# NOTES

## Legislation is Necessary for Deferred Prosecution of Corporate Crime

*"[T]here's been an erosion of confidence . . . not only in the financial system, but in the justice system which failed to bring the bad actors to justice. Pay a fine, avoid jail. Promise you'll do better next time and no one gets prosecuted. The fine simply becomes the price of doing business . . . . [T]he captains of corporate America who did our nation wrong, look to the very justice system that's supposed to protect citizens, to bail themselves out. We're here today seeking legislation to help right the ship of justice."*[1]

### I. INTRODUCTION

Corporate crime has plagued the American economy during the past two decades, causing staggering unemployment and destroying investor confidence in the stock market.[2] Typically involving complex financial schemes and sophisticated cover-ups, corporate crime is incredibly difficult to detect and prevent.[3] Corporate culture often embraces the criminal activity, so employees

1. Rep. Steve Cohen Holds a Hearing on Accountability, Transparency, and Uniformity in Corporate Deferred and Non-prosecution Agreements, Hearing on H.R. 1947 Before the H. Comm. on the Judiciary and Subcomm. on Commercial and Administrative Law, 111th Cong. 41 (June 25, 2009) [hereinafter H.R. 1947 Congressional Hearing] (statement of Rep. Pascrell) (advocating for legislation regarding deferred prosecution agreements).

2. *See* INTERNAL CORPORATE INVESTIGATIONS 2 (Barry F. McNeil & Brad D. Brian eds., 3d ed. 2007) (opining rampant corporate scandals responsible for increased corporate investigations); *see also* Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 109 (2006) (recognizing "epidemic" of corporate crime); Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 2-3 (2008) (describing corporate crime in twenty-first century); J. Scott Dutcher, Note, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1298 (2005) (highlighting economic damage caused by corporate crime). Corporate crime refers to crimes committed by a business entity or an individual representing the business entity and includes fraud, theft, bribery, embezzlement, extortion, forgery, counterfeiting, insider trading, money laundering, and tax evasion. See Dutcher, *supra* at 1297 (listing common types of corporate crime).

3. *See* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 72 (2007) (noting corporate crime "difficult to detect, investigate, and prosecute"). Corporate criminal prosecution is complicated by the corporation's "peculiar, and often confounding, status as legal 'persons'; the inscrutability of the corporate

are less likely to report or refrain from wrongdoing.[4] Within the corporate setting, minor accounting or tax violations can quickly snowball into complex fraudulent schemes.[5] Most corporate crime entails methodical deceit and concealment by intelligent high-level executives who are familiar with and can anticipate and evade government regulation.[6] In addition, corporations hire experienced lawyers who conduct internal investigations to defend the corporation and utilize principles such as the attorney-client privilege and work-product protection to make the government's investigation more difficult.[7]

On July 9, 2002, in response to the ever-growing problem of corporate crime, President Bush established the Corporate Fraud Task Force to strengthen prosecution of corporate crime by the Department of Justice (DOJ).[8] Additionally, Congress enacted the Sarbanes-Oxley Act in 2002 to expand the Securities and Exchange Commission's ability to regulate corporate activity and increase compliance requirements for corporate accounting practices.[9] In 2003, Deputy Attorney General Larry D. Thompson issued a memorandum establishing new federal guidelines for the prosecution of business organizations.[10] While the legal community generally accepted Sarbanes-Oxley, many criticized the Thompson Memorandum for being unfairly

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form; their central importance to the economy; their relationships with shareholders and employees; and their special vulnerability in the marketplace." *Id.* at 73.

4. *See* United States v. Brodie, 403 F.3d 123, 154-56 (3d Cir. 2005) (providing example of "corporate culture" of concealment and deceit that makes evidence gathering extremely difficult); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 496 (2006) (suggesting people more likely to stray from societal norms when acting in groups).

5. *See* Buell, *supra* note 4, at 496 (examining group psychology leading to widespread corporate crime).

6. *See* Cynthia Barnett, U.S. Dep't of Justice, The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 1, http://www.fbi.gov/ucr/whitecollarforweb.pdf (describing characteristics of white-collar crime). According to the Federal Bureau of Investigation (FBI), white-collar crime is defined as "those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence." *Id.*; *see also* Dutcher, *supra* note 2, at 1297 (differentiating white-collar crime from violent crime).

7. *See* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 2, at 21-60 (summarizing elements and implications of attorney-client privilege within corporations); Seigel, *supra* note 2, at 31 (arguing corporate privilege deprives prosecutors of essential facts).

8. CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT 1.2 (July 20, 2004), http://www.usdoj.gov/dag/cftf/2nd _yr_fraud_report.pdf.

9. *See* David H. Kistenbroker et al., *Criminal and Civil Investigations:* United States v. Stein *and Related Issues* 1, Practising Law Institute: Securities Litigation & Enforcement Institute (2006) (describing Act's purpose); INTERNAL CORPORATE INVESTIGATIONS, *supra* note 2, at 3-5 (summarizing Sarbanes-Oxley's effects on internal corporate investigations).

10. *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations 3 (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum] (listing nine factors to consider when investigating business organizations). The Thompson Memorandum states "[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation." *Id.*; *see also* Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1484-85 (2007) (highlighting corporate scandals leading to Thompson Memorandum).

prejudicial to corporations and individual defendants.[11]

The criticism stemmed from the Thompson Memorandum's emphasis on genuine cooperation, which directed prosecutors to request that corporations waive attorney-client privilege and encourage employees to testify.[12] Although privilege waiver and witness testimony were traditionally difficult for the DOJ to obtain, most corporations complied with the DOJ requests because criminal prosecution causes severe reputational and monetary harm.[13] In exchange for cooperation, federal prosecutors offered many corporations deferred prosecution agreements to avoid the negative effects an indictment has on the corporation's innocent employees and shareholders, such as job loss and financial ruin.[14] Deferred prosecution agreements are essentially contracts with the DOJ, whereby the DOJ agrees not to pursue the charges filed against the corporation so long as the corporation fulfills certain requirements contained in the agreement.[15]

In accordance with the Thompson Memorandum, federal prosecutors entered into numerous deferred prosecution agreements with corporations in return for the corporation's assistance in prosecuting individual employees.[16] With the

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11. *See* Joshua K. Byers, Comment, *Restoring Access to the Advancement of Defense Costs for White-Collar Defendants: The Inadequacies of the McNulty Memo*, 91 MARQ. L. REV. 549, 551 (2007) (describing unfair leveraging techniques authorized by Thompson Memorandum).

12. *See* Thompson Memorandum, *supra* note 10, at 3 (setting forth factors for consideration when charging corporations). The Thompson Memorandum directs prosecutors to consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." *Id.*; *see also* Byers *supra* note 11, at 551 (highlighting detrimental effects of Thompson Memorandum on individual employees).

13. *See infra* note 84 and accompanying text (explaining detrimental effects of corporate criminal investigations).

14. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321 (2007) (introducing deferred prosecution agreements); Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1437-38 (2007) (describing deferred prosecution agreements as "probationary agreement[s]"); *see also infra* note 84 (illustrating swift demise of Arthur Anderson and harm to innocent employees and shareholders). In some cases, prosecutors seek non-prosecution agreements, which differ from deferred prosecution agreements because prosecutors do not file formal charges against the corporation in non-prosecution agreements. *See* Paulsen, *supra*, at 1438; *see also* Elizabeth R. Sheyn, *Anything but a "Racket": Why Professor Richard Epstein's Attack on the Nature and Function of Deferred and Non-Prosecution Agreements Misses the Mark* (2007) (unpublished comment, on file with the Washington University Law Review), http://lawreview.wustl.edu/slip-opinions/anything-but-a-racket-why-professor-richard-epsteins-attack-on-the-nature-and-function-of-deferred-and-non-prosecution-agreements-misses-the-mark/ (differentiating deferred prosecution and non-prosecution agreements). While this Note focuses on deferred prosecution agreements, most of the discussion applies to both deferred prosecution and non-prosecution agreements.

15. *See* Griffin, *supra* note 14, at 321-22 (describing deferred prosecution procedure).

16. *See id.* at 323 (explaining how Thompson Memorandum encouraged use of deferred prosecution agreements "as an alternative to indictment"). The Thompson Memorandum encouraged federal prosecutors to indict individual wrongdoers, which allowed prosecutors to "bolster their statistics . . . while avoiding the collateral consequences of the collapse of a big company." *Id.* at 331; *see also* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 893-902 (conducting empirical analysis of thirty-five DOJ Agreements).

corporation's assistance, federal prosecutors frequently bypassed the attorney-client privilege and work-product protection to obtain the corporate attorney's internal investigative records.[17] Although intended to guide prosecutors through corporate criminal charging decisions, the Thompson Memorandum caused some overzealous prosecutors to abuse their discretion.[18]

In what has been called the "perfect storm" of cases, *United States v. Stein*[19] sent shockwaves through the legal community when the United States District Court for the Southern District of New York dismissed thirteen indictments against former KPMG executives due to prosecutorial misconduct.[20] KPMG, a Big Four accounting firm, entered into a deferred prosecution agreement with the DOJ in 2005 in connection with a tax fraud investigation, and, as part of the agreement, assisted the DOJ with its investigation of KPMG's former executives.[21] However, the district court dismissed the indictments against the former executives on the grounds that the federal prosecutors, acting under the guidance of the Thompson Memorandum, violated the defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to effective assistance of counsel.[22] The district court explained that, to defer prosecution, KPMG waived its attorney-client privilege, coerced its employees to testify, and ceased paying the legal fees for indicted employees.[23] In 2008, the Second Circuit affirmed the district court's decision that the federal prosecutor's use of the Thompson Memorandum unconstitutionally influenced KPMG's decision to stop paying the defendants' attorneys' fees, thereby depriving them of their Sixth Amendment right to effective assistance of counsel.[24]

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17. *See* Garrett, *supra* note 16, at 883 (illustrating significant advantages of corporate cooperation).

