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The Eleventh Circuit Casts Doubts on "Obey the Law" Injunctions

The Eleventh Circuit Court of Appeals last month dealt a blow to the Securities and Exchange Commission ("SEC") and its long-standing practice of seeking broad federal court injunction orders directing defendants to refrain from any future violations of securities laws, often referred to as "obey-the-law" injunctions. In *SEC v. Goble*,[1] the Eleventh Circuit vacated the "obey-the-law" injunctions entered against defendant Richard Goble, the founder of North American Clearing, Inc. ("North American"), because the injunctions did not satisfy Federal Rule of Civil Procedure 65(d)(1), which requires that injunctions describe, "in reasonable detail . . . the act or acts [sought to be] restrained or required."

An illustrative case is the Consent Judgment in the SEC's suit against Comverse Technologies, which included a provision to "permanently restrain[] and enjoin[]" any person receiving actual notice of the Final Judgment from violating, directly or indirectly, Sections 13(b)(2)(A) [(books and records provisions)] and 13(b)(2)(B) [(internal controls provisions)] of the Exchange Act."[2] Other cases from recent years are to similar effect.[3]

Although the *Goble* decision appears to widen an existing gap between the Eleventh and Second Circuits on the propriety of "obey-the-law" injunctions in SEC settlements, the full impact of the decision remains unclear. The Eleventh Circuit's strongly worded opinion and careful analysis could prompt other courts to question the benefit and efficacy of the SEC's frequent practice of seeking such broad "obey-the-law" injunctions in FCPA-related matters.

CONTINUED ON PAGE 2

1. No. 11-12059, 2012 WL 1918819 (11th Cir. May 29, 2012).
2. *SEC v. Comverse Tech., Inc.*, 2:11-cv-01704, Consent at ¶ 2 (E.D.N.Y. Apr. 11, 2011).
3. *See, e.g.*, *SEC v. Magyar Telekom, PLC,* 1:11-cv-9646, Final Judgment as to Defendant Magyar Telekom, PLC at 1-2 (S.D.N.Y. Jan. 3, 2012); *SEC v. Magyar Telekom, PLC,* 1:11-cv-9646, Final Judgment as to Defendant Deutsche Telekom, PLC at 1-2 (S.D.N.Y. Jan. 3, 2012); *SEC v. Aon*, 1:11-cv-02256, Final Judgment as to Defendant Aon Corporation at 1-2 (D.D.C. Dec. 20, 2011); *SEC v. Johnson & Johnson,* 1:11-cv-686, Final Judgment as to Defendant Johnson & Johnson at 1-2 (D.D.C. Apr. 13, 2011); *SEC v. IBM Corp.*, 1:11-cv-563, Final Judgment as to Defendant International Business Machines Corp. at 1-2 (D.D.C. Apr. 8, 2011); *SEC v. Tyson Foods*, 1:11-cv-350, Final Judgment as to Defendant Tyson Foods, Inc. at 1-2 (D.D.C. Feb. 10, 2011); *SEC v. Maxwell Tech., Inc.*, 1:11-cv-2528, Final Judgment as to Defendant Maxwell Tech., Inc. at 1-2 (D.D.C Jan 31, 2011); *SEC v. Jennings*, 1:11-cv-144, Final Judgment as to Defendant Paul W. Jennings at 1-2 (D.D.C. Jan. 24, 2011).

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Factual Background And The Eleventh Circuit's Opinion

The SEC brought a civil enforcement action against Goble and others in 2008 alleging that Goble, the founder and owner of North American, had orchestrated a scheme to manipulate the amount of money required to be set aside in North American's reserve account to protect the assets of its customers in the event the firm failed. After a bench trial, a district judge in the Middle District of Florida found that Goble had directed an employee to make a false entry in the company's books, and thus found Goble liable for securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The court also found Goble liable for aiding and abetting violations of the Customer Protection Rule, which is Section 15(c)(3) of the Exchange Act, and the books and records requirements in Section 17(a) of the Exchange Act.

On appeal to the Eleventh Circuit, defendant Goble argued, among other things, that the injunctions imposed by the district court were impermissible "obey-the-law" injunctions that violated Rule 65(d)(1) because they did not describe in sufficient detail the conduct that was prohibited. Rule 65(d)(1) states that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." In considering the propriety of the district court's injunctions, the Eleventh Circuit was troubled by the conclusory language that restrained and enjoined Goble from violating cited laws and rules, without specifying the actual enjoined conduct. The court concluded that the injunctions under Sections 15(c)(3) and 17(a) were impermissible "obey-the-law" commands and vacated them. The court vacated the injunction under Section 10(b) on other grounds, but also said in dicta that it too appeared to be an impermissible "obey-the-law" injunction.

The Eleventh Circuit explained that, because "obey-the-law" injunctions lack specificity, they necessarily deprive defendants of procedural safeguards alerting them to what could be a future charge of a violation of the securities laws. In making its ruling, the court discussed its previous ruling in *SEC v. Smyth*,[4] where the court went out of its way to comment, albeit in dicta, that an SEC "obey-the-law" injunction was "unenforceable." According to the Circuit Court, the specificity requirements of Rule 65(d)(1) were designed to prevent uncertainty and confusion by those subject to the injunction orders and to "avoid the possible founding of a contempt citation on a decree too vague to be understood."[5] A defendant faced with an injunction should therefore be able to determine from the four corners of the injunction the proscribed conduct. The injunctions ordered by the district court failed this test and therefore had to be vacated. In making this ruling, the Eleventh Circuit acknowledged that in some circumstances injunctions that order a defendant to comply with a statute can be appropriate where the terms of the statute

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4. 420 F.3d 1225, 1233 n.14 (11th Cir. 2005).

5. *Goble*, at *11 (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)).

