

AN UNREDEEMED PROMISE: HOW COURTS CAN PREVENT OFFENSIVE COLLATERAL ESTOPPEL FROM UNDERCUTTING THE POLICY GOALS OF AMENDED FEDERAL RULE OF EVIDENCE 408

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INTRODUCTION

The Federal Rules of Evidence codify the common law of evidence and protect litigants from unfair procedures and unwarranted evidentiary prejudice.¹ Though the Rules are impressive in their breadth and detail,

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¹ Federal Rule of Evidence 102, titled “Purpose and Construction,” reads: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promo-

they contain a number of unredeemed promises.² In 2006, the Advisory Committee on the Federal Rules of Evidence (the Committee) inadvertently created another unredeemed promise. On December 1, 2006, an amended version of Federal Rule of Evidence 408 (Rule 408) went into effect. Rule 408 governs the admissibility of evidence arising out of settlement discussions, including discussions related to prior proceedings.³ The Committee amended Rule 408 to resolve disagreement in the courts of appeals over whether the Rule excluded settlement evidence from admission only in civil trials, or in criminal trials as well.⁴ The amendment to Rule 408 excludes evidence from settlement negotiations between private parties from both types of trial.

At the same time, the Rule does allow admission in subsequent criminal trials of statements and conduct arising out of negotiations between a private party and government regulators. At the same time, it precludes admission of this evidence in private civil suits even if prosecutors previously used it in a criminal proceeding. A party's statements and conduct during settlement negotiations with civil regulators are now unquestionably admissible in federal or state criminal proceedings, but are not similarly admissible in subsequent actions brought by private parties. Rule 408 is plainly intended to allow sharing of information about federal investigation targets between government agencies. The Rule also aims to protect parties who disclose sensitive information to the government during settlement negotiations by prohibiting admission of that information in private civil suits.

However, a longstanding estoppel doctrine has the potential to undermine this protection. Offensive collateral estoppel, adopted by the Supreme Court in *Parklane Hosiery Co. v. Shore*,⁵ allows plaintiffs to use a finding against a defendant in similar prior litigation to preclude the defendant from relitigating its liability in the plaintiff's suit. Subsequent case law has placed some limitations on the use of offensive collateral estoppel, but none of these limitations prevent a private plaintiff from utilizing a defendant's prior liability in a criminal proceeding as preclusive evidence of the defendant's liability in a subsequent civil suit. The amendment to Rule 408 allows prosecutors to obtain convictions based on evidence arising out of a defendant's civil settlement with a government agency. If plaintiffs are al-

tion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

² Thanks to Professor Ronald J. Allen for permission to use this wording, which he uses to describe conflicts in the Federal Rules of Evidence to his Evidence students. The classic example of such an unredeemed promise is Rule 404(b), which in one sentence excludes character evidence to prove a person's actions in conformity therewith on a particular occasion, but in the next sentence allows admission of the same evidence for purposes as wide-ranging as "motive, opportunity, intent, preparation, plan, knowledge, [and] identity." FED. R. EVID. 404(b).

³ See FED. R. EVID. 408.

⁴ See *infra* text accompanying notes 19–23.

⁵ 439 U.S. 322, 331–32 (1979).

lowed to utilize such convictions to obtain judgments of liability in private civil suits, they will do so by indirectly exploiting evidence that would not have been available to them at trial. Therefore, applying offensive collateral estoppel on the basis of a criminal conviction that involved Rule 408 evidence would allow private parties to make an end run around the restrictions of Rule 408. The Committee seems not to have considered this potential issue, as the record of the deliberations over Rule 408 does not reflect any discussion pertaining to it.⁶

Part I of this Comment describes the development of the 2006 amendment to Federal Rule of Evidence 408. This Part outlines the circuit split that drove the Committee to amend the Rule and dissects the Committee's deliberative process. Part II describes the Securities and Exchange Commission's (SEC) interaction with the Department of Justice (DOJ) when both agencies intend to investigate the same conduct. The historical interaction of the two agencies is relevant to the future application of Rule 408 because the SEC has a well-defined framework for obtaining and sharing information with the DOJ, and because other civil agencies emulate the SEC's practices. Part II also examines the outer limits of acceptable cross-agency investigation tactics. Part III focuses on the Supreme Court's decision in *Parklane Hosiery*, subsequent decisions that have limited or expanded the use of offensive collateral estoppel, and the impact of the doctrine on faithful application of Rule 408. This Comment concludes that offensive collateral estoppel has the potential to undercut Rule 408's protection of government investigation targets who disclose inculpatory information to government agents during settlement negotiations. This Comment therefore urges courts not to apply offensive collateral estoppel in favor of civil plaintiffs in any case where prosecutors gained admission of regulatory settlement evidence in a defendant's prior criminal trial.

I. FEDERAL RULE OF EVIDENCE 408: COMPROMISE AND OFFERS TO COMPROMISE

A. *The Circuit Split over Rule 408*

Rule 408 has governed the admissibility of evidence arising out of settlement negotiations since it first went into effect in 1974.⁷ The Advisory Committee for the Federal Rules of Evidence adopted the Rule to encourage settlement by excluding the content of settlement discussions from admission into evidence at trial.⁸ The Rule went unchanged from its original enactment until December 1, 2006. Rule 408's original text provided that:

⁶ See *infra* Part I.B.

⁷ See FED. R. EVID. 408 advisory committee's note (1972 Proposed Rules).

⁸ *Id.*

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.⁹

Thus, litigants who sought settlement with their adversaries could be relatively certain that statements made in the course of their negotiations would be inadmissible at trial.¹⁰

The need for revision of Rule 408 arose out of a circuit split over the interpretation of the old Rule. The original version of Rule 408 did not explicitly state whether compromise evidence was inadmissible only in civil trials, or in criminal trials as well. Some courts of appeals applied Rule 408 only in civil cases, thereby opening the door for prosecutors to use statements made by potential criminal defendants during settlement negotiations to the government's advantage.¹¹ Other courts of appeals read Rule 408 to exclude evidence from compromise negotiations in both classes of trial.¹²

The split reflected a fundamental difference in opinion over the scope of Rule 408. Courts of appeals adopting a narrow reading of Rule 408 allowed admission of settlement evidence in criminal trials. These courts cited a strong public interest in the effective enforcement of criminal statutes.¹³ Some of these courts further argued that exclusion of settlement-related evidence from criminal trials was already governed by Rule 403's exclusion of relevant but substantially prejudicial evidence.¹⁴

⁹ FED. R. EVID. 408 (2000) (amended 2006).

¹⁰ The Rule generally did not preclude discovery of such statements. *See, e.g.,* *Burda Media, Inc. v. Blumenberg*, No. 97 Civ. 7167, 1999 WL 413469, at *3 (S.D.N.Y. June 21, 1999) ("While Rule 408 of the Federal Rules of Evidence limits the introduction at trial of evidence regarding settlement negotiations, this rule does not itself govern discovery."), *superseded on other grounds as recognized in Johnson Matthey, Inc. v. Research Corp.*, No. 01 CIV.8115, 2002 WL 31235717, at *2 (S.D.N.Y. Oct. 3, 2002). Although the Committee did not directly address this in its deliberations over the 2006 amendment, the same will presumably hold true for the new version of Rule 408.

¹¹ The Second, Sixth, and Seventh Circuits adopted this reasoning. *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (holding Rule 408 inapplicable in criminal proceedings); *Manko v. United States*, 87 F.3d 50, 54–55 (2d Cir. 1996) (same); *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (same).

¹² The Fifth, Tenth, and Eleventh Circuits adopted this reasoning. *United States v. Arias*, 431 F.3d 1327, 1336 (11th Cir. 2005) (holding that Rule 408 precludes introduction of settlement evidence in criminal proceedings); *United States v. Bailey*, 327 F.3d 1131, 1146 (10th Cir. 2001) (same); *United States v. Hays*, 872 F.2d 582, 588–89 (5th Cir. 1989) (same).

¹³ *See, e.g., Prewitt*, 34 F.3d at 439 ("The public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes." (citing *United States v. Gonzalez*, 748 F.3d 74, 78 (2d Cir. 1984))).

¹⁴ *See, e.g., Manko*, 87 F.3d at 55 ("[T]he district court should consider [on remand] whether it would have admitted or excluded the evidence under Rule 403 . . ."). FED. R. EVID. 403 reads:

Courts of appeals that interpreted Rule 408's preclusive effect more broadly excluded settlement evidence from both civil and criminal trials. These courts noted that compromise offers are often "motivated by a desire for peace," and statements made in furtherance of settlement therefore may not be indicative of fact.¹⁵ Furthermore, courts applying the broadly preclusive construction of Rule 408 posited that exclusion of statements made during negotiations from all subsequent litigation would promote candid discussion and make settlement of disputes more likely.¹⁶ Some courts were particularly sympathetic to this candidness argument in light of the Committee's original conception of Rule 408 as a settlement-encouraging Rule.¹⁷ With the circuits divided, the time was ripe for a resolution. The Supreme Court repeatedly denied certiorari, so the task of resolving the split fell to the Committee.¹⁸

B. The Deliberation over the Amendment to Rule 408

The Committee first considered amending Rule 408 to resolve the circuit split at its April 2002 meeting.¹⁹ The Reporter presented a memorandum on Rule 408 at the Committee's next meeting in October 2002.²⁰ This

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¹⁵ *Arias*, 431 F.3d at 1337. This argument has a long history in American jurisprudence. *See, e.g.*, *West v. Smith*, 101 U.S. 263, 273 (1879) ("[T]he rule [is not] that an admission made during or in consequence of an effort to compromise is admissible These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation.").

¹⁶ *See, e.g., Arias*, 431 F.3d at 1337.

¹⁷ *See, e.g., id.*; *supra* text accompanying note 8.

¹⁸ The Supreme Court denied certiorari to petitioners from courts of appeals on both sides of the split. *See, e.g., Arias v. United States*, 127 S. Ct. 179 (2006); *Logan v. United States*, 534 U.S. 895 (2001).

¹⁹ Advisory Comm. on Evidence Rules, Meeting Minutes 17 (Apr. 19, 2002), available at <http://www.uscourts.gov/rules/Minutes/402EVMin.pdf>. A detailed overview of the rulemaking process and its various committees can be found at Admin. Office of the U.S. Courts, Federal Rulemaking: The Rulemaking Process, <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Aug. 4, 2008). In summary, there is a statutory seven-step process for amending each body of Federal Rules. First, an Advisory Committee that is focused on a particular set of Federal Rules—for example, Evidence, Bankruptcy, or Civil Procedure—considers and develops amendments. Second, the Advisory Committee publishes the proposed amendment and collects public comments. Third, the Advisory Committee considers the public comments and may make changes to the proposed amendment before approval. Fourth, the Committee on Rules of Practice and Procedure considers the amendment and either approves it or returns it to the Advisory Committee for modification. Fifth, the Judicial Conference considers the amendment and either adopts or returns it. Sixth, the Supreme Court considers the amendment and then transmits it to Congress if the Court approves. Seventh, Congress may take action to reject or modify the proposed amendment within seven months of receiving it from the Supreme Court. If Congress takes no action, the amendment takes effect at the end of the seven month period, usually on December 1 of any particular year. *See also* 28 U.S.C. §§ 2071–77 (2000) (describing rulemaking process).

