

ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

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NOVEMBER 13, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

R E P O R T

[To accompany H.R. 3013]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3013) to provide appropriate protection to attorney-client privileged communications and attorney work product, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

The centuries-old common law and constitutional protections of the attorney-client privilege and attorney work product doctrine are fundamental to our Nation's system of justice. Unfortunately, recent governmental policies have given rise to a "culture of waiver"

that places the continuing vitality of these crucial protections in serious jeopardy. H.R. 3013, the “Attorney-Client Privilege Protection Act of 2007,” will restore judicial oversight to these protections, while preserving prosecutorial discretion necessary to fight corporate crime.

#### BACKGROUND AND NEED FOR THE LEGISLATION

The United States Supreme Court’s landmark decision in *Upjohn Co. v. United States* confirmed that companies are entitled to the protections of the attorney-client privilege and work product doctrine.<sup>1</sup> With respect to communications between a company’s attorney and its employees, the Court reasoned that the privilege operates in the public’s best interest by encouraging corporate executives and managers to seek legal advice in order to ensure compliance with the law in their day-to-day work. Protecting client confidences helps to foster timely reporting of problems so that they can be either avoided or quickly addressed and remedied, thereby promoting well-informed and responsible company practices. Without this protection of confidentiality, employees may be hesitant to bring their concerns to counsel.

Recent empirical evidence supports the Supreme Court’s conclusions regarding the importance of attorney-client privilege in the organizational context. In 2005, a survey of more than 700 corporate lawyers yielded the following findings:

- *Reliance on privilege*: In-house lawyers confirmed that their clients are aware of and rely on the privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid- and lower-tier employees).
- *Absent privilege, clients will be less candid*: If these communications are not protected, in-house lawyers believe, there will be a “chill” on the flow or candor of information from clients (95%).
- *Privilege facilitates delivery of legal services*: 96% of in-house counsel respondents reported that the privilege and work product doctrines serve an important purpose in facilitating their work as company counsel.
- *Privilege enhances likelihood that clients will proactively seek advice*: 94% of in-house counsel respondents believe that the existence of the attorney-client privilege increases the likelihood that company employees will come forward to discuss sensitive or difficult issues regarding the company’s compliance with law.
- *Privilege improves ability to implement effective compliance initiatives*: 97% of corporate counsel surveyed believe that the privilege improves the lawyer’s ability to monitor, enforce, or improve company compliance initiatives.<sup>2</sup>

Like the attorney-client privilege, the work product doctrine facilitates open and frank discussion of issues among management, employees, and counsel in order to prepare for litigation, as the doctrine generally protects that discussion from disclosure. The

<sup>1</sup> *Upjohn Co. v. U.S.* 449 U.S. 383 (1981).

<sup>2</sup> Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack? (Apr. 6, 2005), at <http://www.acc.com/Surveys/attyclient.pdf>.

work product doctrine promotes the effectiveness of “adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.”<sup>3</sup> If a corporation routinely waives the protection of the work product doctrine, employees may be hesitant to assist counsel in preparation for litigation, or may even be discouraged from seeking legal advice at all. As the Supreme Court observed sixty years ago, “[M]uch of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . And the interests of the clients and the cause of justice would be poorly served.”<sup>4</sup>

In recent years, however, certain government agencies have adopted policies that may place companies at greater risk of prosecution if they claim any of the fundamental protections embodied in the attorney-client privilege or work product doctrine. The genesis of these recent policies is a series of Department of Justice (“DOJ”) memoranda designed to provide prosecutors with factors to consider when determining whether to charge a corporation with a criminal offense. Since then, other Federal agencies have issued similar guidance to their prosecutors.

The first of such memorandum was issued by Deputy Attorney General Eric Holder in 1999; it was superseded by a 2003 memorandum from Deputy Attorney General Larry Thompson, and then by a 2006 memorandum from Deputy Attorney General Paul McNulty. These memoranda list factors that Federal prosecutors should consider when charging companies. One of the factors is the corporation’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections.”<sup>5</sup>

In practice, these new policies have created a “culture of waiver,” despite the fact that their tone may be moderate and the officials representing these government agencies may stress their intent to implement them in reasonable ways. By creating a differential in the treatment of a company based upon whether that company waives—whether that differential is in the form of a “reward” for waiving or in the form of a “penalty” for not waiving—these policies put undue pressure on companies to relinquish fundamental rights.