18. *See, e.g.*, United States v. Stein, 541 F.3d 130, 146 (2d Cir. 2008) (upholding district court's dismissal of indictments due to prosecutors' violation of defendants' Sixth Amendment right); United States v. Stringer, 408 F. Supp. 2d 1083, 1091-92 (D. Or. 2006) (dismissing indictment because prosecutors violated defendant's Fifth Amendment right to due process); United States v. Scrushy, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005) (suppressing SEC testimony because prosecutors violated defendant's Fifth Amendment right).

19. 435 F. Supp. 2d 330 (S.D.N.Y. 2006) [hereinafter *Stein I*], *aff'd*, 541 F.3d 130 (2d Cir. 2008).

20. *See* Response to Rule 21(b)(4) Invitation at 10, Stein v. KPMG, LLP, No. 06-4358-cv, 2007 WL 1593793 (2d Cir. Jan. 8, 2007) (listing "improbable circumstances" leading up to the dismissal); *see also Stein*, 541 F.3d at 158 (affirming district court's dismissal of indictments); Joan-Alice M. Burn, United States v. Stein: *Has the "Perfect Storm" Led to a Sea Change?*, 32 DEL. J. CORP. L. 859, 859 (2007) (noting circumstances unlikely to occur again). In what the government called the "largest criminal tax-fraud case in history," the Senate's Permanent Subcommittee on Investigations found that the fraudulent tax shelters used by KPMG cost the Treasury at least $1.4 billion in unpaid taxes. Brian M. Carney, *Tax 'Fraud' Travesty*, WALL ST. J., July 19, 2007, at A14 (announcing dismissal of thirteen defendants).

21. *See Stein*, 541 F.3d at 137 (providing background information regarding KPMG's criminal investigation); Lynnley Browning, *KPMG Says Tax Shelters Involved Wrongdoing*, N.Y. TIMES, June 17, 2005, at C1 (describing KPMG's unlawful scheme).

22. *See Stein*, 541 F.3d at 136 (setting forth reasons for affirming trial court's decision). The Second Circuit did not discuss the district court's Fifth Amendment ruling. *Id.*

23. *Id.* at 137-39 (describing facts leading up to indictment).

24. *Id.* at 144 (stating no error in Judge Kaplan's factual findings). The Second Circuit held that the

On August 28, 2008, the same day that the Second Circuit affirmed the district court's decision in *United States v. Stein*, Deputy Attorney General Mark R. Filip announced a revised set of guidelines for the prosecution of business organizations.[25] The new guidelines state that credit for cooperation will depend on the disclosure of relevant facts and not on the waiver of attorney-client privilege.[26] Furthermore, the Filip Memorandum instructs prosecutors not to take into account the payment of attorneys' fees when evaluating cooperation.[27] Despite a major victory for corporate defendants, the Filip Memorandum and the *United States v. Stein* decision have not significantly changed the DOJ's strategy for prosecuting corporate crime.[28]

Part II.A of this Note will discuss the Fifth and Sixth Amendments, indemnification agreements, and the attorney-client privilege in the context of corporate crime.[29] Part II.B of this Note will then consider the role of the federal prosecutor in corporate criminal investigations.[30] Part II.C of this Note

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district court correctly found that "but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have advanced legal fees without condition or cap." *Id.* On December 12, 2006, Deputy Attorney General Paul McNulty issued his own memorandum setting forth revised federal prosecutorial guidelines. *See generally* Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter the McNulty Memorandum]. While the McNulty Memorandum revised some of the more egregious aspects of the Thompson Memorandum, prosecutors were still allowed, under special circumstances, to request a waiver of privilege and to consider the payment of attorneys' fees when evaluating a corporation's cooperation. *Id.* at 11.

25. *See* Press Release, United States Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html [hereinafter Press Release, Justice Department] (announcing revised guidelines).

26. *See* Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations, at 9 (Aug. 28, 2008), http://www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf [hereinafter Filip Memorandum] (discussing cooperation and disclosure by corporations).

27. *Id.* Deputy Attorney General Filip stated that "[t]he changes that the Department announces today are in keeping with the long-standing tradition of refining the Department's policy guidance in light of lessons learned from our prosecutions, as well as comments from others in the criminal justice system, the judiciary, and the broader legal community." Press Release, Justice Department, *supra* note 25; *see also* Mark R. Filip, Deputy Att'y Gen'l, Dep't of Justice, Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines, (Aug. 28, 2008), *available at* http://www.justice.gov/archive/dag/speeches/2008/dag-speech-0808286.html (proclaiming three mandates for DOJ).

28. *See* Jonathan D. Glater & Michael M. Grynbaum, *U.S. Lifts a Policy in Corporate Crime Cases*, N.Y. TIMES, Aug. 29, 2008, at C6 (analyzing Second Circuit decision and Justice Department's announcement). Defense attorney Michael J. Madigan for John Lanning, former head of KPMG's tax practice, said "[t]his decision is a watershed event that is going to go down as one of the most important decisions in the last 20 years in the criminal justice system." *Id.* Stephanie Martz, Director of the White-Collar Crime Project for the National Association of Criminal Defense Lawyers, wrote "[t]wo branches of government in one day have announced their agreement that the government cannot pressure businesses and other entities to treat individuals in a way that it would be unconstitutional for the government to do directly." *Id.*

29. *See infra* Part II.A (discussing various Fifth and Sixth Amendment issues, indemnification agreements, and attorney-client privilege in corporate investigations).

30. *See infra* Part II.B (examining role of U.S. Attorney in conjunction with federal prosecutorial guidelines).

will discuss the purpose of deferred prosecution agreements and explore the effects deferred prosecution has on corporations and employees.[31] Part II.D of this Note will examine how the federal prosecutorial guidelines of business organizations have transformed prosecutorial discretion.[32] Finally, in Part III, this Note will analyze the limitations of the Filip Memorandum and promote the Attorney-Client Privilege Protection Act and the Accountability in Deferred Prosecution Act.[33]

## II. HISTORY

### *A. Practical and Constitutional Issues in Corporate Criminal Investigations*

#### *1. The Fifth Amendment*

The Due Process Clause of the Fifth Amendment guarantees fairness to criminal defendants throughout criminal proceedings.[34] Under the Self-Incrimination Clause of the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[35] The Fifth Amendment Self-Incrimination Clause applies to corporate investigations, whether conducted internally by corporate counsel or externally by government agents, because the Fifth Amendment applies to any disclosure that may criminally implicate a declarant.[36] However, for the Fifth Amendment privilege against self-incrimination to apply in internal corporate investigations, there must be state action that compels the disclosure.[37]

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31. *See infra* Part II.C (explaining advantages and disadvantages of deferred prosecution agreements to corporations, individuals and DOJ).

32. *See infra* Part II.D (illustrating DOJ policy shift for prosecuting corporate crime).

33. *See infra* Part III.A (revealing Filip Memorandum's limitations); *infra* Part III.B (promoting Attorney-Client Privilege Protection Act); *infra* Part III.C (endorsing Accountability in Deferred Prosecution Act).

34. *See* U.S. CONST. amend. V (declaring "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law"); *see also Stein I*, 435 F.Supp.2d 330, 356-60 (S.D.N.Y. 2006) (describing nature of due process under Fifth Amendment).

35. U.S. CONST. amend. V (promulgating individual right against self-incrimination).

36. *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (acknowledging validity of Fifth Amendment in all proceedings); *see also* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (applying Fifth Amendment protection to witness in grand jury investigation). An individual may invoke his or her Fifth Amendment right against self-incrimination "unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Turley*, 414 U.S. at 78. If the individual is compelled to answer without receiving immunity from future criminal proceedings against him, his incriminating statements are inadmissible. *Id.*

37. *See* Griffin, *supra* note 14, at 353 (outlining requirements for Fifth Amendment application to internal corporate investigations). The Supreme Court has never applied the Fifth Amendment to prevent disclosures that "did not involve compelled testimonial self-incrimination of some sort." Fisher v. United States, 425 U.S. 391, 399 (1976). Further, the statements must be compelled by "state action," meaning the compulsion must be "fairly attributable" to the state. *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982); *see also* Bohrer & Trencher, *supra* note 10, at 1489 (outlining requirements of "state action"). The Supreme Court has held that "state action" exists where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting

In most corporate internal investigations, employees must decide whether to cooperate with the company's investigation by answering questions or receive disciplinary action.[38] The pressure corporations put on employees during internal investigations is a direct result of the potential negative impact corporations face during state and federal investigations.[39] While the Fifth Amendment does not prevent employers from asking questions and terminating employees who refuse to answer, it does prohibit the in-court use of statements obtained under the threat of termination, if that threat derives from the government.[40]

### *2. The Sixth Amendment*

The Sixth Amendment's Assistance of Counsel Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[41] This guarantees more than the mere presence of a lawyer at a criminal trial; it protects, among other things, an individual's right to choose his or her own lawyer, to use his or her own funds, and to mount his or her own defense.[42] The Sixth Amendment protects a

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Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)). The "close nexus" exists when the state exercises "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* (citations omitted).

38. *See* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 2, at 406-09 (highlighting dilemma facing employees during internal investigations and summarizing court's conclusions of law). Typically, courts do not review federal prosecutors' tactics during corporate criminal investigations, but in *United State v. Stein*, the district court, given the opportunity, suppressed certain statements made by employees who were under pressure from their employer and the DOJ to testify. *See* United States v. Stein, 440 F. Supp. 2d 315, 337-38 (S.D.N.Y. 2006) [hereinafter *Stein II*] (suppressing coerced statements).

39. *See* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 2, at 411 (explaining negative consequences to corporation when employees plead Fifth Amendment). When employees exercise their Fifth Amendment privilege during a criminal investigation, the government may find that the corporation is being uncooperative, which will increase the likelihood of an indictment. *Id.* In civil cases, the trier of fact is asked to draw an adverse inference against the corporation on the basis of an employee's silence. *Id.*

40. *See* Griffin, *supra* note 14, at 360 (differentiating between employer coercion and government delegated coercion); *see also* Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 873 (1998) (stating "a state may not do indirectly what it is prohibited from doing directly"); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1816-17 (1992) (explaining differences between government and employer rights). "[T]he fact that an employer has a right to do something to its employees does not mean that the government may force the employer to do it." *See* Volokh, *supra*, at 1816. *But see* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 868 (1995) (cautioning extension of Fifth Amendment privilege to economic coercion outside criminal justice system).

