Bottom-Up: An Alternative Approach for Investigating Corporate Malfeasance

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ABSTRACT

Bottom-Up: An Alternative Approach for Investigating Corporate Malfeasance

At least since the Enron scandal, the government has focused intensive efforts on developing a strategy to investigate and prosecute corporate malfeasance. The prevailing method has been a “top-down” approach: government agents provide companies with incentives to conduct internal investigations, coerce employee cooperation, and disclose privileged information. Although many have expressed concern about violations of constitutional rights and erasures of privilege, the current system faces another critical problem: the top-down strategy will become less effective at unraveling corporate fraud as employees learn that it is not in their interest to cooperate. Further, the approach aims deterrence at the wrong people – it does not focus on high corporate officials who often orchestrate and tolerate the wrongdoing, but instead focuses on employees who participate in the unlawful acts.

A “bottom-up” approach, long used by government agencies in rooting out criminal behavior in other areas, particularly drug enforcement, would encourage employee cooperation and focus enforcement on the appropriate actors. There is every reason to believe that a bottom-up strategy would be an effective supplement to the top-down approach that currently predominates in the corporate world. Indeed, the first and to date only internal investigation completed using an amnesty program which protected cooperating employees from adverse employment actions has proven successful in encouraging employee cooperation and unraveling the web of corporate fraud.
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Consider the case of Richard Smith, a former KPMG, LLP (“KPMG”) partner and Vice Chairman in charge of the firm’s tax practice. In 2004, the government launched one of the largest criminal tax fraud investigations in history against KPMG and several of its partners and employees, including Mr. Smith, for their alleged role in abusive tax shelters. Mr. Smith initially refused to make a proffer to the Department of Justice (“DOJ”) and DOJ’s agent informed KPMG’s outside counsel of the refusal. The agent suggested that KPMG urge Mr. Smith to cooperate by threatening to terminate his employment and refusing to pay his legal fees. To avoid indictment, which would likely have destroyed the company, KPMG agreed, and also declined to assert any claim of privilege to keep information from the government. KPMG’s chairman then informed Mr. Smith that “there [were] concerns about whether [he was] cooperating with the investigation” and further explained that the chairman did not want
to be forced to “take action against [him].” Mr. Smith reasonably interpreted this to mean that KPMG would terminate his employment if he did not proffer to the government.\(^4\) Two weeks later, outside counsel for KPMG forwarded to Mr. Smith copies of letters sent by the government and included the following warning in the cover letter: “KPMG will view continued non-cooperation as a basis for disciplinary action including expulsion from the Firm.”\(^6\)

Soon after these oral and written threats, Mr. Smith, whose family was entirely dependent upon him for support, acted against the advice of his counsel and not only met with prosecutors, but also entered into the DOJ’s standard proffer agreement, in order to avoid termination.\(^7\) KPMG repeatedly reminded prosecutors, through letters, at meetings, and in the “White Paper” it submitted to avoid indictment, of its substantial cooperation, including not asserting privilege over protected information, and exerting significant pressure on employees to cooperate. Such efforts “led previously non-cooperating individuals to meet with [prosecutors].”\(^8\) Ultimately, the DOJ entered into an agreement with KPMG in exchange for its full cooperation,\(^9\) and indicted Mr. Smith, and numerous other partners and employees for tax fraud.

* * * * *

The government, through the use of coercive tactics, obtained enough information to unravel the fraud at KPMG, received proffers from nearly every employee involved in the fraud, unraveled the fraud at KPMG, received proffers from nearly every employee involved in the fraud,

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\(^4\) United States v. Stein, 440 F.Supp.2d 315, 322 (S.D.N.Y. 2006) (“Stein II”) (holding that, in an effort to be viewed as “cooperative,” KPMG’s threats to terminate employment or cease payment of legal fees of its employees, impermissibly compelled the employees to make self-incriminating statements to the government in violation of the employees’ Fifth and Sixth Amendment rights). For a description of Stein I, see Section II(B)(1-2), infra.

\(^5\) See id.

\(^6\) Id.

\(^7\) See id.

\(^8\) Id. at 324.

\(^9\) See United States v. Stein, 435 F.Supp.2d at 349, (S.D.N.Y. 2006) (“Stein I”). On August 29, 2005 KPMG and the government entered into a Deferred Prosecution Agreement (“DPA”). Under the terms of the DPA, the government agreed to seek dismissal of the information if KPMG complied with its obligations, which included cooperating extensively with the government. Id. at 349. KPMG’s cooperation included, (a) completely and truthfully disclosing all information in its possession; (e) not asserting in relation to the DOJ any claim of privilege; and (f) using its reasonable best efforts to make available for interviews its present and former partners and employees. See id. at 349-50. KPMG agreed to accept these terms to avoid criminal conviction.” Id. at 349.
punished wrongdoers and potentially deterred future misconduct. However, in the only case to reach the issue, the United States District Court for the Southern District of New York held that the government’s coercive tactics to compel KPMG to exert economic pressure on its employees infringed on Mr. Smith’s and other employees’ Fifth Amendment rights to fairness in the criminal process and against self-incrimination. That court also held that the government’s exertion of pressure on KPMG to cease paying legal fees for employees suspected of wrongdoing, violated their Sixth Amendment right to counsel. The Second Circuit affirmed.

The KPMG situation is far from unique. At least since the devastating Enron, WorldCom and Adelphia corporate scandals, the DOJ and the Securities and Exchange Commission (the “SEC”) have focused intensive efforts on using a company’s own resources to ferret out corporate wrongdoing. The prevailing method has been a “top-down” approach: government agents seeking to obtain information about an alleged wrongdoing provide corporations with incentives to conduct comprehensive internal investigations and compel employee disclosure.

Corporations routinely turn over the results of such investigations to the government, thereby waiving the attorney-client privilege and work-product protection. In exchange for cooperation, the government has withheld indictments, reduced the types of charges sought, or reduced the size of monetary penalties. These potential benefits are significant as the issuance

10 See Stein II, 440 F. Supp. 2d at 337. For a detailed description of Stein II, see Section II(B)(3), infra.; see also, Stein I, 435 F.Supp.2d at 365, 382. For a detailed description of Stein I, see Section II(B)(1-2), infra.


12 United States v. Stein, 541 F.3d 130 (2d Cir. 2008) (affirming the district court’s ruling on the Sixth Amendment issue and dismissing as moot the appeal of the Fifth Amendment issue.).

13 American College of Trial Lawyers, Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations, 46 AM. CRIM. L. REV. 73, 73 (2009). Between 2001 and 2009, over 2,500 public companies have retained counsel to conduct internal investigations into suspected corporate malfeasance. See id.

14 The government routinely enters into agreements with cooperating corporations. See e.g., Peter Spivack & Sujit Raman, Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements, 45 AM. CRIM. L. REV. 159, 159 (2008) (“[Settlement agreements] are proliferating. In the four years between 2002 and 2005, prosecutors and major corporations entered into twice as many of these agreements...as in the previous ten years combined. ... According to one estimate, thirteen [agreements] were executed in 2006, and another thirty-seven... were publicly announced in 2007.”); Leonard Orland, The Transformation of Corporate Criminal Law, 1 BROOK J.
of an indictment, especially of a financial services firm, is the corporate equivalent of capital punishment – it often spells the collapse of the business regardless of whether the firm is ultimately convicted or acquitted. Consequently, most practitioners advise their corporate clients to capitulate to the demands of the government. This system effectively turns corporations into investigative arms of the government and forces corporate counsel to hold “the status of quasi-deputy.”

The government’s case for continuing such practices, even in modified form, is that deputizing corporations to engage in arm-twisting is necessary to both discover and unravel complex corporate crimes as well as to deter future wrongful behavior by corporate actors. However, Congress, the Judiciary, and various interest groups have launched a campaign to curtail the government’s tactics. The opposition largely rests on the ground that the government is effectively and unconstitutionally coercing cooperation and eroding the attorney–

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15 Arthur Andersen & Co., one of the largest accounting firms, was destroyed almost immediately after it was indicted. See generally KURT EICHENWALD, CONSPIRACY OF FOOLS (2005) (documenting accounting scandals of the early 21st century). The eventual reversal if its conviction did not undo the damage. See Arthur Andersen LLP v. United States, 544 U.S. 696, 706-08 (2005) (reversing conviction because jury instructions did not require proof of any wrongdoing of employees nor of a nexus between destruction of documents and any proceeding).

16 See JOHN K. VILLA, 2 CORPORATE COUNSEL GUIDELINES § 5:38 (2008); but see American College of Trial Lawyers, supra note 12; But see Bruce E. Yannett, Conducting Internal Investigations in the U.S. and Abroad, in 40TH ANNUAL INSTITUTE ON SECURITIES REGULATION, 723, 743 (PLI Corp. L. and Practice Course Handbook Series No. 14864, 2008) (“The dilemma . . . is that disclosing the results of an internal investigation may demonstrate . . . cooperation, but also provide the government with the proof needed in subsequent . . . action.”).


18 Some scholars have also defended the current system asserting that the government should have every tool available to them because of the inherent difficulties in prosecuting white-collar crimes. See e.g., Michael Elston, Cooperation with the Government Is Good For Companies, Investors, and the Economy, 44 AM. CRIM. L. REV. 1435, 1437-39 (2007) (analyzing the obstacles to investigating corporate crime); Liesa L. Richter, The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor’s New Clothes, 43 WAKE FOREST L. REV. 979 (2008) (warning that the ACPP Act is the work of the corporate lobby and will result in a pre-Enron “circle-the-wagons” approach).

19 Among the organizations opposing the government’s tactics are the American Bar Association (the “ABA”), the Association of Corporate Counsel (the “ACC”), and the United States Chamber of Commerce (the “Chamber of Commerce”). For a description of the opposition, see Sections II(A-D).
client privilege and work-product protection.\textsuperscript{20} Without the protections the privilege affords, corporations would not be able to investigate potential misconduct and employees would not be able to freely disclose information to, and seek legal advice from, corporate counsel without fear that the fruits of their efforts would later be used against them. Consequently, Senator Arlen Specter introduced a bill, referred to as the “Attorney-Client Privilege Protection Act” (the “ACPP Act”) to preserve the legal rights of corporations under investigation and their individual employees.\textsuperscript{21} The proposed legislation would, among other things, limit the government’s ability to request protected information or penalize a company for not exerting enough pressure on employees to cooperate. In response to broad opposition to its policies, the DOJ has repeatedly revised its guidelines.\textsuperscript{22}

Regardless of whether the culture of corporate cooperation changes, the hard-ball top-down approach that provides incentives for corporations to secure cooperation in internal investigations will, over time, become less successful at accomplishing its objectives. As corporate actors become increasingly aware of government practices, they will learn that although cooperation may be in the company’s best interest, it may not be in their own. Consequently, they may refuse to cooperate, depriving the government of potentially valuable information. And undoubtedly, if Congress, the courts, or the revised guidelines are successful in curtailing current tactics, corporate incentives to waive privilege and coerce employee cooperation will be eliminated and it may torpedo investigations.

That does not, however, suggest that the government will become powerless to efficiently root out corporate wrongdoing. Instead, the government will have to supplement the existing approach with the “bottom-up” approach long used to root out criminal behavior in other areas –

\textsuperscript{20} For a description of the problems with coercing waiver of privilege, see discussion \textit{infra} at Sections I(B)(i-iii).
\textsuperscript{21} For a description of the proposed legislation, see notes 62, 70, 81, 117-118 and accompanying text.
\textsuperscript{22} For a description of the guidelines, see \textit{supra} Sections I(B)(i-iv).
particularly drug enforcement and organized crime. That is, the government and corporations will have to provide incentives not only to “kingpins” but also to “underlings.” There is every reason to believe that such a strategy can be effective in the corporate world. Indeed, it was successful in encouraging employee cooperation in the first and to date only internal investigation ever completed using this approach.\textsuperscript{23}

Numerous scholars and practitioners have addressed fundamental reasons for restricting the government’s powers and have suggested reforms including: adopting the ACPP Act;\textsuperscript{24} narrowing the standards for corporate criminal liability;\textsuperscript{25} amending the Model Rules of Professional Conduct\textsuperscript{26} and Federal Rules of Evidence;\textsuperscript{27} conditioning legal fee advancement on a judicial finding of culpability;\textsuperscript{28} and assuring a safe harbor to any corporation that meets a bright line test for cooperation.\textsuperscript{29} Scholarship has not, however, focused on developing affirmative incentives for employees to cooperate with investigations.

\textsuperscript{23} As part of the largest internal investigation ever conducted, Siemens AG (“Siemens”) recently adopted an amnesty program, under which cooperating employees would be immune from negative employment action. For an in depth discussion of the Siemens investigation, see infra notes 238-249 and accompanying text.


\textsuperscript{27} The proposed amendment to Rule 502 of the Federal Rules of Evidence would have permitted corporations to selectively waive privilege in a government investigation without waiving as to all subsequent private actions. However, the selective waiver provision was ultimately dropped. Letter from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, U.S. Judicial Conference 4 (May 15, 2007) (on file with author), available at http://www.uscourts.gov/rules/Reports/EV05-2007.pdf.


This article explores the need for the government to realign the incentives of employees with those of the corporation and the mechanisms available to accomplish that realignment. The first section will examine the strategies currently employed by the DOJ and SEC to investigate, prosecute, and regulate corporate wrongdoing. The second section will explore constitutional and doctrinal objections to the current, coercive regulatory environment. The third section will analyze the effectiveness of the current top-down approach and explain why this strategy will be less effective at unraveling the web of corporate fraud in the future. The last section will outline a bottom-up approach more conducive to achieving cooperation while maintaining employees’ legal rights. Such a system will better serve the interests of the government, the corporations, the employees, the shareholders, and the general public.

I. Overview of Current Regulatory Environment

In the wake of the Enron scandal, the DOJ, SEC, self-regulatory organizations such as the Financial Industry Regulatory Authority (“FINRA”) and the Commodity Futures Trading Commission (“CFTC”), and state prosecutors have increasingly pressured companies to cooperate with investigations. The DOJ and SEC have adopted and published specific policies identifying criteria that they would consider in determining, in the first instance, whether

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30 The Financial Industry Regulatory Authority (“FINRA”) has not issued specific cooperation guidance. However, FINRA’s “Sanction Guidelines” at factor 12 references, “substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct” as a principle consideration in determining the mitigation of sanctions. FINANCIAL INDUSTRY REGULATORY AUTHORITY, SANCTION GUIDELINES 7 (2007), available at http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf.

to award credit for cooperation and, second, how much credit to award for the provision of various forms of corporate assistance. The stated policies to which government agencies currently adhere do not require corporations to waive privilege or coerce employee cooperation in violation of their constitutional rights in order to garner cooperation credit. However unobjectionable on their face, in practice the policies lead to waivers and coercion.

A. The SEC’s Policies and Practices for Investigating Corporate Misconduct

The SEC was the first administrative agency to adopt a formal policy of rewarding corporate cooperation.\textsuperscript{32} In October 2001, the SEC issued a release referred to as the “Seaboard Report” which identified factors it would consider in assessing cooperation: including whether the company (i) voluntarily disclosed information that the SEC did not directly request and otherwise might not have been uncovered; and (ii) asked employees to cooperate with the SEC and make reasonable efforts to secure cooperation.\textsuperscript{33} The Seaboard Report explained that the SEC would not view a company’s waiver of privilege as “an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information.”\textsuperscript{34}

Recently, and likely in response to the mounting objections against the government’s

\textsuperscript{32} See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Release No. 1,470 (October 23, 2001) [hereinafter “Seaboard Report”], available at http://www.sec.gov/litigation/investreport/34-44969.htm. The SEC announced this policy when it decided not to prosecute Seaboard Corporation despite evidence that the former controller of one of its subsidiaries had caused the books and records to be inaccurate and its financial reports misstated. In determining not to take action against the parent company, the SEC considered that it cooperated fully by turning over its investigation results, rather than invoking privilege. Also, the company promptly took remedial steps – terminating the controller and other employees involved in the wrongdoing, restating its financials, and refining its auditing processes.

\textsuperscript{33} See id. (These considerations are embodied in the numbered factors 8 and 11 of the Seaboard Report.). The other factors the SEC would consider, included whether the company (i) cooperated with the SEC and other regulatory and law enforcement agencies; (ii) promptly make available to the SEC staff the results of any review and provided sufficient documentation reflecting its response to the situation; (iii) identified possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law; and (iv) produced a thorough and probing written report detailing the findings of its review. Id.

\textsuperscript{34} Id. at n.3.
practices, the SEC made its Enforcement Manual publicly available. However, the Enforcement Manual states that the Seaboard Report remains the SEC’s policy with respect to cooperation, and re-iterates many of its factors. After repeating the language from the Seaboard Report relating to waiver, the Enforcement Manual explains that waiver 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.” Rather, the appropriate inquiry for considering cooperation is whether, “notwithstanding a legitimate claim of privilege, the party has disclosed all relevant underlying facts within its knowledge.”

Although the cooperation factors articulated by the SEC are silent regarding employee coercion, corporations have, in practice, received credit for coercing employee cooperation. As an example, in a release describing its settlement with American Int’l Group, Inc. (“AIG”), the SEC explained that the reduced penalty took into account the company’s “complete cooperation” including “sending a clear message to its employees that they should cooperate in the staff’s investigation by terminating those . . . who chose not to cooperate.”