²⁰ Advisory Comm. on Evidence Rules, Meeting Minutes 5 (Oct. 18, 2002) [hereinafter October 2002 Minutes], available at <http://www.uscourts.gov/rules/Minutes/1002EVMin.pdf>.

memorandum spurred the Committee to examine the policy interests identified by both sides of the debate over the proper interpretation of Rule 408.²¹ The Committee agreed on the need for an amendment to the Rule in order to resolve the circuit split.²² At the outset of the Committee's discussions, many Committee members felt that admitting settlement evidence in criminal prosecutions would "diminish[] the incentive to settle civil litigation" and therefore favored complete exclusion.²³

The Reporter prepared two models of an amendment to Rule 408 for the Committee's April 2003 meeting.²⁴ One model provided for admission of settlement evidence in criminal proceedings, and the other provided for its exclusion.²⁵ The DOJ representative to the Committee opposed the exclusionary rule, arguing that all compromise evidence should be admissible in criminal proceedings because settlement negotiations often provide evidence that a defendant was on notice of the wrongfulness of its conduct.²⁶ Thus, the DOJ representative argued, excluding evidence arising out of settlement negotiations would impede the DOJ's ability to prove that a criminal defendant knew that its conduct was illegal.²⁷ Other Committee members argued that a rule allowing admission of compromise evidence in subsequent criminal proceedings would chill settlement in civil cases.²⁸ Noting that the DOJ's concern was the use of compromise evidence to prove notice, the Committee resolved to retain part of the original language of Rule 408, which only excluded evidence used to prove the "validity or amount" of a claim.²⁹ The Committee considered this modification a solution to the DOJ's concern over the proposed amendment and asked the DOJ to present a revised report at the next Committee meeting.³⁰

²¹ See *supra* text accompanying notes 11–17.

²² October 2002 Minutes, *supra* note 20, at 7. The Committee also feared that the old version of Rule 408 presented a "trap for the unwary." *Id.* at 6. Committee members posited that parties litigating in a district court within a circuit adopting a broad reading of Rule 408 could reach a civil settlement, only to have prosecutors in a circuit that adopted a narrower reading of Rule 408 gain admission of evidence from that settlement process in a subsequent criminal action. *Id.*

²³ *Id.*

²⁴ Advisory Comm. on Evidence Rules, Meeting Minutes 12 (Apr. 25, 2003), available at <http://www.uscourts.gov/rules/Minutes/403EVMIn.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 13. Retaining the "validity or amount" language also alleviated Committee concerns that fraudulent statements made during compromise negotiations might be inadmissible under an amended version of Rule 408 with a broader exclusionary provision.

³⁰ *Id.* By only excluding compromise evidence pertaining to the validity or amount of a claim, the proposed amendment would still have allowed the DOJ to use settlement conversations with a defendant to prove that the defendant was on notice of the unlawfulness of its conduct, because an admission that a defendant knew it was acting unlawfully generally does not go to the validity or amount of a claim.

At the November 2003 meeting, the DOJ representative maintained that settlement evidence should be broadly admissible in criminal trials.³¹ The DOJ representative justified his position by arguing that prosecutors need the ability to admit evidence arising out of settlement discussions with government regulators in order to obtain convictions.³² In response to Committee members' concerns that admission of any settlement evidence in criminal cases would deter civil settlements, the DOJ representative argued that the DOJ's Civil Division had not noted a decrease in civil settlements in circuits where compromise evidence was admissible in criminal proceedings.³³ The DOJ representative's contention apparently was convincing, and the Committee passed a tentative amendment that explicitly made the rule's exclusion applicable *only* in civil proceedings.³⁴ The Committee published the proposed amendment in its minutes and agreed to consider whether any modification was necessary at its next meeting.³⁵

At the Committee's next meeting in April 2004, Committee members expressed renewed concern over the amendment as published in the Committee's November 2003 minutes.³⁶ Some Committee members argued that the Rule should explicitly protect settlement evidence because courts had applied the most obvious alternative to Rule 408—Rule 403³⁷—too unpredictably for civil litigants to rely upon it.³⁸ On the basis of this argument, the Reporter crafted a compromise amendment that differentiated between offers and acceptances of settlement, and statements made during negotiations. Under this revision of Rule 408, offers and acceptances of settlement would be flatly inadmissible in criminal proceedings, but statements made during negotiations would still be admissible subject to Rule 403.³⁹ The Committee approved the revised amendment to Rule 408 by a five-to-two vote and recommended to the Standing Committee that the amendment be released for public comment.⁴⁰ In June 2004, the Standing Committee unanimously approved publication of the amendment to Rule 408 for public

³¹ Advisory Comm. on Evidence Rules, Meeting Minutes 5–6 (Nov. 13, 2003) [hereinafter November 2003 Minutes], available at <http://www.uscourts.gov/rules/Minutes/1103EVMIn.pdf>.

³² *Id.*

³³ *Id.* The Committee minutes do not indicate that the DOJ representative presented any evidence to support this contention. *Id.* at 6.

³⁴ November 2003 Minutes, *supra* note 31, at 6–8. The tentative amendment was passed over a lone dissenting vote and excluded conduct, statements, and offers of compromise “in a *civil* case on behalf of any party.” *Id.* at 7–8 (emphasis added).

³⁵ *Id.* at 7.

³⁶ Advisory Comm. on Evidence Rules, Meeting Minutes 8 (Apr. 29–30, 2004) [hereinafter April 2004 Minutes], available at <http://www.uscourts.gov/rules/Minutes/EV04-2004.pdf>.

³⁷ See FED. R. EVID. 403; *supra* note 14.

³⁸ April 2004 Minutes, *supra* note 36, at 8.

³⁹ *Id.*

⁴⁰ *Id.* at 9.

comment.⁴¹ The Committee met again in January 2005 but largely focused on matters besides Rule 408. The only notable development in the January 2005 meeting was the suggestion that the Rule could allow admission of settlement evidence in cases where that evidence arose out of a settlement with civil regulators.⁴²

The public comment stage for the amendment to Rule 408 closed on March 15, 2005. The Committee received twelve comments by that deadline.⁴³ Many of these were critical, and the Committee addressed them at its meeting in April 2005. Commentators were especially concerned that the proposed rule would deter settlement, with one commentator noting that “[a]ttaching potential criminal liability to unguarded statements in settlement discussions discourages settlement even more than civil liability, given the harshness of the criminal sanction.”⁴⁴ One group of commentators questioned the DOJ representative’s assertion that compromise evidence was necessary for the effective prosecution of federal criminal offenders.⁴⁵ The Committee acknowledged that the message from the public was one of strong opposition, noting that the public comments were “uniformly negative.”⁴⁶

Despite this public opposition to the proposed amendment, the DOJ representative vigorously argued that the DOJ needed unfettered access to compromise evidence in order to prosecute criminals effectively.⁴⁷ The DOJ representative pointed to what he perceived as several flaws in the commentators’ arguments. First, the comments overstated the protections offered by the existing version of Rule 408, which prohibited admission of compromise evidence in criminal cases *only* when it was offered to prove

⁴¹ Comm. on Rules of Practice and Procedure, Meeting Minutes 38 (June 17–18, 2004), available at <http://www.uscourts.gov/rules/Minutes/june2004.pdf>.

⁴² Advisory Comm. on Evidence Rules, Meeting Minutes 3 (Jan. 15, 2005) available at <http://www.uscourts.gov/rules/Minutes/EV01-2005.pdf>.

⁴³ 2004 Evidence Rules Comments Chart, Including Requests to Testify, <http://www.uscourts.gov/rules/2004%20Evidence%20Rules%20Comments%20Chart.htm> (last visited June 10, 2008).

⁴⁴ Letter from Jeffrey S. Parker, Professor of Law, George Mason University School of Law, to the Advisory Comm. on Evidence Rules (Feb. 15, 2005), available at <http://www.uscourts.gov/rules/Evidence%20Comments/04-EV-014.pdf>.

⁴⁵ See Federal Magistrate Judges Ass’n, Comments of Federal Magistrate Judges Ass’n Rules Comm. on Proposed Changes to the Fed. Rules of Civil Procedure, Criminal Procedure, and Evidence (Feb. 3, 2005), available at <http://www.uscourts.gov/rules/Evidence%20Comments/04-EV-007.pdf>. The comment noted that “there is nothing in the materials provided that demonstrates that exclusion of settlement statements from a criminal trial is a serious problem in connection with the Justice Department’s efforts to ferret out crime.” *Id.* at 12 (internal quotations omitted).

⁴⁶ Advisory Comm. on Evidence Rules, Meeting Minutes 4 (Apr. 28, 2005) [hereinafter April 2005 Minutes], available at <http://www.uscourts.gov/rules/Minutes/EV04-2005-min.pdf>. Other public comments criticizing the proposed rule claimed that it would create a trap for the poorly counseled, allow private parties to abuse the rule by threatening to turn over compromise evidence to the government, and enact a previously rejected distinction between offers and statements or conduct. *Id.*

⁴⁷ *Id.* at 4.

the validity or amount of a claim.⁴⁸ Second, the comments failed to consider that several circuits already interpreted Rule 408 to allow admission of evidence from compromise negotiations in criminal trials.⁴⁹ Third, the comments failed to adequately recognize the criticality of statements made in negotiations with civil regulators to the government's criminal case against the same party.⁵⁰ Finally, the commentators' preferred rule would allow a party to make a statement in compromise negotiations and later contradict that statement under oath free from impeachment.⁵¹

The DOJ representative's criticisms of the public comments sparked substantial debate among the Committee members.⁵² Some Committee members were sympathetic to the DOJ representative's position, but they noted that his concerns applied with the most force when the statements prosecutors would want to admit arose out of a regulatory action.⁵³ The Committee therefore settled on a middle ground solution: statements or conduct from compromise negotiations would be admissible in a subsequent criminal trial *only* if made while settling an action brought by a government regulatory agency.⁵⁴ The Reporter drafted a new version of the amendment, which the Committee approved and submitted to the Standing Committee with a recommendation for final approval.⁵⁵ The Standing Committee approved the amendment,⁵⁶ as did the Judicial Conference.⁵⁷

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The DOJ argued that statements made during compromise negotiations are "essential for proving the defendant's guilt" in many cases. *Id.*

⁵¹ *Id.*

⁵² *Id.* at 4–5.

⁵³ *Id.* at 5.

⁵⁴ *Id.* The exact wording of the proposed amendment made inadmissible in all proceedings "conduct or statements made in compromise negotiations regarding [a] claim, except when made in compromise of a claim by a government regulatory agency and offered in a subsequent criminal case." Advisory Comm. on Evidence Rules, Report 15 (May 16, 2005), available at <http://www.uscourts.gov/rules/Reports/EV5-2005.pdf>. With regard to the types of "regulatory agencies" included in the ambit of the rule, the Committee minutes specifically mention only revenue agencies. April 2005 Minutes, *supra* note 46, at 4–5. Presumably, however, the rule applies to any government agency that exercises civil enforcement power including, inter alia, the Securities and Exchange Commission, the Food and Drug Administration, and the Environmental Protection Agency, as all of these agencies exercise regulatory enforcement powers similar to those of the Internal Revenue Service.

⁵⁵ April 2005 Minutes, *supra* note 46, at 5.