41. *See* U.S. CONST. amend. VI (promulgating Assistance of Counsel Clause). The Assistance of Counsel Clause requires that a defendant "be afforded the right to assistance of counsel before [the defendant] can be validly convicted and punished." Martinez v. Court of Appeal of Cal., Fourth Appellate District, 528 U.S. 152, 154 (2000); *see also* Kistenbroker, *supra* note 9, at 6-7 (discussing investigatory tactics violating Sixth Amendment).

42. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989) (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)) (evaluating Sixth Amendment right to counsel). A defendant's exercise of his Sixth Amendment right to counsel is not to be feared or avoided by the Government:

defendant's right to spend his own money—or money to which the defendant has a right—toward counsel of his choice.[43] In addition, the Supreme Court has held that the right to counsel is the right to "effective assistance of competent counsel."[44] The difficulty in most complex corporate criminal cases is that public defenders and general practitioners are unfit to represent defendants effectively because they do not posses adequate knowledge and experience in both business and criminal law.[45]

### *3. Indemnification of Legal Fees*

Indemnification of legal fees has a long history in the United States and corporate law sanctions it in one form or another in every state.[46] Contrary to the belief that indemnifying officers and directors serves to protect corporate wrongdoers, indemnification agreements are designed to level the playing

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> No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

43. *See* Caplin & Drysdale, 491 U.S. at 624-25 (examining Sixth Amendment right to counsel). In a recent decision, the United States District Court for the Eastern District of Virginia ruled that to prevail on a Sixth Amendment claim defendants must prove:

> (i) that they had retained counsel of choice to represent them with funds of their own or funds to which they had a right, (ii) that the government wrongfully interfered with their right to be represented by counsel of choice, (iii) that the right to be free from government interference with retained counsel had attached at time of the interference, (iv) the interference prejudiced defendants.

United States v. Rosen, 487 F. Supp. 2d 721, 727 (E.D. Va. 2007).

44. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (recognizing right to effective assistance of counsel); McMann v. Richardson, 397 U.S. 759, 771 (1970) (explaining purpose of Sixth Amendment right to counsel).

45. *See* Byers, *supra* note 11, at 549-51 (2007) (describing frequent complexity and ambiguity of charges stemming from corporate criminal investigations).

46. *See Stein I*, 435 F. Supp. 2d 330, 353-55 (S.D.N.Y. 2006) (summarizing history of indemnification in corporate America); Kistenbroker, *supra* note 9, at 2 (providing background for indemnification). Delaware's indemnification provision provides:

> A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative . . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation . . . against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

DEL. CODE ANN. tit. VIII, § 145(a) (2006).

field.[47] Reimbursing corporate employees for legal expenses incurred while responding to government investigations is an essential element of good corporate governance.[48] Not surprisingly, many employment contracts provide for the payment of legal fees by the employer, although the defendant's right to legal fees may be based on the employer's past business practice if it is not provided for in the contract.[49]

Defending against complex corporate criminal investigations can result in colossal legal fees and severe sanctions, which is difficult for even the wealthiest defendants to afford.[50] Therefore, many states permit corporations to advance legal fees to employees with the condition that the employee must repay the money if it is subsequently determined that the employee performed illegal acts.[51] While indemnification agreements relieve employees of the burden of defending against investigations or indictments, corporations also benefit because these agreements attract talented employees.[52]

### *4. Attorney-Client Privilege in the Corporate Context*

The attorney-client privilege is a common-law rule of evidence that protects the communications between a client and his or her attorney.[53] The privilege

47. *See* Kistenbroker, *supra* note 9, at 2 (outlining purpose and benefit of corporate indemnification agreements).

48. *See id.*; *see also* Nishchay H. Maskay, Comment, *The Constitutionality of Federal Restrictions on the Indemnification of Attorneys' Fees*, 156 U. PA. L. REV. 491, 497-500 (2007) (discussing different types of indemnification).

49. *See* United States v. Rosen, 487 F. Supp. 2d 721, 727-28 (E.D. Va. 2007) (acknowledging right to advancement of fees from employer's past practice).

50. *See* Maskay, *supra* note 48, at 494-96 (demonstrating substantial costs in white-collar criminal cases); Byers, *supra* note 11, at 549-51, 562 (summarizing defense costs in white-collar criminal cases). *See, e.g.*, Steve Fry, Lake's Attorneys Are Owed Millions, THE TOPEKA CAP.-J., May 30, 2007, at A1 (stating senior executive will spend three million in legal defense fees for third trial alone); Jennifer Levitz, Moving the Market: Kozlowski Seeks Reimbursement, WALL ST. J., June 5, 2006, at C3 (noting Tyco's former CEO sought reimbursement of $17.8 million from his first white-collar criminal defense). Indemnification ensures that employees will receive effective assistance of counsel during the investigation. *See* Maskay, *supra* note 48, at 496-97 (providing justifications for indemnification).

51. *See Stein I*, 435 F. Supp. 2d at 355 (describing common conditions attached to legal fee advancement).

52. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005) (acknowledging indemnification "encourages corporate service by capable individuals"). Corporate employees involved with investigations and legal proceedings will incur significant out-of-pocket expenses due to their service for the corporation and indemnification relieves them of this financial burden. *See Stein I*, 435 F. Supp. 2d at 355 (examining indemnification provisions). In return for paying defense costs of individual employees, the corporation benefits by "keeping and hiring competent and honest employees." *Id.* at 364. Today, due to the aggressive tactics used by the DOJ to combat corporate crime, employees are dependent upon indemnification as part of their standard benefits package. *See* Byers, *supra* note 11, at 562 (explaining employee dependence on indemnification).

53. *See* Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (explaining privilege protects communications not facts); *see also* Mathew S. Miller, Note, *The Costs of Waiver: Cost-Benefit Analysis as a New Basis for Selective Waiver of Attorney-Client Privilege*, 83 N.Y.U. L. REV. 1248, 1252 (2008) (explaining common-law roots of attorney-client privilege).

applies if the communication is between the client and his or her attorney, made in confidence, for the purpose of seeking legal advice, and the client has not waived the privilege.[54] While the privilege protects the communication, it does not protect the underlying facts of the case or the investigation from disclosure by the attorney.[55] The purpose behind the privilege is to promote "full and frank communication between attorneys and their clients."[56] The privilege encourages individual and organizational clients to consult with their attorneys regarding how to comply with the law.[57]

Once a corporation learns of a potential government investigation, it will often conduct an independent internal investigation to determine the legitimacy of the allegations and the extent of the alleged wrongdoing.[58] By conducting its own internal investigation, the corporation is better able to predict its potential liability and take the best corrective action, while preserving the record with attorney-client privilege and work-product protection.[59] Internal investigations typically involve comprehensive document reviews coupled with interviews of employees associated with the alleged wrongdoing.[60] While most internal investigations begin with document reviews, employee interviews are a crucial step because they add relevant background information that documents are unable to provide.[61] During employee interviews, corporate counsel must disclose the fact that he or she represents the corporation and not the employee, so that the employee understands his or her right to obtain separate counsel.[62]

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54. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (listing elements of attorney-client privilege).

55. *See Upjohn*, 449 U.S. at 395 (describing limits to privilege).

56. *See id.* at 389 (explaining privilege promotes compliance with law and administration of justice). For attorneys to render sound legal advice they must obtain all the facts from their client and the client must have confidence that his disclosures to his or her attorney will be protected from compelled disclosure. *See* Miller, *supra* note 53, at 1252 (explaining purpose and importance of privilege). *But see* Seigle, *supra* note 2, at 30 (noting "privilege interferes with ascertainment of the truth").

57. *See* R. William Ide, III, *Erosion of the Attorney-Client Privilege and Work Product Doctrine: The ABA and Other Groups Seek Reversal Of Government Waiver Policies*, THE METRO. CORPORATE COUNSEL, 27 (2006) (advocating importance of attorney-client privilege).

58. *See* Andrew Gilman, *The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy*, 35 FORDHAM URB. L.J. 1075, 1083 (2008) (describing process of initiating internal investigation).

59. *See id.* (depicting benefit of conducting internal investigation); Seigle, *supra* note 2, at 15 (illustrating ability to slow down investigation with attorney-client privilege and work-product protection). The corporation's internal investigative record typically includes privileged communications between employees and counsel as well as attorney notes and memoranda from employee interviews, which are protected by work-product. *See* Miller, *supra* note 53, at 1250 (describing investigatory process); *see also* Seigle, *supra* at 26 (explaining attorney-client privileged material).

60. *See* Gilman, *supra* note 58 (describing investigative process); *see also* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 888-92 (explaining key steps for successful internal investigations).

61. *See* Duggin *supra* note 60, at 891-92 (stressing most critical element in internal investigations is employee interview). As Professor Duggin explains, "[d]ocuments are the bare bones, but interviews are the heart and soul of an internal investigation." *Id.*

62. *See* Gilman, *supra* note 58, at 1085-86 (discussing importance of counsel's explanation of nature of

While conducting internal investigations, the attorney-client privilege is the primary means for protecting corporate counsel's investigative record from disclosure to investigating government agencies.[63] For the privilege to apply to communications between corporate counsel and low-level corporate employees, corporate counsel should note that the employee was seeking legal advice, the employee was cooperating at the direction of his or her superiors, and the communications were regarding matters within the employee's scope of employment.[64] However, the privilege belongs to the corporation, and the corporation may unilaterally disclose privileged communications between corporate counsel and corporate employees.[65]

As the government investigation advances, most corporations attempt to cooperate and avoid indictment.[66] Corporate cooperation requires assisting the DOJ with gathering information, providing explanations for complicated issues or suspicious behavior, and making employees available for interviews.[67] From 2003 to 2007, the DOJ frequently requested that corporations waive attorney-client privilege and produce all results from internal investigations, including attorney notes and memoranda from employee interviews.[68] With the threat of indictment providing tremendous leverage to the DOJ, many corporations waived their attorney-client privilege to receive cooperation credit.[69] By obtaining privileged material through waiver, the DOJ discovers the corporate attorneys' and employees' unpolished thoughts and impressions in connection with the alleged wrongdoing, without doing any investigative work.[70]

In an effort to protect the attorney-client privilege, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2009, a revised version of a previous act, which proposes statutory protections to corporations dealing with waiver issues.[71] The DOJ opposes legislation strengthening the

representation, referred to as "Upjohn warnings").

