H.R.3013

IN THE SENATE OF THE UNITED STATES

NOVEMBER 14, 2007

Received; read twice and referred to the Committee on the Judiciary

AN ACT

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,

1 SECTION 1. SHORT TITLE.

- 2 This Act may be cited as the "Attorney-Client Privi-
- 3 lege Protection Act of 2007".

4 SEC. 2. FINDINGS AND PURPOSE.

- 5 (a) FINDINGS.—Congress finds the following:
- (1) Justice is served when all parties to litiga tion are represented by experienced diligent counsel.
 - (2) Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law.
 - (3) To serve the purpose of the attorney-client privilege, attorneys and clients must have a degree of confidence that they will not be required to disclose privileged communications.
 - (4) The ability of an organization to have effective compliance programs and to conduct comprehensive internal investigations is enhanced when there is clarity and consistency regarding the attorney-client privilege.
 - (5) Prosecutors, investigators, enforcement officials, and other officers or employees of Government agencies have been able to, and can continue to, conduct their work while respecting attorney-client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations.

- 1 (6) Despite the existence of these legitimate
 2 tools, the Department of Justice and other agencies
 3 have increasingly employed tactics that undermine
 4 the adversarial system of justice, such as encour5 aging organizations to waive attorney-client privilege
 6 and work product protections to avoid indictment or
 7 other sanctions.
 - (7) An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive post-indictment or to dispute the charges against it at trial.
 - (8) Waiver demands and other tactics of Government agencies are encroaching on the constitutional rights and other legal protections of employees.
 - (9) The attorney-client privilege, work product doctrine, and payment of counsel fees shall not be used as devices to conceal wrongdoing or to cloak advice on evading the law.
- 20 (b) Purpose.—It is the purpose of this Act to place 21 on each agency clear and practical limits designed to pre-22 serve the attorney-client privilege and work product pro-23 tections available to an organization and preserve the con-24 stitutional rights and other legal protections available to 25 employees of such an organization.

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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

- 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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- 1 "(e) Not to Affect Examination or Inspection
- 2 Access Otherwise Permitted.—This Act does not af-
- 3 fect any other federal statute that may authorize, in the
- 4 course of an examination or inspection, an agent or attor-
- 5 new of the United States to require or compel the produc-
- 6 tion of attorney-client privileged material or attorney work
- 7 product.
- 8 "(f) Charging Decisions Not to Include Deci-
- 9 SIONS TO CHARGE UNDER INDEPENDENT PROHIBI-
- 10 Tions.—It is not conditioning a charging decision under
- 11 subsection (b)(2) of this section to charge an organization
- 12 or person affiliated with that organization for conduct de-
- 13 scribed in subparagraph (B), (C), or (D) of that sub-
- 14 section under a federal law which makes that conduct in
- 15 itself an offense.".
- 16 (b) Conforming Amendment.—The table of sec-
- 17 tions for chapter 201 of title 18, United States Code, is
- 18 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 organizations.".

Passed the House of Representatives November 13, 2007.

Attest: LORRAINE C. MILLER,

Clerk.