35 A few months before the publication of the Enforcement Manual, then-SEC Commissioner Paul Atkins explained that the SEC was re-examining its policies regarding “cooperation credit and penalties” partly in light of the legislation proposed by Specter. See Paul S. Atkins, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks at the Federalist Society Lawyers’ Chapter of Dallas, Texas (Jan. 18, 2008), available at http://www.sec.gov/news/speech/2008/spch011808psa.htm.


37 The cooperation factors listed in the Enforcement Manual include: (i) timely disclosing facts relevant to the investigation; (ii) voluntary producing relevant information not requested; (iii) requesting that corporate employees cooperate with the staff and make all reasonable efforts to secure such cooperation; (iv) making witnesses available for interviews when it might otherwise be difficult or impossible for the SEC to interview the witnesses, and (v) assisting in the interpretation of complex business records. See SEC Enforcement Manual, supra note 35, at § 4.3.

38 The Enforcement Manual states that “the SEC does not view a party’s waiver of privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the staff.” SEC Enforcement Manual, supra note 35, at § 4.3.

39 Id.

40 Id.

41 SEC v. American Int’l Group, Inc. (“AIG Release”), Litig. Release No. 19560, 2006 SEC LEXIS 277, at *1, 5-6 (Feb. 9, 2006) (settling with the SEC with a $700 million disgorgement and a $100 million penalty). Other factors that the SEC took into account in assessing AIG’s cooperation are that AIG: (i) promptly provided information
describing its settlement with Merrill Lynch & Co, the SEC explained that the mitigated penalty took into account “certain affirmative conduct” including the company’s decision to terminate two executives after they asserted their constitutional right and “refused to testify.”

Further, despite the Seaboard Report’s explanation that the SEC would not consider waiver as an “end in itself, but only as a means (where necessary) to provide relevant . . . information,” the SEC has taken a company’s decision not to assert privilege into account when assessing cooperation. In a release describing its settlement with food retailer Royal Ahold, the SEC explained that it was settling without seeking penalty because of the company’s “extensive cooperation” including “waiv[ing] the attorney-client privilege and work-product protection with respect to its internal investigations.”

As objections to the government’s coercive tactics have intensified, the SEC has provided less detailed descriptions of cooperation in their releases. Recent releases generally contain boilerplate language regarding cooperation, which may be a sign that the culture of cooperation

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42 SEC v. Merrill Lynch & Co., Litig. Release No. 18038, 2003 SEC LEXIS 620, at *5-6 (Mar. 17, 2003) (settling with the SEC with a $37.5 million in disgorgement, $5 million in prejudgment interest, and a civil penalty of $37.5 million). Another factor that the SEC considered in assessing Merrill’s cooperation is that the company “brought the energy trade transaction to the staff’s attention at a time when it believed the staff was unaware of its existence.”

43 Seaboard Report, supra note 31, at n.3.

44 SEC v. Koninklijke Ahold N.V. (“Ahold Release”), Litig. Release No. 18929, 2004 SEC LEXIS 2330, at *8 (Oct. 13, 2004) (settling without seeking a penalty from Ahold “because of the company’s extensive cooperation with the Commission’s investigation”). Other factors the SEC considered in assessing cooperation are that Ahold self-reported the misconduct and conducted an extensive internal investigation, promptly provided internal investigative reports, waived privilege with respect to its internal investigation, made its current personnel available for interviews, and promptly took remedial actions including, revising its internal controls and terminating employees responsible for the wrongdoing.” Id. at *8-9.

and waiver has not changed; it has just gone underground. The uncertainty surrounding the
SEC's practices leaves companies and their counsel at a loss when determining what is required
to gain cooperation credit. In the face of such uncertainty, companies routinely err on the side
of coercing cooperation from employees and disclosing privileged information because any
perceived failure to cooperate may produce draconian consequences.

B. The DOJ’s Policies and Practices for Investigating Corporate Misconduct

The DOJ, like the SEC, has recently published facially unobjectionable standards for
determining whether to charge a corporation and award credit for cooperation. In practice,
however, these standards arguably perpetuate the culture of coercion and waiver developed
under former guidelines. Unlike any version of SEC guidelines, previous DOJ guidelines have
been criticized for encouraging corporations to waive privilege and coerce employee cooperation
in violation of their Fifth and Sixth Amendment rights. During the past decade, the DOJ has
altered its policies regarding corporate cooperation five times. Under each version of the

46 Several SEC releases – both press releases and litigation releases – have recently included almost identical
language indicating only that the Commission “takes [or took] into account the [company’s] cooperation” during the
investigation. See, e.g., supra; SEC v. Monster Worldwide, Inc., Litig. Release No. 21042, Accounting and
(“The Commission took into account the cooperation that Monster provided Commission staff during the course of
Enforcement Release No. 2843 (July 9, 2008), available at
http://www.sec.gov/litigation/litreleases/2008/lr20638.htm ("The settlement with Sycamore takes into account the
company's cooperation during the Commission's investigation."). Further, there are litigation releases which do not
address cooperation at all even when the corresponding press releases do, making knowledge of a company’s
cooperation dependent upon which document is discovered. Compare SEC v. Take-Two Interactive Software, Inc.,
47 Then SEC-Commissioner Paul S. Atkins acknowledged, “the SEC must provide more predictability [on]
corporate penalties and settlements. Companies should have a clear understanding of what it takes to receive
cooperation credit, and that credit should be fairly and evenly administered.” Paul S. Atkins, Comm’r, U.S. Sec. &
Exch. Comm’n, Remarks to the 'SEC Speaks in 2008' Program of the Practising Law Institute (Feb. 8, 2008),
48 See, e.g., NICOLE A. BAKER ET AL., THE SECURITIES ENFORCEMENT MANUAL 67 (Kirkpatrick & Lockhart Preston
Gates Ellis LLP eds., 2nd ed. 2007) (suggesting that corporations in almost all cases should “maintain a posture of
cooperation with the [SEC] staff in the day-to-day conduct of an investigation”).
guidelines, a key component for making prosecutorial decisions, including decisions to enter into deferred prosecution agreements ("DPAs") or non-prosecution agreements (NPA’s), has always revolved around the level of cooperation by corporations under investigation. However, in response to intense objections, each version of the guidelines modified the requirements a corporation needed to meet to be entitled to cooperation credit.

1. The Holder Memo

Breaking with the tradition of keeping charging criteria confidential, then-Deputy Attorney General Eric Holder issued the initial iteration of the DOJ’s policies regarding a corporation’s willingness to cooperate, Bringing Criminal Charges Against Corporation (the “Holder Memo”) on June 16, 1999. Although not “outcome-determinative,” the Holder Memo identified two factors prosecutors should weigh in assessing cooperation. First, prosecutors considered the completeness of the corporation’s disclosure, including waiver of the

49 Deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") function almost exactly as they sound. See, e.g., Spivack & Raman, supra note 13, at 159. A DPA defers prosecution so long as the corporation meets its requirements and typically entails the concurrent filing of an information or indictment in federal court along with a motion to hold the charges in abeyance during the deferred period. An NPA refrains prosecution altogether and typically does not entail the filing of any criminal charges. See id. The use of these agreements became more routine in the wake of the Anderson collapse as the DOJ sought alternative means for punishing a corporation without the fallout and potential destruction of the corporation. See Kyle C. Barry & David Debold, Consistency in Non-prosecution and Deferred Prosecution Agreements: A Lesson from the World of Federal Sentencing, 20 FED. SENT’G REP. 331, 331 (2008) (“Since the harsh consequences of the Arthur Andersen conviction, federal prosecutors have stepped up pursuit of a new strategy of [DPAs and NPAs] aimed at punishing and deterring corporations without causing them to collapse.”). Some commentators believe that the use of DPAs and NPAs has become the “standard” means for concluding corporate criminal investigations. See id. “In short, DPAs and NPAs are tools that have transformed the way federal prosecutors and defense counsel interact. The marked increase in their use is arguably the most profound development in corporate white collar criminal practice over the past five years.” Id.; see also Orland, supra note 13, at 45 (“The Justice Department now routinely disposes of charges of corporate misconduct by entering into [DPAs or NPAs] with putative corporate defendants.”).


51 Id. at intro.

52 Id. at §§ II(A)(4), VI(A-B).
attorney-client and work-product protections. The Holder Memo specifically provides that prosecutors could “request a waiver in appropriate circumstances.” Second, prosecutors considered whether the corporation appeared to be protecting its culpable employees by advancing their attorneys’ fees, retaining them without sanction, or providing them with information about the government’s investigation pursuant to a joint defense agreement.

2. The Thompson and McCallum Memos

In response to the corporate scandals following the collapse of Enron and Anderson, on January 20, 2003, then-Deputy Attorney General Larry Thompson, issued a memorandum Principles of Federal Prosecution of Business Organizations (the “Thompson Memo”), which superseded the Holder Memo. The main focus of the revisions was “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.” With respect to assessing cooperation, the Thompson Memo left intact the two factors of the Holder Memo—regarding the completeness of disclosure including waiver; and protection of culpable employees. The memo added that prosecutors should consider whether the corporation engages in conduct “that impedes the investigation (whether or not rising to the level of criminal obstruction).”

Congress, along with numerous interest groups, criticized the Thompson Memo for providing no guidance on when and how privilege waiver would be required and no standards by

53 Id. at § VI(B). “Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.” Id.
54 Id. (“The Department does not . . . consider waiver of a corporation’s attorney-client and work-product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation’s cooperation.”).
55 Id.
57 Id. at intro.
58 See supra notes 49-54 and accompanying text.
59 Id. at § VI(B).
which a corporation could determine when an employee appeared culpable enough to warrant withholding legal fees. In response to this criticism, then-Acting Deputy Attorney General Robert McCallum, issued what was more of an explanatory than substantive memorandum, *Waiver of Corporate Attorney-Client and Work-product Protection* (the “McCallum Memo”), on October 21, 2005. Rather than altering any of the factors contained in the Thompson Memo, it simply directed how each United States Attorney’s Office would implement the Thompson Memo’s waiver factor by establishing procedures that prosecutors had to follow before asking a corporation to waive its privilege.

3. *The McNulty Memo*

Criticism of the Thompson Memo mounted with the introduction of Senator Specter’s proposed legislation, the ACPP Act designed to prevent the erosion of the attorney-client privilege and work-product protection and the decision of the United States District Court for

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60 See, e.g., Rebecca C.E. McFadyen, *The Thompson Memo: Its Predecessors, Its Successor, and Its Effect on Corporate Attorney-Client Privilege*, 8 J. BUS. & SEC. L. 23, 29 (2007) (“[T]he Thompson Memo recognized the impropriety of a waiver request for communications regarding a corporation’s ongoing defence in a criminal investigation, but the Memo’s general lack of guidance created a ‘wide area in the middle where the practices of federal prosecutors vary considerably.’” (quoting *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary, 109th Cong. 145 (2006)* (statement of Andrew Weissmann, Partner, Jenner & Block)); *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary, 109th Cong. 147 (2006)* (statement of Andrew Weissmann, Partner, Jenner & Block) (pointing out a lack of uniform standards in the application of the Thompson Memo and going on to suggest that the Thompson memo “should be revised so that it no longer encourages an environment where employees risk losing their jobs or legal defense.”)).


62 Id.

the Southern District of New York in *United States v. Stein*. In *Stein*, Judge Kaplan held that the fee provision contained in the Thompson Memo, combined with the government agents’ implementation of it, violated the rights against self-incrimination, to fairness in criminal proceedings, and to counsel of certain KPMG employees, including Mr. Smith. In response to these objections, then-Deputy Attorney General Paul J. McNulty, issued a memorandum *Principles of Federal Prosecution of Business Organizations* (the “McNulty Memo”) that set forth revised guidelines with respect to charging corporations.

The most significant policy shift from the Thompson Memo was an explicit statement that waiver was not a pre-requisite to a finding that a company had cooperated. While the guidelines still permitted prosecutors to request waiver, it limited their ability to do so by implementing a two-tier system for categorizing information and adopting different procedures for seeking access to each. Category I information was factual in nature (e.g., key documents, witness statements, factual interview memoranda). Before seeking Category I materials, prosecutors were required to obtain written authorization from a United States Attorney. Category II information was non-factual work-product (e.g., attorney notes, reports of counsel’s conclusions, legal determinations) which should rarely be sought. Before seeking Category II materials, prosecutors were required establish a “legitimate need” for the information and obtain written authorization from the Deputy Attorney General.

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64 *Stein I*, 435 F.Supp. 2d 330.
65 *Id.*. See Sections II(B)(1-3), *infra*, and accompanying notes for a description of the Stein opinion.
67 *Id.* at § VII(B)(2). The memo went on to explain that a “legitimate need” to justify a prosecutor’s request for waiver depends upon: (1) the likelihood and degree to which the privileged information will benefit the government’s investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver. *Id.*
This bifurcated system for obtaining information remained fraught with ambiguity—many questions lingered regarding the nature and degree of pressure prosecutors may lawfully place on cooperating companies.\(^{68}\) The Memo appears to have been an effort to silence critics rather than an effort to effect change.\(^{69}\)

4. The Filip Memo

After much criticism of the McNulty Memo,\(^{70}\) Senator Specter re-introduced the ACPP Act.\(^{71}\) A few weeks later, on the same day the Second Circuit affirmed the dismissal of the

\(^{68}\) See Eric W. Sitarchuk & Gina M. Smith, New Department of Justice Guidelines on Corporate Prosecutions: Does The Song Remain the Same? 16 no. 6 BUS. L. TODAY 49 (2007), available at http://www.abanet.org/buslaw/blt/2007-07-08/smith.shtml. Others asserted that waiver was simply driven underground by the approach of the McNulty Memo. See The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 98 (2007) (statement of Karen J. Mathis, President, American Bar Association, Chicago, Illinois) (“And what we think is happening, but there is no hard evidence, because it is not being kept by DOJ, is that what is happening now is it has gone underground, and there now are implicit requirements that they be waived.”); id. at 100 (testimony of Andrew Weissmann, Partner, Jenner and Block, New York, NY) (“[O]ur feedback is from our folks out in the field, that the practice continues underground.”); Pamela A. MacLean, McNulty Memo on Attorney-Client Privilege Blasted for Lack of Change, NAT’L L.J., January 26, 2007, available at http://www.law.com/jsf/ihc/PubArticleIHC.jsp?id=1169719351771 (discussing perception that McNulty Memo would only result in a “don’t ask, don’t tell” policy driving waiver underground).

\(^{69}\) The introduction to the McNulty Memo emphasized the confidence that the Deputy Attorney General had in the system. As McNulty stated, “I remain convinced that the fundamental principles that have guided our enforcement practices are sound.” McNulty Memo, supra note 65, intro, at 1. The Memo explained that the primary reason for the revisions was the corporate legal community’s “concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel” and that the main benefit will be the increase of “public confidence in the Department.” See id., intro, at 1-2.

\(^{70}\) See e.g., John K. Villa, The McNulty Memorandum: A Reversal in Practice or in Name Only?, 25 no. 3 ACC DOCKET 88, 88 (April 2007), available at http://www.wc.com/assets/attachments/Ethics_Privilege_WEB_April07.pdf (questioning whether the McNulty Memo will prevent further erosion of the privilege and encroachment upon the right of corporate employees).

\(^{71}\) This time the bill was entitled, the Attorney-Client Privilege Protection Act of 2008 (“ACPP Act of 2008”), S.3217, 110th Cong. (2008). Similar to the earlier bill, this version would prohibit the government from requesting waiver of the attorney-client privilege or work-product doctrine, and weighing into its charging decision whether a company advanced legal fees. See id. The 2008 and 2009 incarnation of the bill went further than earlier versions by applying to both criminal and civil proceedings and including both charging and enforcement decisions. Id. Commentators have debated whether the bill would be effective despite its lack of an enforcement mechanism. Compare Ball & Bolivia, supra note 16, at 257 (“The new bill...is armed to the teeth with provisions protecting corporations’ core privileges and corporate constituents' right to counsel.”) with The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 34 (2007) (testimony of William Sullivan, Partner, Winston & Strawn, Former Assistant United States Attorney, District of Columbia) (“While the idea
indictments against the KPMG Defendants,\textsuperscript{72} the DOJ once again revised its guidelines. The new guidelines were, for the first time, codified in the United States Attorney’s manual on August 28, 2008 by Deputy Attorney General Mark R. Filip (the “Filip Memo”).

The Filip Memo instructs prosecutors to consider the following factors when determining whether to charge a corporation: (i) The corporation’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;” and (ii) The corporation’s “remedial actions, including any effort to implement an effective corporate compliance program (or to improve an existing one), to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.”\textsuperscript{73} In assessing cooperation, the Filip Memo goes on to explain that prosecutors may consider, “the corporation’s willingness to provide relevant information and evidence as well as identify relevant actors within and outside the corporation.”\textsuperscript{74}

The new guidelines changed prior policies in two main respects. First, prosecutors may not consider whether a company is paying attorneys’ fees for employees or whether it entered into a joint defense agreement with employees in assessing a company’s willingness to cooperate.\textsuperscript{75} Second, prosecutors may not ask a company under investigation to disclose information protected by the attorney-client privilege or work-product protection. The new guidelines abandoned the two-tier system outlined in the McNulty Memo in favor of a “don’t

\textsuperscript{72} See United States v. Stein, 541 F.3d 130 (2d Cir. 2008).


\textsuperscript{74} Id. at 9-28.700(A) (emphasis added). Other indicia of cooperation are “providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.” Id. at 9-28.720 n.2. The guidelines explain that cooperation is a “potential mitigating factor” Id. at 9-28.700(A), and the “failure to cooperate, in and of itself, does not support or require a filing of charges.” Id.