63. *See* Gilman, *supra* note 58, at 1083-84 (comparing privilege to "shield" that protects internal investigations); Seigle, *supra* note 2, at 26 (describing attorney-client privilege in corporate context); *see also* McNeil, *supra* note 2, at 10-11, 19 (highlighting importance of establishing and preserving privilege during internal investigation).

64. *See* Upjohn Co. v. United States, 449 U.S. 383, 394 (1981) (stating requirements for privilege to apply to communications with corporate employees during internal investigation).

65. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc) (explaining privilege ordinarily belongs to corporation, not employee).

66. *See* Miller, *supra* note 53, at 1249 (observing cooperation with government dramatically decreases risk of indictment).

67. *See* Seigle, *supra* note 2, at 27-28 (explaining tremendous advantage corporations provide to government investigations by cooperating).

68. *Id.* at 28-29 (providing examples of why government deems privilege waiver necessary to fight corporate crime).

69. *See* Miller, *supra* note 53, at 1249-50 (illustrating enormous pressure on corporations to avoid indictment); *see also* Gilman, *supra* note 58, at 1079-80 (opining corporations "compelled to waive their privilege in order to receive cooperation credit").

70. Seigle, *supra* note 2, at 31 (suggesting attorney-client privilege conceals "true facts surrounding alleged corporate criminality").

71. *See* Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. § 2 (2009) (proposing to

attorney-client privilege, and, in a 2007 letter to House Speaker Nancy Pelosi, the DOJ claimed the 2007 version of the proposed act "would impede the Department's efforts to bring corporate criminals to justice, protect investors, shareholders and our nation's retirees from the devastating effects of corporate fraud, and return assets to victims of crime."[72] In the letter to Pelosi, the DOJ provided examples of major victories in corporate crime to demonstrate the success of the waiver strategy.[73] Notwithstanding the strong arguments set forth in the letter, less than a year later the DOJ issued the Filip Memorandum, which provides more protection surrounding the attorney-client privilege.[74]

### *B. The Role of the Federal Prosecutor in Corporate Criminal Investigations*

The federal prosecutor's responsibility is to "seek justice, not merely to convict."[75] While federal prosecutors' statutory duty under 28 U.S.C. § 547(1) is to "prosecute for all offenses against the United States," one of their main priorities is to investigate criminal activity prior to indictment.[76] The United States delegates most of its discretion to federal prosecutors, transforming the position into one with tremendous power.[77] In this capacity, "[t]he prosecutor

set "clear and practical limits designed to preserve the attorney-client privilege"); 154 CONG. REC., S2331-32 (daily ed. Feb. 13, 2009) (statement of Sen. Specter) (reintroducing Attorney-Client Privilege Protection Act). Senator Specter declared the bill would "prohibit the government from . . . invocation of the attorney-client privilege." 154 CONG. REC., S2331-32 (daily ed. Feb. 13, 2009) (statement of Sen. Specter); *see also Attorney-Client Privilege Protection Act of 2009 Is Introduced in the Senate (S. 445)*, FED. EVID. REVIEW (Feb. 23, 2009), http://federalevidence.com/print/360 (quoting Senator Specter's remarks in favor of legislation).

72. *See* Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., to The Honorable Nancy Pelosi, Speaker for the U.S. House of Representatives 1 (Nov. 13, 2007) (on file with author), *available at* http://www.ctbar.org/filemanager/download/1092 [hereinafter DOJ Letter to Pelosi] (summarizing DOJ's opposition to proposed Attorney-Client Privilege Protection Act of 2007).

73. *See* DOJ Letter to Pelosi, *supra* note 72, at 3-4 (highlighting cases where disclosure of privileged information critical to government's ability to obtain justice).

74. *See Attorney-Client Privilege Protection Act of 2009 Is Introduced in the Senate (S. 445)*, FED. EVID. REVIEW (Feb. 23, 2009), http://federalevidence.com/print/360 (explaining Attorney-Client Privilege Protection Act of 2007 died in Senate after DOJ adopted new guidelines); Joseph Goldstein, *Justice Department Guidelines on Corporate Prosecution Are Due*, N.Y. SUN, (Aug. 28, 2008), *available at* http://www.nysun.com/new-york/justice-department-guidelines-on-corporate/84805/ (suggesting Filip's revised guidelines "intended to head off support for the [Attorney-Client Privilege Protection Act]).

75. ABA Criminal Justice Section Standards § 3-1.2(c) (2007) (outlining professional standards for prosecutors); MODEL RULES OF PROF'L CONDUCT, R. 3.8 cmt.[1] (2007) (declaring prosecutor has responsibility of "a minister of justice"); *see also* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999) (illustrating importance of "undefined responsibilities" of federal prosecutors); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528 (1999) (comparing prosecutors to defense attorneys). As Justice Sutherland eloquently wrote in 1935, the United States Attorney "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935) (describing unique duty of United States Attorneys).

76. 28 U.S.C. § 547(1) (2000); *see also* Miller, *supra* note 53, at 1269-70 (explaining prosecutor's ever-expanding role in criminal investigations).

77. *See* Miller, *supra* note 53, at 1269-70 (articulating prosecutor's discretionary power); *see also* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633 (1999) (explaining federal prosecutors make decisions "ordinarily entrusted to a client").

has more control over life, liberty, and reputation than any other person in America."[78] Generally, a prosecutor should not act unless the societal benefits outweigh the societal costs of the action because the action must be in the public's best interest.[79] However, federal prosecutors have nearly unfettered discretion to decide whether to investigate and prosecute a crime.[80]

Stressing the importance of prosecutorial discretion, former United States Assistant Attorney Laurie L. Levenson explained, "[p]rosecutors seeking justice often must go beyond the boundaries of the law in an effort to create informal procedures for justice that will apply where the law is silent."[81] The United States Constitution affords broad discretion to prosecutors during "charging and investigative decisions, discovery, plea bargaining, dealing with the press, and sentencing decisions," so they can ascertain the proper decision based on societal needs.[82] Corporate criminal investigations, due to their complex nature, pose a significant challenge to prosecutors because of the substantial amount of time and resources required to investigate and prosecute each case.[83] In addition, there are unique and important social factors prosecutors must consider because an indictment puts a corporation at risk of insolvency, which may have dramatic effects on the economy.[84] Therefore,

78. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (reprinting original remarks of Attorney Geneneral Jackson delivered at Second Annual Conference of U.S. Attorneys) (stressing enormous power U.S. Attorneys wield).

79. *See* Levenson, *supra* note 75, at 558 (demonstrating prosecutor's practical and moral considerations in decision-making process); Miller, *supra* note 53, at 1269 (outlining prosecutor's cost-benefit analysis).

80. *See* Levenson, *supra* note 75, at 557-58 (describing "gaps in the rules guiding the prosecutor's behavior"). As Professor Gershman explains, "[t]he prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law." Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993).

81. *See* Levenson, *supra* note 75, at 553 (contending prosecutorial discretion imperative to pursuit of justice).

82. *See* Levenson, *supra* note 75, at 554 (listing situations where rules "take a back seat" to prosecutorial discretion); *see also* George J. Terwilliger, III, *Facing the Music: Understanding and Addressing the Exercise of Prosecutorial Discretion*, 23d Ann. Nat'l Inst. on White Collar Crime I-9 (2009) (providing background to scope of prosecutorial discretion).

83. *See* Maskay, *supra* note 48, at 494-95 (explaining complexity of white-collar cases). The court in *Stein I* provides a good example of how complex a corporate criminal investigation may become:

> The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents *plus* transcripts of 335 depositions and 195 income tax returns. The briefs on pretrial motions passed the 1,000-page mark some time ago. The government expects its case in chief to last three months, while defendants expect theirs to be lengthy as well.

*Stein I*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006). The discovery phase of the criminal investigation can be the most overwhelming part of the case. *See* Greg Burns, *Top-Dollar Defense Is Often No Bargain; Black Latest to Lose Case Despite Having a Legal Dream Team*, CHI. TRIB., July 15, 2007, at C1 (explaining significant burden discovery brings to corporate criminal cases). Although these examples refer to the defense costs, the costs for the prosecution are no less intimidating and the prosecutor must consider them when deciding whether to commence an investigation and proceed to trial. *Id.*

84. *See* Burn, *supra* note 20, at 863 (explaining indictment destroyed Arthur Anderson resulting in 28,000 job losses). Recognizing that indicting a corporation may have far-reaching detrimental effects on the

even though corporate criminal liability can attach to corporations when their lowest-level employee commits a crime, prosecutors are hesitant to indict corporations because of the difficulty in building a case and the potential harm to the economy.[85]

As an alternative to indictment, prosecutors utilize deferred prosecution agreements because they quickly impose financial penalties and implement structural reforms, without expending substantial government resources, and they reduce the possibility of harming innocent employees, shareholders, and other related parties.[86] Most corporations favor deferred prosecution as well, because corporate indictments and convictions may result in loan agreement defaults, lower bond ratings, debarment from contracting with governmental agencies, revocation of licenses, and serious reputational harm.[87]

### *C. Deferred Prosecution Agreements: The Alternative to Corporate Executions*

Deferred prosecution agreements originated as an alternative disposition for juvenile offenders in an attempt to refrain from "branding them as criminals."[88] In the 1960s, prosecutors applied these agreements to low-level narcotics cases, and in 1992, to cases involving corporate crime.[89] The typical deferral process begins with the filing of a formal charge against the corporation, negotiation and implementation of a deferred prosecution agreement, and a suspension of further proceedings on the condition that the corporation complies with all the obligations set forth in the agreement.[90] If prosecutors determine that the corporation has complied with all of the requirements at the end of the deferment period, they will dismiss the charges.[91]

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economy, prosecutors use deferred or non-prosecution agreements as a new means of punishment. *See* Buell, *supra* note 5, at 522 (describing negative collateral consequences from indicting corporations); Paulsen, *supra* note 14, at 1436 (observing decrease in corporate indictments after Arthur Anderson debacle).