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at issue are specific enough so that the defendant "clearly [knows] what conduct the injunction addresse[s]."[6] In dicta, the court added that the issue of specifying the prohibited conduct is especially acute in the context of injunctions for Section 10(b) and Rule 10b-5 violations – perhaps the most common of the "obey-the-law" injunctions sought by the SEC – because of the "ever-changing judicial landscape" of rulings on Section 10(b) violations.

Application of *SEC v. Goble* to the FCPA Context

The Eleventh Circuit's holding could have a significant impact in the FCPA context, as there are several parts of the FCPA that have been criticized for their lack of clarity. The business community has called for reform in recent years to address some of the vague areas of the statute, seeking congressional clarification of, for example, the definition of a foreign official, the level of control a non-U.S. government must exercise to consider a business an "instrumentality" of a foreign state, and the level of gift giving that is acceptable under the law.[7] As a result, an "obey-the-law" injunction, in which compliance with the FCPA, stated without elaboration, is the object, could very well fall short under the Eleventh Circuit's test, and be unenforceable.

SEC v. Goble May Signal That Broad Injunctions Fail in the Face of Further Scrutiny

The *Goble* decision will undoubtedly have a significant impact on the SEC's ability to continue seeking and enforcing "obey-the-law" injunctions in district courts in the Eleventh Circuit. What remains to be seen is whether the decision will have a more far-reaching impact. In *SEC v. Zwick*,[8] the District Court for the Southern District of New York expressly rejected the Eleventh Circuit's analysis in *Smyth*, and upheld a broad "obey-the-law" injunction. The *Zwick* court relied on the Second Circuit's decision in *SEC v. Manor Nursing Centers, Inc.*,[9] a decision that pre-dated *Smyth* but which expressly provided that an injunction that mirrored the text of Section 10(b) and Rule 10b-5 was appropriate.

> "Given that the Eleventh Circuit has not backed down from its view on [refusing to enforce "obey-the law" injunctions], . . . other courts may be prompted to question future attempts by the SEC to obtain broad "obey-the-law" injunctions."

Given that the Eleventh Circuit has not backed down from its view in *Smyth*, and in fact has given it an articulate defense, other courts may be prompted to question future attempts by the SEC to obtain broad "obey-the-law" injunctions. It is also possible that the SEC may shift on its own towards a policy of pursuing more specifically tailored injunctions, although tailored injunctions may be viewed by many as diminishing the deterrent impact of SEC injunctions – and the threat of contempt that stands behind them.

The *Goble* decision may also prod the SEC into pursuing alternate forms of settlement in FCPA matters in jurisdictions where the courts refuse to enforce "obey-the-law" injunctions. For example, pursuant to its authority under the Exchange Act, the SEC frequently utilizes Cease and Desist orders in FCPA matters to order companies and individuals to "cease and desist from committing or causing any violations and future violations" of the Exchange Act.[10] The SEC may also opt to pursue more Deferred Prosecution Agreements, as it did in the matter of ***Tenaris***, entering into a private agreement with settling defendants.[11]

In light of the *Goble* decision, individuals and companies in active litigation with the SEC, as well as those

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6. *Goble*, 2012 WL 1918819 at *11.
7. *See e.g.*, Letter to Lanny Breuer, Assistant Attorney General, Criminal Division, DOJ, and Robert Khuzami, Director of Enforcement, SEC, from the U.S. Chamber of Commerce (Feb. 21, 2012), http://www.scribd.com/doc/82585638/Chamber-Letter-to-DOJ-SEC-Regarding-FCPA-Guidance.
8. No. 03 Civ. 2742(JGK), 2007 WL 831812, *19 (S.D.N.Y. Mar. 16, 2007).
9. 458 F.2d 1082, 1103 (2nd Cir. 1972).
10. *See, e.g., In the matter of Watts Water Tech.*, Admin. Pro. 3-14585, Cease and Desist Order at 7-8 (Oct. 13, 2011).
11. *In the matter of Tenaris, S.A.*, Deferred Prosecution Agreement (May 17, 2011) (Tenaris agrees to "refrain from violating the U.S. federal and state securities laws"; if agreement is violated, SEC has discretion to recommend enforcement proceeding.).

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considering settlement with the agency, may want to consider challenging any attempt by the SEC to impose "obey-the-law" injunctions. Although it is likely that the SEC will continue to pursue vigorously broad injunctive orders, the recent trend by federal judges to scrutinize SEC settlements may result in the SEC being more open to the suggestion that injunctions should be narrowly tailored and sufficiently specific so as to comply with Rule 65(d)(1).

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Mexico Catches Up: A New Law Against Corruption in Government Procurement

On April 21, 2012, *The New York Times* reported that Mexico-based Wal-Mart officials, in a rush to obtain building permits, paid bribes "in virtually every corner of the country."[1] The *Times* alleged that the bribes totaled more than U.S. $24 million and had been "hushed up" by Wal-Mart officials for years. A few days after the story broke, Mexican President Felipe Calderón Hinojosa reacted to Wal-Mart's corruption scandal by saying that he was "very indignant."[2] Calderón acknowledged that Wal-Mart had created many jobs in Mexico but said that "what is not right is doing business on the basis of bribes."[3]

The day Calderón made his public declarations regarding Wal-Mart, the Mexican Senate approved the Ley Federal Anticorrupción en Contrataciones Públicas ("LFACP") (in English, the Federal Law Against Corruption in Public Procurement).[4] Although Calderón had submitted the anti-corruption bill to Mexico's National Congress on March 3, 2011 and the Senate had initially approved the bill on April 5, 2011, the bill spent more than a year in legislative deliberations in the House of Representatives. The House finally approved it on March 13, 2012 and then sent it to the Senate for final approval.[5] On June 8, Calderón signed the new law, which came into effect on June 12, 2012.[6] In his signing statement, Calderón emphasized that in order to break the cycle of corruption in Mexico, the country needed, in addition to existing sanctions

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1. David Barstow, "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle," *The New York Times* (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.
2. Miguel Gutierrez and Elinor Comlay, "Mexico Starts Investigation in Wal-Mart Bribery Case," *Reuters* (Apr. 25, 2012), http://www.reuters.com/article/2012/04/26/us-walmart-idUSBRE83O1BP20120426.
3. *Id.*
4. Senate of the Republic, Opinions for Discussion and Voting, Second Ordinary Period, Gazette No. 384 (Apr. 25, 2012) (Mex.), http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=14518&lg=61.
5. *Id.*
6. Official Federal Daily Gazette, Decree Issuing the Federal Law Against Corruption in Public Procurement (June 11, 2012) (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5251641&fecha=11/06/2012.

