a set of Frequently Asked Questions ("FAQs") supplementing previous guidance issued on Schedule UTP. *See* Frequently Asked Questions on Schedule UTP (March 23, 2011), *available at* http://www.irs.gov/businesses/article/0,,id=237538,00.html. With regard to the application of the policy of restraint post-examination, the FAQs clarify that the changes to the policy of restraint apply to any request for documents during IRS Appeals' consideration of proposed audit adjustments. With regard to any litigation, the FAQs state that during Tax Court litigation, IRS Counsel will "in general" not issue discovery requests for documents covered under the policy. This statement is far from clear and also loosely qualified; in addition, neither the FAQs nor the implementing directive in the Internal Revenue Manual would be binding precedent in a court.

[89] *See, e.g.,* American Bar Association Presidential Task Force on the Attorney-Client Privilege, April. 21, 2005, Hearing in New York City, Testimony of Elizabeth J. Cabraser, Lieff, Cabraser, Heimann & Bernstein, LLP, at 5-6, *available at* http://www.docstoc.com/docs/51058783/Hearing-Schedule-and-Individual-Testimony-Testimony [723].

[90] Letter from Gregory P. Joseph, Gregory P. Joseph Law Offices LLC, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 10 (Oct. 13, 2006) ("Nor is it unfair to require civil plaintiffs to conduct their own discovery, without the benefit of materials supplied to facilitate governmental investigations or effectively compelled by the

government at risk of loss of liberty, in accordance with the Federal Rules of Civil Procedure.").

[91] *See generally McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (prosecutorial discretion); *Solem v. Helm*, 463 U.S. 277, 284-88 (1983) (proportionality).

[92] *See* 12 CFR § 261.2(c) (defining confidential supervisory materials, including reports of examinations and related materials provided to the FRB, that may not be shared with the public).

[93] Fed. R. Crim. P. 6(e).

[94] Ronald F. Wright, *Congressional Use of Immunity Grants after Iran-Contra*, 80 Minn. L. Rev. 407 (Dec. 1995) (explaining that third parties have no realistic way of exposing themselves to compelled grand jury testimony).

[95] *See, e.g.*, *Chevron Corp. v. Pennzoil Co.*, CA-9, 974 F2d 1156, 1162 (1992) (holding that Pennzoil waived the privilege by using the advice of counsel both as a "sword" to defeat Chevron's tax arguments and as a "shield" to protect the advice from disclosure. The court explained that by claiming that its tax position was reasonable because it was based on the advice of counsel, Pennzoil put the advice at issue in the case, and that privilege over the advice must be deemed waived because Chevron needed access to that very advice in order to demonstrate that Pennzoil's SEC filing was misleading.).

[96] *See* note 13, *supra.*

[97] *United States v. MIT*, 129 F.3d 681, 682 (1st Cir. 1997).

[98] *See* note 13, *supra.*