⁵⁶ *Id.* Comm. on Rules of Practice And Procedure, Meeting Minutes 37 (June 15–16, 2005), available at http://www.uscourts.gov/rules/Minutes/ST_June_2005.pdf. The Standing Committee made a change from the language proposed, *see supra* note 54, before approving the proposed amendment. The Standing Committee limited compromise evidence admissible in criminal proceedings to that arising out of "a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority." The change was motivated by (1) a desire for language that would parallel Rule 803's exception of the records and reports of public offices or agencies from hearsay exclusion and (2) consensus among the Standing Committee that the admission of compromise evidence in criminal proceedings should be limited to those instances where the claim settled was brought *by* a government agency and not *against* it. *Id.*

The Supreme Court approved the amendment on April 12, 2006.⁵⁸ The Court's approval set in motion Congress's incubation period, during which Congress had a chance to consider the new Rule's merits and pass legislation to modify or reject it.⁵⁹ Congress passed no such legislation, so the Rule became effective on December 1, 2006.

The amended version of Rule 408 provides that:

(a) . . . Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

- (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.⁶⁰

Rule 408 now excludes from admission in all subsequent proceedings (1) offers and acceptances of settlement and (2) statements or conduct made during compromise negotiations. However, the new Rule includes an exception that allows admission in criminal cases of statements or conduct by investigation targets in compromise negotiations with a public office or regulatory agency.

*C. Conclusion: Rule 408 Prohibits Admission of Settlement
Evidence in Civil Suits*

The 2006 amendment to Rule 408 was motivated by the need to resolve a division of opinion among the courts of appeals, and the amendment undeniably does that. Inherent in the amended version of Rule 408 is a policy judgment that private parties should have access to a smaller body of evidence than prosecutors. Rule 408 implements this policy in the specific context of settlement by barring the use of statements and conduct from regulatory compromises in subsequent civil suits. Rule 408 therefore reflects a reasoned conclusion that, although a limited class of settlement evidence is admissible in criminal trials, this same class of evidence should be inaccessible to private parties in suits that follow settlement. This policy judgment is especially important in light of the type of information gov-

⁵⁷ JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 38 (2005), available at http://www.uscourts.gov/judconf/sept05proc_final.pdf.

⁵⁸ JOURNAL OF THE SUPREME COURT OF THE UNITED STATES 834 (Oct. Term 2005), available at <http://www.supremecourtus.gov/orders/journal/jnl05.pdf>.

⁵⁹ *Id.*

⁶⁰ FED R. EVID. 408(a).

ernment agencies obtain during settlement, how frequently agencies share this information with prosecutors, and the ability of private plaintiffs to use these convictions as a basis for offensive collateral estoppel.

II. INFORMATION SHARING AMONG GOVERNMENT AGENCIES: THE SEC AND DOJ MODEL

As recently amended, Rule 408 codifies prosecutorial access to regulatory settlement evidence. Parties negotiating with federal regulators should expect that any statements or conduct occurring during their settlement negotiations will be passed on to the DOJ.⁶¹ Although this new version of the Rule may spur the DOJ and civil enforcement agencies to share regulatory settlement information more frequently, some agencies already have a substantial history of sharing information with prosecutors. The SEC commonly disclosed investigation and enforcement-related information to the DOJ even before the amendment to Rule 408. The SEC also has a history of threatening severe consequences in order to pressure its investigation targets to meet its standard of “cooperation.” The SEC’s historical practices serve as an illuminating example of how regulatory agencies may pressure investigation targets for disclosures during settlement and share them with the DOJ under the amended version of Rule 408.

This Part discusses the investigative approach of the SEC as outlined in its Seaboard Report⁶² and the now-defunct parallel approach of the DOJ as outlined in its Thompson Memorandum.⁶³ Both policy statements emphasize disclosure as a key element of cooperation with the respective agency. This Part then provides an initial assessment of the recent DOJ McNulty Memorandum, which supersedes the Thompson Memorandum and is meant to address criticisms of the DOJ’s aggressive stance on waiver of the attorney-client privilege.⁶⁴ Under the directives of these policy statements, the SEC and, until recently, the DOJ, have pressed investigation targets to “cooperate” by making specific disclosures. Finally, this Part examines some

⁶¹ Many practitioners believe that this increased risk that statements made during settlement will be used as a basis for criminal liability will cause settlement discussions with civil agencies to become more protracted. See generally Robert A. Weninger, *Amended Rule of Evidence 408: Trapping the Unwary*, 26 REV. LITIG. 401 (2007) (discussing a survey collecting reactions of 346 securities practitioners to the amendment to Rule 408).

⁶² Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220, 2001 WL 1301408 (Oct. 23, 2001) [hereinafter Seaboard Report].

⁶³ Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo], available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

⁶⁴ Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo], available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (“This Memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson . . .”).

typical cases of cross-agency information sharing during parallel SEC and DOJ investigations. Although courts have sometimes found that the DOJ and SEC abused their ability to share information while investigating the same conduct in parallel, those decisions are exceedingly rare. More often, courts have given the SEC carte blanche to share disclosures from its investigation targets with the DOJ. The DOJ is then free to use this information to indict individuals or corporations. Even before the amendment to Rule 408, other civil agencies began to emulate the SEC's investigation and disclosure practices.⁶⁵ Thus, the historical SEC-DOJ interaction is a useful proxy for examining how civil agencies will share information obtained during settlement with prosecutors under Rule 408. When a criminal trial where prosecutors gain admission of evidence under Rule 408 results in a conviction, the conflict between the policies underlying Rule 408 and offensive collateral estoppel is inescapable.

A. *The SEC and DOJ Expectations of Cooperation*

The SEC uses a consistent set of criteria, including the extent of an investigation target's cooperation, to determine the sanction to be imposed on an entity that has violated securities laws. These criteria have a tremendous influence on the way an investigation target conducts itself during investigation, as well as during any settlement negotiations. The current analytical framework is described in the Seaboard Report, which details the specific factors the SEC considers when determining if a corporation is cooperative enough to avoid an enforcement action or qualify for a lighter sanction.⁶⁶ The Seaboard Report contains the SEC's final disposition of its investigation of the Seaboard Corporation in 2001. The SEC began investigating Seaboard after the controller of one of the company's subsidiaries covered up inaccuracies she caused in Seaboard's books and records.⁶⁷ In the Seaboard Report, the SEC described Seaboard's cooperation with the Commission during its investigation and highlighted remedial measures the company took to prevent similar conduct from occurring in the future.⁶⁸ The Seaboard Report announced that the SEC would not take enforcement action against Seaboard, citing "the company's responses," including its immediate instigation of an internal audit and its decision not to invoke the attorney-client and work-product privileges.⁶⁹ Although the SEC noted that

⁶⁵ See *infra* notes 116–119.

⁶⁶ Seaboard Report, *supra* note 62, at *2–4. Some of these factors are the promptness of internal corporate action, reassurances that similar violations will not occur in the future, the attitudes of corporate agents who interact with the SEC, and the willingness to disclose internal reports to the SEC and, if necessary, waive privilege by turning attorney-client and work-product material over to the SEC.

⁶⁷ *Id.* For the order instituting proceedings against the controller, see *In re* Gisela de Leon-Meredith, Exchange Act Release No. 44,970, 76 SEC Docket 223, 2001 WL 1268303, at *1 (Oct. 23, 2001).

⁶⁸ Seaboard Report, *supra* note 62, at *2–4.

⁶⁹ *Id.*

cooperative behavior would not always be sufficient to shield a corporation from a Commission enforcement action, cooperation was almost certainly the factor that led the SEC to its decision in the Seaboard Report.⁷⁰

The idea that corporations could gain credit with the SEC for cooperating with its investigation was not new when the SEC issued the Seaboard Report.⁷¹ The Seaboard Report was significant, however, because it specifically described how the SEC would determine whether a target's cooperation with its investigation was enough to qualify the target for lenient treatment by the agency.⁷² Since the Seaboard Report, the SEC has used an investigation target's compliance with the Report's cooperation factors as a major element of its sanctioning decision at the close of an investigation.⁷³ The SEC has made clear that failure to adhere to its expectation of cooperation can have dire financial consequences for corporations and individuals under investigation.⁷⁴ Investigation targets therefore have a strong incentive

⁷⁰ The Commission noted that “[w]hen businesses seek out, self-report and rectify illegal conduct, and otherwise *cooperate* with Commission staff, large expenditures of government and shareholder resources can be avoided . . .” *Id.* (emphasis added); *see also* Press Release, Sec. & Exch. Comm’n, SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2001), *available at* <http://www.sec.gov/news/press/2001-117.txt> (“Credit for cooperative behavior may range from the extraordinary step of taking no enforcement action at all to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents the Commission uses to announce and resolve enforcement actions.”).

⁷¹ During the 1970s, the SEC utilized a voluntary disclosure program that encouraged corporations uncovering wrongdoing to self-report it to the SEC. Although there was no guarantee that self-reporting would immunize corporations from enforcement actions, “those companies participating in the program were promised fair consideration by the agency as to whether further action would be taken.” William R. McLucas et al., *Common Sense, Flexibility, and Enforcement of the Federal Securities Laws*, 51 *BUS. LAW.* 1221, 1225 (1996).

⁷² Seaboard Report, *supra* note 62, at *2–4.

⁷³ *See* Russell G. Ryan, *Cooperation in SEC Enforcement: The Carrot Becomes the Stick*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), Oct. 1, 2004, at 1, *available at* <http://www.wlf.org/upload/100104LBRyan.pdf>. Ryan notes that in the time since the SEC issued the Seaboard Report, “the Commission has sought and obtained multi-million dollar penalties against an increasing number of companies based on their *lack* of cooperation during investigative proceedings.” *Id.* at 1 (emphasis in original); *see also, e.g.*, Press Release, Sec. & Exch. Comm’n, Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud (May 17, 2004), *available at* <http://www.sec.gov/news/press/2004-67.htm> (noting that Lucent agreed to pay \$25 million dollar fine for its lack of cooperation).

⁷⁴ *See* Tim Reason, *The Limits of Mercy*, CFO MAG., Apr. 11, 2005, at 68 (chart titled “Who Played Ball?”). This chart contains a list of selected actions the SEC took against securities law violators from Seaboard in October 2001 to Banc of America in February 2005. Most importantly, the chart indicates whether the entity was deemed to be cooperative and the fine the SEC imposed on that entity. This chart indicates that during the period from October 2001 to February 2005, the SEC uniformly imposed larger monetary sanctions on companies that did not cooperate with the agency's investigation than on those that did. The largest sanction where noncooperation was noted by the SEC as an element of its decision was leveled against Computer Associates, which was required to pay \$225 million in restitution to shareholders in September 2004. *Id.* Although this entire amount was probably not a punishment for noncooperation, counsel for the SEC noted that the restitution penalty “should send a clear message that public companies will pay a heavy price for obstructing the government's investigation.” Press Release,

to cooperate with the Commission in whatever fashion the Commission expects.

The SEC has used its emphasis on cooperation to pressure investigation targets into making disclosures the targets might not otherwise make. The most commented-on disclosure commonly requested by the SEC is waiver of the attorney-client and work-product privileges.⁷⁵ SEC officials contend that the Commission does not expect its investigation targets to waive the attorney-client or work-product privileges in an effort to cooperate unless waiver will lead to disclosure of information that directly pertains to the SEC's investigation.⁷⁶ However, a substantial body of anecdotal evidence suggests that the SEC regularly asks subjects of its investigations to effect a broad waiver of privilege by turning over internal reports and other protected materials.⁷⁷ Thus, the SEC may fairly be said to pressure investi-

Sec. & Exch. Comm'n, SEC Files Securities Fraud Charges Against Computer Associates International, Inc. (Sept. 22, 2004), available at <http://www.sec.gov/news/press/2004-134.htm> (quoting Alexander M. Vasilescu, Senior Trial Counsel in the SEC's Northeast Regional Office); see also *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008) ("Since September 30, 2002, SEC enforcement actions have collected over \$10 billion in disgorgement and penalties . . .").