85. *See* Bharara, *supra* note 3, at 64-65 (explaining respondeat superior and doctrine of collective knowledge leave corporations exposed to liability); Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 37th Ann. Inst. on Sec. Reg., 815, 817 (PLI Corp. Law & Prac. Course Handbook Series No. 1517, 2005) (comparing corporate criminal liability to "absolute liability"). Under these rules, a corporation may be indicted and convicted "based on the alleged criminal activity of a single, low-level, rogue employee who was acting without the knowledge of any executive or director, in violation of well-publicized procedures, practices, and instructions of the company." Bharara, *supra* note 3, at 65.

86. *See* Bohrer & Trencher, *supra* note 10, at 1483 (listing advantages of deferred prosecution to federal prosecutors).

87. *See id*. at 1483 (listing dire consequences of indictment).

88. *See* JAMES A. INCIARDI ET AL., DRUG CONTROL AND THE COURTS 25 (1996) (quoting Chicago Boys' Court Judge Jacob Braude referring to negative consequences of conviction).

89. *See* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005) (explaining deferred prosecution's popularity with drug cases during 1960s). In response to the wave of corporate crime that began in the 1990s, prosecutors began to apply deferred prosecution to corporations. *Id.* at 1863.

90. *See id.* at 1863 (summarizing deferred prosecution); *see also* Griffin, *supra* note 14, at 321-22 (outlining deferred prosecution procedure).

91. *See* Griffin, *supra* note 14, at 322 (explaining typical deferred prosecution period between one and two years).

Although originally developed to resolve minor cases without expending substantial government resources, after the collapse of Arthur Anderson and the announcement of the Thompson Memorandum, deferred prosecution became popular in corporate criminal investigations.[92] For example, from 1992 to 2001, there were only eleven deferred prosecution agreements, and from 2002 to 2005, there were twenty-three agreements.[93] Between 2002 and 2006, government agencies amassed more than one thousand guilty pleas or convictions against individuals involved with corporate crime, while charging few corporate entities.[94] In 2007 alone, government agencies entered into forty deferred prosecution agreements with corporations.[95]

While deferred prosecution agreements may appear to be extremely advantageous to corporations because corporations avoid criminal conviction, these agreements frequently require extensive cooperation, acknowledgement of criminal conduct, monetary penalties, business reforms, compliance programs, and independent monitors.[96] Although formal requests for waiver and curtailment of legal fees have decreased following the *United States v. Stein* decision, prosecutors still rely on corporations to assist with individual prosecutions of corporate executives, thereby creating a significant incentive for corporations to cooperate as much as possible.[97] The majority of deferred prosecution agreements contain a statement of facts that requires the corporation to admit to the government's allegations, subjecting the corporation to significant future criminal and civil liability.[98] Another standard requirement

92. *See id.* at 329 (describing shift from corporate to individual prosecution).

93. *See Crime Without Conviction: The Rise of Deferred Prosecution and Non Prosecution Agreements*, CORP. CRIME REP., (Dec. 28, 2005), *available at* http://corporatecrimereporter.com/deferredreport.htm (reporting significant increase in deferred prosecution after Enron's collapse and distribution of Thompson Memorandum); John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J. (2005) (explaining by 2005 deferred prosecution agreements "intruded deeply into corporate governance").

94. *See* Paul Davies & Kara Scannell, *Guilty Verdicts Provide 'Red Meat' to Prosecutors Chasing Companies*, WALL ST. J., May 26, 2006, at A1 (illustrating government's recent trend of deferring prosecution of corporations and convicting individual employees).

95. *See* Lynnley Browning, *Deferred-Prosecution Deals Said To Be Declining*, N.Y. TIMES, Feb. 7, 2009 (outlining history of deferred prosecution in corporate America).

96. *See* Greenblum, *supra* note 89, at 1885-87 (listing collateral consequences of conviction such as debarment, license forfeiture, and adverse publicity); Paulsen, *supra* note 14, at 1439-43 (discussing common elements of deferred prosecution agreements); *see also* Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A1 (illustrating DOJ's deferred prosecution strategy). As former Deputy Attorney General Paul McNulty explained, "[t]here's a fundamental misapprehension with D.P.A.'s to think that they're a break for the company." *Id.*; *see also Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, 19 CORP. CRIME REP. 48 (2005), *available at* http://www.corporatecrime reporter.com/maryjowhiteinterview010806.htm (noting deferred prosecution agreements have "a tremendous reputational as well as monetary cost").

97. *See* Garrett, *supra* note 16, at 883 (describing corporation as informant who helps build government's case); *see also* Bill Bailey, *Corporate Deferred Prosecution Agreements*, The Rabbit Hole, http://60733066. blogspot.com/2008/04/corporate-deferred-prosection.html (Apr. 9, 2008) (explaining deferred prosecution agreements benefit corporations and prejudice individual employees).

98. *See* Paulsen, *supra* note 14, at 1440-41 (describing dire consequences of admitting statement of facts such as future criminal and civil liability); *see also*, *e.g.*, Deferred Prosecution Agreement Between U.S. Dep't

in deferred prosecution agreements is monetary penalties in the form of restitution payments, and civil or criminal fines, which can become quite excessive.[99] In addition, deferred prosecution agreements frequently contain significant business reforms, strict compliance programs, and provisions for independent monitors.[100] By deferring prosecution, prosecutors achieve sufficient compliance reform without the negative consequences associated with prosecution, such as reputational harm, disbarment, or insolvency.[101]

In April 2009, United States Representatives Steve Cohen, Bill Pascrell, Jr., Frank Pallone, and Linda Sanchez introduced the Accountability in Deferred Prosecution Act of 2009, to "regulate certain deferred prosecution agreements and non prosecution agreements in federal criminal cases."[102] Most notably, the Accountability in Deferred Prosecution Act will statutorily require the Attorney General to release guidelines that establish acceptable terms and conditions for deferred prosecution agreements, promulgate rules for the selection of independent monitors, define the independent monitor's authority, provide examples of what constitutes cooperation, explain the process for determining a breach in the agreement, allow judicial review upon motion by either party to the agreement, and require public access to each deferred prosecution agreement.[103] The proposed act aims to bring transparency,

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of Justice and Lloyds TSB Bank PLC, para. 2 (Jan. 9, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/lloyds.pdf (agreeing to statement of facts); Deferred Prosecution Agreement Between U.S. Dep't of Justice and AB Volvo, et al., para. 4 (Mar. 18, 2008), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/abvolvo.pdf (admitting to statement of facts); Deferred Prosecution Agreement Between U.S. Dep't of Justice and AGA Medical Corporation, para. 2 (June 3, 2008), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/agamedical.pdf (accepting and acknowledging statement of facts).

99. *See* Greenblum, *supra* note 89, at 1889-90 (suggesting monetary payments typically equal or exceed potential penalties and collateral consequences if convicted); Paulsen, *supra* note 14, at 1441-42 (listing excessive monetary penalties in various deferred prosecution agreements).

100. *See, e.g.*, Deferred Prosecution Agreement Between U.S. Dep't of Justice and UBS AG, para. 21 (Feb. 18, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/ubs.pdf (stating external auditor provision); Deferred Prosecution Agreement Between U.S. Dep't of Justice and AB Volvo, et al., para. 8 (Mar. 18, 2008), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/abvolvo.pdf (setting forth new compliance program); Deferred Prosecution Agreement Between U.S. Dep't of Justice and KPMG, para. 6 (Aug. 26, 2006), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/kpmg.pdf (listing "Permanent Restrictions on and Elevated Standards for KPMG's Tax Practice"); *see also* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and United States Att'ys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf) (setting forth principles pertaining to use of monitors); Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (arguing business reforms contained in deferred prosecution agreements often lack "business rationality").

101. *See* Garrett, *supra* note 16, at 890-91 (explaining prosecutors use threat of prosecution to leverage massive compliance reform within corporations); *Corporate Pre-Trial Agreements Down 60 Percent*, 22 CORP. CRIME REP. 5 (Jan. 29, 2009) (describing collateral consequences of criminal conviction).

102. *See* H.R. 1947, 111th Cong. (2009) (announcing purpose of Accountability in Deferred Prosecution Act); *see also* Official Website of the United States House of Representatives, *Congressman Cohen Introduces Reforms to Deferred Prosecutions*, Apr. 2, 2009, http://cohen.house.gov/index.php?option=content&task view&id=796 (arguing "[t]he prosecution of corporate crime should not be accomplished in backroom deals").

103. H.R. 1947, 111th Cong. §§ 4-8 (2009) (listing proposed statutory requirements for monitoring

objectivity, and consistency to deferred prosecution of business organizations, an area that has experienced substantial criticism from the public and frequent policy shifts in the DOJ during the last decade.[104]

### *D. Federal Prosecution Guidelines for Business Organizations*

#### *1. The Holder and Thompson Memoranda: Revamping the War on Corporate Crime*

In response to the growing necessity and complexity of corporate prosecution, the DOJ issued guidelines in 1999 to assist prosecutors in corporate criminal investigations and prosecutions.[105] The first guidelines, attached to a memorandum from United States Deputy Attorney General Eric H. Holder, listed eight factors for prosecutors to consider during their charging decisions.[106] The factors were: (1) "the nature and seriousness of the offense"; (2) "the pervasiveness of wrongdoing within the corporation"; (3) "the corporation's history of similar conduct"; (4) "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate . . . including, if necessary, the waiver of the corporate attorney-client and work product privileges"; (5) "the existence and adequacy of the corporation's compliance program"; (6) "the corporation's remedial actions"; (7) "collateral consequences" arising from the prosecution; and (8) "the adequacy of non-criminal remedies."[107] In addition, the Holder Memorandum permitted prosecutors to consider "whether the corporation appears to be protecting its culpable employees and agents . . . through the advancing of attorneys' fees."[108] After the tidal wave of corporate crime hit the United States in the beginning of the twenty-first century, the new United States Deputy Attorney General, Larry D. Thompson, issued a revised set of guidelines in 2003 to bolster the DOJ's strategy.[109] Unlike the Holder Memorandum, the Thompson Memorandum

deferred prosecution agreements).