The coercive effect of these new policies is inherent in the differential itself, whereby companies are forced to waive regardless of whether the Federal prosecutor or investigator “demands” waiver, “requests” waiver, or does not explicitly mention waiver at all. The clear thrust of these new policies is that waiver is required to get “cooperation” credit, a crucial element in charging decisions.

While aggressive enforcement against corporate wrongdoers is appropriate, stripping corporate targets of their fundamental rights is neither a necessary nor appropriate tactic for a government agency to employ in the course of an investigation, especially before

<sup>3</sup>*United States v. Amer. Tel. & Tel. Co.*, 642 F.3d 1286, 1299 (D.C. Cir. 1980).

<sup>4</sup>*Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

<sup>5</sup>See, e.g., Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorney, “Principles of Federal Prosecution of Business Organizations” (Jan. 20, 2003).

any finding of culpability. Companies may cooperate with government investigations in a variety of ways that will serve the interests of justice and the swift and sure prosecution of wrongdoers, without the need for waiver.

Claims that corporate misconduct today is too complex, large-scale, and difficult to unravel and analyze without coercing a waiver of these protections are unpersuasive. Immense and complex acts of fraud have been perpetrated since the days of the robber barons; today's acts are nothing new. Moreover, it is well-settled that there is a wide range of prosecutorial tools available to prosecutors and investigators that do not require waiver and that have been used effectively for decades. While it may be more expeditious for a prosecutor or investigator to coerce waiver, taking such a short cut has not been necessary in the past and is not necessary now.

H.R. 3013 is carefully crafted to restore judicial oversight to the important protections of attorney-client privilege and attorney work product doctrine, while preserving prosecutorial discretion necessary to fight corporate crime. Nothing in the legislation is intended to prevent a prosecutor or enforcement official from vigorously and professionally investigating the facts or bringing the guilty to justice. Likewise, the bill does not preclude or inhibit a company or an individual from cooperating with prosecutors in the conduct of an investigation. In short, the bill attempts to strike a balance between the promotion of effective law enforcement and compliance efforts, on the one hand, and the preservation of essential legal protections on the other.

Under the bill, an agent or attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.

Receipt by an agent or attorney of the United States of inadvertently disclosed materials that are protected by attorney-client privilege or attorney work product would not constitute a violation of the bill. Similarly, an agent or attorney of the United States does not violate it by propounding a general discovery request that does not specifically request materials protected by attorney-client privilege or attorney work product, even if certain protected materials may be responsive.

Finally, the measure is not intended to limit any statutory authority of any agent or attorney of the United States to access material protected by attorney client privilege or attorney work product. Nor is it designed to prohibit an agent or attorney from charging an entity or individual under a Federal statute that makes the conduct in itself an independent offense.

## HEARINGS

The Committee's Subcommittee on Crime, Terrorism, and Homeland Security held 1 day of hearings on the issue of the right to counsel, particularly in the context of corporate investigations, on March 8, 2007. Testimony was received and heard from Barry M. Sabin, Deputy Attorney General, U.S. Department of Justice; Andrew Weissman, Partner, Jenner and Block; Richard White, Senior Vice President, Secretary, and General Counsel, The Auto Club Group; William Sullivan, Jr., Partner, Winston & Strawn; and Karen J. Mathis, President, American Bar Association.

## COMMITTEE CONSIDERATION

On July 24, 2007, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered the bill H.R.3013 favorably reported, by voice vote, a quorum being present. On August 1, 2007, the Committee met in open session and ordered the bill favorably reported without amendment, by voice vote, a quorum being present.

## COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 3013.

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3013, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, August 17, 2007.

Hon. JOHN CONYERS, Jr., *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3013, the Attorney-Client Privilege Protection Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226-2680.