⁷⁵ The question of whether government agencies should reasonably expect investigation targets to waive evidentiary privileges in an effort to cooperate has inspired impassioned debate. See, e.g., Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 906-07 (2006); Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 191 (2006). One response to this debate has been the adoption of a "selective waiver" approach in the Eighth Circuit. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc). Under a selective waiver approach, a party's waiver of privilege as to a specific litigant—generally the government—does not operate as a subject matter waiver as to any other party. See Brown, *supra*, at 906-07. All other courts of appeals that have considered the adoption of selective waiver have rejected it. See *In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 1184 (10th Cir. 2006) (cataloguing cases from other circuits), *cert. denied*, 127 S. Ct. 584 (Nov. 13, 2006).

In 2006, the Advisory Committee proposed a new Rule of Evidence, Rule 502(c), that would have codified the doctrine of selective waiver. Advisory Comm. on Evidence Rules, Report 5-6 (May 15, 2006) (revised June 30, 2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf. The rule generated substantial debate, and the Committee ultimately dropped the selective waiver provisions in 2007. Advisory Comm. on Evidence Rules, Report 4-5 (May 15, 2007), available at http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf. However, Senator Arlen Specter has introduced a bill that would codify selective waiver as Rule 502, and the House passed a bill that would prevent government investigators from considering waiver as part of a cooperation assessment, so the debate rages on. See S. 186, 110th Cong. (2007); H.R. 3013, 110th Cong. (2007). Many of the issues this Comment addresses in the context of Rule 408 would be similarly relevant to selective waiver disclosures under Senator Specter's Rule 502. However, until Congress adopts Senator Specter's or a similar proposal, an independent analysis of offensive collateral estoppel in the selective waiver context is premature.

⁷⁶ See, e.g., Paul S. Atkins, SEC Comm'r, Remarks Before the Federalist Society (Sept. 21, 2006), available at <http://www.sec.gov/news/speech/2006/spch092106psa.htm> ("I strongly believe that the Commission should not view a company's waiver of privilege as a factor that will afford cooperation credit.").

⁷⁷ See, e.g., AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT—SURVEY RESULTS 9 (2006), available at <http://www.acc.com/Surveys/attyclient2.pdf> (identifying the SEC as an agency commonly requesting waiver of privilege from in-

gation targets into disclosing information the targets would prefer to keep confidential.

Complying with the SEC's requests for disclosure may aid investigation targets that seek to avoid the brand of noncooperation. However, the decision to cooperate with the SEC is not without a price. The SEC regularly shares information it obtains in the course of its investigations with criminal enforcement divisions of both federal and state governments.⁷⁸ The DOJ may access any information an investigation target shares with the SEC if the DOJ requests the SEC's file on the matter or the SEC refers the matter to the DOJ for criminal investigation.⁷⁹ The DOJ may then use the information when considering whether to seek indictment.⁸⁰

When determining whether to indict a corporation or its officers, the DOJ also utilizes a specific set of publicly disclosed policies. Until recently, the Thompson Memorandum set out this framework.⁸¹ Like the SEC's Seaboard Report, the Thompson Memorandum heavily emphasized cooperation as an element of the DOJ's decision to indict an entity or individual for corporate malfeasance.⁸² The Thompson Memorandum also explicitly listed waiver of the attorney-client and work-product privileges as a potentially "necessary" element of cooperation.⁸³ Under the Thompson

house and outside corporate counsel). *See generally* Brown, *supra* note 75, at 899 n.9 (collecting sources indicating that requests for waiver regularly occur in many types of government investigations).

⁷⁸ The SEC notes in a document that is provided to all persons who will supply the Commission with information voluntarily or by subpoena that "[t]he Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors." U.S. Sec. & Exch. Comm'n, SEC Form No. 1662, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena (May 2004), available at <http://www.sec.gov/about/forms/sec1662.pdf>. When SEC staff take sworn testimony from a witness, they either ask the witness to state on the record that he or she has reviewed Form 1662 or give the witness several minutes to review the document before testimony proceeds. THE SECURITIES ENFORCEMENT MANUAL 82–83 (Richard M. Phillips ed., 1997).

⁷⁹ *See, e.g.*, 17 C.F.R. § 202.5(b) (2006) ("The [SEC] may . . . refer the matter to, or grant requests for access to its [investigative] files made by, domestic and foreign governmental authorities . . ."); *see also* Securities Exchange Act of 1934 § 21(d)(1), 15 U.S.C. § 78u(d)(1) (2006) ("The Commission may transmit such evidence . . . concerning such acts or practices as may constitute a violation of any provision of this chapter . . . to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter."); Ralph C. Ferrara & David A. Garcia, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 38 Sec. Reg. & L. Rep. (BNA) 1329, 1330 (July 31, 2006) (reviewing the historical development of information sharing between the SEC and DOJ).

⁸⁰ *See, e.g.*, CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT 3.2–3.15, 3.18–3.22 (2004), available at http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf (describing DOJ and SEC actions against corporate fraud); U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 17 (2006) (describing incentives for U.S. Attorneys to prosecute corporate fraud and labeling SEC and DOJ emphasis on cooperation "a prescription for corporate self-indictment").

⁸¹ Thompson Memo, *supra* note 63.

⁸² *Id.* at 3–4, 6.

⁸³ *Id.* at 3.

Memorandum, the DOJ's criteria for deciding whether to prosecute a corporation or its officers were similar to the criteria the SEC uses when making a sanctioning decision.

The DOJ's stance on the need for investigation targets to waive the attorney-client privilege subjected it to heavy criticism.⁸⁴ In response to this commentary, the DOJ released an updated policy statement known as the McNulty Memorandum in December 2006.⁸⁵ The McNulty Memorandum supersedes the Thompson Memorandum, so the provisions of the Thompson Memorandum that differ from the new policy statement are no longer in force.⁸⁶ The DOJ intended the McNulty Memorandum to address the concern of many commentators and attorneys that the Thompson Memorandum gave prosecutors too much leverage when requesting waiver of the attorney-client and work-product privileges.⁸⁷ As a result, the McNulty Memorandum establishes detailed procedures to which prosecutors must adhere when requesting disclosure of privileged materials.⁸⁸ One of the most notable changes from the Thompson Memorandum is the McNulty Memorandum's mandate that prosecutors not consider a corporation's unwillingness to waive privilege as a negative factor in their charging decision.⁸⁹ However, investigation targets may still gain *positive* credit in a prosecutor's charging decision for waiving privilege.⁹⁰ Therefore, the McNulty Memorandum continues the Thompson Memorandum's practice of incentivizing waiver of privilege.⁹¹

The DOJ and SEC emphasis on waiver of privilege, whether tacit or overt, is an example of the type of pressure these agencies place on investigation targets to meet the agencies' expectations of cooperation. Rule 408

⁸⁴ See, e.g., Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 347 (2007) ("Like many aspects of Thompson Memorandum procedure, this 'consideration' [of a company's refusal to waive the attorney-client privilege] became a virtual requirement, one that placed corporate counsel in an untenable position.").

⁸⁵ McNulty Memo, *supra* note 64.

⁸⁶ Press Release, U.S. Dep't of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html ("The new guidance revises the Thompson Memorandum.").

⁸⁷ *Id.* ("The guidance . . . creates new approval requirements that federal prosecutors must comply with before they can request waivers of attorney-client privilege and work product protections from corporations in criminal investigations.").

⁸⁸ McNulty Memo, *supra* note 64, at 9.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Karen J. Mathis, President, Am. Bar Ass'n, Statement Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on Judiciary of the United States House of Representatives Concerning "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations" 5-6 (Mar. 8, 2007), *available at* http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf ("[T]he ABA believes that the new McNulty Memorandum . . . will continue to lead to the routine compelled waiver of attorney-client privilege and work product protections.").

adds a new layer of complexity to an investigation target's decision to cooperate, at least in the context of settlement discussions, because Rule 408 allows any information shared with a regulatory agency in an effort to settle a case to be admitted by the DOJ in a criminal trial. Furthermore, because investigation targets may make disclosures during settlement that they would not make to the DOJ, Rule 408 provides an especially attractive avenue for prosecutors to obtain information about an investigation target's activities. As a result, the DOJ may place additional pressure on civil agencies to extract disclosures from investigation targets during settlement discussions under the guise of cooperation. This may seem inequitable, but the coordination of investigations between the DOJ and civil agencies is a common occurrence.

B. The Potential for Abuse in Parallel Investigations

An investigation target's decision to disclose information to the SEC or other civil agencies is made more complicated by the common DOJ practice of conducting a parallel investigation. For some time, courts have recognized parallel investigations as a standard, permissible government practice.⁹² When two agencies investigate the same conduct at the same time, however, there is inherent potential for manipulation to the government's advantage.⁹³ Courts recognize that the SEC and DOJ sometimes abuse their overlapping authority. Some isolated cases indicate judicial willingness to quash indictments entered by prosecutors who took advantage of the SEC's ability to wring information out of its investigation targets.⁹⁴ However, these cases are the exception and uniformly involve egregious behavior by

⁹² See, e.g., *United States v. Kordel*, 397 U.S. 1, 11 (1969) ("It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.").

⁹³ For example, the DOJ could direct the SEC to seek disclosures that would be useful for the DOJ in obtaining an indictment, but which would be unavailable to it under the rules of discovery in criminal prosecution. See *id.* at 12 n.23; see also *Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 13 (D. Mass. 1991) (noting that "[d]iscovery is generally limited in criminal cases" and discussing the differences between civil and criminal discovery). Compare FED. R. CRIM. P. 16, with FED. R. CIV. P. 26.

⁹⁴ See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (requiring corporation to indemnify officer in criminal proceeding after determining that prosecutors abused their discretion in pressuring corporation to reform indemnification agreement); *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006) (dismissing indictment where SEC regulators concealed from defendant that civil proceedings were being used to gather evidence for contemplated criminal prosecution), *rev'd*, 521 F.3d 1189 (9th Cir. 2008); *United States v. Scrusby*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005) (dismissing counts of perjury indictment after DOJ directed SEC to take defendant's deposition in a particular district where it felt a greater likelihood of a perjury conviction existed). But see *United States v. Mahaffy*, 446 F. Supp. 2d 115, 127 (E.D.N.Y. 2006) (denying motion to suppress statements made to SEC in criminal prosecution because defendant was aware of criminal prosecution when he gave statements to the SEC).

the relevant agencies.⁹⁵ In most cases, the SEC and DOJ have broad ability to conduct parallel investigations and to share information freely.