104. *See* H.R. 1947 Congressional Hearing, at 41-43 (statements of Rep. Pascrell and Rep. Pallone) (promoting Accountability in Deferred Prosecution Act and explaining deficiencies in current policy and practice); *see also* Maya Krigman, *Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases*, 74 BROOK. L. REV. 231, 246 (noting five different DOJ prosecutorial guidelines for business organizations in ten years).

105. *See* Paulsen, *supra* note 14, at 1448-49 (illustrating various concerns surrounding corporate indictments); *see also* Seigel, *supra* note 2, at 3 (noting lack of DOJ guidance regarding prosecution of corporations prior to 1999); Byers, *supra* note 11, at 554 (stating no DOJ charging policy for business organizations prior to 1999).

106. Memorandum from Eric H. Holder, U.S. Deputy Att'y Gen., to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/docs/reports/1999/chargingcorps.html) [hereinafter Holder Memorandum].

107. *Id.* (listing factors for prosecutors to consider).

108. *Id.* (discussing other factors prosecutors weigh).

109. *See* Thompson Memorandum, *supra* note 10; *see also* Byers, *supra* note 11, at 551 (suggesting increasing corporate scandals led to adjustment of guidelines); Paulsen, *supra* note 14, at 1435 (stating Thompson Memorandum "written in the wake of the accounting scandals" engulfing 2000 to 2003).

significantly increased the pressure prosecutors put on corporations to cooperate with government investigations.[110]

While the Thompson Memorandum meant "to provide guidance rather than to mandate a particular result," many federal prosecutors strictly adhered to the Thompson Memorandum and gained a significant advantage during corporate investigations.[111] Under the Thompson Memorandum, the advancement of legal fees by the corporation to employees under investigation and the corporation's refusal to waive the attorney-client privilege constituted a failure to cooperate.[112] Facing the dire consequences of an indictment, many corporations waived attorney-client privilege, ceased legal fee advancement, and demanded that employees testify.[113] To cooperate under the Thompson Memorandum, corporations routinely made employees available to testify without subpoenas, terminated employees who were responsible for the conduct and who refused to cooperate, shared the results of the company's internal investigation including privileged material, and agreed to use outside professionals recommended by the government to evaluate the company.[114] Corporations frequently compelled corporate employees to choose between refusing to testify and losing their job, or testifying without the advice of effective legal counsel.[115] From 2003 to 2006, federal prosecutors, armed with the mighty Thompson Memorandum, indicted corporate criminals with a vengeance, accumulating hundreds of individual convictions, while entering

110. *See Stein I*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (differentiating Thompson Memorandum from Holder Memorandum); Burn, *supra* note 20, at 862-63 (explaining Thompson Memorandum's additional pressure towards cooperation). The Thompson Memorandum states that "[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation." Thompson Memorandum, *supra* note 10, at preface. Most notably, the Thompson Memorandum required federal prosecutors to label corporations as uncooperative if they failed to waive the attorney-client privilege and continued to advance defense costs to indicted employees, thereby significantly increasing the likelihood of indictment for the corporation. *See* Byers, *supra* note 11, at 551 (explaining effects of Thompson Memorandum); Maskay, *supra* note 48, at 502-03 (explaining Thompson Memorandum's focus on corporate cooperation).

111. Thompson Memorandum, *supra* note 10, at 4; *see* Bharara, *supra* note 3, at 73-74, 76-78 (criticizing prosecutor's leveraging power); Paulsen, *supra* note 14, at 1451 (opining Thompson Memorandum provided prosecutors with massive discretion).

112. *See* Thompson Memorandum, *supra* note 10, at 7-8 (detailing factors "the prosecutor may weigh in assessing the adequacy of a corporation's cooperation").

113. *See Stein II*, 440 F. Supp. 2d 315, 336-37 (S.D.N.Y. 2006) (illustrating negative effects of Thompson Memorandum on vulnerable corporations); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 174-75 (2004) (explaining mere threat of indictment causes corporations to cooperate fully with prosecutors); *see also* Seigel, *supra* note 2, at 4-5 (stating companies understood full cooperation necessary to avoid indictment). As the chief legal officer for KPMG stated, KPMG complied fully with prosecutors in order "'to be able to say at the right time and with the right audience, we're in full compliance with the Thompson Memorandum.'" *Stein II*, 440 F. Supp. 2d at 319; *see also* Byers, *supra* note 11, at 557 (describing corporate cooperation under Thompson Memorandum).

114. *See* Byers, *supra* note 11, at 557 (describing corporate cooperation under Thompson Memorandum).

115. *See Stein II*, 440 F. Supp. 2d at 336-37 (analyzing prosecutors' coercive power over KPMG).

into forty-two deferred or non-prosecution agreements with corporations.[116]

### *2. United States v. Stein: Ending the Thompson Memorandum's Reign of Terror*

In 2006, after dominating corporate investigations for three years, Judge Kaplan of the United States District Court for the Southern District of New York denounced the Thompson Memorandum in *United States v. Stein.*[117] During the initial investigation, the government and KPMG entered into a deferred prosecution agreement, whereby the government would refrain from prosecuting the firm, so long as KPMG complied with all of the requirements in the agreement, which included fully cooperating with the investigation.[118] Unfortunately for employees of KPMG, cooperating with the investigation meant KPMG would cease paying former employees' legal fees and demand that current employees testify or face termination.[119] The aggressive tactics employed by prosecutors under the direction of the Thompson Memorandum caused the court to hold that the prosecutors violated the Fifth and Sixth Amendments to the Constitution.[120]

In *Stein I*, Judge Kaplan proclaimed, "KPMG refused to pay because the government held the proverbial gun to its head."[121] The court held that KPMG's legal fee policy violated the Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective assistance of counsel.[122] In addition, the court announced that the Thompson Memorandum violated the Fifth and Sixth Amendments.[123] In *Stein II*, Judge Kaplan allowed

116. *See* Seigel, *supra* note 2, at 3 (suggesting corporate cooperation enabled prosecutors to obtain convictions).

117. *See Stein I*, 435 F. Supp. 2d 330, 362-66 (S.D.N.Y. 2006) (holding Thompson Memorandum fails strict scrutiny test).

118. *See id.* at 349-50 (setting forth cooperation requirements of KPMG's deferred prosecution agreement). Under the deferred prosecution agreement, if the government determined that KPMG was not cooperating, a decision left solely to the prosecutor's discretion, the government would hold KPMG in violation of the deferred prosecution agreement and prosecute fully. *Id.* at 350.

119. *See id.* at 350 (reciting facts). In addition to cutting off attorneys' fees for former employees facing indictment, KPMG "conditioned the payment of attorney's fees [for current employees] on full cooperation with the investigation." *Id.* at 349. In other words, if employees exercised their Fifth Amendment rights and refused to interview with federal prosecutors or refused to answer specific questions during the interview, the prosecutors informed KPMG and KPMG stopped paying their legal fees. *Id.*

120. *See supra* notes 22-28 and accompanying text (discussing unconstitutionality of coerced privilege waiver and curtailment of legal fees).

121. *Stein I*, 435 F. Supp. 2d at 336 (concluding prosecutors coerced KPMG to cease paying defendants' legal expenses). Judge Kaplan went on to state that "[t]hose who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend." *Id.* at 336.

122. *See id.* at 365, 369, 372, 382 (holding prosecutors' and KPMG's actions unconstitutional). The court condemned the prosecutors' actions, stressing "[t]he 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." *Id.* at 363.

123. *See id*. at 362-365, 382 (explaining Thompson Memorandum fails strict scrutiny).

two defendants' motions to suppress statements proffered to the government.[124] Judge Kaplan held that the DOJ coerced the proffers through KPMG because the corporation threatened them with hostile employment action if they did not cooperate, thereby unjustifiably infringing on their Fifth Amendment right.[125]

### *3. The McNulty and Filip Memoranda: Denouncing Requests for Waiver and Consideration of Fee Advancement*

Within months of *Stein I* and *Stein II*, Deputy Attorney General Paul McNulty issued a revised set of federal guidelines containing changes with respect to the advancement of legal fees and waiver of the attorney-client privilege.[126] The McNulty Memorandum states that prosecutors may only request waiver when there is a "legitimate need," not merely because it is desirable or convenient.[127] Regarding fee advancement, the McNulty Memorandum adds that "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[128] Although the changes were a step in the right direction, the McNulty Memorandum still allowed prosecutors to consider these factors in evaluating a corporation's cooperation.[129]

In response to the growing criticism from the courts, legal scholars, and members of the bar, the DOJ issued the Filip Memorandum, which removes a corporation's willingness to waive attorney-client privilege as a factor in charging decisions.[130] The Filip Memorandum also instructs prosecutors not to

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124. *See Stein II*, 440 F. Supp. 2d 315, 338 (S.D.N.Y. 2006) (allowing motion to suppress statements made by defendants Smith and Watson due to coercion).

125. *See id.* at 337-38 (explaining coerced statements must be suppressed). The court stated that:

> [t]he government brandished a big stick—it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Anderson if KPMG could deliver to the [U.S. Attorneys Office] employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves.

*Id.*

126. *See* McNulty Memorandum, *supra* note 24, at 9 (reducing pressure on corporate cooperation). *But see* Lynnley Browning, *Bill to Protect Companies in Inquiries Adds Support*, N.Y. TIMES, June 23, 2008 (highlighting McNulty Memorandum's inadequacies).

127. *See* McNulty Memorandum, *supra* note 24, at 9. The McNulty Memorandum also states that "prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation," and certain categories of information require prosecutors to obtain written authorization from superiors. *Id.*

128. *Id.* at 11. The McNulty Memorandum recognizes that the advancement of attorneys' fees complies with most state law, and, as such, cannot be considered uncooperative except in "extremely rare cases." *Id.*

129. *See id.*; *see also* Letter from Thirty-three Former United States Attorneys to The Honorable Patrick Leahy, Chair of the Senate Judiciary Committee, Regarding S. 186, the Attorney Client Privilege Protection Act (June 20, 2008), *available at* http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_ Letter.pdf [hereinafter Letter to Leahy] (arguing legislation necessary to set "clearly defined limits" on prosecutorial demands to corporations).