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against public servants, new legal tools to punish actors from the private sector involved in corruption.[7]

The LFACP makes it illegal for domestic and foreign companies (as well as individuals) participating in federal public contracts to bribe a public servant, a third party working at the direction of a public servant or an individual involved in the procurement process.[8] The new federal law creates strict penalties for national and foreign individuals and companies involved in bribery related to federal government procurement, raising the stakes by subjecting both Mexican and international companies doing business in Mexico to greater potential legal exposure.

> "The new federal law . . . rais[es] the stakes by subjecting both Mexican and international companies doing business in Mexico to greater potential legal exposure."

Mexico's Recent Anti-Corruption Efforts

In recent years, the Mexican government, like many others around the globe, has undertaken several steps to combat corruption. Mexico ratified the Inter-American Convention Against Corruption in 1997,[9] the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1999,[10] and the United Nations Convention Against Corruption in 2004.[11]

In 1999, as part of its efforts to implement OECD standards, the Mexican federal government amended its Penal Code, which already provided for sanctions against persons who bribe a domestic public official, to also criminalize bribery of a foreign public official.[12] Currently, the Federal Penal Code establishes sanctions for companies if (1) the company representative has been convicted of bribing a foreign public official (or a third party working at the direction of a foreign official) and (2) the company provided the means by which the offense was committed on its behalf.[13] Penalties may include a fine of up to 1,000 times the daily net income of whoever commits the crime, suspension of company activities or dissolution of the company.[14]

Mexico's Congress is also in the process of creating the National Anti-Corruption Prosecutor, a new agency designed to fight corruption and money laundering.[15] If approved by the House of Representatives, the creation of this office, which would require an amendment to the Constitution, would elevate the prevention and investigation of corruption to a constitutional level.[16]

The legal changes Mexico has undertaken and is now pushing must be contrasted with a Mexico in which corruption remains commonplace and continues to cloud public perceptions of the country. In 2011, Mexico ranked 100th out of 178 countries on Transparency International's Corruption Perceptions Index, and has fallen twenty-eight places

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7. Presidency of the Republic, Speech: Anti-corruption in Public Procurement (June 8, 2012), http://www.presidencia.gob.mx/2012/06/firma-del-decreto-de-la-ley-anticorrupcion-en-contrataciones-publicas/.
8. Federal Law Against Corruption in Public Procurement (June 11, 2012) (Mex.), http://www.diputados.gob.mx/LeyesBiblio/doc/LFACP.doc.
9. Organization of American States, Department of Legal Cooperation: Mexico, http://www.oas.org/juridico/english/mex.htm.
10. OECD, Mexico – OECD Anti-Bribery Convention, http://www.oecd.org/document/16/0,3746,en_2649_34859_44597136_1_1_1_1,00.html.
11. United Nations Office on Drugs and Crime, United Nations Convention Against Corruption: UNCAC Signature and Ratification Status as of 12 March 2012, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.
12. Código Penal Federal ("Federal Penal Code"), as amended, Arts. 222 and 222 bis (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf.
13. Article 222 bis of the Federal Penal Code provides sanctions for the offense of bribing a foreign public official by incorporating the sanctions provided under Article 222 for the bribery of a domestic public official. *Id.*; *see also* OECD, Mexico-Phase 1: Report on Implementation of the OECD Anti-Bribery Convention at 2 (June 27, 2000), http://www.oecd.org/dataoecd/15/30/2388858.pdf (clarifying that according to Mexican authorities, Article 222 bis applies to any "natural person"). In addition, Article 222 bis incorporates by reference Article 11 of the Federal Penal Code, which establishes sanctions for a legal entity when any member or representative commits a crime "in the name or on behalf" of the legal entity.
14. Federal Penal Code, note 12, *supra*, art. 222 bis*; see also id.* art. 29 (explanation of how fines are calculated).
15. House Of Representatives, News Agency Note No. 7766, National Anti-Corruption Prosecutor (Mar. 3 2012) (Mex.), http://www3.diputados.gob.mx/camara/005_comunicacion/b_agencia_de_noticias/008_2012/03_marzo/19_19/7766_fiscalia_nacional_contra_la_corrupcionpublica_avance_para_mejorar_instituciones_escudero_morales_poco_abona_a_combatirla_santiago_ramirez_afrontar_problema_grave_ramirez_puente.
16. The proposal sent to the House of Representatives by the Senate amends article 102 of the Constitution. *Id.*

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(indicating an increase in perceived corruption) since 2008.[17] The *Economist* recently reported that builders in Mexico typically add 10 percent to their budgets to account for payments to municipal officials whose sign-off is required, and that, according to the World Bank, obtaining a building permit in Mexico takes 81 days, while in the United States it takes 26.[18] In the last ten years, U.S. regulators have brought several proceedings and actions against U.S. companies for alleged Foreign Corrupt Practices Act ("FCPA") violations involving bribery in Mexico: Syncor International Corporation in 2002;[19] Paradigm BV in 2007;[20] Siemens AG in 2008;[21] ABB Ltd[22] and Pride International, Inc. in 2010;[23] and Bridgestone Corporation,[24] Lindsey Manufacturing Company[25] and Tyson Foods Inc. in 2011.[26]