\textsuperscript{75} Id. at 9-28.730. (“This prohibition is not meant to prevent a prosecutor from asking questions about an attorney’s representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.”)
Prosecutors will not judge a corporation’s cooperation based on waiver of privilege, but rather by whether it provides the “relevant facts.”

In practice, this focus may prove to be a distinction without a difference. The problem is that the Filip Memo’s solution to the waiver issue begs the question: What should a corporation do if the “relevant facts” are protected by the attorney-client privilege or constitute attorney work-product? And, as importantly, how widely defined is the phrase “relevant facts”? Although not requiring waiver, the Filip Memo states that a corporation that does not disclose the relevant facts to the government “for whatever reason”—which by definition includes the assertion of privilege—should not be entitled to receive cooperation credit. Accordingly, corporations seeking credit may still be required to disclose privileged information.

Filip Memo, supra note 72, at 9-28.710 (“[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work-product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”).

Id. at 9-28.720.

The Filip Memo suggests that it is not changing the view of earlier guidelines as “[waiver] has never been a prerequisite . . . for a corporation to be viewed as cooperative. Id. at 9-28.710; See also., Mark J. Stein & Joshua A. Levine, The Filip Memorandum: Does It Go Far Enough?, N.Y.L.J. (Sep. 11, 2008), available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202424426861 (noting that the Filip Memo may not change the culture of waiver nor alleviate other pressures on corporations to cooperate) (“Ironically, the Filip Memo may actually lessen the procedural protections that the McNulty Memo offered. . .[because] no approvals are required for a prosecutor to seek factual material even where its provision may require a privilege waiver.”)

See, Anthony Alexis et al., Requests to Waive Corporate Attorney-Client Privilege: History and Analysis 6-7, in MAYER BROWN, IN FOCUS: CORPORATE LITIGATION WEB SERIES, available at http://www.mayerbrown.com/publications/article.asp?id=6384&nId=6 (“Despite the recent Filip Memo and potential Congressional legislation, it is likely that prosecutors will continue to look favorably on waivers. Thus, waiving privileges is likely to remain one way to demonstrate cooperation.”); Alan I. Raylesberg & Lawrence E. Buterman, DOJ Revises Guidelines to Limit Demands that Corporations Waive Attorney-Client Privilege or Not Advance Employees’ Legal Fees as a Condition of “Cooperating” with a Government Investigation (Sept. 8, 2008), available at http://www.chadbourne.com/clientalerts/2008/dojrevises/ (same).

should the government unilaterally determine that such information constitutes “relevant facts.”

Senator Specter responded to the Filip Memo by re-introducing the ACPP Act. Regardless of whether Congress passes the ACPP Act, there is a real possibility that the new guidelines may create an underground system of waiver and coercion because these tactics have become so entrenched in white-collar practice. The government is still not required, despite proposed legislation, to disclose the factors it considered in deciding whether to charge corporations, and incentives to provide all “relevant information” remain. It appears that, as the DOJ has placed more restrictions on the ability of prosecutors to request waiver and coercion of employees, the descriptions of cooperation contained in DPAs and NPAs have become

81 Former Deputy Attorney General McNulty recently commented that under the new guidelines “there is still a pressure to waive attorney-client privilege if you have ‘relevant factual information’ covered by the . . . privilege that the government wants to get.” Brian Baxter, With Thompson Trashed and McNulty Moot, Filip Memo’s Time Has Come, AM. LAW DAILY, Aug. 28, 2008, available at http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html. Practitioners have likewise noted that the issue remains in the Filip era.


83 In fact, much anecdotal evidence indicates that this may have already happened, at least to a degree. See, e.g., William A. Haddad, Ending the ‘Culture of Waiver’ in Governmental Investigations, MASS. LAWYERS WEEKLY (Dec. 1, 2008), available at http://www.dwyercollora.com/law-articles/securities/culture-of-waiver.aspx (noting that the culture of waiver persists even after the McNulty memo and the SEC Enforcement Manual were released); Baxter, supra note 80 (remarking that even post-Filip, “the power wielded by federal prosecutors remains, because there is still underlying pressure on companies to waive attorney-client privilege in many instances”).


increasingly vague.\textsuperscript{86} This approach, like the one taken by the SEC, will likely result in companies having less guidance on how to curry favor with the government. This leaves companies who are attempting avoid indictment in a precarious situation as they will be forced to speculate as to what conduct will be rewarded. As a result, companies likely will err on the side of disclosure and coercion to ensure that prosecutors perceive them as cooperative.\textsuperscript{87}

\textit{C. Parallel SEC and DOJ Investigations}

Other than the language in the Enforcement Manual relating to waiver, it does not appear that the SEC has altered its system for investigating and regulating corporate misconduct. In particular, the SEC has not amended any of the Seaboard factors for cooperation, under which coercion of employees has been rewarded.\textsuperscript{88} Unless the SEC revises its guidelines and practices to substantially mirror current DOJ policies, there may be an end-run around the restrictions recently implemented by the DOJ. The current regulatory environment permits, and even

\textsuperscript{86} As an example, a 2009 DPA included boilerplate language and a lack of any detail regarding cooperation, simply noting that the company voluntarily conducted an investigation and cooperated with the DOJ investigation. \textit{See} Letter from Steven A. Tyrell & Jonathan E. Lopez, U.S. Dep’t of Justice, Criminal Division, Fraud Section, to Paul V. Gerlach, Counsel for Novo-Nordisk A/S at 4 para 9(c) (“Novo-Nordisk DPA”) (May 6, 2009) (on file with author), \textit{available at} \url{http://www.law.virginia.edu/pdf/faculty/garrett/novonordisk.pdf} However, a 2006 DPA included a substantial amount of detail on cooperation, including termination of employees. \textit{See} Deferred Prosecution Agreement, United States v. Computer Associates Int’l, Inc. at 3 (“Computer Associates DPA”), Cr. No. 04-837 (E.D.N.Y. Sept. 22, 2004), \textit{available at} \url{http://www.law.virginia.edu/pdf/faculty/garrett/computerassociates.pdf} (noting specifically that Computer Associates took a number of remedial actions including “terminating CA officers and employees who were responsible for the improper accounting, inaccurate financial reporting, and obstruction of justice…[and] terminating CA officers and employees who refused to cooperate with CA’s internal investigation…”).

\textsuperscript{87} As Mary Jo White, a former United States Attorney explained: “To ensure that a company does not become that ‘rare’ case resulting in a corporate indictment with all of its attendant negative consequences . . . a company must not poke the government in the eye by declining any of its requests or suggestions.” Lisa Kern Griffin, \textit{Compelled Cooperation and the New Corporate Criminal Procedure}, 82 N.Y.U.L. REV. 311, 327 (2007) (quoting Mary Jo White, \textit{Corporate Criminal Liability: What Has Gone Wrong?}, 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 820-21 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005).

\textsuperscript{88} \textit{See supra} notes 31-32 and accompanying text.
encourages, cooperation and information sharing among government agencies. DOJ investigations are typically followed by or conducted parallel to SEC investigations.

As a result of the long-standing tradition of pursuing common regulatory and enforcement goals via parallel proceedings, a corporation endeavoring to obtain cooperation credit with the SEC may provide privileged information to the SEC or coerce employees into cooperating with the investigation. SEC regulators may then subsequently share the fruits of their investigation with criminal prosecutors at the DOJ without notice to the company or its employees. This collaboration between the SEC and DOJ is generally permissible.

II. Constitutional and Doctrinal Objections to Government Tactics

The government’s practice of compelling corporate cooperation has created a culture of waiver and coercion. This culture has severe repercussions on the sanctity of the attorney-client

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89 The SEC Enforcement Manual unabashedly points out that “[p]arallel civil and criminal proceedings are not uncommon…[and] the [SEC] staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate.” SEC Enforcement Manual, supra note 35, at § 5.2.1.


91 See United States v. Stringer, 535 F.3d 929 (9th Cir. 2008) (holding that the SEC was not required to disclose that it was working closely with federal prosecutors and that the SEC’s Form 1662 provides adequate notice that the SEC may share information with common authorities.) Form 1662 specifically provides, “[t]he Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate.” U.S. Securities & Exchange Commission, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena (“SEC 1662”) 3 (May 2004), available at http://www.sec.gov/about/forms/sec1662.pdf.

92 One limitation placed on this coordination is that “the civil investigation [must have its] own independent civil investigative purpose and not be initiated solely to obtain evidence for a criminal prosecution.” SEC Enforcement Manual, supra note 35, at 5.2.1; see also United States v. Kordel, 397 U.S. 1, 11-13 (1970) (holding that the government may conduct parallel investigations so long as it does not bring a civil action solely for the purpose of obtaining evidence in a criminal prosecution and not advising the defendant of the planned use of evidence).
privilege and work-product doctrine as well as to employees’ rights to fairness in the criminal process, against self-incrimination, and to counsel. Business groups, lawmakers, bar associations, and civil liberties advocates have marshaled forces to advocate for the implementation of controls over the government’s expansive and possibly abusive powers.

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

The attorney-client privilege protects confidential communications between an attorney and client made for the purpose of seeking primarily legal advice from being disclosed. The privilege developed upon two fundamental assumptions: that good legal advice required full disclosure of clients’ problems, and that clients will only disclose such details if they could be assured confidentiality. Similarly, the attorney work-product doctrine protects documents or information prepared in anticipation of litigation from disclosure. The clients, not the

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93 For a comprehensive discussion of the criticisms of the government’s tactics, see Gorman, supra note 28, at 919.
94 The DOJ alone yields enormous power and has the authority to make charging decisions, enter cooperation agreements, accept pleas and often dictate sentences; without any effective legal checks to police the manner in which they exercise their discretion. Prosecutors serve not only as law enforcers, but also as final adjudicators in the 95% of cases that are not tried before a judge or jury. See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 STAN. L. REV. 869, 871 (2009) (proposing structural reforms within the prosecutor’s office to control prosecutorial discretion). See also Ball & Bolia, supra note 16, at 230 (suggesting that Congress move swiftly to curb prosecutorial abuse and prevent further expansion since “[f]ederal prosecutors have long wielded enormous power in their discretion to charge a corporation with a crime based on the alleged illegal acts of its employees, officers, or directors; discretion virtually unchallengeable in a court of law.”); Joseph A. Grundfest, Over Before It Started, N.Y. TIMES, June 14, 2005, at A23, available at http://www.nytimes.com/2005/06/14/opinion/14grundfest.html (noting that an indictment can bring down a company before trial and prosecutors are aware of their expansive power).
95 Jerold S. Solovy et al., Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under The Attorney-Client Privilege and the Work-product Doctrine, in INSURANCE COVERAGE 2009: CLAIM TRENDS & LITIGATION 225, 307 (PLI Litig. and Admin. Practice Course Handbook Series No. 18542, 2009), available at WL 797 PLI/Lit 225 (“The final requirement to establish the privilege is that the protected communication was made for the purpose of securing legal advice or assistance.”).
96 Id. at 235.
97 The work-product doctrine, is narrower than the attorney-client privilege as it protects only litigation related materials, and not all communications relating seeking primarily legal advice See id. at 90.
attorneys, hold the privileges and may assert them to avoid disclosure or waive them to share information, either inadvertently or because it is in their best interest.  

These privileges, historically applied in the individual context, have been translated to apply in the corporate context as well. This application raised several novel issues, each resolved as a matter of federal law by the Supreme Court’s decision in *Upjohn Co. v. United States*. First, and most importantly, the Court held that artificial entities need and deserve the protections of the attorney-client privilege and work-product doctrine. The Court reasoned that corporate entities, like individuals, need a zone of protection and privacy within which to investigate and develop the entity's legal rights, options, and strategies. Recognizing the privilege in the corporate context promotes “broader public interests in the observance of law and administration of justice.” The privilege “allows corporations to monitor employee conduct and investigate potential misconduct without fear that the fruits of their efforts will be used against them criminally, administratively, or by civil plaintiffs. Clearly, the inverse – that a

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98 *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5487 (1986) (explaining that the privilege belongs to the client).  
99 *See* Richter, *supra* note 17, at 979 (citing Wright & Graham, Jr., *supra* note 97, at § 5476 (noting that one of the most perplexing issues in the law of privilege is determining whether and to what extent an artificial entity needs and deserves the protection of privilege)).  
100 449 U.S. 383, 389 (1981) (holding that communications made by employees to corporate attorneys, and written reports of interviews were protected by the attorney-client privilege and work-product doctrine). There are some limitations on the applicability of the *Upjohn* decision. First, the holding in *Upjohn* is grounded in the federal common law and will therefore only be controlling in federal question cases that apply federal common law to decide privilege issues. *See* Thomas R. Mulroy & Eric J. Munoz, The Internal Corporate Investigation, 1 DEPAUL BUS. & COMM. L.J. 49, 53-54 (2002). Accordingly, *Upjohn* may not apply in diversity proceedings where the federal court, in deciding privilege questions, is obligated to use state privilege law. *See id.* For the same reasons, state courts are not bound by the holding in *Upjohn*. *See id.* (“That Upjohn's federal common law holding on privilege is circumscribed by state law flows from Federal Rule of Evidence 501, the rule upon which the Upjohn holding was premised. Rule 501 provides that in civil actions and proceedings where state law supplies the substantive rule of decision (i.e., most diversity litigation) the privilege of a witness 'shall be determined in accordance with State law.'”). According to a recent survey, only fourteen states (either through judicial decision or legislative enactment) have adopted *Upjohn*’s rule on corporate privilege, eight states have adopted the ‘control group’ test, and the remaining states have not adopted a particular approach. *See id.; See also* United States v. Zolin, 491 U.S. 554, 562 (U.S. 1989) (“Questions of privilege that arise in the course of the adjudication of federal rights are ‘governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.’” (quoting FED. R. EVID. 501)).  
101 *See* *Upjohn*, 449 U.S. at 390, 397-398.  
102 *See id.* at 389-90.  
103 *Id.* at 389.
corporation turns a blind eye to wrongdoing for fear that it will come back to haunt them – is unacceptable.”

Second, the Court rejected the “control group” theory and held that the privilege should attach to communications made to counsel by any corporate employee, regardless of level, provided that the communications were made for the purpose of seeking legal advice and were made within the scope of the employee’s duties.

Lastly, the Court held that the entity itself is the holder of the privilege and that the decision to assert or waive privilege rests with the entity alone acting through its empowered officials. Endowing the entity with the sole right to assert or waive privilege, the Court effectively stripped the individual making the communications of any control over its dissemination to others. This deprivation of power undercuts the justification of the privilege in the individual context, where the individual control over dissemination was thought to encourage the full and candid disclosure necessary for effective legal advice.

The rationale for making the corporation the holder of the privilege is largely logistic — it would be unmanageable and potentially inconsistent with the entity’s interests to grant each employee control over the privilege of his or her communications.

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105 *Upjohn*, 449 U.S. at 396-97. Under the “control group” theory, adopted by some circuit courts, protection would only extend to communications made to counsel by members of the corporate control group.

106 See id. at 390-397.

107 See supra note 68 and infra note 230 and accompanying text.

108 See Richter, supra note 17, at 988 (citing Wright & Graham, Jr., supra note 97, at § 5476 (noting that “corporations would not be happy with a rule that all of the persons who can make confidential communications for the corporation are also capable of waiving the privilege”). Another rationale for making the entity the holder of the privilege is that, unlike in the individual context, employees of corporations do not need to hold the privilege to encourage communication with counsel because they have an incentive to disclose information to satisfy employment obligations.
Despite the limited protection the corporate privilege offers individual employees, the privilege nonetheless serves an extremely important function in our legal system.\textsuperscript{109} Even the DOJ recognizes its benefits: “The value of promoting a corporation’s ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations.”\textsuperscript{110} However, as the Filip Memo explains, the government’s policies have been used “either wittingly or unwittingly, to coerce business entities into waiving its attorney-client privilege and work-product protection.”\textsuperscript{111}

Generally, as soon as the government informs a company of an ensuing investigation, the company will launch an internal investigation, using in-house or outside counsel, to uncover the facts surrounding the alleged misconduct by interviewing corporate employees. These interviews are ordinarily protected by the attorney-client privilege as they constitute communications made to assist the company in obtaining legal advice.\textsuperscript{112} Any written reports prepared by counsel

\textsuperscript{109} Filip Memo, supra note 72, at 9-28.710 (“The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law.”).

\textsuperscript{110} Id. \textit{See also} Association of Corporate Counsel, Executive Summary: Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack? 7 (Apr. 5, 2005) [hereinafter “ACC Survey”], available at, \url{http://www.acc.com/legalresources/resource.cfm?show=16315}. (“For every instance where privilege may restrict the flow of information that would appropriately help weed out the ‘bad guys,’ there are many more numerous instances in which the advice of counsel enables individuals and corporate entities to avoid problems, remedy them early, and keep them from getting worse.”).

\textsuperscript{111} Filip Memo, supra note 72, at 9-28.710. \textit{See also}, Glater, supra note 2 (“A recent bar association report notes that while it is difficult to determine how frequently companies are asked by regulators and prosecutors to waive the privilege, those interviewed by the committee said ‘these requests, backed by an express or implied threat of harsh treatment for refusing, have become increasingly common.’”). A recent survey conducted by the Association of Corporate Counsel (the “ACC”) demonstrated that the attorney-client privilege has been under attack. \textit{See ACC Survey}, supra note 109. The survey was sent to in-house counsel who were members of the ACC and a companion survey was sent to outside counsel. The responses from the two surveys closely tracked each other and were generally consistent. \textit{Id}. at 1-2 n.1. More than 30% of in-house counsel and 47.3% of outside counsel responded that their clients had personally experienced an erosion in the protections offered by the privileges since the Enron scandal. \textit{Id}. at 5. Among the experiences described were “[e]xpectations that when making disclosures to government agencies, privileged information will be required to be included with other discovered documents in order to evidence cooperation.” \textit{Id}. at 6.