United States v. Stringer is an example of the type of parallel investigation misconduct that courts have rejected as abusive.⁹⁶ In *Stringer*, the DOJ requested access to SEC files while both agencies were investigating the defendants for securities fraud.⁹⁷ The SEC later met with the U.S. Attorney responsible for the criminal prosecution to exchange more information.⁹⁸ The SEC and DOJ agreed that the criminal investigation would be put on hold to allow the SEC to obtain more information from the defendants.⁹⁹ However, only ten days after the meeting, the U.S. Attorney informed the SEC that her office was prepared to prosecute the defendants unless they could offer a persuasive explanation for their conduct.¹⁰⁰ Despite this readiness to prosecute, the U.S. Attorney held off and allowed the SEC to continue its investigation. The U.S. Attorney “passively observed” the results of the SEC’s investigation and worked to “suppress the presence of the [U.S. Attorney’s Office].”¹⁰¹ The defendants testified that they were never aware during the SEC investigation that the DOJ was investigating them.¹⁰² According to the defendants’ testimony, they first learned of the DOJ’s interest in their case when the DOJ “surface[d]” with “no notice” to indict them.¹⁰³

The *Stringer* court dismissed the indictment.¹⁰⁴ The court rested much of its decision on the DOJ’s aggressive obfuscation of its involvement in the SEC’s investigation, which was ostensibly meant to encourage the potential criminal defendants to disclose as much information as possible.¹⁰⁵ The court found that the U.S. Attorney’s concealment of the criminal investigation while the SEC was still uncovering information—even though she believed the case warranted prosecution—was characteristic of the manipulation that occurred during the parallel investigations.¹⁰⁶ As such, the court held that the SEC’s and U.S. Attorney’s investigations were not parallel, but had merged into a single, cooperative action designed to maximize dis-

⁹⁵ See *Mahaffy*, 446 F. Supp. 2d at 124 (“[T]here is concededly sparse precedent where . . . violations [of defendants’ rights during parallel investigations] have been found.”).

⁹⁶ 408 F. Supp. 2d at 1092.

⁹⁷ *Id.* at 1085.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1086.

¹⁰² *Id.* at 1087.

¹⁰³ *Id.* at 1086 (quoting handwritten note of SEC staff).

¹⁰⁴ *Id.*

¹⁰⁵ The court noted that “[a] government agency may not develop a criminal investigation under the auspices of a civil investigation.” *Id.* at 1089 (citing *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993)).

¹⁰⁶ *Id.* at 1088.

covery and avoid procedural obstacles.¹⁰⁷ The Ninth Circuit recently reversed *Stringer*,¹⁰⁸ but the district court's opinion remains an example of the rare case where a court chose to strike down an indictment for an abuse of the parallel investigation process. At the very least, the district court's opinion shows that concurrent SEC and DOJ investigations of the same conduct provide fertile ground for the manipulation of defendants' disclosures to the government's advantage.

*United States v. Mahaffy*¹⁰⁹ exemplifies the more typical outcome of a challenge to overlapping SEC and DOJ investigations. Like the defendants in *Stringer*, the defendants in *Mahaffy* were charged with violations of federal securities laws.¹¹⁰ Unlike *Stringer*, however, the *Mahaffy* defendants were aware that the DOJ was contemplating a criminal action against them while they were in discussions with the SEC.¹¹¹ Nonetheless, the defendants moved in the criminal prosecution to suppress statements they made to the SEC in the course of the agency's investigation.¹¹² The court denied the defendants' motions to suppress on the ground that *Stringer* was distinguishable from *Mahaffy*.¹¹³ Because the defendants knew the SEC and DOJ were conducting parallel investigations, and because the U.S. Attorney's Office was not orchestrating the SEC's investigation, the court found that there was no fundamental unfairness to the defendants in admitting the disputed statements.¹¹⁴ *Mahaffy* and its peer cases¹¹⁵ stand for the proposition that, in general, courts do not interfere with the sharing of information between government agencies conducting parallel investigations.

*C. Conclusion: Pressure to Cooperate with Civil Agencies
Will Lead to More Disclosures That Are Shared
with the DOJ and Admitted Under Rule 408*

The SEC's history of sharing information with the DOJ provides a look at the impact the DOJ's ability to obtain settlement information from civil agencies will have on regulatory investigation targets. Other regulatory

¹⁰⁷ *Id.*

¹⁰⁸ 521 F.3d 1189, 1198–99 (9th Cir. 2008) (holding that the SEC did not mislead the defendants and that the defendants were given adequate notice that a criminal investigation was occurring at the same time as the SEC investigation).

¹⁰⁹ 446 F. Supp. 2d 115 (E.D.N.Y. 2006).

¹¹⁰ *Id.* at 118.

¹¹¹ *Id.* at 127.

¹¹² *Id.* at 123–24.

¹¹³ *Id.* at 127.

¹¹⁴ *Id.*

¹¹⁵ See *SEC v. Dresser Indus.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) (“Effective enforcement of the securities laws requires that the SEC and [the Department of] Justice be able to investigate possible violations simultaneously.”); *SEC v. Sandifur*, No. C05-1631C, 2006 WL 1719920, at *2–3 (W.D. Wash. June 19, 2006) (denying defendant's motion for a stay of civil enforcement action by SEC due to parallel criminal investigation by DOJ).

bodies have promulgated policy statements that echo the SEC's emphasis on cooperation.¹¹⁶ Consequently, many of these agencies will be able to place the same pressure to cooperate on their investigation targets that the SEC uses as leverage against the corporations and individuals that it investigates. Agencies like the Commodity Futures Trading Commission,¹¹⁷ the Federal Energy Regulatory Commission,¹¹⁸ and the Environmental Protection Agency¹¹⁹ will be able to use the looming threat of "noncooperation" consequences to pressure investigation targets into specific disclosures during settlement. If these settlement disclosures include inculpatory information, the sharing of this information with the DOJ under Rule 408 increases the likelihood of an indictment and possible conviction. The alarming implications of this conclusion when private parties subsequently bring suits for the same conduct are explored in detail below.¹²⁰

III. THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL

Rule 408 legitimizes the sharing of regulatory settlement information while seeking to protect the same information from use by private civil litigants. Rule 408 is therefore intended to prevent private parties from gaining judgments of liability against government investigation targets on the basis of evidence arising out of settlement with government agencies.¹²¹ However, the doctrine of offensive collateral estoppel threatens to undercut the protection of Rule 408. Offensive collateral estoppel is different from ordinary collateral estoppel—sometimes referred to as defensive collateral estoppel—which precludes relitigation of an issue on which a defendant has already successfully defended itself. Defendants often use defensive collateral estoppel as an affirmative defense to a claim on which the same plaintiff lost in a prior suit. In contrast, offensive collateral estoppel allows a

¹¹⁶ See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1108–33 (2006) (describing various agencies' regulatory investigation guidelines which focus on cooperation as an element of the agency's sanctioning decision); *infra* notes 117–119.

¹¹⁷ See Press Release, U.S. Commodity Futures Trading Comm'n, U.S. Commodity Futures Trading Commission's Division of Enforcement Issues Advisory Identifying Cooperation Factors That May Reduce a Litigant's Sanctions (Aug. 11, 2004), available at <http://www.cftc.gov/opa/enf04/opa4968-04.htm>.

¹¹⁸ Fed. Energy Regulatory Comm'n, Policy Statement on Enforcement (Oct. 20, 2005), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10855343>. FERC specifically modeled its policy statement after policies used by the CFTC and the SEC. Wray & Hur, *supra* note 116, at 1130 (quoting Joseph Kelliher, Chairman, Fed. Energy Regulatory Comm'n).

¹¹⁹ Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, U.S. Evtl. Protection Agency, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), available at <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf> (describing factors, including self-reporting and cooperation, for determining whether to refer matter for criminal enforcement).

¹²⁰ See *infra* text accompanying notes 182–193.

¹²¹ See *supra* text accompanying note 60.

plaintiff to prevent a defendant from relitigating an issue that was decided against the defendant in a prior suit.¹²²

Under present doctrine, offensive collateral estoppel allows private party plaintiffs to use government judgments based on protected evidence to their advantage in private suits, thereby sidestepping the intended protection of Rule 408. This Part first reviews the Supreme Court's adoption of offensive collateral estoppel in *Parklane Hosiery Co. v. Shore*.¹²³ Second, this Part summarizes the expansion of the doctrine in federal courts since *Parklane Hosiery* and discusses how courts run the risk of undercutting Rule 408 by applying offensive collateral estoppel in a private civil action when a defendant's previous conviction relied on regulatory settlement evidence. Applying offensive collateral estoppel in such a situation would operate as an end run around the intended operation of Rule 408. Third, this Part considers and rejects two possible solutions to the conflict between offensive collateral estoppel and Rule 408. This Part concludes by urging courts to bar the application of offensive collateral estoppel in any situation where a defendant's prior conviction involved compromise evidence admitted under Rule 408.

A. *Parklane Hosiery and the Genesis of the Doctrine*

The doctrine of offensive collateral estoppel has existed at common law for some time. Traditionally, both offensive and defensive collateral estoppel were limited by the doctrine of mutuality.¹²⁴ Under the mutuality requirement, a final adjudication in one proceeding was only binding on the parties to that proceeding.¹²⁵ As a result, a prior judgment had no collateral effect on a litigant who was not in privity with one of the parties to that judgment.¹²⁶ The mutuality requirement was steadily eroded until the Supreme Court abandoned it altogether in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.¹²⁷ *Blonder-Tongue* was a patent infringement suit in which the defendant sought to utilize a prior adjudication that the plaintiff's patent was invalid as an affirmative defense to the plain-

¹²² The Supreme Court differentiated the two types of estoppel in *Parklane Hosiery Co. v. Shore*:

[O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

439 U.S. 322, 326 n.4 (1979).

¹²³ 439 U.S. 322.

¹²⁴ See, e.g., *Triplett v. Lowell*, 297 U.S. 638, 642 (1936) (“[A]n adjudication adverse to any or all the claims of a patent [does not] preclude[] another suit upon the same claims against a different defendant.”).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 402 U.S. 313, 349–50 (1971) (overruling *Triplett*).

tiff's claims of infringement.¹²⁸ The defendant was not a party to the suit it sought to use to estop the plaintiff's claims, so the lower courts held that the defendant could not meet the mutuality requirement and rejected its affirmative defense.¹²⁹ The Supreme Court reversed, holding that rigid mutuality is "out of place" when a litigant seeks to collaterally estop a plaintiff's attempt to relitigate claims on which it lost in a prior suit against a different defendant.¹³⁰

The Court's holding in *Blonder-Tongue* pertained to the application of defensive collateral estoppel in patent suits, but the rejection of mutuality rapidly expanded to other contexts.¹³¹ The Supreme Court extended nonmutuality to offensive use of collateral estoppel in *Parklane Hosiery Co. v. Shore*.¹³² In *Parklane Hosiery*, the shareholder plaintiffs alleged that the defendants, a corporation and its directors, issued a misleading proxy statement.¹³³ Prior to the private suit, the SEC obtained a declaratory judgment against the defendants that the same proxy statement was materially false and misleading.¹³⁴ The plaintiffs in the private suit argued that because of the declaratory judgment, the defendant was estopped from arguing that the proxy statement was not false and misleading.¹³⁵ The plaintiffs consequently moved for partial summary judgment against the corporation.¹³⁶ The trial court denied the plaintiffs' motion on the basis that granting it would violate the corporation's Seventh Amendment right to a jury trial. The court of appeals reversed, holding that the corporation already had a full and fair opportunity to litigate the factual issue and thus was estopped from relitigating it.¹³⁷ The Supreme Court granted certiorari to resolve a circuit split.¹³⁸

The Court opened its opinion by reiterating its abandonment of mutuality as a requirement for the application of collateral estoppel.¹³⁹ The Court noted that the application of collateral estoppel in an offensive context differed from its prior case law, where collateral estoppel was generally used as a defense.¹⁴⁰ It then addressed the arguments against extending *Blonder-*

¹²⁸ *Id.* at 316.

¹²⁹ *Id.*

¹³⁰ *Id.* at 350.