The New Anti-Corruption Law

The LFACP represents Mexico's most recent effort to strengthen its corporate liability regime by creating a separate non-criminal enforcement system that will operate in parallel with the existing criminal law regime. The LFACP makes clear that national and foreign companies can be sanctioned administratively for bribing Mexican officials in the context of federal procurement and it imposes severe penalties for such violations. Federal public procurement, as defined by the LFACP, covers all proceedings relating to contracts for procurement, leases, services and public works, including the bidding process.[27]

To whom does the law apply? The LFACP applies to (i) domestic or foreign individuals or companies participating in federal public procurement as interested parties, bidders, guests, suppliers, contractors, licensees, concessionaires or any similarly situated parties (the "Interested Parties");[28] (ii) domestic or foreign individuals or companies that, in their capacity as shareholders, partners, associates, representatives, principals, agents, attorneys, brokers, managers, advisers, consultants, subcontractors, employees or any other similar role intervene in federal public procurement on behalf of any Interested Party;[29] and (iii) domestic individuals or companies participating, directly or indirectly, in international commercial transactions.[30]

What does it prohibit? For domestic or foreign individuals or companies, the LFACP prohibits bribery, defined broadly as promising, offering or delivering money or any other gift to a public official or a third party with the purpose of obtaining or maintaining a benefit or advantage in federal public procurement.[31] The LFACP also includes a catch-all provision that prohibits

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17. Transparency International, Corruption Perceptions Index 2011 at 4 (2011), http://archive.transparency.org/content/download/64426/1030807; Transparency International, Corruption Perceptions Index 2008, Table (2008), http://archive.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table.
18. "Walmart's Mexican Morass," *Economist* (Apr. 28, 2012), http://www.economist.com/node/21553451.
19. Securities Exchange Act of 1934 Rel. 46979, *In re Syncor Int'l Corp.*, Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (Dec. 10, 2002), http://www.sec.gov/litigation/admin/34-46979.htm.
20. DOJ Press Rel. 07-751, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), http://www.justice.gov/opa/pr/2007/September/07_crm_751.html.
21. SEC Press Rel. 2008-294, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm.
22. SEC Press Rel. 2010-175, SEC Charges ABB for Bribery Schemes in Mexico and Iraq (Sept. 29, 2010), http://www.sec.gov/news/press/2010/2010-175.htm.
23. SEC Litig. Rel. 21726, SEC Charges Pride International with Violating the Foreign Corrupt Practices Act (Nov. 4, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21726.htm.
24. *U.S. v. Bridgestone Corp.*, No. 11-651/2011, Information (S.D. Tex. Sept. 15, 2011); *see also* DOJ Press Rel. 11-1193, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), http://www.justice.gov/opa/pr/2011/September/11-at-1193.html.
25. DOJ Press Rel. 11-071, South California Company, Two Executives and Intermediary Convicted in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), http://www.justice.gov/usao/cac/Pressroom/pr2011/071.html.
26. SEC Press Rel. 2011-42, SEC Charges Tyson Foods with FCPA Violations (Feb. 10, 2011), http://www.sec.gov/news/press/2011/2011-42.htm.
27. LFACP, note 8, *supra*, art. 3(III).
28. *Id.* art. 2(I).
29. *Id.* art. 2(II).
30. *Id.* art. 2(III).
31. *Id.* art. 8(I).

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any use of influence or political or economic power over a public official to obtain a benefit or advantage.[32] Moreover, like the FCPA, the LFACP prohibits Mexican individuals or companies from bribing foreign public officials (*i.e.*, non-Mexican officials) in international commercial transactions.[33] This provision makes it easier to punish a Mexican company that bribes a foreign official, because the current criminal provision applicable to domestic companies in the Federal Penal Code requires the conviction of a company's representative acting on the company's behalf to hold the company liable.[34]

Who enforces it and how? Mexico's Secretaría de la Función Pública (Ministry of Public Administration, or "SFP") and related agencies are tasked with investigating alleged violations and adjudicating proceedings under the LFACP.[35] Investigations of potential violations may be initiated *sua sponte* or based on a claim presented by individuals, domestic public institutions, foreign states or international organizations.[36] As part of the investigation, competent authorities have broad powers to request information and demand the production of documents from individuals, companies or public institutions, including confidential information.[37] The deadlines to respond to information requests are short, ranging from 5 to 10 business days with the possibility of an extension of up to another 10 business days for individuals and companies and up to 20 business days for public institutions.[38] If the investigation turns up enough evidence to pursue the potential violation, the investigation can be followed by an administrative proceeding, which can levy sanctions.[39]

> The LFACP "makes it easier to punish a Mexican company that bribes a foreign official."

What penalties does it impose? Penalties under the LFACP include fines up to 50,000 times the daily minimum wage for individuals, which results in a maximum of approximately US $220,000 based on current exchange rates, and up to two million times the daily minimum wage for companies, a maximum of approximately US $9 million based on current exchange rates.[40] However, for certain proceedings related to public procurement or international commercial transactions such as permits and concessions, the maximum fine for both individuals and companies may be increased by up to 50 percent if there is proof that the benefit to the offender was greater than the maximum available fine.[41] Moreover, in the case of federal contracts awarded to the offender in which the maximum fine is less than 30 percent of the contract, the fine imposed will be between 30 and 35 percent of the contract value.[42] Individuals may also be prohibited from participating in federal government procurement for up to eight years.[43] Similarly, companies may be blacklisted from participating in federal government procurement for up to 10 years.[44]

The LFACP does not impose any self-reporting obligations on individuals or companies, but provides for a reduction

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32. *Id.* art. 8(VII).
33. *Id.* art. 9.
34. *See* Federal Penal Code, note 12, *supra*, art. 222 bis.
35. LFACP, note 8, *supra*, art. 5.
36. *Id.* art. 10.
37. *Id.* arts. 14 and 15.
38. *Id.* art. 14.
39. *Id.* arts. 18-26.
40. *Id.* art. 27. The daily minimum wage applicable here, that of the Distrito Federal (Mexico City), is currently 62.33 Mexican pesos. Servicio de Administración Tributaria, Salarios Mínimos 2012, http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/. The exchange rate from U.S. dollars to Mexican pesos as of June 15, 2012, according to the U.S. Federal Reserve, is USD 1 = MXN 13.9234. Board of Governors of the Federal Reserve System, Foreign Exchange Rates – H.10 Weekly (June 18, 2012), http://www.federalreserve.gov/releases/h10/current/.
41. LFACP, note 8, *supra*, art. 27.
42. *Id.*
43. *Id.* art. 27(I)(b).
44. *Id.* art. 27(II)(b).