\textsuperscript{112} \textit{See Upjohn}, 449 U.S. at 389 (holding that communications made by employees to corporate attorneys, and written reports of interviews were protected by the attorney-client privilege and work-product doctrine).
summarizing the interviews generally qualify for protection under the work-product doctrine. The problem is that the employees providing the confidential information to counsel, they do not control its dissemination. The corporation retains the sole power to determine whether to waive privilege and it is the only one that gains credit for the dissemination.

Several versions of the DOJ guidelines instructed prosecutors to consider the completeness of a corporation’s disclosure, including waiver of privilege, as a factor in determining whether to award cooperation credit. Although the Filip Memo explained that it would not judge a corporation based on whether it waived privilege, some corporations continue to hand over all the results of their investigations to the government because any perceived failure to cooperate can have draconian consequences. Such a system leaves cooperating employees in a precarious position. The government obtains valuable information the employees disclosed to counsel in the internal investigation and the employees receive nothing in exchange.

This culture of corporate waiver has caused Congress (with the support of a broad coalition of influential players and former prosecutors) to become increasingly involved, or rather,

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113 See id.
114 See supra Sections I(B)(i-iii).
115 See supra notes 47, 82 and accompanying text.
116 The members of the “Coalition to Preserve the Attorney-Client Privilege” include the American Civil Liberties Union, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the United States Chamber of Commerce and the National Association of Manufacturers. See ABA, Protecting the Attorney-Client Privilege, the Work-product Doctrine and Employee Legal Rights: Factsheet 2 (July 2009), available at http://www.abanet.org/poladv/priorities/privilegewaiver/attyclientprivissue_abafactsheetjuly2009_.pdf, for a full list of the Coalition members and their ongoing efforts.
117 Former prosecutors, including former Attorney General Dick Thornbrough, also strongly supported the proposed legislation. Thornburgh condemned the ominous dangers that the DOJ policies pose to the attorney-client privilege and the work-product doctrine and suggested that Congress enact legislation promptly. See Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum, Hearing Before the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Dick Thornburgh, Former Attorney General of the United States and of Counsel, K&L Gates, Washington, D.C.). Further, former prosecutors argued that the ACPP Act is “crucial to stemming the [DOJ’s] widespread practices and policies that pressure business to waive the attorney-client privilege in return for avoiding a harsher charging decision.” Letter from Rebecca A. Betts, et al. (33 Former Prosecutors), U.S. Dep’t of Justice, to Patrick Leahy, Chair, Senate Committee on the Judiciary 1 (June 20, 2008), available at http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_Letter.pdf. In 2006, a bipartisan group of 11 former senior justice department officials wrote then-current Attorney General Alberto Gonzales a similar letter.
threatening to get involved, to preserve the sanctity of the attorney-client privilege and work-product doctrine. Under the terms of the proposed ACPP Act, the government would not be permitted to demand, request, or condition preferential treatment on the disclosure of communications protected by the attorney-client privilege or work-product doctrine. Further, the government would be prohibited from punishing a corporation for making a good faith assertion of the attorney-client privilege or work-product doctrine. The American Bar Association and the Chamber of Commerce also oppose the government’s policies with respect to waiver and have suggested reform.


The purpose of the ACPP Act is to “place on each agency clear and practical limits designed to preserve the attorney-client privilege and work-product protections available to an organization . . .” Attorney-Client Privilege Protection Act of 2009 (“ACPP Act of 2009”), S.445, 111th Cong. § 2(b) (2009). Section 2(b), the “Purpose” of the ACPP Act has remained unedited since the bill was first introduced in 2006. See also ACPP Act of 2008, supra note 70; ACPP Act of 2007, supra note 62; ACPP Act of 2006, supra note 62.

The 2009 ACPP Act (and 2008) added significant provisions to the 2007/2006 versions meant to address criticisms and allay some fears that the bill would be too constraining on prosecutorial discretion. Notably, the 2009 ACPP Act includes a section in definitions exempting organizations for criminal or terrorist activity from its protections. ACPP Act of 2009, supra note 117, at § 3(a)§3014)(a)(3). It also included administrative proceedings and adjudications in the proceedings which the bill would cover. Id. at § 3(a)§3014)(b)(1). It also expands and redefines what federal employees (DOJ or administrative agency) can and can’t do during investigations and in determining charging decisions. Id. at § 3(a)§3014)(b)(1-2). The new version addresses concerns that voluntary disclosures will obviate the protections of the bill by adding a section that disallows consideration of voluntary disclosures if the disclosure had been subject to a non-frivolous claim of privilege in charging decisions. Id. at § 3(a)§3014)(d)(2). Finally, the bill explicitly outlines that individuals can still be prosecuted for conduct which prosecutors can not consider in the charging decision of the corporation if the underlying conduct is criminal. Id. at § 3(a)§3014)(f). See also, Ball & Bolia, supra note 16, at 257-58 (discussing changes made to bill).

The ABA was so outraged by the culture of waiver that emerged from the promulgation of the Holder and Thompson Memos, as well as SEC policies, that it went so far as to create a task force – the ABA Task Force on Attorney-Client Privilege – specifically devoted to the preservation of the attorney-client privilege and work-product doctrine. See Press Release, Robert Grey, President, American Bar Association, ABA President Robert Grey Creates Task Force to Advocate for Attorney-Client Privilege (Oct. 6, 2004) (on file with author), available at http://www.abanet.org/buslaw/attorneyclient/materials/pressrelease.pdf. Their work resulted in the adoption of resolutions opposing the routine practice by government officials of requesting waivers. The resolutions were adopted by the ABA’s House of Delegates. See Keith Paul Bishop, The McNulty Memo – Continuing The Disappointment, 10 Chap. L. Rev. 729, 736 (2007) (“[T]he American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work-product doctrine through the granting or denial of any benefit or advantage.” (citing AM. BAR ASSOC., TASK FORCE ON ATTORNEY-
Regardless of whether these concerns are legitimate or even applicable today, the government’s tactics have also been condemned and roundly criticized for violating individual employees’ Fifth and Sixth Amendment rights.

B. Violations of Constitutional Rights

Two decisions by the Southern District of New York, forced the government to reconsider the constitutionality of the more draconian aspects of its approach to investigating corporations and their employees under the precepts of the Thompson Memo. In Stein I, Judge Kaplan held that the pressure placed on KPMG by the government to deny advancement of legal fees to former partners and employees, who were indicted for their alleged involvement in illegal tax shelters (“the KPMG Defendants”), violated their Fifth Amendment right to fairness in the criminal system and Sixth Amendment right to counsel, and ultimately dismissed the indictment. The Second Circuit affirmed the dismissal on the Sixth Amendment grounds and


125 Despite its findings that the government’s tactics violated certain employees’ constitutional rights, the Stein court did not dismiss the indictment or order the payment of legal fees. Instead the court opened an ancillary civil proceeding to allow the employees to sue KPMG for payment of their legal fees. See Stein I, 435 F.Supp.2d at 373-374. However, after the Second Circuit Court of Appeals dismissed the civil suit, holding that such an ancillary suit was not an appropriate remedy as there were more direct (and far less cumbersome) remedies available, see Stein v. KPMG, LLP, 486 F.3d 753, 763 (2d. Cir. 2007), the district court dismissed the indictment against the majority of Defendants. See United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (“Stein IV”).
dismissed as moot the government’s appeal of the Fifth Amendment self-incrimination issue. In *Stein II*, Judge Kaplan suppressed the statement of two KPMG Defendants, including Richard Smith, finding that KPMG’s threat of termination, at the government’s behest, coerced, the proffers in violation of their Fifth Amendment right against self-incrimination.127

1. Interference With Employees’ Right To Counsel

The Sixth Amendment states in relevant part that “[i]n all criminal prosecutions, the accused shall…be informed of the nature and cause of the accusation…be confronted with the witnesses against him…[and] have the assistance of counsel for his defense.”128 This constitutional right protects against “unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain.”129 To assert a violation, an individual must show that the he or she was deprived of his or her constitutional right “to choose the lawyer or lawyers he or she desires and to mount the defense that one wishes to present.”130 The individual must also assert that the conduct at question is properly attributable, by a clear nexus of activity, to the government.131 Assuming these requirements are met, the government can avoid a finding of a Sixth Amendment violation if it can establish a legitimate justification for interfering with the individual’s right to counsel.132

The *Stein* court has been the only court to consider whether the Thompson Memo and the government’s actions in administering its precepts were constitutional. In affirming the district court's determination that the Thompson Memo and the government’s actions were constitutional, United States v. Stein, 541 F.3d 130 (2d Cir. 2008).126

See *Stein II*, 440 F.Supp. 2d at 337-338.

U.S. CONST. AMEND. VI.

The Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification. Therefore, unless the government's interference was justified, it violated the Sixth Amendment. … [and] the government has failed to establish a legitimate justification for interfering with KPMG’s advancement of legal fees.” United States v. Stein, 541 F.3d 130, 156 (2d Cir. 2008) (“Stein”) (citing *Stein*, 541 F.3d at 151).

See *Stein*, 541 F.3d at 146-48.

*Stein*, 541 F.3d at 156.
court’s dismissal of the indictment on the grounds that the government unjustifiably infringed on the KPMG Defendants’ right to counsel and to present a complete defense, the Second Circuit reasoned that the government’s actions coerced KPMG into limiting their employees’ access to funds necessary for their defense.

The court found that KPMG’s long-standing business practice was to pay for the legal fees of their employees regardless of amount or whether its employees were criminally charged. However, the Thompson Memo and the government agent’s reinforcement of the threat inherent in it — that prosecutors would consider advancements of legal fees as a negative factor in assessing KPMG’s cooperation — caused KPMG to depart from this practice and stop paying legal fees for the KPMG Defendants.

Given the complexity of the issues, none of the KPMG Defendants could properly defend the case without KPMG continuing to pay the fees. It did not make a difference that some of the employees retained their original counsel because even those employees were forced, for economic reasons, to scale back the scope of their defenses.

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133 Stein I, 435 F.Supp.2d at 366.
134 Stein, 541 F.3d at 136 (“We hold that KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action. We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants. In light of this disposition, we do not reach the district court's Fifth Amendment ruling.”).
135 See id. at 141.
136 “The Thompson Memo discourages and, as a practical matter, often prevents companies from providing employees . . . with the financial means to exercise their constitutional rights to defend themselves.” Id. at 368. As one prosecutor put it: the United States Attorney’s Office would view any discretionary payment of fees “under a microscope.” Id. As Judge Kaplan noted, KPMG’s chief legal officer testified that he considered it critical “to be able to say at the right time with the right audience, we’re in full compliance with the Thompson Memorandum.” Stein I, 435 F.Supp.2d at 364 (emphasis added).
137 Stein, 541 F.3d at 145.
138 Nor did it matter that the advancement of attorneys fees were not legal required of KPMG but were a matter of policy which both KPMG and the individual defendants knew of and relied upon. The Court rejected cases put forth by the government noting “[i]t is easy to distinguish the case of an employee who reasonably expects to receive attorneys' fees as a benefit or perquisite of employment, whether or not the expectation arises from a legal
they were deprived of constitutionally effective counsel. ... Their claim is that the government unjustifiably interfered with their relationship with counsel and their ability to mount the best defense they could muster."\(^{139}\) Accordingly, even if KPMG’s actions did not destroy the ability of the KPMG Defendants to find competent counsel, it impermissibly interfered with the choice of and relationship with counsel.

The Second Circuit found, therefore, that Judge Kaplan was correct in holding that the Sixth Amendment had been violated for both, the defendants who had been forced to release their original attorneys and those who merely limited their defenses from those they were entitled to had KPMG continued to advance legal fees.\(^{140}\)

The court had no trouble determining that the conduct of KPMG was attributable to the government—there was a close nexus between the government and KPMG’s conduct. As the court specifically observed, it was easy to establish agency in this case because the conduct complained of was “overt and significant.”\(^{141}\) Further, the government’s conduct was easily considered coercive as KPMG had little choice but to act in accordance with the government’s spoken and unspoken directives.\(^{142}\)

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\(^{139}\) Stein, 541 F.3d at 155.

\(^{140}\) The Court also addressed the issue of “attachment” in determining whether the Sixth Amendment was violated. That is, whether pre-indictment conduct could properly come into consideration because Sixth Amendment rights do not attach until one is indicted. “Although defendants’ Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment.” Stein, 541 F.3d at 153. In Stein, the government and KPMG’s pre-indictment conduct clearly impacted the post-indictment ability to secure their preferred counsel.

\(^{141}\) Stein, 541 F.3d at 148.

\(^{142}\) See Stein, 541 F.3d at 151 (“KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed. ... We therefore conclude that KPMG's adoption and enforcement of the Fees Policy (both before and upon defendants' indictment) amounted to state action.”).
Finally, the Court rejected the government’s defenses for its actions. First, the court held that the government’s interest in “retaining discretion to treat as obstruction a company’s advancement of legal fees” did not justify its conduct.\textsuperscript{143} Second, the court held that the government’s self-serving statement in district court, after it apparently realized that they might be violating the Sixth Amendment, “that KPMG was free to ‘exercise [its] business judgment’” as to whether to advance legal fees did not cure the violation.\textsuperscript{144} The Second Circuit dealt with this assertion rather brusquely noting that it was “unrealistic” that one statement in court would counter the effects of the government’s previously exerted pressures.\textsuperscript{145}

Accordingly, the Second Circuit affirmed the district court’s dismissal of the indictment on the ground that the fees provision of the Thompson Memo, and the government’s implementation of it, deprived the KPMG Defendants of their right to counsel. The Court refrained from deciding whether it agreed with the district court’s conclusion that the Memo also violated the Defendants’ Due Process rights as that issue was moot.

2. Violation of Employees’ Due Process Rights

The Fifth Amendment states, in part, that no person “shall be…deprived of life, liberty, or property, without due process of law…”\textsuperscript{146} The Supreme Court has long identified a defendant’s right to fairness in a criminal proceeding and has anchored that protection in the Due

\textsuperscript{143} Stein, 541 F.3d at 151. (“The government’s interest in retaining discretion to treat as obstruction a company’s advancement of legal fees ’is insufficient to justify the government’s interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves.’” (quoting Stein I, 435 F. Supp. 2d at 369).
\textsuperscript{144} Stein, 541 F.3d at 145.
\textsuperscript{145} Stein, 541 F.3d at 145 (“[I]t was unrealistic to expect KPMG to exercise uncoerced judgment in March 2006 as if it had never experienced the government’s pressure in the first place. The government’s intervention, coupled with the menace inherent in the Thompson Memorandum, altered the decisional dynamic in a way that the district court could find irreparable. Having assumed a supine position in the DPA-under which KPMG must continue to cooperate fully with the government--it is not all that likely that the firm would feel free to reverse course.”).
\textsuperscript{146} U.S. CONST. AMEND. V.
Process Clause of the Fifth Amendment (and the Fourteenth, as applied to the States).⁴⁴⁷ One aspect of the required fairness is to ensure that criminal defendants are afforded a meaningful opportunity to present a complete defense.⁴⁴⁸ Another aspect is to protect the autonomy of the criminal defendant and prohibit the prosecution from actively or passively influencing the manner or substance of the defense.⁴⁴⁹

In holding that the government violated the defendant’s due process rights, Judge Kaplan initially found that the right to fairness is a fundamental liberty interest⁴⁵⁰ while conceding that the government had a compelling interest in investigating and prosecuting crime. The court held, however, that the government’s tactics were unconstitutional under a strict scrutiny analysis because they were not narrowly tailored to achieve the government’s objectives.⁴⁵¹

Judge Kaplan determined that the KPMG Defendants had a fundamental liberty interest in presenting the best defense which had been lawfully available to them, but the Thompson Memo and the United State’s Attorney’s Office impinged upon that interest by influencing KPMG to deny or cut-off the reimbursement of their legal fees.⁴⁵² The court considered three government interests purportedly justifying the Thompson Memo’s provision that one factor to consider in gauging a corporation’s cooperation is whether it is advancing legal fees to employees under investigation: (1) To facilitate charging decisions; (2) To strengthen the

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⁴⁴⁷ See Stein I, 435 F. Supp. 2d at 357-60. Under long-standing Supreme Court jurisprudence that “the right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection.” Id. at 361.
⁴⁵⁰ The court was required to determine if the interest is in fact a fundamental interest as the Due Process Clause “has been interpreted to provide not only procedural protection for deprivations of life, liberty, and property, but also substantive protection for fundamental rights - those that are so essential to individual liberty that they cannot be infringed by the government unless the infringement is narrowly tailored to serve a compelling state interest.” Id. at 360. In other words, a fundamental right requires substantive protection under a strict scrutiny standard rather than a rational basis standard for interests not categorized as “fundamental.”
⁴⁵¹ Id. at 364-65 (“To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.”)
⁴⁵² Id. at 362.
prosecutor’s ability to investigate and prosecute corporate crime; and (3) To punish employees whom the prosecutors perceive as culpable.\textsuperscript{153} Judge Kaplan disposed summarily of the third justification by admonishing the government: “The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest - it is an abuse of power.”\textsuperscript{154} However, the court acknowledged that the interests in investigating, charging and prosecuting those suspected of wrongdoing were compelling: “The consequences for civilization of another government's failure to accomplish that basic end are on view on the evening news every day.”\textsuperscript{155}