Sincerely,

PETER R. ORSZAG,  
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.  
Ranking Member

*H.R. 3013—Attorney-Client Privilege Protection Act of 2007*

H.R. 3013 would prohibit federal prosecutors or agents, in a federal investigation, from demanding or requesting that a corporation waive its attorney-client privilege or from using a waiver as a factor in determining whether to indict the organization. The bill also would bar prosecutors from compelling a corporation to submit its attorneys' litigation materials. Under the bill, a corporation could agree to waive its attorney-client privilege as under current law.

CBO estimates that H.R. 3013 would have no significant impact on the federal budget. According to the Department of Justice, the bill could alter and possibly increase federal attorneys' litigation duties. CBO estimates, however, that any resulting increase in federal spending would total less than \$500,000 a year, assuming the availability of appropriated funds. Enacting H.R. 3013 would not affect direct spending or revenues.

H.R. 3013 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The staff contact for this estimate is Leigh Angres who can be reached at 226-2860. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3013, has as its primary objective the preservation of fundamental legal protections in the context of Federal investigation and enforcement matters.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, Section 8 of the Constitution.

## ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3013 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

## SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short Title.* Section 1 sets forth the bill's short title as the "Attorney-Client Privilege Protection Act of 2007."

*Sec. 2. Findings and Purpose.* Section 2 sets forth nine Congressional findings and explains that the purpose of the Act is to "place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization."

*Sec. 3. Disclosure of Attorney-Client Privilege or Advancement of Counsel Fees as Elements of Cooperation.* Subsection (a) of section 3 adds a new section 3014 to title 18 of the United States Code. New section 3014(a) defines the terms "attorney-client privilege" and "attorney work product."

New section 3014(b)(1) prohibits an attorney or agent of the United States in any Federal investigation or criminal or civil enforcement matter from demanding, requesting, or conditioning treatment on the disclosure of any communication protected by attorney-client privilege or attorney work product. New section 3014(b)(2) prohibits an attorney or agent of the United States in any Federal investigation or criminal or civil enforcement matter relating to an organization or affiliated person from conditioning a charging decision upon, or using as a factor in determining cooperation, any one of five specified actions. These actions include:

- (1) making a valid assertion of attorney-client privilege or attorney work product;
- (2) providing counsel or contributing legal defense fees or expenses to an organization's employee;
- (3) entering into joint defense, information sharing, or common interest agreements with an organization's employee;
- (4) sharing relevant information with an organization's employee; and
- (5) failing to terminate or otherwise sanction an organization's employee because of that employee's decision to exercise constitutional rights or other legal protections.

New section 3014(b)(3) prohibits an attorney or agent of the United States in any Federal investigation or criminal or civil enforcement matter from demanding or requesting that an organization or affiliated person not take any of these five specified actions.

New section 3014(c) provides that the Act does not prohibit an attorney or agent of the United States from requesting or seeking material that such an attorney or agent reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine.

New section 3014(d) establishes that the Act is not intended to prohibit an organization from making, or an attorney or agent of the United States from accepting, a voluntary and unsolicited offer to share the organization's internal investigation materials.

Subsection (b) of section 3 of the Act amends the table of sections for chapter 201 of title 18 of the United States Code to add new section 3014.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

**TITLE 18, UNITED STATES CODE**

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**PART II—CRIMINAL PROCEDURE**

\* \* \* \* \*

**CHAPTER 201—GENERAL PROVISIONS**

Sec.	
3001.	Procedure governed by rules; scope, purpose and effect; definition of terms; local rules; forms-Rule.
	* * * * *
3014.	<i>Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations.</i>
	* * * * *

**§3014. *Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations***

(a) *DEFINITIONS.—In this section:*

(1) *ATTORNEY-CLIENT PRIVILEGE.—The term “attorney-client privilege” means the attorney-client privilege as governed by the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, and the principles of article V of the Federal Rules of Evidence.*

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

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

*(1) demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product;*

(2) condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government—

(A) any valid assertion of the attorney-client privilege or privilege for attorney work product;

(B) the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization;

(C) the entry into a joint defense, information sharing, or common interest agreement with an employee of that organization if the organization determines it has a common interest in defending against the investigation or enforcement matter;

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

(E) a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request; or

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

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

(d) *VOLUNTARY DISCLOSURES.*—Nothing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization.

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