¹³¹ See, e.g., *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 991 (7th Cir. 1979) (applying nonmutual defensive collateral estoppel in trademark suit); *Bricker v. Crane*, 468 F.2d 1228, 1232 (1st Cir. 1972) (applying nonmutual defensive collateral estoppel in civil rights suit).

¹³² 439 U.S. 322 (1979).

¹³³ *Id.* at 324.

¹³⁴ *Id.* at 325.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at n.3 (cataloguing the cases creating the split).

¹³⁹ *Id.* at 327–28.

¹⁴⁰ *Id.* at 329.

Tongue and applying offensive collateral estoppel in the absence of mutuality. First, opponents of offensive collateral estoppel argued that nonmutual application of the doctrine would give potential plaintiffs an incentive to adopt a “wait and see” approach to litigation in the hope that litigation by others would produce a judgment favorable to them.¹⁴¹ Second, opponents argued that applying offensive collateral estoppel would be unfair to defendants. Specifically, unfairness might arise if (1) a defendant had little incentive to defend vigorously against a claim in the first lawsuit—in a suit for nominal damages, for example; (2) the judgment relied upon for estoppel was inconsistent with other judgments in favor of the defendant; or (3) the second action offered the defendant procedural advantages that were not present in the first action.¹⁴²

The Court concluded that these arguments did not outweigh the strong interest in judicial economy that would be served by granting trial courts broad discretion to determine when to apply offensive collateral estoppel.¹⁴³ The Court held that nonmutual offensive collateral estoppel should not be applied in cases where (1) “a plaintiff could easily have joined in the earlier action” or (2) “the application of offensive collateral estoppel would be unfair to a defendant” in the ways identified by the doctrine’s opponents.¹⁴⁴ The Court then applied the doctrine in favor of the plaintiffs in *Parklane Hosiery*. The Court found that the plaintiffs could not have joined in the action they used as the basis for estoppel because private parties cannot join in SEC actions.¹⁴⁵ Furthermore, the Court found that application of offensive collateral estoppel would result in no unfairness to the defendants because they had received a full and fair opportunity to litigate their claim in the SEC’s action.¹⁴⁶ Finally, the Court determined that applying offensive collateral estoppel did not violate the defendants’ right to a jury trial because the defendants previously had a full and fair opportunity to litigate their claims against the SEC.¹⁴⁷ The Court therefore affirmed the judgment of the court of appeals.¹⁴⁸

*B. Offensive Collateral Estoppel Since Parklane Hosiery
and Its Conflict with Rule 408*

Parklane Hosiery spawned a significant body of case law. Although courts have applied offensive collateral estoppel in many contexts, the doc-

¹⁴¹ *Id.* at 330.

¹⁴² *Id.* at 330–31.

¹⁴³ *Id.* at 331.

¹⁴⁴ *Id.* The Court directed trial courts to consider the factors listed *supra* in the text accompanying note 142 when determining unfairness. *Id.*

¹⁴⁵ *Id.* at 332.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 333–37.

¹⁴⁸ *Id.* at 337.

trine is utilized most frequently when a civil regulatory suit follows a criminal prosecution for the same conduct.¹⁴⁹ For example, the SEC utilizes offensive collateral estoppel in suits against defendants who were convicted of violating securities laws.¹⁵⁰ Offensive collateral estoppel is an especially attractive weapon for government agencies because courts have placed few specific limits on the doctrine's use and civil and criminal agencies often take the same parties to court for the same conduct.¹⁵¹ Courts have limited the application of offensive collateral estoppel to facts that were "critical and necessary" to the judgment in the prior litigation¹⁵² and to cases where there has been no "change in the legal landscape" since the decision sought to be used for preclusive effect.¹⁵³

Courts placed another limitation on the use of offensive collateral estoppel in *SEC v. Monarch Funding Corp.*¹⁵⁴ In *Monarch*, the SEC sought summary judgment for a civil securities violation on the basis of a defendant's prior conviction in a federal criminal suit.¹⁵⁵ In the prior criminal proceeding, a jury convicted the defendant of obstruction of justice.¹⁵⁶ At sentencing, the judge enhanced the defendant's sentence after learning that the defendant had committed securities fraud and engaged in a conspiracy to cover it up.¹⁵⁷ Following the defendant's sentencing proceedings, the SEC moved for summary judgment in its civil action on the basis of the sentencing judge's findings.¹⁵⁸ The trial court granted the SEC's motion,¹⁵⁹ but the court of appeals vacated that judgment.¹⁶⁰ The court of appeals held that applying offensive collateral estoppel on the basis of sentencing findings would be unfair to the criminal defendant and therefore contrary to the Supreme Court's holding in *Parklane Hosiery*.¹⁶¹ The *Monarch* court held

¹⁴⁹ 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4474 (2d ed. 2002) ("Perhaps the most attractive cases that have extended issue preclusion from criminal convictions to civil actions involve claims by the government for civil remedies based on the same transaction that gave rise to the conviction.")

¹⁵⁰ See, e.g., *SEC v. Bilzerian*, 29 F.3d 689, 693–94 (D.C. Cir. 1994) (defendant's prior conviction of securities law violations allowed SEC to obtain summary judgment on regulatory charges for same conduct through application of offensive collateral estoppel); *SEC v. Namer*, No. 97 Civ. 2085 (PKC), 2004 WL 2199471, at *8 (S.D.N.Y. Sept. 30, 2004) (same, noting that pendency of criminal appeal is irrelevant to application of offensive collateral estoppel).

¹⁵¹ See *supra* text accompanying notes 92–115.

¹⁵² See *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004).

¹⁵³ See *Faulkner v. Nat'l Geographic Enters., Inc.*, 409 F.3d 26, 37 (2d Cir. 2005).

¹⁵⁴ 192 F.3d 295, 298 (2d Cir. 1999).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *SEC v. Monarch Funding Corp.*, No. 85 CIV. 7072 (LBS), 1996 WL 348209, at *3 (S.D.N.Y. June 24, 1996).

¹⁶⁰ *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 310 (2d Cir. 1999).

¹⁶¹ *Id.* at 305.

that sentencing findings are an unfair basis for offensive collateral estoppel because they are not subject to the Federal Rules of Evidence and there are disincentives to litigate vigorously sentencing findings.¹⁶² Although the court declined to adopt a per se rule that sentencing findings are an inappropriate basis for offensive collateral estoppel, its opinion reflects adherence to the Supreme Court's mandate that offensive collateral estoppel only be applied when it would be fair to the defendant.¹⁶³

The procedural restriction imposed in *Monarch* and the criticality and legal landscape tests imposed by other courts of appeals are the only obstacles to a regulatory agency's use of offensive collateral estoppel. *SEC v. Tandem Management Inc.* is an example of the broad ability of government agencies to use a prior criminal conviction to obtain a judgment in a civil proceeding.¹⁶⁴ In *Tandem*, the SEC sought summary judgment in a civil action against a corporate officer accused of securities fraud.¹⁶⁵ In a prior trial, a jury convicted the officer of sixteen counts of criminal securities fraud.¹⁶⁶ The SEC argued that the case met all the requirements for offensive collateral estoppel described in *Parklane Hosiery* because the elements of the criminal and civil offenses were identical and application of estoppel would not be unfair to the defendant.¹⁶⁷ The defendant relied on *Monarch* in arguing that he did not have a full and fair opportunity to litigate the claims at his criminal trial.¹⁶⁸

The court rejected the defendant's claims and granted summary judgment for the SEC. The court found that *Monarch* was fundamentally different because in that case the government's basis for estoppel arose at sentencing and was not passed on by a jury.¹⁶⁹ The court noted that in *Tandem*, the defendant had every incentive to litigate vigorously in order to avoid a criminal conviction, was given the full range of procedural safeguards, and had his charges considered by a jury.¹⁷⁰ The court held that under such circumstances, "it is well-settled that facts necessary to support a criminal conviction have collateral estoppel effect in a subsequent SEC enforcement proceeding."¹⁷¹ *Tandem* is just one example of many cases in

¹⁶² The court noted that "a criminal defendant will often choose not to challenge sensitive issues during sentencing for any number of reasons, including a belief, or at least a hope, that the sentencing court will grant a prosecutorial downward departure motion or other recommendation." *Id.*

¹⁶³ *Id.* at 306. The court's conclusion relies on the "procedural advantages" prong of unfairness analysis. See *supra* text accompanying note 142.

¹⁶⁴ No. 95 CIV. 8411 (JGK), 2001 WL 1488218, at *11 (S.D.N.Y. Nov. 21, 2001).

¹⁶⁵ *Id.* at *1.

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.* at *9.

¹⁶⁸ *Id.* at *11.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing *SEC v. Sprecher*, Civ. A. No. 92-2860 LFO, 1993 WL 544306, at *1 (D.D.C. Dec. 16, 1993)).

which courts have used offensive collateral estoppel to grant judgment in favor of civil agencies on the basis of a criminal conviction against the same defendant.¹⁷² Although “[i]ssue preclusion in a civil action that follows a criminal conviction has emerged only in recent years,”¹⁷³ cases like *Tandem* demonstrate that courts are receptive to the preclusive application of criminal convictions in favor of civil governmental agencies.

Courts have also given criminal convictions preclusive effect in civil suits brought by private parties.¹⁷⁴ *In re Adelpia Communications* involved institutional investor plaintiffs who brought suit against former senior officers of Adelpia to recover damages suffered as a result of misleading statements made by the defendants.¹⁷⁵ Prior to commencement of the private civil suit, a jury convicted the defendants on criminal charges that were nearly identical to the civil claims brought by the plaintiffs.¹⁷⁶ The civil plaintiffs moved for summary judgment in the early stages of the trial on the basis of the defendants’ criminal convictions.¹⁷⁷ The court found that the allegations in the criminal indictment “mirror[ed] those in the [plaintiffs’] Complaints” and applied estoppel on that basis.¹⁷⁸ On one claim, the court found that all of the elements of civil liability were proven by the defendants’ criminal convictions.¹⁷⁹ For the other claims, the court granted summary judgment only in part.¹⁸⁰ However, the partial grants of summary judgment pertained to the acts of the defendants, which the court found

¹⁷² See, e.g., *SEC v. Dimensional Entm’t Corp.*, 493 F. Supp. 1270 (S.D.N.Y. 1980); *In re Lapp*, 72 SEC Docket 97, 2000 WL 1206207, at *2 (Mar. 29, 2000).

¹⁷³ WRIGHT, MILLER & COOPER, *supra* note 149, § 4474.

¹⁷⁴ See, e.g., *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1020–21 (9th Cir. 2001) (allowing private party to use defendant’s prior racketeering conviction as basis for offensive collateral estoppel); *Columbia Pictures Indus., Inc. v. T & F Enters., Inc.*, 68 F. Supp. 2d 833, 839 (E.D. Mich. 1999) (applying offensive collateral estoppel and granting plaintiff’s motion for summary judgment in copyright infringement suit on basis of defendants’ prior guilty pleas in federal criminal prosecution); see also WRIGHT, MILLER & COOPER, *supra* note 149, § 4474 (“A civil plaintiff now is allowed to rest issue preclusion on the defendant’s criminal conviction.”).

¹⁷⁵ See *In re Adelpia Commc’ns Corp.*, Nos. 03 MD 1529(LMM), 03-CV-5750, 03-CV-5751, 2006 WL 2463355, at *1–2 (S.D.N.Y. Aug. 23, 2006).

¹⁷⁶ The defendants were convicted of conspiracy to commit bank and securities fraud, conspiracy to cause false statements to be made in SEC filings, and numerous counts of securities fraud. *Id.* at *2.