The government’s tactics were nonetheless found unconstitutional because they were not narrowly tailored to achieve the government’s compelling objectives.\textsuperscript{156} The primary problem with the Thompson Memo – and, if this issue has merely been pushed underground, potentially with the McNulty and Filip Memos – was that the challenged fees provision itself was overbroad.\textsuperscript{157} It did not distinguish between cases where legal fees are advanced legitimately and where indemnification was occurring as part of an effort to obstruct an investigation or “circle the wagons.”\textsuperscript{158} The mere payment of legal fees was not an appropriate basis for determining cooperation as “[t]here is no necessary inconsistency between an entity cooperating with the government and, at the same time, paying defense costs to individual employees.”\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{153} Id. at 363.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 363.
\item \textsuperscript{156} Id. at 364-65 (“To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.”)
\item \textsuperscript{157} Under the Thompson Memo, the payment of legal fees (beyond legal obligation) may be held against a company if the government views the payment as protection of “culpable employees” or as evidence of a lack of cooperation. See Thompson Memo, supra note 55, at 7-8; see also Stein I, 435 F.Supp. 2d at 365.
\item \textsuperscript{158} “[T]he Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment only if it is used as a means to obstruct an investigation. Indeed, the text strongly suggests that advancement of defenses costs weighs against an organization independent of whether there is any ‘circling of the wagons.’” Stein I, 435 F. Supp. 2d at 363.
\item \textsuperscript{159} Stein I, 435 F. Supp. 2d at 364.
\end{itemize}
The Thompson Memo, at least with respect to the fees provision, discouraged, and as a practical matter, often prevented companies from providing employees with the financial means to defend themselves.\textsuperscript{160} To remedy this problem, the court explained that the DOJ could easily revise its guidelines to narrowly tailor its means to its ends. The guidelines would likely pass constitutional muster if it provided that the government will only consider the payment of legal fees in making charging decisions where the payments are made as part of an obstruction scheme.\textsuperscript{161}

After finding that the Thompson Memo violated the Due Process clause by denying the KPMG Defendants the fundamental fairness they were due, Judge Kaplan went on to hold that the conduct of the United States Attorney’s Office was also unconstitutional.\textsuperscript{162} The agents exerted enormous pressure on KPMG to withhold legal fees from their employees despite the fact that there was no evidence that the advancements were being made to obstruct justice.\textsuperscript{163} Specifically, during the first meeting between the government and KPMG, the government put the payment of employee legal fees issues near the top of the agenda and threatened KPMG that they would look at the payment of legal fees “under a microscope.”\textsuperscript{164} The court concluded that the government agents’ actions in administering the fee provision in the guidelines and reinforcing its threats were not narrowly tailored to serve the government’s compelling interest.

\textsuperscript{160}Id. The court went on to explain that the government views reimbursement of fees negatively “even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict scrutiny.” \textit{Id.}

\textsuperscript{161}Id.

\textsuperscript{162}Id. at 365.

\textsuperscript{163}“The individual prosecutors in the USAO acted pursuant to the established policy of the DOJ as expressed in the Thompson Memorandum. They understood, however, that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the result that occurred - KPMG’s determination to cut off the payment of legal fees for any employees or former employees who were indicted and to limit and condition their payment during the investigative stage. Their actions cannot withstand strict scrutiny under the \textit{Due Process Clause} because they too were not narrowly tailored to serving compelling governmental interests.” \textit{Id.} at 365.

\textsuperscript{164}Id.
Accordingly, the court held that the Thompson Memo and the government’s conduct under it deprived the KPMG Defendants of their Fifth Amendment right to fairness in the criminal process. A few weeks later, the court considered in Stein II, whether the government’s approach also violated the KPMG Defendants’ rights against self-incrimination.

3. Interference With Employees’ Right Against Self-Incrimination

In addition to protecting an individual’s due process rights, the Fifth Amendment provides that “No person shall be compelled in any criminal case to be a witness against himself.” As with the Sixth Amendment, an individual claiming a violation of this right must demonstrate that the statement sought to be suppressed was a product of coercion and that the conduct complained of was attributable to the government. The Fifth Amendment thus acts as a “bulwark against government coercion” and applies only to conduct “fairly attributable” to the government.

Judge Kaplan suppressed proffer statements made to the government by two of the KPMG Defendants finding that they were coerced into cooperating, by threats of loss of employment and counsel, in violation of their Fifth Amendment privilege against self-incrimination. Specifically, government agents sought interviews with many KPMG employees and encouraged KPMG to convince them to cooperate and to disclose any personal

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165 U.S. CONST. AMEND. V.  
167 Stein II, 440 F. Supp. 2d at 328.  
168 Id. at 337 (“The ultimate question here is whether ‘the state has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.’ … [and] KPMG’s actions in this regard are ‘fairly attributable’ to the United States.”).  
169 A proffer statement in this context means a statement by a subject of the investigation. Under the terms of standard proffer agreements in New York, the government may not use the statements in its case-in-chief, but it is free to use leads obtained from it and may use the statement in many circumstances, including in cross-examination. Id. at 321 n. 20.  
170 Stein II, 440 F.Supp.2d at 337.
criminal wrongdoing.\textsuperscript{171} When employees refused to cooperate, prosecutors informed KPMG. In each case, KPMG threatened to cut off the employee’s legal fees or terminate his or her employment unless the government was satisfied with his or her cooperation.\textsuperscript{172}

First, the court found that two of the KPMG defendants (one being Richard Smith), were coerced into cooperating with the investigation. Coercion is the key component and it is broader than simple threats of incarceration or indictment. Judge Kaplan remarked that “it no longer may be doubted that economic coercion to secure a waiver of the privilege against self-incrimination” is sufficient to support a Fifth Amendment claim, “if the pressure is sufficient to ‘deprive[] [the accused] of his free choice to admit, to deny, or to refuse to answer.’”\textsuperscript{173} KPMG’s refusal to advance attorney’s fees and threatened termination for non-cooperation constituted enough pressure to violate constitutional protections against self-incrimination.\textsuperscript{174}

Next, the court determined that there was a “clear nexus” between the government’s conduct and the private actor’s, such that KPMG’s conduct could be fairly attributable to the government.\textsuperscript{175} As Judge Kaplan explained, “the government . . . coerced KPMG to apply pressure to . . . individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain.”\textsuperscript{176} This was a sufficient basis to conclude that KPMG was acting as the government’s agent when it coerced employee cooperation.\textsuperscript{177}

\textsuperscript{171} Id. at 318.
\textsuperscript{172} Id.
\textsuperscript{173} Stein II, 440 F. Supp. 2d at 326 (quoting Garrity v. New Jersey, 385 U.S. 493, 496 (1967)). See also id. at 328 (noting that in order to prove a violation, an individual must demonstrate that he believed he had no real choice but to speak and a reasonable person in that position would have felt the same way).
\textsuperscript{174} Stein II, 440 F. Supp. 2d at 338 (suppressing the statements by Richard Smith and Mark Watson (but none of the other defendants) holding that they were unconstitutionally obtained).
\textsuperscript{175} Stein II, 440 F. Supp. 2d at 337.
\textsuperscript{176} Id. at 333.
\textsuperscript{177} Id. at 337 (“The Court finds that the government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights.”).
In addition to the Stein court, Congress, former prosecutors, the ABA and the ACC have also spoken out in defense of these constitutional and other legal rights of corporate employees under investigation.

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178 One of the stated purposes of the ACPP Act is to “place on each agency clear and practical limits designed to . . . preserve the constitutional rights and other legal protections available to employees of such an organization.” ACCP Act of 2009, supra note 117, at § 2(b). The ACPP Act was meant to address, in part, the precarious situation employees are put in when a corporation decides to cooperate with the government. The ACPP Act, would prohibit the government from punishing a corporation for, among other things: ii) providing counsel for or contributing to the legal defense of employees, (iii) entering joint defense, information sharing, or common interest agreements with employees; (iv) sharing information relevant to the investigation or enforcement matter with employees; or (v) failing to terminate or otherwise discipline an employee because of the employee’s decision to exercise his or her constitutional rights or other legal protections in response to a government request. ACCP Act of 2009, supra note 117, at § 3(a)(§3014)(b)(2)(B)(i-v). Under the approach developed during the past decade, employees are forced to decide whether to cooperate and give up their legal rights or face termination. As asserted by Senator Russ Feingold, “[t]his is a situation no employee should be forced to contemplate.” The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 75 (2006) (statement of United States Senator Russ Feingold).

179 Former prosecutors praised the ACPP Act for its “crucial protections for individual employees” and faulted the DOJ’s policies for facilitating the erosion of the constitutional rights of employees who may have been involved in corporate investigations. Letter from Rebecca A. Betts, et al. (33 Former Prosecutors), U.S. Dep’t of Justice, to Patrick Leahy, Chair, Senate Committee on the Judiciary 1 (June 20, 2008), available at http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_Letter.pdf. A former AUSA explained that “[a]s a simple policy matter, whether a company punishes employees who assert the Fifth Amendment is a poor proxy for determining whether the entire company should be charged with a crime.” The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 24 (2006) (testimony of Andrew Weissmann, Partner, Jenner and Block, New York, NY) (Weissman was an Assistant United States Attorney for 15 years and the director of the special task force on the Enron scandal).

180 The ABA also objects to the DOJ’s instruction to prosecutors to deny cooperation credit to companies that assist or support their so-called culpable employees or agents by paying their legal fees, participating in a joint defense or information sharing agreement, sharing relevant information with employees, or declining to terminate employees for not cooperating with the investigation. See The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 22-23 (2006) (statement of Karen J. Mathis, President, American Bar Association, Chicago, Illinois). The ABA has shown great concern over the extra-judicial determinations of an employee’s culpability under the direction of the Thompson Memo and its successors. “By forcing companies to conclude that their employees are culpable, long before guilt has been proven or assessed, the [DOJ] policy reverses the presumption of innocence principle.” Id. at 23; see also Baxter, supra note 80 (suggesting that even after the Filip Memo, companies will continue to “voluntarily” offer the DOJ what it wants or needs to gain cooperation credit). As ABA President Karen Mathis has asserted, “[t]he Department’s policy stands the presumption of the innocence principle on its head.” The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 61 (2007) (prepared statement of Karen J. Mathis, President of the American Bar Association).

181 The ACC criticized the McNulty Memo for not going far enough: “Limited changes regarding reimbursement of attorneys’ fees don’t offer enough protection of employees’ rights. Prosecutors are still permitted to trample on employees’ rights by forcing corporations to terminate individual employees, to deny employees information shared with prosecutors and critical to their defense, and to refuse to enter into any joint defense arrangements with employees.” The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 79 (2007) (prepared statement of Richard White, Chairman of the Board, Association of Corporate Counsel).
C. Present Day Analysis of Objections

It has been established that the government’s tactics in the post-Enron era were coercive, and, not only threatened the sanctity of the privilege, but also impinged on employees’ Fifth Amendment rights to fairness in the criminal process and against self-incrimination and Sixth Amendment right to counsel. However, the Thompson Memo, which was at the root of the constitutional and doctrinal problems, is now several memos past. The Filip Memo seemingly responds to these concerns, and even adopted many of the suggestions proposed by Congress.

The question that remains is whether the DOJ’s policies as applied through the era of the McNulty Memo and now the Filip Memo will engender the same type of behavior. In some ways, it is possible that the conundrum faced both by corporations and individual employees may get worse as details of cooperation are forced underground. Regardless of whether the system has changed in such a way that these objections are no longer relevant or whether these objections were never serious in the first place, the current system will not be effective in unraveling corporate fraud in the future. As corporate actors learn that their interests and the interests of the corporations are not adequately aligned, employees – especially those with some degree of culpability, however minor – will cease cooperating with the investigation.

III. The Mismatch Between Corporate and Employee Incentives Under the Top-Down Strategy

The top-down strategy has been successful in achieving the government’s objective of efficiently investigating and prosecuting corporate fraud because employees believe that it is in their best interest to cooperate. Currently, the government gives corporations strong incentives

\[182 \text{See supra notes 45, 67, 82, and 156 and accompanying text.}\]
to cooperate by awarding credit, which may result in the company avoiding an indictment altogether, or at least a reduction in charges or penalties. Further, a company’s refusal to cooperate may result in a negative inference, which could enhance charges or penalties.

The employees’ decisions to cooperate, however, are based in part on their fear of reprisal. Corporations make employees keenly aware that they will face severe repercussions for refusing to cooperate including, loss of employment or counsel. At the same time, employees often have a false sense of security that their communications will be kept confidential under the protections of the attorney-client privilege and work-product doctrine. The query is whether employees and corporations will continue this system of cooperation as companies may no longer be required to waive privilege or coerce cooperation in order to receive credit and employees may become more acutely aware of the risks associated with cooperation.

183 See Michael D. Trager et al., Handling Securities Problems and Responding to U.S. Regulatory Inquiries: The Use of Internal Investigations in the Current Regulatory Environment, in THE FOREIGN CORRUPT PRACTICES ACT 2009: COPING WITH HEIGHTENED ENFORCEMENT RISKS 381, 385 (PLI Corp. L. and Practice Course Handbook Series No. 18499, 2009), available at WL 1737 PLI/Corp 381. As noted by the ABA, even though cooperation is not required, “corporations rarely can resist prosecutorial requests for disclosure, because of the harsh consequences of having to defend against criminal charges, and because, in cases where criminal charges are brought and sustained, corporations depend on the leniency in sentencing that results from providing assistance satisfactory to the prosecution.” AMERICAN BAR ASSOCIATION TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, TASK FORCE REPORT 15 (May 18, 2005), available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf.

184 As indicated by the settlement agreements, entered into with the SEC and DOJ, cooperation can not only lead to a reduction in charges or sanctions, but also may avoid a negative inference. For examples of cooperation mitigating penalties with respect to the DOJ, see the Novo-Nordisk DPA, supra note 85 (naming cooperation as a major factor in reaching the agreement without describing in detail what constituted the cooperation). See generally University of Virginia School of Law, Prosecution Agreements, http://www.law.virginia.edu/html/librarsite/garret_bycompany.htm (last visited Aug. 22, 2009) (cataloging a significant number of DPAs and NPAs). This mitigation through cooperation has been described above as occurring regularly in SEC settlements as well. See Press Release, U.S. SEC, SEC Charges Former Apple General Counsel for Illegal Stock Option Backdating (“Apple Press Release”) (Apr. 24, 2007), available at http://www.sec.gov/news/press/2007/2007-70.htm (declining to charge the company based in part on its “swift, extensive and extraordinary cooperation”); SEC v. Dungarian (“Dungarian Release”), Litig. Release No. 19517, 2006 SEC LEXIS 1, at *3 (Jan. 3, 2006) (same); SEC v. American Int’l Group, Inc. (“AIG Release”), Litig. Release No. 19560, 2006 SEC LEXIS 277, at *1 (Feb. 9, 2006) (acknowledging cooperation with government investigation, including sending a “clear message” to employees to cooperate by terminating any employee who refused to cooperate). Although more recent settlement agreements tend not to include or identify specific elements of cooperation, it is understood that similar factors are considered.
A. The Effectiveness of the Top-Down Strategy In the Absence of Waiver and Coercion

Assuming the new governmental guidelines under the Filip Memo and the SEC Enforcement Manual actually alter the requirements for obtaining cooperation credit and the respective culture, the company itself will have less incentive to disclose privileged information and coerce employee cooperation. Such a shift may torpedo certain governmental investigations. Under the former system, the government provided companies with incentives to conduct expensive and time-consuming investigations, to coerce employees into participating, and ultimately to completely disclose their findings and conclusions. Before the adoption of the new guidelines, corporations routinely cooperated in this manner because the benefits would often outweigh any potential costs. However, under the new guidelines, corporations may find that it is no longer in their best interest to waive privilege and coerce employee cooperation. Corporations may simply go through the motions of appearing cooperative to obtain credit.

Typically, when prosecutors or regulators inform a public company that the government suspects them of being involved in some type of wrongdoing, the company launches an internal investigation to explore the accusations. As part of the investigation, the company generally retains outside counsel or uses in-house counsel to conduct employee interviews. The purpose

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185 See discussion supra at Sections I(B)(i-iii).
186 See, e.g., BARRY F. MCNEIL ET AL., INTERNAL CORPORATE INVESTIGATIONS 449 (3d ed. 2007) (“An internal investigation should be conducted whenever there is a credible indication of a violation of law or established company policy. … Once it learns of a government investigation, the corporation must move swiftly to identify and analyze relevant documents; to interview percipient witnesses; to assess the corporation’s rights, obligations, and potential liability; and to report conclusions to senior management and the board of directors. As a general rule, all credible reports of misconduct should be investigated.” (emphasis added)) (noting a general rule that “favors commencing the investigation and learning of the underlying activity, for good or bad.” Id. at 16.); Baker, supra note 47, at 658-61 (providing factors weighing for and against launching an internal investigation when confronted with potential securities violations and SEC investigations but noting that the “cost of inaction to a company…[can] swiftly outweigh any expense and litigation risk associated with a properly conducted investigation.” Id. at 658.).
187 See McNeil et al., supra note 185, at 450 (“[V]iolations of law or significant corporate policy that expose the corporation to criminal or civil liability should be conducted under the direction of lawyers in order to obtain the protections of the attorney-client privilege and work-product doctrine against compelled disclosure to third parties. An internal investigation in response to a government inquiry should be conducted under counsel’s auspices for the
of the investigation is two-fold. On the one hand, the company hopes to find exculpatory evidence to convince the government of its innocence; or if there was misconduct, to convince the government of the high corporate officials’ innocence and remediate the wrongdoing in order to preserve its reputation. On the other hand, the company wants the government to perceive it as cooperative in order to earn credit if it is culpable and becomes the subject of further governmental action.