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of up to 70% of the applicable sanction for individuals and companies that disclose violations.[45] The law also allows the SFP to enter into agreements with individuals and companies participating in the federal public procurement process and in international business transactions in order to provide guidance regarding self-regulatory mechanisms and internal controls.[46] Companies operating in Mexico are encouraged to familiarize themselves with the new anti-corruption law and to work proactively with in-house experts and, if necessary, outside professionals, to establish and improve their anti-corruption mechanisms, internal compliance policies, as well as training, auditing and discipline of employees.

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45. *Id.* art. 31.
46. *Id.* art. 33.

Transparency International UK's Anti-Bribery Due Diligence Guidance

Transparency International U.K. ("TI UK") has published its final guidance on anti-bribery due diligence (the "Guidance"), following a public consultation in 2011.[1] The publication is intended to be a practical guide for companies and their professional advisors undertaking or subject to due diligence for mergers, acquisitions and other investments.

TI UK's publication of the Guidance is in part a response to the introduction of the U.K. Bribery Act 2010 (the "Bribery Act" or "Act"), which came into force on July 1, 2011. Section 7 of the Act, the so-called "corporate offense," makes commercial organizations carrying on business in the U.K. criminally liable for bribery by associated persons, such as employees, subsidiaries or agents, regardless of the commercial organization's state of knowledge. However, a commercial organization can defend against a Section 7 charge by showing that it had in place "adequate procedures" to prevent bribery.

As required by the Act, the U.K.'s Ministry of Justice (the "MoJ") published guidance as to what constitutes adequate procedures.[2] In its guidance, the MoJ set out six principles, including due diligence, and stated that M&A transactions "carr[y] particularly important due diligence implications."[3] The chief prosecutor and investigator of corruption at the U.K.'s Serious Fraud Office ("SFO") has echoed the importance of due diligence, warning private equity and institutional investors to

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1. Transparency Int'l U.K., Anti-Bribery Due Diligence for Transactions (June 2012), http://www.transparency.org.uk/our-work/publications/10-publications/227-anti-bribery-due-diligence-for-transactions. [hereinafter, "Guidance"].
2. U.K. Ministry of Justice, Guidance to the Bribery Act 2010, (March 2011), http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
3. *Id.* at para 4.4.

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take responsibility for carrying out adequate due diligence.[4]

Those companies that do not carry out appropriate due diligence are therefore more likely both to take on bribery risks, and to be prosecuted in the U.K. for bribes paid by target companies.

Due diligence is also important in the context of other anti-corruption legislation, such as the FCPA, which provides for successor liability and has in the past been enforced against companies that failed to conduct adequate anti-bribery due diligence.

Nonetheless, a recent global survey indicated that one-fifth of companies still do not consider anti-bribery due diligence as part of their standard M&A due diligence.[5] This makes the TI UK guidance all the more timely and useful.

The Guidance incorporates Transparency International's ("TI") Business Principles for Countering Bribery[6] and is underpinned by three considerations: (i) *proportionality*: the level of anti-bribery due diligence should be proportionate to the scale of the transaction and the risk of bribery; (ii) *timing*: if the information necessary for due diligence is not wholly or partly available pre-acquisition, the due diligence may need to be undertaken or completed post-acquisition; and (iii) *effectiveness*: the company should follow a good practice approach.[7]

Animated by these considerations, the Guidance provides "good practice principles" for anti-bribery due diligence, a 6-step template for anti-bribery due diligence, and a checklist of recommended actions.

Good Practice Principles

The Guidance advocates 10 "good practice" principles for anti-bribery due diligence:

1. The purchaser has a public anti-bribery policy.
2. The purchaser has an adequate anti-bribery program that is compatible with TI's Business Principles for Countering Bribery or other equivalent principles.
3. The purchaser considers whether anti-bribery due diligence is needed before every investment.
4. The level of anti-bribery due diligence for the transaction is commensurate with the bribery risks.
5. Anti-bribery due diligence starts as early as possible in the due diligence process so that its findings can influence the outcome of negotiations or stimulate further review.
6. Senior management of the purchaser provide commitment and oversight to the due diligence process.
7. Information gained during the due diligence is passed on efficiently and effectively to the target's management post-completion.
8. The purchaser conducts any remaining due diligence post-completion on a proportionate basis and takes any remedial action necessary.
9. The purchaser ensures that the target has or adopts an adequate anti-bribery program equivalent to its own.
10. Bribery detected through due diligence is reported to the authorities; TI UK considers it is in purchasers' best interest to do so.

TI UK also provides commentary on the interpretation, implementation and execution of these principles in practice.

6-Step Template

The Guidance sets out a six-step template for conducting an anti-bribery review as part of the standard due diligence process:

1. Initiating the process

- A review to establish the scope and depth of the due diligence required should be undertaken by management as soon as possible. Management should start thinking about how much information will be available, and from what sources.