130. *See* Filip Memorandum, *supra* note 26, at 9-28.710 (removing waiver of attorney-client privilege as factor). While corporations are still allowed to waive the attorney-client privilege, the Filip Memorandum

consider a corporation's advancement of legal fees to employees when determining a corporation's cooperativeness.[131] In addition, the U.S. Attorneys' Manual incorporates the Filip Memorandum's guidelines, making them binding on all U.S. Attorneys.[132] While the Filip Memorandum forbids prosecutors from requesting waiver and considering legal fee advancement, corporate criminal investigations have lingering problems, such as voluntary waivers and curtailment of legal fees, covert requests, and unconscionable prosecution agreements.[133]

## III. ANALYSIS

### *A. Insufficiencies of the Filip Memorandum*

While the Filip Memorandum is a significant improvement from the McNulty Memorandum, nothing prevents the next Deputy Attorney General from issuing new guidelines that reinstate the previously flawed policy regarding deferred prosecution and attorney-client privilege waiver.[134] During the congressional debate regarding the proposed Attorney-Client Privilege Protection Act of 2009, Senator Specter praised the DOJ for revising the guidelines, but cautioned the "reforms cannot be trusted to remain static" because they "are subject to unilateral executive branch modification."[135] Although Deputy Attorney General Filip included the new guidelines in the United States Attorneys' Manual, the manual does not carry the force of law and "may not be relied upon to create any rights."[136] Even though the Filip

states that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege," therefore "prosecutors should not ask for such waivers and are directed not to do so." *Id.* at 9-28.720.

131. *See* Filip Memorandum, *supra* note 26, at 9-28.730 (discussing prosecutor's evaluation of cooperation). Notably, the Filip Memorandum states "prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment." *Id.*

132. *See* U.S. Dep't of Justice, *United States Attorneys' Manual*, § 9-28.000-1300 (2008), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam (listing factors to be considered in prosecuting business organizations); *see also* Press Release, Justice Department, *supra* note 25 (announcing revised corporate charging guidelines).

133. *See* Filip Memorandum, *supra* note 26, at 9-28.1000 (evaluating plea agreements with corporations); *see also* Krigman, *supra* note 104, at 246 (announcing "culture of waiver"); Thomas P. Vartanian, Michael R. Bromwich, & Karen S. Bloom, *Assault on the Shrine: The Demise and Possible Revival of the Attorney-Client Privilege*, ABA BUS. LAW COMM. ON BANKING LAW, Aug. 13, 2008, at 9, *available at* http://www.abanet.org/buslaw/committees/CL130000pub/newsletter/200807/vartanian.pdf (explaining damage done to attorney-client privilege will be difficult to repair); Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 260 (2009) (describing revised guidelines' shortcomings).

134. *See* Bharara, *supra* note 3, at 56 (explaining guidelines subject to change by new administrations because guidelines lack force of law).

135. *See* 154 CONG. REC. S. 2331-32, *supra* note 71 (explaining importance of bill to President and Congress).

136. *See* United States Attorneys' Manual, *supra* note 132, at § 1-1.100 (stating "[t]he Manual provides only internal Department of Justice guidance").

Memorandum prohibits federal prosecutors from requesting privileged material, or from considering the advancement of legal fees when determining the level of cooperation, prosecutors continue to enjoy immense discretion with their charging decisions.[137] Compliance with the new guidelines requires self-policing by the DOJ, which permits prosecutors to mold provisions in the manual to their advantage without fear of facing discipline.[138] In addition, the Filip Memorandum does not apply to other governmental agencies that investigate corporate wrongdoings, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, and the Department of Housing and Urban Development.[139]

In today's regulatory environment, by applying broad criminal statutes that encompass all types of corporate crime, federal prosecutors "effectively become super-regulators who not only apply, but also create, regulatory standards."[140] Even with this immense power, the DOJ opposes legislation codifying the revisions set forth in the Filip Memorandum.[141] Whether the opposition stems from a refusal to relinquish power, a fear of making corporate investigations more difficult, or a combination of both, the DOJ is vehemently opposed to any proposed legislation protecting the attorney-client privilege or codifying deferred prosecution guidelines.[142]

### *B. The Attorney-Client Privilege Protection Act of 2009: Protecting Corporations and Individuals During Corporate Criminal Investigations*

The proposed Attorney-Client Privilege Protection Act of 2009 will bring clarity and consistency to corporate criminal investigations, thereby promoting compliance with the law.[143] Contrary to the DOJ's position, the proposed act will not prevent government agencies from investigating and prosecuting corporate crime because the DOJ may utilize search warrants, grand jury subpoenas, and document subpoenas.[144] While allowing federal prosecutors

137. *See* Press Release, Justice Department, *supra* note 25 (highlighting changes to new guidelines); *see also* Terwilliger, *supra* note 82, at I-9 (explaining "prosecutors have nearly complete discretion").

138. *See* Browning, *supra* note 126, at C1 (suggesting DOJ does poor job of self-policing); *see also DOJ's Office of Professional Responsibility: Protecting Their Own*, CRIME & FEDERALISM, Sept. 11, 2009, http://www.crimeandfederalism.com/2009/09/dojs-office-of-professional-responsibility-protecting-its-own.html (explaining odds of punishment for prosecutorial misconduct extremely low).

139. *See* Letter to Leahy, *supra* note 129 (arguing legislation needed to ensure compliance across all federal agencies).

140. *See* Terwilliger, *supra* note 82, at I-14 (illuminating expansion of recent federal crime legislation in environmental, healthcare, and finance industries).

141. *See* Browning, *supra* note 126, at C1 (fearing proposed legislation "could prevent prosecutors from doing their jobs").

142. *See* Goldstein, *supra* note 74 (explaining federal prosecutors view Attorney-Client Privilege Protection Act as legislative encroachment on executive powers).

143. *See* Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. § 2 (2009) (reasoning Attorney-Client Privilege Protection Act will enhance good corporate governance).

144. *See id*. at § 2(a)(5) (suggesting government agencies still have sufficient fact-finding capability).

discretion to request waivers of the attorney-client privilege and work product doctrine increases the efficiency of criminal investigation, it also gives the government an unfair advantage.[145] By giving prosecutors access to privileged information, such as corporate counsel's internal memoranda regarding employee interviews, the corporation discloses the individual defendants' legal concerns and strategy to the government.[146] Although the privilege waiver is technically legal, provided the corporate attorney gives the employee proper "Upjohn Warnings" prior to conducting interviews, many individual employees fail to understand that the corporation holds the right to waive the privilege, which is both unfair and misleading.[147] Legislation will provide clarity and consistency to corporate privilege issues.[148]

Statutorily prohibiting federal prosecutors from requesting waiver does not eliminate the incentive for corporations to do so because the "culture of waiver" still exists.[149] Now more than ever, the Attorney-Client Privilege Protection Act is necessary to prevent federal prosecutors from making covert requests, because the tremendous pressure on the DOJ to prosecute corporate crime is likely to entice some prosecutors to bend the guidelines to obtain convictions.[150] Although prosecutors must investigate and prosecute corporate crime aggressively and swiftly, there must be meaningful protection for the attorney-client privilege and work product doctrine, as it is fundamental to a fair legal system.[151]

### *C. The Future of Deferred Prosecution Agreements*

#### *1. Deferred Prosecution Agreements After United States v. Stein*

During the last decade, prosecutors frequently took advantage of vulnerable

145. *See* Letter to Leahy, *supra* note 129, at 2 (contending requests for waiver violate constitutional rights). *But see* DOJ Letter to Pelosi, *supra* note 72, at 3 (arguing prohibiting waiver requests will hinder government fact-finding and impede corporate crime prosecutions). The DOJ contends that the alternatives to requests for waiver, such as grand jury subpoenas, document subpoenas, and search warrants, are expensive, time-consuming and will ultimately cause more harm to the public. *Id.*

146. See Griffin, *supra* note 14, at 347-48 (suggesting "compelled waiver is thus fundamentally at odds with the purpose of the privilege").

147. *See* Gilman, *supra* note 57, at 1086-87 (questioning adequacy of "Upjohn warnings").

148. *See* 154 CONG. REC., S2331-32 (daily ed. Feb. 13, 2009) (statement of Sen. Specter) (explaining benefits of legislation).

149. *See* DOJ Letter to Pelosi, *supra* note 72, at 1 (cautioning Attorney-Client Privilege Protection Act eliminates incentives for voluntary disclosure by corporations). *But see* Krigman, *supra* note 104, at 242, 246 (describing "culture of waiver" created by Thompson Memorandum and perpetuated by McNulty Memorandum).

150. *See* Ball & Bolia, *supra* note 133, at 231 (questioning whether new guidelines will drive privilege waiver and legal fee issues underground); Vartanian et al., *supra* note 133, at 9 (warning future waiver requests will "be undertaken with an unreviewable wink and a nod").

151. *See* 154 CONG. REC., S2331-32 (daily ed. Feb. 13, 2009) (statement of Sen. Specter) (articulating importance of legislative protection).

corporations to negotiate lopsided deferred prosecution agreements.[152] After *United States v. Stein*, the risk of prosecutorial abuse with deferred prosecution agreements is lower because the days of overtly requesting privilege waiver and curtailment of attorneys' fees advancement are over; however, there are other areas ripe for potential abuse.[153] Although the *Stein* decision was a major win for corporate America, the DOJ continues to defer corporate prosecution in exchange for corporate assistance in prosecuting individual wrongdoers; therefore, there must be more statutory regulation to strengthen the oversight and implementation of deferred prosecution agreements.[154]

By emphasizing cooperation and reform, prosecutors commandeer internal investigations and establish their own corporate governance.[155] As a result, deferred prosecution agreements can be extremely detrimental and unfair to corporations and their employees.[156] While the deferred prosecution agreement must meet the court's approval before becoming effective, prosecutors have sole discretion to determine when the corporation has breached the agreement.[157] Prosecutors also enjoy complete discretion while selecting independent monitors for corporations, which frequently results in questionable selections.[158] For example, several members of Congress criticized the selection of former Attorney General Ashcroft to serve as corporate monitor for Zimmer Holdings, Inc. (Zimmer), because Assistant U.S. Attorney Christie selected Mr. Ashcroft, his former colleague, and Zimmer paid Mr. Ashcroft's firm approximately $52 million in legal fees.[159]

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152. *See* Bohrer & Trencher, *supra* note 10, at 1483 (listing irreparable consequences following a corporate indictment); Epstein, *supra* note 100 (announcing "sinister" characteristics of corporate deferred prosecution agreements); Paulsen, *supra* note 14, at 1444 (stating "what the prosecutor asks for, the prosecutor gets").