Under the new guidelines companies will still have an incentive to conduct internal investigations as they will receive credit for sharing the “relevant information and evidence” revealed. However, they will not have the same pressure to freely disclose all of their findings and conclusions as prosecutors and regulators have been advised not to judge corporate cooperation based on waiver of privilege. If the government awards the same amount of credit regardless of whether a company shares only non-privileged facts, or shares privileged

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same reason.”) (noting also that determinations as to whether to use in-house or outside counsel include the familiarity with the corporation’s processes and understanding of the significance of various documents in favor of in-house counsel and perceptions of independence and the levels of management to which the asserted violations rise in favor of outside counsel. Id. at 450-51.; Baker, supra note 47, at 669-70 (noting that the internal investigation should be staffed with either outside or in-house counsel and providing a number of factors for determining whether to use outside counsel).

188 It should be noted, however, that there is no guarantee that the incentives for corporations to conduct comprehensive internal investigations of their own accord will continue. Cost considerations often come into play when corporations determine the scope of the investigation. Indeed, the institutional and transactional complexity of many corporations today means that investigations can be prohibitively costly. Some commentators have observed that a comprehensive internal investigation’s “cost may bankrupt the company,” Harvey L. Pitt, The Changing Landscape of Internal Corporate Investigations, COMPLIANCE WEEK, July 27, 2004, available at http://www.complianceweek.com/article/982/the-changing-landscape-of-internal-corporate-investigations. See also Melissa Klein Aguilar, Siemens Teaches Cos. FCPA Dos & Don’ts, Jan. 20, 2009, available at http://www.complianceweek.com/article/5234/siemens-teaches-cos-fcpa-dos-and-don-ts (noting that the Siemens investigation probably cost the company around $850 million). In order to have companies continue to conduct comprehensive investigations, the government may have to consider other incentives such as publicly reducing penalties to reflect the cost incurred by the corporation in conducting a satisfactory and useful investigation. If the cost of an internal investigation is set off against the penalty, the company would continue to have an incentive to conduct a comprehensive investigation and the deterrent effect of a penalty would not be decreased.

189 Under the Filip Memo and Enforcement Manual, corporations receive credit, in part based on their “willingness to provide relevant information and evidence to identify relevant actors within and outside the corporation.” Filip Memo, supra note 72, at 9-28.700(A). See also SEC Enforcement Manual, supra note 35, at § 4.3.
information as well, then there would be little reason for corporations to waive privilege particularly in light of the costs of disclosure.

One of the most significant costs is that waiver of the corporate privilege as to the government, waives the privilege as to all future litigants. The corporation would not be able to assert privilege over any materials shared with the government in any subsequent action brought by shareholders or other third parties. Corporations, prosecutors and regulators have suggested reforming this system to allow for “selective waiver,” whereby the corporation would be entitled to waive privilege in order to disclose protected information to the government but preserve its privilege in relation to all other parties.\footnote{Letter from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, U.S. Judicial Conference 4 (May 15, 2007) (on file with author), available at \url{http://www.uscourts.gov/rules/Reports/EV05-2007.pdf} (ultimately deciding to drop selective waiver from the proposed changes to Federal Rule of Evidence 502 as it wasn’t within the spirit of the rest of the amendments and suggesting that Congress take the issue up individually); see also supra note 26.} However, the doctrine has not been adopted legislatively or judicially.\footnote{As a review of federal circuit case law has indicated, there is but one circuit that has applied the selective waiver doctrine to attorney-client material. All other circuits addressing the matter have refused to apply the doctrine. In the context of non-opinion work product, no circuit has adopted selective waiver and five circuits have rejected the doctrine.” In re Qwest Commc’ns Int’l Inc., 450 F.3d 1179, 1196 (10th Cir. 2006) (rejecting selective waiver in the face of confidentiality agreements between Qwest and the DOJ and the SEC).} Accordingly, companies wishing to take advantage of the privilege in subsequent litigation may not disclose privileged information to government investigators.\footnote{In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 467, 2008 U.S. Dist. LEXIS 11058, *34 (2008) (illustration of the consequences of unintended waiver of attorney-work product) (“Parties wishing to take advantage of the privilege that protects attorney work product must zealously maintain the confidentiality of that work product from their adversaries.”).}

Another disadvantage for the corporation in disclosing privileged information to the government is that the confidential evidence may implicate high corporate officials. The officials making the decision of whether to waive privilege would certainly prefer to withhold any inculpatory evidence.

Given these potential costs and lack of counter-veiling benefits, corporations may determine that waiver is not in their best interest. The government itself acknowledged that if it
were no longer permitted to consider waiver as a factor in determining whether to grant cooperation credit, it would “eliminate incentives for voluntary disclosure by corporations.”

Further, under the former system prosecutors based their decisions to award cooperation credit in part on the corporation’s willingness to compel employee cooperation through threats of termination or non-payment of attorneys’ fees. Under the Stein decisions and the new guidelines however, prosecutors are instructed not to consider whether a company takes negative employment action against non-cooperative employees. If a company will receive the same amount of credit for conducting an internal investigation regardless of whether it coerces employee participation, the company will have little incentive to exert such pressure.

Unlike the government, the corporation’s interests in conducting an investigation is not necessarily to get to the bottom of the issue, but is instead to receive cooperation credit and possibly to demonstrate its innocence and preserve its reputation. Coercive tactics would not be necessary to obtain exculpatory evidence as employees who have this information would likely be forthcoming in an investigation without this pressure. Conversely, culpable employees or those privy to incriminating information, would be reluctant to participate in an investigation without proper incentive to do so. However, corporations have little incentive to pressure those employees into cooperating if they would obtain credit without their participation.

Because culpable employees or those with incriminating information would, absent corporate pressure, be less likely to cooperate, the investigation itself is less likely to uncover wrongdoing. Accordingly, without waiver and coercion there will be less transparency into

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194 See supra notes 55-59 and accompanying text.
195 See Filip Memo, supra note 72, at 9-28,730, and discussion on Stein I, supra Sections II(B)(1-2).
196 It should be noted that where high level officials were not involved in the malfeasance, they may have an incentive to unravel the fraud so that they can remediate and preserve the corporation’s reputation.
corporate practices and the government may be deprived of vital information. As the Principal Deputy Assistant Attorney General, explained, such a system would “undermine the Department’s ability to conduct fact-finding and uncover [corporate] fraud.” The Enron, Worldcom and Adelphia scandals are proof that the conventional corporate practice of “circling the wagons” was not effective in regulating and governing corporations. Generally, the nature of white-collar crime, the complexity of the corporate structure, and the number of employees, officers and directors acting on the corporation’s behalf, makes it extremely difficult, if not impossible, to effectively enforce the law without the full cooperation of corporate insiders. Efficient “real time” investigations would not be possible without the partnership between the corporation and government. Corporate cooperation has “allowed federal investigators to wrap up complex corporate investigations that put a stop to corporate misconduct

198 The government coined the term “circle the wagons” to describe the approach that companies used to obstruct an investigation. See also Stein I, supra Sections II(B)(1-2). Under this approach the companies would “pay the legal fees for those individuals who needed their own attorney, establish joint-defense agreements with attorneys representing those employees and share the results of internal investigations with those lawyers to keep abreast of the government investigation. This approach often had the benefit of the company learning about the full nature and extent of the conduct under investigation and correcting it.” Lawrence Barcella Jr., et al., Cooperation With the Government in a Growing Trend: As Prosecutions Intensify Companies and Executives are Learning How to Play Ball, PAUL HASTINGS: STAY CURRENT 1-2 (August 2004), available at http://www.paulhastings.com/assets/publications/90.pdf?wt.mc_ID=90.pdf.
199 See Richter, supra note 17, at 1016-17 (“The ACPP Act will largely turn back the clock to the ‘circle-the-wagons’ days of corporate defense when investors and employees had to trust companies to police themselves because the federal government was unable to act as an effective watchdog.”).
200 See John Hasnas, Ethics and the Problem of White Collar Crime, 54 Am. U. L. Rev. 579, 592-95 (2005) (discussing how the liberal features of the criminal law, such as the mens rea requirement and the attorney-client privilege, impose especially high costs on the prosecution of white collar crimes) (noting how it is often the case that “the evidence necessary for a conviction for a white collar criminal offense will be in the hands of those who cannot be compelled to produce it [as it is privileged].” Id. at 594.); see also Richter, supra note 17, at 984-85 (explaining that following the Enron scandal, federal agencies realized that they would be unable to police corporate misconduct without corporate cooperation).
201 See Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum, Hearing Before the S. Comm. on the Judiciary, 110th Cong. 5 (2007) (statement of Karin Immergut, U.S. Attorney, District of Oregon, U.S. Dep’t of Justice, and Chair, White Collar Subcomm. for the Attorney General’s Advisory Comm., Portland, Oregon) (explaining that the government has obtained over 1,200 corporate fraud convictions since 2001 and has recovered billions of dollars for shareholders and investors).
and provide restitution to its victims in a matter of months, in sharp contrast to the prolonged and
sometimes unsuccessful investigations prior to such cooperation policies.\footnote{202}

Although the government could likely acquire information to reveal the corporate fraud
through traditional discovery devices, without corporate waiver and coercion of employees to
cooperate, it would be far more expensive and time consuming. The result of requiring the
government to use additional resources to combat corporate crime would be fewer successful
complex investigations and prosecutions of corporate malfeasance, which in turn would frustrate
shareholders and reduce the public’s confidence in the markets.\footnote{203}

\textbf{B. Effectiveness of Top-Down Strategy Assuming the Culture of Waiver and Coercion
Remains under the New Guidelines}

Assuming the requirements for obtaining cooperation credit have not changed, but have
simply been pushed underground,\footnote{204} corporations will continue to have significant incentives to
waive privilege and coerce employee cooperation. However, employees will over time learn that
their interests and those of the corporation are not adequately aligned, either through additional
warnings, increased public disclosure, or advice of personal counsel. With increased knowledge,

\footnote{202} Richter, \textit{supra} note 17, at 991.
\footnote{203} The government recognized the limitations it faces in investigating and prosecuting corporate crimes. The Filip Memo explains, “[i]n investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles . . . It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries.” Filip Memo, \textit{supra} note 72, at 9-28.700(B).
\footnote{204} Indicia of corporate cooperation will continue to include: conducting and sharing the results of internal investigations, and coercing employees to cooperate with the investigation. \textit{See} Christopher J. Steskal & Jennifer C. Bretan, \textit{Securities Litigation Update: Must A Corporation Disclose Privileged Information To Avoid Prosecution, And If It Does So, Will It Be At The Mercy of The Plaintiff’s Bar? – Recent Developments in DOJ Policy and Case Law}, Fenwick & West LLP, January 21, 2009, \url{http://www.fenwick.com/docstore/Publications/Litigation/sec/Sec_Litigation_Alert_01-21-09.pdf} (noting that even after the Filip revisions went into effect, corporations are still likely to turn over evidence uncovered in an internal investigation to avoid being charged criminally).
potentially culpable employees may refuse to participate in interviews or may be less forthcoming; thereby compromising the results of the investigation.\(^{205}\)

A company’s interest in obtaining cooperation credit to avoid an indictment, or receive a reduction in charges or penalties will almost always outweigh the costs associated with waiver and coercion.\(^ {206}\) In the past, corporations, often at the government’s bequest, tried to compel employee cooperation by threatening negative employment actions (i.e., termination or withdrawal of counsel fees) against any employee who was uncooperative. Employees weighed these short-term incentives against the long-term threats of prosecution or job loss in the event the company or government deemed them culpable. Most employees chose to cooperate, despite the potential long-term consequences, possibly because (1) they were not culpable and had no fear of corporate or government reprisal; (2) they believed to some extent that the corporations interest and their own were aligned, providing a false sense of loyalty and job security; or (3) they believed that they were protected by the corporate privilege.

The question is whether these short-term incentives, which encouraged participation in the past, will continue to be as effective in the future. That is, whether these incentives adequately align the interests of the individual employees with those of the corporation. The answer predominantly depends on whether the employee has engaged in wrongdoing, or fears that he or she may have.

For those employees who were in no way involved in the alleged misconduct, the short-term incentives should continue to be sufficient to encourage participation. Innocent employees have every reason to participate in order to maintain job security and counsel. The only possible downside of cooperation for completely innocently employees is fear of termination for

\(^{205}\) See supra notes 40-41, 43-45 and accompanying text for a description of the benefits a company receives for cooperation.

\(^{206}\) See id.
implicating their superiors. This fear is unlikely to outweigh the employees’ concerns over their continued employment and reimbursement of legal fees.

The matter is more complex with culpable employees, or those unsure of their culpability. For them, criminal liability is a real threat. Obtaining their cooperation has not been a significant problem because many of them believed that the information was privileged, and didn’t recognize the possibility of waiver. However, as employees become increasingly aware of the reality of corporate cooperation and the likelihood of waiver, and begin to consider their own exposure, they will become less inclined to cooperate.

There are several ways in which culpable employees may become more aware that the privilege offers them little, if any, protection and that the corporate interests may be adverse to their own. First, employees may begin receiving more extensive warnings before interviews are conducted. Currently, corporate counsel is required to give employee warnings, known as “Upjohn warnings,” before conducting an interview pursuant to an internal investigation. These warnings are meant to inform the employee that (1) the attorney represents the corporation, not the individual employee; (2) the privilege attaches to information given to counsel, but the corporation, not the employee; holds the privilege; and (3) the corporation, not the employee, decides whether to waive the privilege.

In theory, these pronouncements should caution employees that the company might choose to provide the information the employee discloses with others. However, employees

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207 See The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 68 (2006) (joint statement of the Coalition to Preserve the Attorney-Client Privilege; Submission to the U.S. Senate Judiciary Committee) (noting that “the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive/difficult issues” and “clients are far more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive…and when the issue might impact the employee personally.” (citing ACC Survey, supra note 109, at 3-4.

208 See Upjohn, 449 U.S. at 389.

209 See id.
often fail to consider that the corporation will disclose their confidences because they don’t recognize that company’s interests and their own are not completely aligned. As a general counsel explained: “If employees believe[d] that corporate counsel are simply conduits for delivering confidential information to prosecutors, attorney-client communications [would] be chilled.”

A survey conducted a few years ago revealed that almost all senior-level employees, and a majority of low-mid level employees, were aware of and relied on the privilege when communicating with counsel.

Recently, there has been discussion about expanding the scope of Upjohn warnings to something closer to Miranda warnings, which include the right to counsel and the possibility that incriminating statements may be used against them. A former district court judge coined the term “Adnarim Warnings” – Miranda spelt backwards – to describe these broader warnings.

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210 The ACC contends that “important lawyer-client conversations occur with greater meaning and effect when supported by the client’s expectation of the corporate confidentiality of the consultation.” See ACC Survey, supra note 109, at 1.

211 See The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 75 (2007) (statement of Richard T. White, Senior Vice President, Secretary, and General Counsel, The Auto Club Group, Dearborn, MI). In a 2005 survey conducted by the Corporation Counsel, 95% of lawyers interviewed responded that they believed that if privilege did not offer protections, there would be a “chill” in the flow of candor if information from clients. ACC Survey, supra note 109, at 3. A similar survey was conducted the same year by the National Association of Criminal Defense Lawyers (“NACDL”) which yielded comparable results. See NACDL, Executive Summary: The Attorney-client Privilege is Under Attack (“NACDL Survey”) 3 (Apr. 8, 2005), available at http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf (95% of lawyers interviewed responded that the weakening of the privilege chills a client’s frank discussion of legal issues). Further, 96% of lawyers interviewed responded that they believed the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel. ACC Survey, supra, at 1. See also NACDL Survey, supra, at 5 (95.8% of lawyers interviewed believed that the privilege and work-product doctrine serve an important purpose in facilitating their work as company’s counsel).

212 Responses to the Association of Corporate Counsel survey seem to warn against this outcome. 93% of respondents said senior-level employees were aware of and relied on privilege when discussing matters with corporate counsel; 68% of low-mid level employees were aware of and relied on privilege. 95% said a loss [or perceived loss] would chill the flow of information and candor from their clients. ACC Survey, supra note 109, at 3.

213 Former United States District Judge Frederick Lacey of the District of New Jersey recommended the following type of warnings:

I am not your lawyer, I represent the corporation. It is the corporation's interests I have been retained to serve. You are entitled to have your own lawyer. If you cannot afford a lawyer, the corporation may or may not pay his fee. You may wish to consult with him before you confer with me. Among other things, you may wish to claim the privilege against self-incrimination. You may wish not to talk to me at
Additionally, it has been recommended that an employee be advised that the substance of their interview is likely to be disclosed to the government and possibly used against them. Scholars have even suggested that the DOJ reward companies for providing extensive warnings to employees, including the possibility of waiver, before conducting investigations.

These additional warnings may provide employees with a more complete understanding of the long-term risks associated with cooperation and that the corporate interests and their own are not necessarily aligned. The corporation’s interest in waiving privilege to receive a reduction in charges or penalties does not align with the individual employee’s interest in avoiding individual prosecution. The employee disclosing the information derives no benefit from either the government or the corporation for cooperating. Typically, it is the corporation that interfaces directly with the government and receives cooperation credit. If these employees

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All.