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4. SFO Press Rel., Shareholder agrees civil recovery by SFO in Mabey & Johnson (Jan. 13, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx ("Shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in…. It is particularly so for institutional investors who have the knowledge and expertise to do it…Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect.").
5. Ernst & Young, "Driving ethical growth – new markets, new challenges," 11th Global Fraud Survey at 2 (2011), http://www.ey.com/Publication/vwLUAssets/Driving_ethical_growth_-_new_markets,_new_challenges:_11th_Global_Fraud_Survey/$FILE/EY_11th_Global_Fraud_Survey.pdf.
6. Transparency International, Business Principles for Countering Bribery (2009), http://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery/1/.
7. *See* Guidance at 1.

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2. Initial screening

- The purchaser should conduct market research and discussions with the target to evaluate any significant bribery risks and assess the target's anti-bribery program. Factors to be considered include investigations by authorities, poor management, and lax internal controls in high-risk jurisdictions and sectors.

3. Detailed analysis

- The purchaser should conduct a detailed review proportionate to the risk of bribery, and produce an anti-bribery due diligence report. This review should include:
  - Detailed analysis of the target's markets and competitors' activities to assess the bribery risk.
  - Corporate intelligence and background checks on the targets and key owners, directors and management.
  - Assessment of the adequacy of the target's anti-bribery program.
  - Assessment of the target's "tone from the top".
  - Interviewing senior employees in high-risk functions.
  - Undertaking interviews with the target's knowledgeable outsiders (e.g. customers of the target, industry experts etc.) and site visits.
  - Carrying out "walk-through tests" to check if policies and procedures are implemented effectively.
  - Review of data provide by the target company.
  - Detailed financial review to address the veracity of financial transactions and understand the target's finances and financial controls.

4. Decision

- Any relevant findings should form part of the proposal for purchase or investment to be considered by management. It may also be advisable before proceeding with a transaction to discuss any bribery issues with the SFO[8] or other relevant authority.

5. Post-Acquisition Due Diligence

- If access to information was restricted prior to completion of the transaction, due diligence should be completed (or commenced) immediately after completion. Where necessary, any remedial action should be undertaken and suspected bribery reported to the authorities.

6. Post-Acquisition Integration and Monitoring

- An adequate anti-bribery program should be integrated into the acquired company and its implementation monitored.

Checklist

The Guidance also provides a checklist of due diligence questions and requests for information, although TI UK states that this should be used only as a general aid. Actual due diligence should be tailored to each individual transaction; a "tick-box approach" will not be adequate.

The Guidance provides a useful and practical framework for companies and professional advisers alike in approaching anti-bribery due diligence. However, the Guidance is intended to provide only a general framework. The level of due diligence required, and the actual steps to be taken, must always be assessed on a transaction-by-transaction basis, following a suitable risk assessment. Doing so will help companies ensure that they are following "adequate procedures" and minimizing the risk of bribery at acquisitions and investments.

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8. The SFO actively encourages purchasers and investors to discuss with it any issues that arise during M&A due diligence, and may promise purchasers that it will take no action post-completion if appropriate remedial steps are taken. *See* Serious Fraud Office, "The Serious Fraud Office's Approach to Dealing with Overseas Corruption" (July 21, 2009), http://www.sfo.gov.uk/media/107247/approach%20of%20the%20serious%20fraud%20office%20v3.pdf

In Re Pacific Pictures: The Ninth Circuit Rejects Selective Waiver

The U.S. Department of Justice's ("DOJ") position on the role of a company's waiver of the attorney-client privilege and work product protections has evolved with respect to the government's calculation of a corporation's "cooperation score" in the course of an FCPA investigation; specifically, a company's "cooperation score" no longer increases based on its decision to waive privilege. As a result, there is less pressure on companies to waive privilege or work product protection today than there was before the DOJ changed course. Nonetheless, when waiving privilege is potentially in a company's strategic interests, understanding the consequences of providing privileged or work-product-protected materials remains critical.

Without addressing the various circumstances in which such a waiver might, on balance, be counseled, this article reviews the current status of the "selective waiver" doctrine, *i.e.*, the notion that a waiver of attorney-client privilege or work-product protection in a submission to the government is not a "waiver to all others" – a concept of particular concern to private plaintiffs who might seek copies of produced documents in collateral litigation.

An update on the selective-waiver doctrine is warranted in light of a recent decision by the United States Court of Appeals for the Ninth Circuit, which joined the growing list of federal courts of appeals that have rejected the "selective waiver doctrine," holding that the voluntarily disclosure of privileged documents to the federal government waives attorney client privilege as to others.[1] As a result, voluntarily waiving privilege by producing documents in the course of a federal criminal investigation is deemed to waive privilege with respect to any party seeking production of those documents – even third party civil litigants. The court's opinion in *In re Pacific Pictures* leaves the selective waiver doctrine in its broadest formulation on life support, with only the Eighth Circuit's 1978 decision in *Diversified Industries v. Meredith, Inc.*[2] in conflict, and a substantial number of sister circuits rejecting the doctrine. Nevertheless, several important wrinkles in the doctrine remain, providing protection for parties producing privileged or work-product materials to the government against broad waiver findings in specific circumstances.[3]

Waiver of Privilege and Work Product Protection: The DOJ's Evolving Position

Essential to understanding the strategic calculus that goes into privilege and work product waiver decisions is the DOJ's evolving view of the role of such waivers in the government's assessment of a corporation's cooperation with an investigation.[4] In 1999, then-Deputy Attorney General Eric Holder stated that a corporation's willingness to waive attorney-client privilege could be considered as a factor in assessing the corporation's level of cooperation.[5] In 2003, then Deputy Attorney General Larry Thompson instructed prosecutors specifically to consider in charging decisions the corporation's willingness to waive privilege.[6] The DOJ has since revised its policy, first via the McNulty Memorandum, which permitted prosecutors to seek production of privileged materials only in the case of "legitimate need" and eliminated the consideration of a company's willingness

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1. *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012).
2. *Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
3. *See, e.g. In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993). *See also* additional cases cited *infra* nn. 21-37.
4. DOJ policy on a number of matters typically committed to the department's discretion is often implemented by the current Deputy Attorney General in a memorandum to all federal prosecutors. Such guidelines are thus referred to by the name of the Deputy Attorney General issuing the memorandum. For background on these memos *see generally* Debevoise & Plimpton LLP, "Cooperation with Investigation Authorities from a Comparative Transnational Perspective: In the US," *ICID Review*, Vol. 1, No. 2 (Spring 2010), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=a7982d1e-cba3-4bea-b761-63f405ec5a03.
5. U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf.
6. U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Larry D. Thompson to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), http://www.justice.gov/dag/cftf/business_organizations.pdf.