¹⁷⁷ *Id.* at *3.

¹⁷⁸ *Id.* at *5. The court briefly discussed the other three requisite factors for the application of offensive collateral estoppel and found that they were inarguably present. *Id.* at *4.

¹⁷⁹ Under section 11 (15 U.S.C. § 77k (2000)), on which the court granted summary judgment for the plaintiffs, a plaintiff prevails when he proves that a defendant made a material misstatement or omission in the registration statement for a registered security purchased by the plaintiff. The plaintiff need not prove any actual reliance on the misstatement or omission in order to prevail. *Adelpia*, 2006 WL 2463355, at *8.

¹⁸⁰ Although the court did not grant complete summary judgment for the section 10(b) (15 U.S.C. § 78j (2000)), section 18 (15 U.S.C. § 78r (2000)), or common law fraud claims, it did so on the grounds that discovery would need to be taken to establish the plaintiffs’ detrimental reliance, an essential element of each claim, which was not established by applying *Parklane Hosiery*. *Adelpia*, 2006 WL 2463355, at *6–9.

conclusively proven by the defendants' criminal convictions.¹⁸¹ The *Adelphia* court thus used offensive collateral estoppel to preclude a defendant in a private civil action from relitigating claims identical to charges that it was previously convicted of in a criminal trial.

The *Adelphia* court's application of offensive collateral estoppel has troubling implications for Rule 408. The new Rule is intended to protect a defendant's disclosures made to regulatory agencies during compromise negotiations from use by plaintiffs in private civil suits.¹⁸² However, private plaintiffs can circumvent this restriction by seeking offensive collateral estoppel when a defendant's prior conviction was based on evidence that prosecutors admitted through Rule 408. This result would directly conflict with the intent of Rule 408, as well as *Parklane Hosiery's* directive that offensive collateral estoppel not be applied when it would be unfair to a defendant.¹⁸³ The simplest solution to this conflict would be to bar the application of offensive collateral estoppel in any situation where prosecutors admitted settlement evidence under Rule 408 in proceedings that led to the civil defendant's conviction.¹⁸⁴ Before accepting an outright ban on offensive collateral estoppel in this situation, however, the next section considers other potential solutions to the conflict.

C. Two Possible Solutions to the Conflict Between Offensive Collateral Estoppel and Rule 408

One possible solution would be for a judge to deny a plaintiff's attempt to use a prior criminal conviction as the basis for offensive collateral estoppel only if a critical element of that conviction was based on evidence prosecutors entered solely as a result of Rule 408.¹⁸⁵ However, the analysis a court would have to undertake to make this determination is time-

¹⁸¹ *Id.* at *8.

¹⁸² Whether particular statements or conduct occurred during compromise negotiations is not easy to determine. The few courts that have attempted to define the scope of "settlement" or "compromise negotiations" have reached differing conclusions. *Compare* *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 529–30 (3d Cir. 1995) (holding that district court acted within its discretion to exclude internal memoranda that "function[ed] as the basis for compromise negotiations" under Rule 408), *with* *Blue Circle Atl., Inc. v. Falcon Materials, Inc.*, 760 F. Supp. 516, 522 (D. Md. 1991), *aff'd without op.*, 960 F.2d 145 (4th Cir. 1992) ("Rule 408 does not apply to internal memoranda unless communicated to the other side in an attempt at settlement."). Civil agencies and the DOJ could use the inherently ambiguous definition of settlement to gain admission of more evidence than the drafters of Rule 408 intended. A thorough analysis of the existence and effects of this problem is beyond the scope of this Comment. It is worth noting, however, that a broad definition of "settlement" would make available to prosecutors a larger body of evidence that is unavailable to civil plaintiffs, and would therefore exacerbate the unfairness of improper application of offensive collateral estoppel.

¹⁸³ *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

¹⁸⁴ This solution is analyzed and ultimately advocated in Part III.D.

¹⁸⁵ Recall that one of the DOJ's primary arguments for the admission of regulatory settlement evidence in criminal proceedings was the "critical" nature of that evidence to the DOJ's ability to obtain convictions. *See supra* text accompanying note 50.

consuming and filled with potential missteps. For a court to determine whether there is a conflict between Rule 408 and the application of offensive collateral estoppel, a two-part inquiry would be necessary. First, a court would have to review the criminal trial record to determine if prosecutors utilized regulatory settlement evidence to build their case. Second, if the court found that prosecutors *did* gain admission of such evidence, it would need to determine whether that evidence was a critical element of the defendant's criminal conviction. If the court determined that evidence admitted under Rule 408 was critical to the defendant's conviction, the court would not apply estoppel on the basis of that conviction.

Both steps of this analysis are problematic. Review of a trial transcript and evidentiary record would sap a tremendous amount of a court's time. Government prosecutions are complex and often involve the introduction of thousands of exhibits. In light of ever-increasing backlogs in the federal docket,¹⁸⁶ some courts may be unwilling to take a good-faith look at a criminal case record and opt instead to simply skim over it. Even the utilization of a burden-shifting approach¹⁸⁷ would not entirely eliminate the need for a court to sift through the criminal trial record. Thus, courts would face the large initial hurdle of becoming familiar with the record of a prior criminal trial.

Despite the onerous nature of fully reviewing a criminal trial transcript, *Adelphia* indicates that courts may be willing to undertake the inquiry if it leads to the quick disposal of a case. Although Rule 408 evidence was not at issue in *Adelphia*, that court adopted an approach to the application of offensive collateral estoppel that would be equally appropriate in Rule 408 cases. The court examined the entire history of the criminal proceeding that the plaintiff sought to use as the basis for estoppel, including "the trial record, court opinions, Indictment, Special Verdict Form, and Jury Instructions."¹⁸⁸ This type of intensive inquiry would be necessary for any court considering whether a plaintiff should be allowed to use a defendant's prior conviction to block relitigation of issues in a civil proceeding. *Adelphia* indicates that even though a proper first-stage inquiry is time-consuming, some courts may be willing to undertake it.

Even assuming that courts would shoulder the workload associated with the initial inquiry, the second stage of the required analysis raises more troubling issues. If a court reviewed the defendant's criminal trial record and found evidence admitted under Rule 408, it would then have to determine whether such evidence was "critical and necessary" to the defendant's

¹⁸⁶ See U.S. Courts, Judicial Caseload Indicators (2005), <http://www.uscourts.gov/caseload2005/front/mar05toc.pdf> (indicating consistent increase in cases filed and pending in federal courts between 1996 and 2005).

¹⁸⁷ Possible burden-shifting schemes are considered and rejected *infra* in the text accompanying notes 192–193.

¹⁸⁸ *In re Adelphia Commc'ns Corp.*, Nos. 03 MD 1529(LMM), 03-CV-5750, 03-CV-5751, 2006 WL 2463355, at *6 (S.D.N.Y. Aug. 23, 2006).

conviction.¹⁸⁹ A general-purpose definition of critical evidence is that which is “necessary, material, and essential” to a court’s finding on a particular issue.¹⁹⁰ A court ruling on a plaintiff’s motion for offensive collateral estoppel would therefore have to estimate the weight the factfinder at the defendant’s criminal trial gave to any Rule 408 evidence before determining if estoppel is appropriate.

Under this solution to the conflict between Rule 408 and offensive collateral estoppel, a court would have to restrict the application of estoppel to those situations where Rule 408 evidence was not critical to the defendant’s prior conviction. However, estimation of whether a particular piece of evidence was “critical” to a conviction will always be imprecise. A finding of guilt in a criminal trial relies on the conclusions of twelve jurors, so a judge’s determination of whether a particular piece of evidence was “essential” to a conviction is inarguably subjective.¹⁹¹ Because this two-step inquiry into the criticality of Rule 408 evidence to a civil defendant’s past conviction would require a trial court to expend judicial resources on the review of criminal trial records and would be unavoidably subjective, it should be rejected in favor of a more efficient and principled solution.

The inquiry described above would be a demanding one for the courts due to the need for a court to review a criminal trial record in order to determine if Rule 408 evidence was used to obtain a conviction. Alternatively, courts could seek to allay some of this workload by placing the burden of proof that offensive collateral estoppel should or should not be applied on one of the parties to the civil litigation. One option would be to place the burden of proof on a defendant who opposes estoppel.¹⁹² If courts

¹⁸⁹ See *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004) (restricting application of offensive collateral estoppel to those facts “critical and necessary” to the judgment in the prior litigation). The Supreme Court has not adopted this language as a threshold test of whether offensive collateral estoppel is appropriate. However, given the Court’s mandate that offensive collateral estoppel be denied when it would be “unfair to the defendant,” there is little reason to believe that the Court would adopt a *less* restrictive test than the Fourth Circuit. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

¹⁹⁰ *Polk v. Montgomery County, Md.*, 782 F.2d 1196, 1201 (4th Cir. 1986); see also *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 912 n.9 (8th Cir. 2007); *Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc.*, 458 F.3d 244, 251 (3d Cir. 2006); *Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 37 (2d Cir. 2005).

¹⁹¹ Federal criminal defendants have a constitutional right to trial before a jury. See U.S. CONST. amend. VI; *United States v. Gomez-Lepe*, 207 F.3d 623, 630 (9th Cir. 2000). This inquiry is vaguely analogous to the postconviction harmless error review that appellate courts sometimes undertake on appeal. See FED. R. CRIM. P. 52(a). However, the criticality inquiry is more troublesome in the context of offensive collateral estoppel because the inquirer is a trial court that lacks the record-reviewing expertise of a court of appeals. Cf. *Dickinson v. Zurko*, 527 U.S. 150, 161 (1999) (“[T]rial court advantages lie in, e.g., evaluation of witnesses, not comparative expertise.” (citing Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 82–83 (1944))).

¹⁹² The Indiana Supreme Court adopted this approach, albeit not in the context of Rule 408, in *Doe v. Tobias*, 715 N.E.2d 829, 833 (Ind. 1999). See *id.* (“The convicted defendant bears the burden of showing that [offensive collateral estoppel] is unfair.”).

adopted this approach in cases implicating Rule 408, the defendant would be required to prove that evidence a civil plaintiff sought to introduce in the civil trial was critical to its prior conviction. Placing the burden on the defendant would be more efficient than placing it on the plaintiff, as defendants are likely to be more familiar with the criminal trial record than the plaintiff or the court.

Placing the burden on the defendant would reflect a presumption that the defendant is civilly liable on the basis of its prior criminal conviction. At first glance, this presumption may seem sensible. Because the standard of proof for criminal conviction is greater than that for civil liability, it may seem fair to assume that a criminal conviction beyond a reasonable doubt proves the same elements by a preponderance of the evidence. However, the relevant inquiry in determining the appropriateness of offensive collateral estoppel is not whether the defendant is actually liable under the plaintiff's theory of liability. In the context of *Parklane Hosiery*, the proper question is whether evidence that would ordinarily be inadmissible if offered at trial by a civil plaintiff was critical to the defendant's criminal conviction, thereby foreclosing application of estoppel on fairness grounds.¹⁹³ This criticality question is entirely divorced from any inquiry into liability and should not be colored by a defendant's prior criminal conviction. Given the objective nature of this fairness question, there is no clear reason why a defendant should be placed at an initial disadvantage.