What you tell me, if it relates to the performance of your duties, and is confidential, will be privileged. The privilege, however, requires explanation. It is not your privilege to claim. It is the corporation’s privilege. Thus, not only can I tell, I must tell, others in the corporation what you have told me, if it is necessary to enable me to provide the legal services to the corporation it has retained me to provide.

Moreover, the corporation can waive its privilege and thus, the president, or I, or someone else, can disclose to the authorities what you tell me if the corporation decides to waive its privilege.

Also, if I find wrongdoing, I am under certain obligations to report it to the Board of Directors and perhaps the stockholders.


216 See Garrett, *Corporate Confessions*, supra note 212, at 940. The government should consider, “not just whether the firm secured the cooperation of employees, but whether the firm did so in a way that informed them of their rights under their employment contracts, whatever those may be, avoided potential conflicts of interest, and informed them of the possibility of entity waiver of privilege. In that way, federal prosecutors would reward not haphazard cooperation at all costs, but cooperation that sensibly elicits informed, sound, and conflict-free statements by employees.”

217 See Ball & Bolia, *Supra* note 16, at 247 (explaining that these divergent interests drive a wedge between senior management and other employees and between corporate counsel and all employees).

were dealing with the government, rather than the internal investigators, they would attempt to negotiate for leniency in exchange for the information.

As more employees begin to appreciate this mismatch of incentives, a larger number of them will determine that the consequences of revealing inculpatory statements to the government and the company outweigh the negative employment consequences based on their failure to cooperate.\(^{219}\) By cooperating, employees may preserve their employment and counsel in the short-term. However, once employees provide inculpatory evidence, they subject themselves to termination of employment and withdrawal of legal fees based on the misconduct. Indeed, one of the factors the government considers in awarding cooperation credit to corporations is their remedial efforts, including “disciplin[ing] or terminat[ing] wrongdoers.”\(^{220}\) Further, the government may initiate individual civil or criminal proceedings against culpable employees.

Ultimately, once the employee understands the long-term implications of their statements, the threats of termination and withdrawal of legal fees will not adequately encourage cooperation from culpable or potentially culpable employees. One practitioner has predicted that over time a “culture of silence” among employees may develop if corporations continue to routinely waive privilege.\(^{221}\)

Even without more warnings, additional information from corporate scandals or from debates between business groups, lawmakers, and civil liberties advocates regarding the deterioration of the corporate privilege, will increase employee awareness of the risks associated with disclosure. As an example, if a recent bill proposed by Congress passes, the government

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\(^{219}\) See George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 993 (2005) (noting that, in the face of corporate counsel effectively becoming agents of the government when they routinely waive privilege, “company personnel have an incentive not to be forthcoming and even to lie, although thereby risking obstruction charges.”).


would be required to make all settlement agreements between the DOJ and corporations publicly available on its website.\textsuperscript{222} With increased knowledge, the threats of prosecution and termination will become more apparent and employees will hesitate to disclose inculpatory information, even in the face of potential loss of employment or counsel for non-cooperation. As one practitioner noted some executives have refused to fully cooperate in internal investigations, “realizing that the company is simply gathering evidence for the government to use against [them].”\textsuperscript{223} Indeed, waivers have become so routine and so broad that it is as though employees are “speaking to prosecutors” whenever they speak to counsel during an investigation.\textsuperscript{224}

Whether the corporation provides additional warnings or more information becomes publicly available, employees likely will consult personal lawyers. Generally, employees seek legal advice from in-house counsel when they have job-related questions. However, as employees comprehend the “quasi-deputy” status of their corporate counsel, they will be motivated to obtain independent advice before participating in an interview.\textsuperscript{225} Potentially culpable employees are most likely to recognize that an attorney detached from the company may be in a better position than corporate counsel to advise them of whether to cooperate or to assert their right against self-incrimination.\textsuperscript{226} This is particularly the case where corporate counsel threatened employees to cooperate with the investigation; as these threats would expose

\textsuperscript{222} Under the terms of the Accountability in Deferred Prosecution Act (“ADPA”), proposed by Representative Pascrell in 2008 and re-introduced in 2009, the DOJ would be required to among other things, publicly disclose all of the DPAs and NPAs on their website. See ADPA of 2009, H.R. 1947, 111th Cong. § 8 (2009); ADPA of 2008, H.R. 6492, 110th Cong. § 8 (2008).

\textsuperscript{223} Barcella Jr., et al., \textit{supra} note 197, at 3.

\textsuperscript{224} Ellard, \textit{supra} note 218, at 990, 993.

\textsuperscript{225} Ball & Bolia, \textit{supra} note 16, at 260.

\textsuperscript{226} See Michael L. Seigel, \textit{Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege}, 49 B.C. L. REV. 1, 38-39 (2008) (“A potentially guilty employee thus faces a dismal set of options: (1) silence, and likely termination; (2) cooperation, and likely sanctions; and (3) lying, perhaps avoiding liability in the short term, but running the risk of worse consequences in the future. Caught in this trilemma, the employee needs legal advice. If she is a high-level officer, she is probably aware of the implications of \textit{Upjohn} and will seek advice from a private attorney.”)
the parties diverging interests. Further, sophisticated employees may recognize the potential conflict of interest based on the Upjohn warnings they receive and seek independent counsel before participating in an interview. Any personal lawyer who has experience with internal investigations would warn an employee of the risks associated with corporate waiver, and advise the employee to disclose as little as possible to the internal investigators.

Accordingly, as employees obtain more information current strategies will on the margin be less effective in unraveling the corporate fraud. As more employees become aware of the reality of corporate waivers and the risks associated with disclosure, a larger number of them will stop cooperating altogether or being as forthcoming with investigators. Naturally, employees are fearful of sharing potentially inculpatory information when they believe that the corporation will turn over the details of their communications to the government and the information could possibly be used against them.

Exacerbating the issue is the inability of corporate internal investigators to promise employees leniency or immunity from prosecution as these decisions rest solely in the discretion of prosecutors. Also, they cannot offer job security for fear that the government would look

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227 Upjohn warnings are meant to inform employees that (1) the attorney represents the corporation, not the individual employee; (2) the privilege attaches to information given to counsel, but the privilege is held by the corporation, not the employee; and (3) the corporation, not the employee, decides whether to waive the privilege. See supra notes 99-107 and 207-208 and accompanying text.

228 In Upjohn, the Supreme Court found that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn, 449 U.S. at 393.

229 The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 33 (2007) (statement of William M. Sullivan, Jr., Partner, Winston and Strawn, LLP, Washington, DC; former AUSA, D.C.) (“Naturally, clients are fearful of sharing all pertinent information when they believe that the details of an attorney-client conversation may be turned over the Justice Department as part of a current or future investigation into these activities.”).
unfavorably on such an assurance. Indeed, under the current regime such an offer might actually be grounds for drawing a negative inference.\footnote{The Filip Memo specifically instructs prosecutors to consider the following factor in determining whether to charge a corporation: “The corporation’s remedial actions, including any effort to replace responsible management [or] to discipline or terminate wrongdoers.” \textit{See} Filip Memo, \textit{supra} note 72, at 9-28.300.}

Without candid and complete disclosure from employees, companies will learn less about potential misconduct in their midst and the government will be deprived of the roadmap it wants even if the corporation waives privilege.\footnote{Further, compliance with the law, prosecutions, and remediation efforts by responsible corporate employees and their counsel will be inhibited. In a 2005 survey, 97\% of lawyers interviewed believed that the privilege improves their ability to monitor, enforce, and improve compliance initiatives. \textit{ACC Survey, \textit{supra} note 109, at 4; see also NACDL Survey, \textit{supra} note 210, at 6-7 (94.6\% of lawyers interviewed believed that the existence of the privilege improves their ability to monitor, enforce and improve company compliance initiatives). Ninety-four percent (94\%) of lawyers interviewed believed that the privilege enhances the likelihood that company employees will discuss sensitive, difficult issues regarding legal compliance. \textit{ACC Survey, \textit{supra} note 109, at 4; see also NACDL Survey, \textit{supra} note 210, at 6 (90.5\% of lawyers interviewed responded that the existence of the privilege enhances the likelihood that company employees come forward to discuss or agree to be interviewed about sensitive or difficult issues regarding the company’s compliance with the law); Letter from Daniel E. Lundgren, Member of Congress, to Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission (Aug. 15, 2005), \textit{available at http://www.abanet.org/poladv/documents/acpriv_replungrencommentletter8-15-05.pdf} (writing to request that the language respecting waiver and cooperation added in the 2004 amendments to the U.S. Sentencing Guidelines be removed; the reference to waiver was subsequently removed in the 2006 amendments) (“This [demand for waiver], in turn, impedes the lawyers’ ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct.” \textit{Id. at 2.}); Letter from Griffin B. Bell et al., Former Attorneys General, Acting Attorney General, Deputy Attorneys General, and Solicitors General, to Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission (Aug. 15, 2005), \textit{available at http://www.abanet.org/poladv/documents/acpriv_formerdojo officialstletter8-15-05.pdf} (same) (“Because the effectiveness of internal investigations depends on the ability of employees and other individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early.” \textit{Id. at 2.}).} As a result, the top-down strategy will become less effective in unraveling corporate fraud in the future than it has been in the past. For this reason, regardless of whether the new guidelines change the culture of waiver and coercion, corporations and the government need to develop incentives to lawfully encourage employee cooperation. The interests of the corporation and those of its employees need to be re-aligned in order to achieve the government’s laudable goal of effectively pursuing corporate crime.
A Bottom-Up Alternative: Realigning the Interests of Corporations and the Government with Those of Individual Employees

The prevailing approach to corporate criminal investigations has been a top-down strategy designed to induce high corporate officials to pressure employees into cooperating with the government and internal investigators. The government gives corporations credit for cooperating with its efforts and essentially becoming its investigative partner in unraveling corporate fraud. This approach was developed to help the government more efficiently achieve its ultimate objective of identifying and prosecuting corporate wrongdoers.\(^{232}\)

The preceding sections have identified two main problems with the top-down approach. First, it may be unduly coercive, raising concerns about violations of the constitutional rights of individual employees and the sanctity of the attorney-client privilege and work-product protection. Second, the approach may be ineffective because in the long run, employees will learn that it is not in their best interest to cooperate. A third problem is that the approach may not deter the right people. Corporate officials who orchestrate, tolerate and often reward the wrongdoing should be a significant focus of the government’s efforts, but current practices focus on the individual employees who participate in the unlawful acts. Focusing on high corporate officials would reduce the overall incidence of corporate crime and enhance monitoring of employee behavior.

This premise, that the “kingpins” are the appropriate target of government prosecutions, underlies criminal law enforcement in at least two other areas — drug enforcement and

\(^{232}\) See James R. Doty & Peter K. Hwang, Ethical and Professional Problems in Law Enforcement Investigations: Recent Developments, in Corporate Governance – A Master Class 2009 513, 517 (PLI Corp. L. and Practice Course Handbook Series No. 18483, 2009), available at WL 1721 PLI/Corp 513 (“The post-Enron era of corporate investigations has seen many changes, as the pendulum swings back and forth with the government’s attempts to balance demand for increased accountability and transparency by corporations with concerns regarding fundamental fairness for corporations.”).
organized crime. In both of these areas, the government focuses on providing incentives to lower level actors, the “underlings,” with the hope of identifying and punishing those at the top of the pyramid. However, in the area of corporate investigations, the focus has been on providing incentives to the corporations to cooperate; it has not been on creating affirmative incentives for employees to cooperate.

This comparison raises the natural questions: Would such a bottom-up approach work in the area of corporate investigations? Would this strategy be more effective at identifying culpable actors — particularly the corporate officials at the top of the pyramid — than the top-down strategy currently employed? Although neither the DOJ nor the SEC has endorsed such an approach, a recent investigation illustrates a potential move in that direction.

There are two avenues for implementing a bottom-up strategy for investigating corporate fraud. One approach is for corporations to develop a system whereby they offer employees who cooperate some type of amnesty or leniency; including promises of employment or negotiated severance packages, continued payment of legal fees, or immunity from corporate claims for damages. An alternative approach is for the DOJ and SEC to create a system whereby the

233 Under the current system, corporations have an incentive to cooperate with the government, as they will receive credit for disclosing “relevant facts” and possibly for waiving privilege and coercing employee cooperation. Filip Memo, supra note 72, at 9-28.720.
235 Under the current strategy, “liability has shifted markedly to the employee level: Over one thousand individuals have been indicted and convicted since the July 2002 creation of the Corporate Fraud Task Force, while few corporations have been charged.” See Griffin, supra note 86, at 311.
government offers employees who cooperate some type of credit (similar to the credit awarded to cooperating corporations), including avoiding an indictment altogether, reducing charges or penalties, or at a minimum avoiding a negative inference.

The bottom-up approach should supplement, not replace the top-down approach; thereby providing lawful incentives to encourage employees to cooperate by being forthcoming in interviews, while maintaining incentives for corporations to cooperate by conducting comprehensive internal investigations. This combined approach would re-align, and develop an equilibrium between, the government’s interests in unraveling and prosecuting corporate fraud, the employee’s interests in job security, counsel and avoiding prosecution, and the corporation’s interest in avoiding an indictment and preserving its reputation.

A. Model for Amnesty or Leniency Programs Implemented by Corporations

Corporations can encourage their employees to cooperate during an internal investigation by offering them protection against negative employment actions if they participate and provide truthful and complete information. Such a bottom-up strategy for investigating an alleged

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237 The bottom-up approach should supplement, not replace, the “top-down” approach. Using a building block approach to reach the top of a corporation can be time-consuming and circuitous. The Enron and Worldcom cases demonstrate the “complexity of the work required to build a solid case against top executives of corporations that engaged in elaborately concealed, long-term schemes to defraud.” See Brickey, supra note 233, at 275.

238 The interests of the corporation, employees and the government are not necessarily adverse: Cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government — and ultimately shareholders, employees, and other often blameless victims — by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation’s legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

Filip Memo, supra note 72, at § 9-28.700(B).
bribery scheme was recently applied by Siemens AG (“Siemens”), a German engineering company, to facilitate the largest internal investigation ever conducted.  

Siemens, with the assistance of their outside counsel, consulted with the DOJ and jointly created incentives that differed significantly from the norm. The system, labeled an “amnesty program,” provided incentives designed to encourage employees to voluntarily disclose truthful and complete information about possible violations to outside counsel conducting the internal investigation. The program’s incentives were available to all but the most senior employees. As a supplement, Siemens developed a “leniency program” for employees too senior to participate in the amnesty program and others who never came forward during the amnesty program period.

First, Siemens assured cooperating employees that they would be “protected from unilateral employment termination.” This affirmative incentive should be included in any program designed by the company as it is one of the most significant protections a corporation can offer its employees. However, corporations should include a caveat providing for negotiated departures (including some type of severance package) for cooperating employees who were involved in perpetuating the fraud. This flexibility would allow corporations to

239 “According to Siemens’ latest estimates, over 1.5 million hours of billable time by Debevoise and Deloitte professionals have been devoted to the investigation . . . Over 100 million documents have been collected and preserved, many of which have been searched or reviewed for evidence relevant to the investigation. Siemens, either directly or through Debevoise, has produced to the Department over 24,000 documents, amounting to over 100,000 pages.” See Siemens Sentencing Memorandum, supra note 235, at 19. (Debevoise & Plimpton, LLP was retained to conduct an independent investigation to determine whether anti-corruption regulations had been violated and to assess the compliance and control systems).

240 See id. (“In consultation with the Department, Siemens designed and implemented a company-wide amnesty program to facilitate the internal investigation. This amnesty program was implemented on October 31, 2007 and continued until about February 29, 2008.”).

241 See Mike Esterl, Siemens Amnesty Plan Assists Bribery Probe, WALL ST. J. (Mar. 5, 2008) at A12, available at http://online.wsj.com/article/SB120465805725710921.html?mod=googlenews-wsj (“The program…was offered to all employees except 300 of Siemens’s top executives and expired at the end of February…[and] prompted about 110 employees to offer information about alleged wrongdoing.”).

242 See Siemens Sentencing Memorandum, supra note 235, at 20 (“Over 100 employees provided information in connection with the programs, including numerous employees who previously provided incomplete or less than truthful information and employees who had not come forward previously.”).

243 Id.
terminate culpable employees whose continued employment would not only harm the reputation and integrity of the firm, but also be adverse to the best interests of the government, the shareholders and the general public; while at the same time maintaining an incentive to encourage participation.

Siemens also granted cooperating employees immunity from any “company claims for damages” and agreed that it would bring an employee’s cooperation to the attention of authorities if he or she became the subject of a government investigation. While companies cannot, and should not, give employees immunity against suits brought by regulators or prosecutors; it can and should give them immunity from their own potential claims and recommend that they receive credit from the government for their cooperation or at a minimum avoid a negative inference. These incentives would encourage potentially culpable employees to cooperate because they have a significant interest in avoiding litigation and prosecution.

Another incentive that corporations should consider offering cooperating employees, which was not included in the Siemens’s program, is an assurance that that they will continue to receive advancements of legal fees according to stated corporate policies or past practices. In other words, reimbursement of attorneys’ fees would not be made contingent on the innocence of the employee. Under this approach, culpable employees who cooperate in the investigation would be protected against the company’s unilateral decision to withhold fees based on their incriminating statements. This would provide potentially culpable employees with an incentive to cooperate because if the company discovered their involvement in the fraud and they did not cooperate, the company could withhold legal fees.