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to waive privilege in charging decisions.[7] Ultimately, under then-Deputy Attorney General Mark A. Filip, the U.S. Attorneys' Manual was revised to altogether prohibit prosecutors from requesting documents with "core" attorney work product and to emphasize that cooperation is to be assessed with regard to a corporation's disclosure of key facts, not privileged materials.[8]

Nonetheless, both formal and informal pressures continue to affect the calculus underlying corporate disclosure decisions in the course of government investigations or supervisory proceedings.[9] Though the DOJ emphasizes the disclosure of facts, such "facts" are often arrived at following an attorney's distillation of "what was said and how it was said" in interviews and documents – in other words, privileged work product-protected materials.[10] Additionally, though no longer an official charging consideration at the DOJ, a company's assertion of privilege might still influence its goodwill with prosecutors in some generalized fashion. Reliance on an advice-of-counsel defense to a potential criminal charge raises other issues. As a result, disclosure and waiver decisions must be made thoughtfully and with an eye to the scope of documents or other evidence requested, and the impact of the waiver on collateral proceedings.

The Legal Landscape Regarding Selective Waiver

In 1978, the Eighth Circuit endorsed the selective waiver doctrine, holding that voluntarily providing privileged materials to the Securities and Exchange Commission ("SEC") pursuant to a subpoena did not waive privilege with respect to third parties.[11] In *Diversified*, the company hired a law firm to conduct an internal investigation of the company's business practices and report the findings to the company's board of directors.[12] Diversified disclosed these documents to the SEC in the course of the SEC's separate and non-public investigation.[13] When ordered to produce the documents in a suit with a third party, Diversified objected on the ground that the documents were privileged.[14] The court of appeals agreed, asserting that the disclosure to the SEC was only a "limited waiver of [attorney-client] privilege," rationalizing that to hold otherwise would create a disincentive for corporations to employ outside counsel in internal investigations.[15]

> "[T]hough no longer an official charging consideration at the DOJ, a company's assertion of privilege might still influence its goodwill with prosecutors in some generalized fashion."

As noted above, every circuit to address the issue since *Diversified* has rejected the doctrine, rendering selective waiver effectively null in every circuit except the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, North Dakota and South Dakota) as well as the federal district courts in the Fifth and Eleventh Circuits (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas), where the courts of appeals have not yet ruled on the doctrine.[16] The Ninth Circuit, in *Pacific Pictures*, is the most recent federal court of appeals to weigh in. The litigation in that case stemmed from the lengthy legal battle between D.C. Comics and the heirs of the creators of Superman.[17] In rejecting selective waiver, the court of appeals affirmed the denial of a motion to

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7. U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Paul J. McNulty to Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006), http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.
8. *See* United States Attorneys' Manual §§ 9-28.000 to 9-28.1300 (2008) (incorporating Filip revisions), http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.
9. Alex C. Lakatos and Golaleh "Lili" Kazemi, *Keeping Half the Cat in the Bag: Selective Waiver of Privileged Materials Pursuant to 1828(X)*, 129 BLJ 242, 243 (March 2012).
10. Mark J. Stein and Joshua A. Levine, "The Filip Memorandum: Does It Go Far Enough?," *N.Y. Law J.* (Sept. 11, 2008), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202424426861 (subscription).
11. *Diversified Industries*, 572 F.2d at 611.
12. *Id.* at 600.
13. *Id.* at 611.
14. *Id.* at 600.
15. *Id.* at 611.
16. *See In re Pacific Pictures Corp.*, 679 F.3d at 1127 (collecting cases). The doctrine had been rejected by the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Federal, and D.C. Circuits. *Id.* In fact, even the Eighth Circuit has pulled back on its initial adoption of selective waiver outside the attorney-client privilege context, holding that selective waiver does not apply to non-opinion work product. *See In re Chrysler Motors Corp.*, 860 F.2d 844, 846 (8th Cir. 1988).
17. *See In re Pacific Pictures*, 679 F.3d at 1123.

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prevent discovery of certain materials on the ground that the moving party had only selectively waived privilege by producing the documents to the federal government in a related matter.[18] The court of appeals based its decision on the purposes underlying attorney-client privilege, noting that selective waiver does not incentivize frank discourse between attorneys and clients, but rather encourages voluntary party disclosure to government agencies, a worthwhile but distinct objective.[19] Other circuits rejecting selective waiver have reasoned similarly.[20]

Issues That Remain if the Majority View Prevails

Although as a general matter, selective waiver has not met with acceptance in recent years in the courts of appeals, there are some potential discrepancies in the courts' handling of the issue, though they vary by circuit. First, some circuits rejecting selective waiver in the attorney-client privilege context permit it in the work product context.[21] The Fourth Circuit is the only one expressly to adopt selective waiver in relation to opinion work product.[22] The D.C. Circuit, in its rejection of selective waiver in the attorney-client privilege context, upheld selective waiver for work product in the context of a confidentiality agreement protecting the materials in question.[23] However, the D.C. Circuit has rejected selective waiver in another work-product instance, and has more recently evaluated selective waiver for work product on the basis of a three-factor test, leading other circuits to question D.C.'s adherence to the doctrine.[24] The Second Circuit has been similarly enigmatic in its approach, denying work-product protection for documents previously disclosed to the SEC, but explicitly refusing to adopt a *per se* rule against selective waiver in the work product context.[25]