Alternatively, if the burden of proof were the plaintiff's, the plaintiff would have to prove that the conviction it sought to use as the basis for offensive collateral estoppel was not based on evidence that would be excluded from admission in a civil trial. Shifting the burden to the plaintiff would have the positive effect of limiting plaintiffs' requests to apply offensive collateral estoppel to those cases in which the plaintiff could persuasively argue that the application of estoppel would not violate the policy underlying Rule 408. Furthermore, placing the burden on the plaintiff would put a cost on seeking offensive collateral estoppel, as it would require the plaintiff to closely review the criminal trial record in good faith. Thus, placing the burden to prove fairness on a plaintiff seeking offensive collateral estoppel has distinct advantages over placing the opposite burden on the defendant.

However, neither burden-shifting approach eliminates the weakest element of a court's decision. Regardless of which party is forced to bear the initial burden of determining whether a defendant's conviction relied on evidence admitted under Rule 408, a court would still be forced to deter-

¹⁹³ Recall that *Parklane Hosiery* forbids the application of offensive collateral estoppel in situations where estoppel would be unfair to the defendant, for example, when "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." 439 U.S. 322, 331 (1979). The Court focused on forum issues in its treatment of this problem, *id.* at n.15, but there is no reason why the availability of more favorable evidentiary rules in the second proceeding should not similarly prevent the application of estoppel.

mine the criticality of a particular piece of evidence to a defendant's prior conviction. A court's inquiry into whether settlement evidence was "critical" to a defendant's conviction will be highly subjective no matter which party is required to investigate whether that evidence was used. Thus, a burden-shifting approach would still result in a highly subjective inquiry into criticality, which courts should seek to avoid.

D. A Better Approach: A Rule of Non-Use

The superior approach, and the only one that avoids an inquiry into the criticality of Rule 408 evidence to a defendant's past conviction, is to forgo application of offensive collateral estoppel in any instance where prosecutors used evidence arising out of a defendant's regulatory settlement negotiations *in any fashion* at trial. Although this approach may decrease efficiency by requiring a court to review the criminal trial record¹⁹⁴ and by requiring some claims to be litigated anew during a civil trial, it is the only solution that absolutely ensures the intent of Rule 408 will be upheld. The heart of the DOJ's argument for admission of evidence arising out of regulatory settlement negotiations in criminal trials was that such evidence is often "critical" to obtaining convictions.¹⁹⁵ Thus, barring the use of any conviction where prosecutors admitted evidence under Rule 408 as a basis for offensive collateral estoppel is simply the logical conclusion of the DOJ's argument for the admission of that evidence in the first place. A flat ban would also recognize that Rule 408 affords a civil defendant an evidentiary advantage that would not be available to him in a criminal prosecution—the exclusion of disclosures made to government regulators during settlement.¹⁹⁶

A ban on offensive collateral estoppel in all cases where Rule 408 evidence could have supported a defendant's criminal conviction may appear to be overinclusive.¹⁹⁷ However, courts have held that the use of offensive

¹⁹⁴ As the *Adelphia* court proved, not all trial courts are averse to this exercise. See *supra* text accompanying note 188. Furthermore, the amount of work involved in this review could be mitigated by requiring a defendant against whom offensive collateral estoppel is asserted to raise the admission of Rule 408 evidence in its criminal trial as an affirmative defense. A burden-shifting approach in the context of a ban does not implicate the same concerns suggested in the context of a criticality inquiry, where the defendant would be required to *prove* that the Rule 408 evidence was critical to its past conviction rather than bring the existence of that evidence to the court's attention. See *supra* text accompanying notes 192–193. In essence, this solution would place a light burden of production on a defendant rather than a heavy burden of proof.

¹⁹⁵ See April 2005 Minutes, *supra* note 46, at 4 (“[M]any statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case . . .”).

¹⁹⁶ See *supra* note 193.

¹⁹⁷ One immediate concern with a ban on offensive collateral estoppel in this context, as with any categorical solution, is whether it would allow parties to game the system. In theory, a defendant could try to make a majority of its disclosures in settlement negotiations with a civil agency in the hope that prosecutors will admit the evidence using Rule 408, thereby foreclosing the use of the defendant's con-

collateral estoppel is *always* inappropriate in a variety of settings. These decisions primarily reflect concerns for procedural fairness.¹⁹⁸ For example, in criminal trials, courts broadly reject offensive collateral estoppel on the basis of a prior finding of civil liability because the prosecutor's burden of proof in a criminal trial is greater than the plaintiff's in a civil proceeding.¹⁹⁹ In the civil context, courts have held that findings of fact from prior sentencing proceedings are not available to plaintiffs seeking offensive collateral estoppel against the sentenced defendant because sentencing findings are less vigorously litigated than other issues in a criminal trial.²⁰⁰

Expanding these procedurally oriented restrictions on offensive collateral estoppel to also exclude convictions involving Rule 408 evidence would not be novel, as courts already apply a similar restriction in situations where a civil plaintiff seeks to use a defendant's prior criminal conviction to its advantage. Specifically, a criminal defendant "avoid[s] both a [contested] trial and *any collateral estoppel effects*" with a plea of *nolo contendere*.²⁰¹ This conclusion follows because a plea of no contest allows the court to proceed directly to sentencing without litigating any of the issues at stake in the case. This proposition finds support in federal and state case law as well as uniform codes.²⁰²

Opponents of an approach that bars offensive collateral estoppel may argue that each of these categorical restrictions is different from cases where a defendant's prior conviction involved Rule 408 evidence. However, each example above reflects judicial awareness that the application of offensive collateral estoppel must be fair to defendants. The courts' decision not to apply offensive collateral estoppel in criminal trials on the basis of prior civil liability is especially instructive. This conclusion indicates an

viction as a basis for offensive collateral estoppel in a private civil proceeding. The defendant could thus seek to "trade" the admission of those disclosures in a criminal prosecution—and, almost certainly, a conviction—for the inability of civil plaintiffs to use that conviction as a basis for offensive collateral estoppel. It is unclear if any defendant would ever gamble a more severe criminal sentence for decreased civil exposure, but it is admittedly possible under this proposal.

¹⁹⁸ Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

¹⁹⁹ See *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1361 n.5 (9th Cir. 1987); *United States v. Beery*, 678 F.2d 856, 868 n.10 (10th Cir. 1982); *United States v. Konovsky*, 202 F.2d 721, 726–27 (7th Cir. 1953). See generally Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753 (2004).

²⁰⁰ See, e.g., *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 298 (2d Cir. 1999); see also *supra* text accompanying notes 154–163.

²⁰¹ *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983) (emphasis added).

²⁰² See *id.*; *State v. Johnson*, 594 A.2d 1288, 1290 (N.H. 1991) ("[C]ollateral estoppel [is] not applicable . . . where [the] prior conviction was the result of a plea of *nolo contendere*." (citing *State v. LaRose*, 71 N.H. 435, 435 (1902))); *Crowall v. Heritage Mut. Ins. Co.*, 346 N.W.2d 327, 329 n.2 (Wis. Ct. App. 1984) ("A plea of guilty or *nolo contendere* in the criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel."); RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (1982) (noting issue preclusion in civil case on basis of criminal conviction is not applicable "where the criminal judgment was based on a plea of *nolo contendere* or a plea of guilty" because issue was not "actually . . . litigated" in criminal proceeding).

awareness of the contextual inquiry that is necessary to preserve evidentiary fairness in any situation where a plaintiff seeks to use offensive collateral estoppel.²⁰³ Rule 408 reflects a similar judgment that fairness requires context-sensitive admission rules for certain types of evidence. As with the application of offensive collateral estoppel across proceedings with different standards of proof, applying offensive collateral estoppel when prosecutors introduced Rule 408 evidence at trial would undercut fair evidentiary procedure. The same procedural fairness concerns that animate the courts' other rejections of offensive collateral estoppel are applicable in the context of Rule 408.

Finally, the effects of denying offensive collateral estoppel in any case where a defendant's prior conviction involved Rule 408 evidence will not be as far-reaching as one might think. Imagine a case where the Rule 408 evidence used at the defendant's criminal trial was of only minor importance to the conviction. In such an instance, a civil plaintiff who cannot use offensive collateral estoppel will simply shift its efforts to a summary judgment motion, which is likely to succeed on the basis of other admissible evidence. Thus, even under a rule calling for broad non-use of offensive collateral estoppel in many situations, meritorious summary judgment motions will allow plaintiffs and courts to avoid a full trial and remain true to the intent of Rule 408. In the event that a civil action proceeds to trial, a defendant's prior conviction is still likely to be admissible as evidence of the defendant's liability under the appropriate hearsay exception despite its unavailability for offensive collateral estoppel.²⁰⁴

Courts deny plaintiffs the use of offensive collateral estoppel in classes of cases where the doctrine's application would be unfair to a defendant. Application of offensive collateral estoppel when a defendant's prior conviction involved evidence that would be flatly inadmissible to the proponent of estoppel would be similarly unfair. To comport with *Parklane Hosiery's* limitations on the use of offensive collateral estoppel, courts should deny a civil plaintiff the benefit of estoppel when the conviction the plaintiff seeks to use involved settlement evidence that was available to prosecutors through Rule 408. To do otherwise would allow civil plaintiffs to make an end run around the Committee's intent that Rule 408 keep conduct and

²⁰³ See *United States v. Beery*, 678 F.2d 856, 868 n.10 (10th Cir. 1982) ("In view of the different degrees of proof in civil and criminal cases, the adjudication of a fact in a civil proceeding is not binding in a criminal case under principles of collateral estoppel.").

²⁰⁴ FED. R. EVID. 803(22) (excepting a felony judgment from the bar on admission of hearsay evidence). It is worth noting that many of the same concerns this Comment raises regarding the use of a conviction that involved Rule 408 evidence as a basis for offensive collateral estoppel also define the contours of the hearsay exception, such as the exclusion of nonfelony convictions due to the minimal motivation to defend, and the exclusion of *nolo contendere* pleas from admission consistent with Federal Rule of Evidence 410. See FED. R. EVID. 803 (1972 committee notes). Thus, there may be a plausible argument that convictions involving Rule 408 evidence should similarly be excluded from admission under the hearsay exception for previous convictions. A thorough consideration of this issue is beyond the scope of this Comment.

statements between government regulators and private parties out of the hands of civil litigants. Committee members who opposed the adoption of the now-effective version of Rule 408 were primarily concerned that allowing government prosecutors to utilize statements and conduct from settlement would chill compromise negotiations. By restricting the use of offensive collateral estoppel in civil suits to those situations where a defendant's conviction did not even arguably rely on Rule 408 evidence, courts will ensure that the protection promised to parties who settle with regulatory agencies is realized.

CONCLUSION

The Advisory Committee's amendment to Rule 408 delivers a clear message: The Committee intended to codify the ability of government agencies to share conduct and statements from regulatory settlements with federal prosecutors while protecting that same evidence from admission in private civil suits. Application of offensive collateral estoppel in favor of private civil litigants will undercut this intent if courts allow estoppel when a defendant's conviction involved protected evidence. The inquiry that would be required to determine the criticality of Rule 408 evidence to a defendant's conviction is both time-consuming and subjective. As a result, courts should tread carefully when analyzing a civil plaintiff's petition for offensive collateral estoppel on the basis of a defendant's prior criminal conviction, which may have hinged on evidence that was only available to prosecutors because of Rule 408. The approach most consistent with the Supreme Court's requirement of fairness, and the one urged in this Comment, is to reject offensive collateral estoppel in all cases where prosecutors in a defendant's prior criminal conviction gained admission of regulatory settlement evidence pursuant to Rule 408.