153. *See* Press Release, Justice Department, *supra* note 25 (abolishing privilege waiver and fee advancement as consideration for cooperativeness); *see also* Paulsen, *supra* note 14, at 1439-43 (describing elements of deferred prosecution agreements).

154. *See* Press Release, Justice Department, *supra* note 25 (announcing revised guidelines without mentioning any alternative to deferred prosecution strategy); *see also* H.R. 1947 Congressional Hearing, *supra* note 1, at 41-42 (statement of Rep. Pascrell) (highlighting lack of oversight in deferred prosecution). Representative Pascrell emphasizes the need for legislation by asking "AIG, 2004, 2006—two deferred prosecutions and it worked well, didn't it?" H.R. 1947 Congressional Hearing, *supra* note 1, at 42.

155. *See* Griffin, *supra* note 14, at 323-24 (indicating deferred prosecution agreements do much more than prohibit wrongful conduct). According to the terms of most agreements, prosecutors obtain control over personnel and business decisions that range far beyond the scope of the investigation. *Id.*

156. *See* Garrett, *supra* note 16, at 883 (describing employees' dilemma of choosing cooperation or job loss and curtailment of legal fee advancement); Griffin, *supra* note 14, at 333 (explaining statements made during internal investigations form basis for individual criminal liability instead of initial alleged misconduct).

157. *See* Greenblum, *supra* note 89, at 1893 (setting forth extra-judicial process for corporations accused of breach).

158. *See* H.R. 1947 Congressional Hearing, *supra* note 1, at 2, 4, 20 (explaining appearance of impropriety when former federal prosecutors selected and paid substantial legal fees).

159. *See* H.R. 1947 Congressional Hearing, *supra* note 1, at 4 (arguing for impartial selection of corporate monitors).

### *2. Refuting the Critics of Deferred Prosecution*

Notwithstanding the problems with deferred prosecution agreements, they are still the most effective way to prevent corporate crime without crippling the economy.[160] While critics of deferred prosecution argue that it undermines the legal system by substituting the role of the prosecutor for the judge and the jury, the corporation ultimately has the choice to reject the agreement and go to trial, similar to every individual criminal defendant faced with a plea agreement.[161] The DOJ recognizes that prosecutors are ill-equipped to make business decisions for corporations or suggest business reforms, and prosecutors frequently appoint independent monitors with substantial business experience to implement and supervise business reforms.[162] It is true that deferred prosecution agreements typically require the corporation to offer selected employees as "sacrificial lambs," however, those "sacrificial lambs" are employees who have strong evidence of illegal activity against them.[163]

Critics also fear that corporations will employ legally questionable business practices because the chances of obtaining deferred prosecution are high; however, deferred prosecution agreements are extremely demanding and impose substantial financial penalties.[164] Although deferred prosecution agreements pose a threat of abuse by prosecutors, the threat of prosecutorial abuse will always be present during charging decisions, and benefits of deferred prosecution significantly outweigh the potential harm.[165] For example, deferred prosecution saved the medical device industry for hip and knee replacement, a multi-million dollar industry infested with corruption.[166] By deferring prosecution, the government penalized medical device companies

160. *See id*. at 11 (explaining deferred prosecution working well to punish corporate crime).

161. *See* Garrett, *supra* note 16, at 882 (suggesting prosecutors' expertise indicting and convicting, not business reform); Epstein, *supra* note 100 (warning deferred prosecution undermines separation of powers by substituting prosecutors for judge and jury).

162. *See Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, *supra* note 96 (stating implementing changes to corporate culture "is skating on fairly thin ice" for prosecutors); *see also* Coffee, *supra* note 93 (suggesting deferred prosecution agreements allow prosecutors to experiment with corporate governance). Former United States Attorney Mary Jo White explained prosecutors were becoming "super-regulators." White, *supra* note 85, at 818.

163. *See* Bailey, *supra* note 97 (suggesting unfairness of deferred prosecution agreements to individual employees).

164. *See* Lichtblau, *supra* note 96 (noting deferred prosecution may increase risky corporate behavior). Some legal experts surmise the increased use of deferred prosecution led many financial institutions involved in subprime mortgages to loosen their standards for processing and selling mortgages. *Id.* Yet, former United States Attorney Lawrence Finder explains that most companies consider deferred prosecution agreements as "a fate almost worse than death." *Corporate Pre-Trial Agreements Down 60 Percent*, 22 CORP. CRIME REP. 5 (Jan. 29, 2009) (quoting interview with Lawrence Finder).

165. *See* Paulsen, *supra* note 14, at 1459-62 (discussing potential for prosecutorial abuse with deferred prosecution); *see also* H.R. 1947 Congressional Hearing, *supra* note 1, at 11 (explaining deferred prosecution provides a balanced approach for preventing corporate crime).

166. *See* H.R. 1947 Congressional Hearing, *supra* note 1, at 19 (statement of Rep. Franks) (explaining advantages of deferred prosecution).

and restored compliance with the law, while preserving thousands of jobs.[167]

### *3. Ensuring Fairness and Accountability in Deferred Prosecution*

While deferred prosecution is an effective strategy to prevent corporate crime, there remains a need for legislative action to provide consistency and transparency to current DOJ practices.[168] For example, AIG entered into deferred prosecution agreements with the DOJ in 2004 and 2006; however, the deferred prosecution agreements failed to prevent AIG from nearly destroying the economy.[169] The Proposed Accountability in Deferred Prosecution Act of 2009 requires the Attorney General to issue guidelines defining when to enter into deferred prosecution agreements; allows for judicial sanction and interpretation of such agreements; and provides rules for choosing federal monitors to supervise the agreements.[170] Statutory guidelines will promote consistency and fairness while negotiating and implementing deferred prosecution agreements.[171] Allowing judicial review upon the motion of either party to the deferred prosecution agreement will curtail prosecutorial overreaching and ensure the agreement "is in the interest of justice."[172] Judicial review will also ensure that the cooperation provisions are reasonable because federal judges will have final authority to determine whether a corporation has committed a breach of the deferred prosecution agreement.[173] Finally, statutory requirements regarding independent monitors will bring impartiality to the selection process and provide a clear understanding of the duties and authority bestowed upon each independent monitor.[174]

### *4. Corporate Crime Fighting With Deferred Prosecution*

Deferred prosecution balances the public need for swift prosecution with the financial industry's need for regulation and stability.[175] Prosecuting corporate

167. *Id.* (praising former U.S. Attorney Christie's successful deferred prosecution).

168. *See Congressman Cohen Introduces Reforms to Deferred Prosecutions*, *supra* note 102 (discussing Accountability in Deferred Prosecution Act of 2009).

169. *See* H.R. 1947 Congressional Hearing, *supra* note 1, at 42 (statement of Rep. Pascrell) (arguing legislative action will improve deferred prosecution's effectiveness).

170. *See* H.R. 1947, 111th Cong., at §§ 4-8 (2009) (promulgating guidelines on agreements, rules for judicial oversight, and requirements for federal monitors).

171. *See id*. at § 4 (outlining administrative guidelines on agreements).

172. *See id.* at § 7 (describing judicial review and sanction procedure of deferred prosecution agreements); *see also* Greenblum, *supra* note 89, at 1900 (suggesting limitation on prosecutors' "sole discretion" for determining breach of deferred prosecution agreement).

173. *See* Paulsen, *supra* note 14, at 1464 (explaining judicial review would limit prosecutorial discretion and provide security to corporations).

174. *See* H.R. 1947 Congressional Hearing, *supra* note 1, at 4 (statement of Rep. Steve Cohen) (describing current selection process as "in-house shop" where corporations pay "baksheesh" to monitors).

175. *See supra* notes 86-87 and accompanying text (illustrating benefits of deferred prosecution); *see also* H.R. 1947 Congressional Hearing, *supra* note 1, at 7 (statement of Eileen Lawrence) (raising issue of balancing "tradeoffs of uniformity, consistency and transparency, with prosecutor discretion and flexibility").

crime is a complex process, and deferred prosecution provides the most effective strategy to prevent it without causing unnecessary public harm.[176] The proposed Accountability in Deferred Prosecution Act of 2009 will silence critics by reducing the risk of prosecutorial misconduct without impairing the DOJ's ability to combat corporate crime.[177] Continuing deferred prosecution in compliance with the proposed Accountability in Deferred Prosecution Act of 2009 will restore public trust in the government, by requiring the DOJ to regulate corporate crime fairly, and in the market, by changing the underlying policy and culture that enabled corporate crime to thrive.[178]

## IV. CONCLUSION

It is axiomatic that the DOJ must aggressively investigate and prosecute corporate crime for the economy to recover from the current recession and move forward. The only debatable issue is what the best approach shall be to detect and punish those responsible for corporate crime without causing unnecessary harm to the economy and millions of innocent Americans. This Note argues for the continued use of deferred prosecution agreements, which will enable prosecutors to punish corporate criminals while revitalizing the corporations upon which millions of Americans depend. However, there is a serious risk that prosecutors will use this mighty weapon to gain an unfair advantage while negotiating and implementing deferred prosecution agreements. Therefore, the Attorney-Client Privilege Protection Act and the Accountability in Deferred Prosecution Act are necessary to protect corporations and individuals from prosecutorial overreaching and ensure aggressive and impartial prosecution.

*John A. Gallagher*

176. *See supra* notes 83-86 and accompanying text (describing complexity of corporate criminal prosecution and advantages of deferred prosecution); *see also* Sheyn, *supra* note 14 (opining deferred prosecution effectively stops corporate crime).

177. *See Congressman Cohen Introduces Reforms to Deferred Prosecutions*, *supra* note 102 (explaining deferred prosecution effective when used judiciously).

178. *See* Sheyn, *supra* note 14 (arguing deferred prosecution agreements in best interest of shareholders).