244 Id.
245 See id. (explaining that it would make recommendations to the government, but that the program was in no way binding on any prosecutors or regulators).
After learning of the bottom-up strategy in Siemens, another German company, MAN AG announced its decision to implement a similar program to encourage employee cooperation with its investigation. Under the program, the company will generally waive any potential claim for damages and refrain from dismissing any employee that voluntarily provides information in connection with the investigation. This investigation has not been completed, so its success remains to be determined.

The DOJ, the SEC, and outside counsel conducting the Siemens investigation acknowledged the success of its programs, noting that it “was essential in gathering facts” and yielded “impressive results.” The advantages of a bottom-up approach, like the one used in Siemens, is that it creates affirmative incentives for employees to participate in internal investigations — employees who cooperate receive economic benefits and the potential for reduced criminal or civil liability. The offer of these incentives would encourage virtually all employees to participate in internal investigations. Unlike the coercive tactics currently used (threatening termination and withholding legal fees) these incentives would encourage even potentially culpable employees to cooperate. Employees who are culpable, or believe that they

247  See id. (“Employees of the Company are to be able to help clarify facts voluntarily in connection with the ongoing investigations by providing information. In return, MAN will generally waive any potential claims for damages and refrain from dismissals under the amnesty program.”).
250  See Siemens Sentencing Memorandum, supra note 235, at 20. The DOJ further acknowledged that “[i]t was only through the extensive, worldwide investigative efforts of the internal investigators that these complex criminal activities were uncovered. As a practical matter, it would have been exceedingly difficult for the Department to identify and obtain the necessary foreign financial records, review them, trace proceeds, and identify and interview potential witnesses, all between late 2006 and the present.” Id at 17.
are, would nonetheless benefit from cooperation because they would be insulated from some of the negative consequences that would typically flow once the company discovered their misconduct. Although innocent employees hardly need these additional incentives to cooperate, including them eliminates the fear that they may be terminated for outing a more senior official of wrongdoing. Further, exempting employees who are too high up in the hierarchy, a feature included in the Siemens program, can mitigate abuse of the system.

It is imperative that any company considering whether to adopt an amnesty program consult with government authorities and obtain their approval. The last thing a company would want is for the government to perceive the company’s incentive program to be a way of protecting culpable employees and interfering with the integrity of the investigation. Under the DOJ’s guidelines the decision of a company to protect culpable employees, by not disciplining them or terminating their employment, is considered a factor weighing against an award of cooperation credit, and might actually be grounds for the drawing of a negative inference.251 Accordingly, corporations should carefully explain the parameters of the program and its intended purpose to the government.

Ideally, the government will agree that these types of programs are beneficial and will adopt incentives for companies to develop and implement them, such as including it as a factor that prosecutors and regulators will consider when determining whether to award cooperation credit under the guidelines. Creating this type of corporate incentive would align the interests of the employees in receiving these benefits with the interests of the corporation in offering these concessions. Absent any incentive from the government, corporations may determine that it is not in their interest to encourage employee cooperation by offering them protection from

251 The Filip Memo specifically instructs prosecutors to consider the following factor in determining whether to charge a corporation: “[T]he corporation’s remedial actions, including any efforts...to replace responsible management [or] to discipline or terminate wrongdoers.” See Filip Memo, supra note 72, at 9-28.300(A) (factor 6).
negative employment consequences. Amnesty programs would be costly for corporations as they could require corporations to continue paying salaries or counsel fees for some period of time, and would restrict them from seeking damages, from culpable but cooperative employees. An additional benefit of referring to these types of potential incentives for employee cooperation in the guidelines is that it would make them more consistently and regularly applied by corporations. Even corporations who lack the resources to retain savvy counsel to suggest the bottom-up approach will become aware of its application to investigations and possibly adopt it when conducting their own.

Accordingly, one way to encourage an employee to share information about wrongdoing is to address his or her fear of reprisal from the company. An alternative method is to address the employee’s fear of criminal or civil prosecution from the government.

B. Model for Cooperation Credit Implemented by the Government

The government can also encourage employees to cooperate in investigations — similar to the way it encourages corporations to cooperate — by making it a factor the government will consider in awarding credit if the employee ultimately becomes the subject of a government investigation or prosecution. 252 Under this approach, the DOJ and SEC would publish official

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252 The adoption of leniency programs for cooperating employees would not be a novel idea for the government. In fact, the Anti-Trust Division of the DOJ published its guidelines for granting individual leniency programs under which individuals who approach the Division to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware will not be charged criminally for the activity being reported. See DEPT’ OF JUSTICE, ANTITRUST DIVISION, LEMIENCY POLICY FOR INDIVIDUALS (Aug. 10, 1994), available at http://www.usdoj.gov/atr/public/guidelines/0092.pdf; see also DEPT’ OF JUSTICE, ANTITRUST DIVISION, CORPORATE LEMIENCY PROGRAM 4 (Aug. 10, 1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.pdf (establishing a similar leniency program for corporations under which a corporation by which can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting other specified conditions).
criteria for corporate employees to earn cooperation credit.\(^{253}\) The indicia of cooperation should include: (i) whether the individual employee came forward to disclose relevant information which was not specifically requested, (ii) whether the individual employee provided truthful and complete information in response to questions from counsel, and (iii) whether the individual employee participated in remedial efforts, such as restating the books and records, or paying restitution.

The guidelines should stress that although corporations should make recommendations, the government would retain unfettered discretion to determine whether an individual employee is entitled to receive credit and how much credit to award.\(^{254}\) Although employees would not be guaranteed credit, the mere possibility of receiving credit (which may result in avoiding prosecution, or receiving a reduction in charges or penalties) would be enough to encourage many potentially culpable employees to cooperate given the high stakes of conviction.\(^{255}\)

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\(^{253}\) The DOJ would also have to revise the provision of the Filip Memo instructing prosecutors to generally “not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.” Filip Memo, supra note 72, at 9-28.1300(A). The comments go on to explain that “[p]rosecutors should rarely negotiate away individual criminal liability in a corporate plea.” Id. at 9-28.1300(B). Similar instructions were included in the McNulty and Thompson Memos. See McNulty Memo, supra note 65, at 2 (“Only rarely should provable individual culpability not be pursued even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.”); Thompson Memo, supra note 55, at 1 (“Only rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas”). While under the proposed system, prosecutors would not automatically grant immunity to individual employees, prosecutors would consider whether any individual employee was such an integral figure during the internal investigation that he or she should be entitled to avoid an indictment or receive a reduction in charges.

\(^{254}\) The government should have the same discretion in granting individual employees cooperation credit as it does in granting corporations credit. “A corporation’s [or individual employee’s] offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation [or individual employee] should not be able to escape liability merely by offering up its directors, officers, employees, or agents [or other individuals]. Thus, a corporation’s [or individual employee’s] willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.” Filip Memo, supra note 72, at 9-28.740 (additions by author).

\(^{255}\) These incentives would exist regardless of whether corporations routinely waived privilege and shared the results of the investigation with the government. By refusing to cooperate, an employee will risk that the government will obtain valuable information from other sources and will prosecute based on that evidence. Under such a scenario, the employee would not be entitled to receive cooperation credit and would possibly face enhanced financial penalties or criminal sentences for obstructing the investigation.
This system will only be effective if corporations advise employees at the outset of an investigation that the government will consider their cooperation in making charging and sentencing determinations if they are later pursued individually. Further, corporations and their counsel would have to retain copious records of employee cooperation throughout the investigation and turn those records over to the government in order for prosecutors or regulators to have a basis for determining who is entitled to receive credit. Alternatively, the government in coordination with the corporation can develop a system whereby individual employees can meet with government agents to negotiate an award of cooperation credit before they participate in the internal investigation.

Although it is a novel approach to grant credit to individual employees for their cooperation during internal investigations, the government has long recognized and rewarded an individual’s willingness to cooperate with prosecutors during government investigations. The prosecutorial technique of “flipping” is frequently used in the investigation and prosecution of drug crimes, where the government offers credit to the underlings in exchange for information about the kingpins. These pressures are intense for potential drug felons as the mandatory minimum sentences for drug crimes are extremely high. The only mechanism that allows a court to sentence a drug offender (like any other defendant) to less than the mandatory minimum sentences for drug crimes is to impose a sentence below the statutory minimum to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Similarly, the United States Sentencing Commission permits district courts to go below the minimum required under the Guidelines.

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256 Courts have also held that it is an acceptable practice in criminal prosecution for individuals to be rewarded for cooperation. See, e.g., Wade v. United States, 504 U.S. 181, 182 (1992) (“[T]he United States Code empowers district courts ‘upon motion of the Government,’ to impose a sentence below the statutory minimum to reflect a defendant’s ‘substantial assistance in the investigation or prosecution of another person who has committed an offense.’” Similarly, the United States Sentencing Commission permits district courts to go below the minimum required under the Guidelines.”).

257 See, e.g., Sara Sun Beale, Is Corporate Criminal Liability Unique? 44 AM. CRIM. L. REV. 1503, 1528 (2007) (“The typical prosecutorial technique in such cases [drug cases] is to proceed methodically through a series of cases, requiring each defendant to ‘flip’ that is to assist in the investigation and prosecution of others.”); David M. Zlotnick, Federal Prosecutors and the Clemency Power, 13 FED. SENT’G REP. 168, 169 (2001) (pointing out that “flipping” low level drug traffickers is key in prosecuting drug rings).

258 Unless the defendant cooperates, even a relatively low-level drug dealer is subject to mandatory minimum sentences of ten years. As an example, defendants who possess fifty grams of crack with intent to distribute face a mandatory minimum sentence of ten years. See 21 U.S.C. § 841(b)(1)(A)(iii) (2006).
requires that he or she have provided substantial assistance to the prosecution in the investigation of another person.\(^\text{259}\)

Under the current system, only after an employee becomes the target of a government investigation or prosecution can he or she receive credit for cooperation, similar to a drug offender.\(^\text{260}\) The credit is generally awarded based on the employee’s cooperation with prosecutors or regulators during the investigation into the employee’s misconduct, not based on the employee’s cooperation during the investigation of the corporation’s malfeasance.\(^\text{261}\) Rather, the credit for providing information obtained during an internal investigation is routinely awarded to the company who interfaces with the government and waives privilege instead of to the employees who deal with corporate counsel and make the statements.

One immediately identifiable downside to giving employees cooperation credit for participating in internal investigations is that the government may give credit, leading to an avoidance or reduction in charges or penalties, for information that it would have received from the company even without this concession. However, there is evidence that this system would not significantly alter the number of prosecutions or convictions ultimately obtained. Recent data has revealed that the overwhelming majority of employees pursued by prosecutors plead


\(^{260}\) As the DOJ guidelines prescribe: “A person’s willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination of whether a Federal prosecution should be undertaken.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL: PRINCIPLES OF FEDERAL PROSECUTION, tit. 9, ch. 9-27.230(B)(6) [hereinafter “USAM”], available at http://www.usdoj.gov/usaو/eousa/foia_reading_room/usam/title9/27mcrm.htm. See also USSG, supra note 258, at §§ 1B1.8 (cooperation agreements generally), 5F1.6 (drug trafficking and cooperation), 8C2.5 (cooperation in the prosecution of organizations).

\(^{261}\) See USAM, supra note 259. The problem is that by the time the individual employee is eligible to obtain credit, the government may no longer require cooperation as it may already have sufficient evidence to prosecute. “Of course not every defendant’s assistance is needed, and some defendants who wish to provide substantial assistance are denied that opportunity – and the concessions it would bring – because the prosecution can obtain the evidence in question without their assistance.” Beale, supra note 256, at 1527-28.
guilty and then cooperate with the government. This feature is not unique in our federal criminal justice system. All criminal defendants face pressure to plead guilty, and the overwhelming majority do in fact plead guilty waiving many legal rights.

Although the bottom-up approach for awarding cooperation credit to employees has never been suggested, some scholars have recommended that the government grant immunity for employee statements made during internal investigations. These scholars contend that employees interviewed during internal investigations should enjoy immunity analogous to the Garrity shield that protects public employees. In Garrity v. New Jersey, the Supreme Court held that coercion had tainted confessions made by law enforcement officers when the terms of a state statute made them choose between exercising their right against self-incrimination and retaining their employment. Under the Garrity rule, the government must therefore grant public employees immunity from the use of their statements in a subsequent criminal prosecution before the employees are required to answer questions about their public responsibilities, in order

262 See Garrett, supra note 212, at 928 n.50 (data demonstrates that ninety percent of employees subject to prosecution plead guilty and virtually all become cooperating witnesses for the government, frequently in trials against corporate executives (citing Kathleen F. Brickey, In Enron's Wake: Corporate Executives On Trial, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006)).

263 See Beale, supra note 256.

264 See U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.3 (“Guilty Pleas and Trial Rates”), available at http://www.ussc.gov/ANNRPT2008/SBTC08.htm (data showing that 95.7% of cases ended in a guilty plea in 2006, 95.8% in 2007, and 96.3% in 2008). The federal sentencing guidelines create a powerful incentive for any defendant to plead guilty to receive sentencing concessions. A reduction of two or three levels is available to a defendant who accepts responsibility. USSG, supra note 258, at § 3E1.1(a). A two-level reduction equals, on average, a thirty-five percent reduction in the sentence. See Julie R. O’Sullivan, Ten Years Later: In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System, 91 NW. U. L. REV. 1342, 1415 & n.274 (1997) (collecting data for the calculation). This reduction is not available to a defendant who "puts the government to its burden of proof at trial by denying the essential factual element of guilt." USSG, supra note 258, at § 3E1.1 (cmt., app. notes, 2).

265 See Griffin, supra note 86, at 313 (“[T]he convergence of cooperation doctrine with the shift to individual targets results in significant unfairness for the individual employees compelled to incriminate themselves in the context of internal investigations directed by the government.”).

266 Garrity v. New Jersey, 385 U.S. 493, 496 (1967) (holding that statements obtained from police officers in circumstances in which a state statute would have required the termination of their employment had they decided to answer were involuntary and therefore inadmissible against them in a criminal trial).
to avoid a constitutional violation. 267 Those advocating extending Garrity protections explain that corporate employees compelled to make statements in government-directed investigations should be able to avail themselves of constitutional protections, similar to those available to public employees. 268 Extending Garrity in this way would mean excluding statements made during internal interviews and their fruits in subsequent individual prosecutions. 269 This protection would avoid the precarious situation of employees being “convicted of lying to prosecutors without ever talking to them.” 270

The downside of this approach is that it would limit the government’s ability to successfully bring claims against individual employees because it would automatically suppress all incriminating statements, and any evidence obtained based on those statements. The bottom-up approach would retain the positive feature that immunity offers — it would give employees an incentive to cooperate by offering them potential protection from prosecution. However, it would cure the negative aspect of a Garrity-type immunity as it would not cripple the efforts of prosecutors or regulators to pursue individual wrongdoers.

Accordingly, the government and corporations suspected of malfeasance should consider implementing a bottom-up strategy to supplement the top-down strategy currently used to investigate corporate misconduct. Such a system would align the interests of the government, the corporations, and the individual employees; the government would receive additional

267 See Griffin, supra note 86, at 355 n.215 (citing Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 392 U.S. 280, 284 (1968) to support the proposition that “public employees required to answer questions ‘on pain of dismissal from public employment’ would ordinarily be able to invoke their ‘right to immunity’ in later proceedings); see also Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977) (“[W]hen a state compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution.”).  
268 See Griffin, supra note 86, at 356.  
269 See id. at 353-58.  
270 Id. at 373 (explaining that employees of Computer Associates were convicted for lying to prosecutors based on statements made to counsel and auditors).
information to help them more efficiently unravel and prosecute corporate fraud, cooperating employees would avoid negative employment actions and possibly prosecution which would give them financial security, and cooperating corporations would possibly avoid an indictment or receive a reduction in charges which would help preserve their reputations. The bottom-up approach thus represents an improvement over the current system as it would give the “underlings” affirmative incentives to disclose relevant, but potentially harmful, information which would help the government identify and prosecute the “kingpins.”

**Conclusion**

In response to the recent corporate scandals of Enron and Worldcom, the government has focused intensive efforts on developing a strategy to investigate and prosecute corporate malfeasance. The prevailing top-down approach, which essentially turns corporations into the investigative arm of the government, stands in stark contrast to the pre-Enron era when corporations were accused of “circling the wagons” to obstruct government investigations. To encourage corporations to shift gears during an investigation, the government adopted guidelines which provided corporations with incentives to cooperate, such as offering to withhold indictments. Among the indicia of cooperation have been conducting comprehensive internal investigations, waiving privilege to disclose the results, and coercing employee cooperation by threatening them with loss of employment or legal fees.

This approach to investigation not only raises concerns about violations of constitutional rights and the erosion of privilege, but also faces another critical problem: the top-down strategy will become less effective in unraveling corporate fraud as employees learn that it is not in their interest to cooperate. Further, the approach aims deterrence at the wrong people – it does not
focus on high corporate officials who often orchestrate and tolerate the wrongdoing, but instead focuses on employees who participate in the unlawful acts.

In order to encourage employee cooperation and focus enforcement on the appropriate actors, the top-down approach should be supplemented with a bottom-up approach, long used by government agencies in rooting out criminal behavior in other areas, particularly drug enforcement. The program can be offered either by the company in the form of protection from negative employment consequences or by the government in the form of potential protection from prosecution. Although neither type of program has been endorsed by the government, the Siemens investigation demonstrates a potential move in that direction. There is every reason to believe that a bottom-up strategy would be an effective supplement to the top-down approach that currently predominates in the corporate world. Indeed, the use of a corporate amnesty program in the Siemens investigation has proven successful in encouraging employee cooperation and unraveling the web of corporate fraud.