The Second Circuit, in refusing to adopt a blanket rule against selective waiver, has adopted a case-by-case approach in particular for the scenario in which a federal agency and the disclosing party have entered into an explicit confidentiality agreement.[26] This raises another wrinkle: though no circuit has officially adopted such a rule, some have indicated that they might permit selective waiver in the context of a confidentiality agreement accompanying the initial production to the government.[27] Others, however, have deemed the existence of such agreements irrelevant to the determination of waiver, noting that – as with the underlying rationale for selective waiver itself – the rationale for considering such agreements (*i.e.*, to encourage cooperation with the government) is distinct from that underlying privilege.[28]

A third potential issue in the doctrine is the application of the federal settlement privilege. The federal settlement privilege rests on invocation of the federal rules of evidence, which permit the courts to develop doctrines of privilege, as governed by principles of common law and "in light of reason and experience."[29] Pursuant to this authority, the Sixth Circuit endorsed the idea of federal settlement privilege: communications made in furtherance of settlement negotiations are privileged and are therefore protected from third party discovery.[30] Under this doctrine, any documents produced to a federal agency pursuant to settlement negotiations would be protected by discovery from third party litigants.[31] However, this doctrine is relatively untested; in recent years the D.C.

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18. *Id.*
19. *Id.* at *4.
20. *See In re Qwest Communications Int'l Inc.*, 450 F.3d 1179, at 1187-88 (10th Cir. 2006) (collecting cases with similar reasoning).
21. Lakatos and Kazemi, note 9, *supra* at 250.
22. *Id.*; *see In re Martin Marietta*, 856 F.2d 619, 626 (4th Cir. 1988) (Note, however, that the court declined to apply selective waiver to non-opinion work product.).
23. Lakatos and Kazemi, note 9, *supra* at 250, *see Permian Corp. v. United States*, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981).
24. *See In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C.Cir.1984); *In re Qwest Comm.,* 450 F.3d at 1190-91.
25. *See In re Steinhardt Partners*, 9 F.3d at 236.
26. *Id.*
27. *In re Pacific Pictures*, 679 F.3d at 1128 (noting the Second and Seventh Circuits have indicated interest in such an approach); *see also In re Qwest Comm.*, 450 F.3d at 1194 (noting the Second and Tenth Circuits' interest in adopting such an approach, and declining to categorically reject agreements as a consideration).
28. *See e.g., In re Pacific Pictures*, 679 F.3d at 1129; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-03 (6th Cir. 2002).
29. *See* Fed. R. Evid. 501.
30. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980-82 (6th Cir. 2003) (reasoning that "[t]here exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. . . Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used . . . by some future third party.").
31. *See id.*

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Circuit avoided ruling on its viability,[32] and only a handful of federal district courts have addressed the topic, some adopting such a privilege and some rejecting it.[33] As such, the federal settlement privilege may be asserted as a potential shield from discovery with respect to documents voluntarily produced during settlement negotiations, but its viability is far from certain.

> "The risk that a 'selective waiver' position will be rejected is substantial, and companies and their counsel must think hard and strategically about voluntary production."

A final issue is raised in the banking context by a congressionally mandated exception: 12 U.S.C. § 1828(x) permits financial institutions to share privileged materials with government supervisors without waiving privilege with respect to third parties.[34] Section 1828(x) and its companion, 12 U.S.C. § 1785(j),[35] are the only federal statutes that expressly allow selective waiver.[36] Thus, the problems that accompany cooperation with government agencies do not apply to banks and other financial institutions that produce materials to supervising agencies as a part of the regulatory process.[37]

Conclusion

The bottom line is that while Supreme Court action to resolve the conflict between *Diversified Industries* and the law elsewhere is always a possibility, the overall trend in the courts of appeal is rejection of the notion of selective waiver as a general matter, with limited exceptions for opinion work product in some circuits. Whether the Supreme Court will take up the issue could depend on whether petitions for certiorari are brought at all on the subject, and whether the Justices are of a view that the Eighth Circuit might resolve the issue on its own through an *en banc* proceeding in a subsequent case. In the meantime, a number of ambiguities remain, and companies and their counsel should continue to monitor the law and consider the scope of confidentiality agreements with government agencies. The risk that a "selective waiver" position will be rejected is substantial, and companies and their counsel must think hard and strategically about voluntary production.[38] Including an explicit and stringent confidentiality clause in any agreement to produce may afford some protection in some jurisdictions. At the very least, companies and their counsel are well advised to work carefully with federal entities to tailor the scope of what is requested in a government investigation to what is genuinely needed by the government.

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32. *See In re Subpoena Duces Tecum Issued to CFTC*, 439 F.3d 740, 754 (D.C. Cir. 2006).
33. *See In re Subpoena Issued to CFTC*, 370 F.Supp.2d. 201, 209-10 (D.D.C) (2005) (collecting district court cases).
34. Section 1828(x) provides: "[t]he submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority."
35. Section 1785(j) applies the same rule to credit unions.
36. Lakatos and Kazemi, *supra* note 9 at 245. In fact, the absence of congressionally mandated selective waiver – despite multiple legislative attempts to establish it – was a primary consideration in the Ninth Circuit's rejection of selective waiver. *See In re Pacific Pictures*, 679 F.3d at 1128.
37. *See generally,* Lakatos and Kazemi, note 9, *supra.*
38. It is relevant to note that involuntary disclosures – those documents produced under the threat of contempt – do not necessarily waive privilege. *In re Pacific Pictures*, 679 F.3d at 1130 (citing *United States v. de la Jara*, 973 F.2d 746, 749–50 (9th Cir.1992)).

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