

110TH CONGRESS  
1ST SESSION

# S. 186

To provide appropriate protection to attorney-client privileged communications and attorney work product.

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IN THE SENATE OF THE UNITED STATES

JANUARY 4, 2007

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide appropriate protection to attorney-client privileged communications and attorney work product.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Attorney-Client Privi-  
5 lege Protection Act of 2007”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

8 (1) Justice is served when all parties to litiga-  
9 tion are represented by experienced diligent counsel.

1           (2) Protecting attorney-client privileged commu-  
2           nications from compelled disclosure fosters voluntary  
3           compliance with the law.

4           (3) To serve the purpose of the attorney-client  
5           privilege, attorneys and clients must have a degree  
6           of confidence that they will not be required to dis-  
7           close privileged communications.

8           (4) The ability of an organization to have effec-  
9           tive compliance programs and to conduct com-  
10          prehensive internal investigations is enhanced when  
11          there is clarity and consistency regarding the attor-  
12          ney-client privilege.

13          (5) Prosecutors, investigators, enforcement offi-  
14          cials, and other officers or employees of Government  
15          agencies have been able to, and can continue to, con-  
16          duct their work while respecting attorney-client and  
17          work product protections and the rights of individ-  
18          uals, including seeking and discovering facts crucial  
19          to the investigation and prosecution of organizations.

20          (6) Despite the existence of these legitimate  
21          tools, the Department of Justice and other agencies  
22          have increasingly employed tactics that undermine  
23          the adversarial system of justice, such as encour-  
24          aging organizations to waive attorney-client privilege

1 and work product protections to avoid indictment or  
2 other sanctions.

3 (7) An indictment can have devastating con-  
4 sequences on an organization, potentially eliminating  
5 the ability of the organization to survive post-indict-  
6 ment or to dispute the charges against it at trial.

7 (8) Waiver demands and other tactics of Gov-  
8 ernment agencies are encroaching on the constitu-  
9 tional rights and other legal protections of employ-  
10 ees.

11 (9) The attorney-client privilege, work product  
12 doctrine, and payment of counsel fees shall not be  
13 used as devices to conceal wrongdoing or to cloak  
14 advice on evading the law.

15 (b) PURPOSE.—It is the purpose of this Act to place  
16 on each agency clear and practical limits designed to pre-  
17 serve the attorney-client privilege and work product pro-  
18 tections available to an organization and preserve the con-  
19 stitutional rights and other legal protections available to  
20 employees of such an organization.

1 **SEC. 3. DISCLOSURE OF ATTORNEY-CLIENT PRIVILEGE OR**  
2 **ADVANCEMENT OF COUNSEL FEES AS ELE-**  
3 **MENTS OF COOPERATION.**

4 (a) IN GENERAL.—Chapter 201 of title 18, United  
5 States Code, is amended by inserting after section 3013  
6 the following:

7 **“§ 3014. Preservation of fundamental legal protec-**  
8 **tions and rights in the context of inves-**  
9 **tigations and enforcement matters re-**  
10 **garding organizations**

11 “(a) DEFINITIONS.—In this section:

12 “(1) ATTORNEY-CLIENT PRIVILEGE.—The term  
13 ‘attorney-client privilege’ means the attorney-client  
14 privilege as governed by the principles of the com-  
15 mon law, as they may be interpreted by the courts  
16 of the United States in the light of reason and expe-  
17 rience, and the principles of article V of the Federal  
18 Rules of Evidence.

19 “(2) ATTORNEY WORK PRODUCT.—The term  
20 ‘attorney work product’ means materials prepared  
21 by or at the direction of an attorney in anticipation  
22 of litigation, particularly any such materials that  
23 contain a mental impression, conclusion, opinion, or  
24 legal theory of that attorney.

1       “(b) IN GENERAL.—In any Federal investigation or  
2 criminal or civil enforcement matter, an agent or attorney  
3 of the United States shall not—

4           “(1) demand, request, or condition treatment  
5 on the disclosure by an organization, or person affili-  
6 ated with that organization, of any communication  
7 protected by the attorney-client privilege or any at-  
8 torney work product;

9           “(2) condition a civil or criminal charging deci-  
10 sion relating to a organization, or person affiliated  
11 with that organization, on, or use as a factor in de-  
12 termining whether an organization, or person affili-  
13 ated with that organization, is cooperating with the  
14 Government—

15           “(A) any valid assertion of the attorney-cli-  
16 ent privilege or privilege for attorney work  
17 product;

18           “(B) the provision of counsel to, or con-  
19 tribution to the legal defense fees or expenses  
20 of, an employee of that organization;

21           “(C) the entry into a joint defense, infor-  
22 mation sharing, or common interest agreement  
23 with an employee of that organization if the or-  
24 ganization determines it has a common interest

1 in defending against the investigation or en-  
2 forcement matter;

3 “(D) the sharing of information relevant to  
4 the investigation or enforcement matter with an  
5 employee of that organization; or

6 “(E) a failure to terminate the employ-  
7 ment of or otherwise sanction any employee of  
8 that organization because of the decision by  
9 that employee to exercise the constitutional  
10 rights or other legal protections of that em-  
11 ployee in response to a Government request; or

12 “(3) demand or request that an organization, or  
13 person affiliated with that organization, not take any  
14 action described in paragraph (2).

15 “(c) INAPPLICABILITY.—Nothing in this Act shall  
16 prohibit an agent or attorney of the United States from  
17 requesting or seeking any communication or material that  
18 such agent or attorney reasonably believes is not entitled  
19 to protection under the attorney-client privilege or attor-  
20 ney work product doctrine.

21 “(d) VOLUNTARY DISCLOSURES.—Nothing in this  
22 Act is intended to prohibit an organization from making,  
23 or an agent or attorney of the United States from accept-  
24 ing, a voluntary and unsolicited offer to share the internal  
25 investigation materials of such organization.”.

1           (b) CONFORMING AMENDMENT.—The table of sec-  
2 tions for chapter 201 of title 18, United States Code, is  
3 amended by adding at the end the following:

“3014. Preservation of fundamental legal protections and rights in the context  
of investigations and enforcement matters regarding organiza-  
tions.”.

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