

111TH CONGRESS
1ST SESSION

S. 445

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2009

Mr. SPECTER (for himself, Ms. LANDRIEU, Mr. CARPER, Mr. KERRY, Mrs. MCCASKILL, and Mr. COCHRAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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 2009”.

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) Congress recognized that law enforcement
21 can effectively investigate without attorney-client
22 privileged information when it banned demands by
23 the Attorney General for privileged materials in the
24 Racketeer Influenced and Corrupt Organizations

1 Act. See section 1968(c)(2) of title 18, United
2 States Code.

3 (7) Despite the existence of numerous investiga-
4 tive tools that do not impact the attorney-client rela-
5 tionship, the Department of Justice and other agen-
6 cies have increasingly created and implemented poli-
7 cies that tend to undermine the adversarial system
8 of justice, such as encouraging organizations to
9 waive attorney-client privilege and work product pro-
10 tections to avoid indictment or other sanctions.

11 (8) An indictment can have devastating con-
12 sequences on an organization, potentially eliminating
13 the ability of the organization to survive post-indict-
14 ment or to dispute the charges against it at trial.

15 (9) Waiver demands and related policies of Gov-
16 ernment agencies are encroaching on the constitu-
17 tional rights and other legal protections of employ-
18 ees.

19 (10) As recognized throughout the common law,
20 and specifically in the crime-fraud exception, the at-
21 torney-client privilege, work product doctrine, and
22 payment of counsel fees cannot and shall not be
23 used as devices to conceal wrongdoing or to cloak
24 advice on evading the law.

1 (b) PURPOSE.—It is the purpose of this Act to place
 2 on each agency clear and practical limits designed to pre-
 3 serve the attorney-client privilege and work product pro-
 4 tections available to an organization and preserve the con-
 5 stitutional rights and other legal protections available to
 6 employees of such an organization.

7 **SEC. 3. DISCLOSURE OF ATTORNEY-CLIENT PRIVILEGE OR**
 8 **ADVANCEMENT OF COUNSEL FEES AS ELE-**
 9 **MENTS OF COOPERATION.**

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

13 **“§ 3014. Preservation of fundamental legal protec-**
 14 **tions and rights in the context of inves-**
 15 **tigations and enforcement matters re-**
 16 **garding organizations**

17 “(a) DEFINITIONS.—In this section:

18 “(1) ATTORNEY-CLIENT PRIVILEGE.—The term
 19 ‘attorney-client privilege’ means the attorney-client
 20 privilege as governed by the principles of the com-
 21 mon law, as they may be interpreted by the courts
 22 of the United States in the light of reason and expe-
 23 rience, and the principles of article V of the Federal
 24 Rules of Evidence.

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

7 “(3) ORGANIZATION.—The term ‘organiza-
8 tion’—

9 “(A) means an organization as defined in
10 section 18 of title 18, United States Code, and
11 any State, local, or municipal government entity
12 or instrumentality; and

13 “(B) does not include—

14 “(i) a continuing criminal enterprise,
15 as defined in section 408 of the Controlled
16 Substances Act (21 U.S.C. 848);

17 “(ii) an entity charged under chapter
18 96 of title 18, United States Code; or

19 “(iii) a terrorist organization, as de-
20 fined in section 2339B.

21 “(b) ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY
22 WORK PRODUCT.—

23 “(1) IN GENERAL.—In any Federal investiga-
24 tion or criminal or civil enforcement matter, includ-
25 ing any form of administrative proceeding or adju-

1 dication, an agent or attorney of the United States
2 shall not—

3 “(A) demand or request that an organiza-
4 tion, or a current or former employee, officer,
5 director, or agent of such organization, waive
6 the protections of the attorney-client privilege
7 or the attorney work product doctrine;

8 “(B) offer to reward or actually reward an
9 organization, or current or former employee, of-
10 ficer, director, or agent of such organization,
11 for waiving the protections of the attorney-cl-
12 ient privilege or the attorney work product doc-
13 trine; or

14 “(C) threaten adverse treatment or penal-
15 ize an organization, or current or former em-
16 ployee, officer, director, or agent of such orga-
17 nization, for declining to waive the protections
18 of the attorney-client privilege or the attorney
19 work product doctrine.

20 “(2) CHARGING DECISIONS.—

21 “(A) IN GENERAL.—In any Federal inves-
22 tigation or criminal or civil enforcement matter,
23 including any form of administrative proceeding
24 or adjudication, an agent or attorney of the

1 United States shall not consider any conduct
2 described in subparagraph (B) in—

3 “(i) making a civil or criminal charg-
4 ing or enforcement decision relating to an
5 organization, or a current or former em-
6 ployee, officer, director, or agent of such
7 organization; or

8 “(ii) determining whether an organi-
9 zation, or a current or former employee,
10 officer, director, or agent of such organiza-
11 tion, is cooperating with the Government.

12 “(B) CONDUCT.—The conduct described in
13 this subparagraph is—

14 “(i) the good faith assertion of the
15 protection of the attorney-client privilege
16 or attorney work product doctrine;

17 “(ii) the provision of counsel to, or
18 contribution to the legal defense fees or ex-
19 penses of, a current or former employee,
20 officer, director, or agent of an organiza-
21 tion;

22 “(iii) the good faith entry into, or ex-
23 istence of, a bona fide joint defense, infor-
24 mation sharing, or common interest agree-
25 ment between an organization and a cur-

1 rent or former employee, officer, director,
2 or agent of such organization, or among its
3 current or former employees, officers, di-
4 rectors, or agents;

5 “(iv) except as provided in subsection
6 (f), the sharing of relevant information in
7 anticipation of or in response to an inves-
8 tigation or enforcement matter between an
9 organization and a current or former em-
10 ployee, officer, director, or agent of such
11 organization, or among its current or
12 former employees, officers, directors, or
13 agents; or

14 “(v) the failure to terminate the em-
15 ployment or affiliation of or otherwise
16 sanction any employee, officer, director, or
17 agent of that organization because of the
18 decision by that employee, officer, director,
19 or agent to exercise personal constitutional
20 rights or other legal protections in re-
21 sponse to a Government request.

22 “(3) DEMANDS AND REQUESTS.—In any Fed-
23 eral investigation or criminal or civil enforcement
24 matter, including any form of administrative pro-
25 ceeding or adjudication, an agent or attorney of the

1 United States shall not demand or request an orga-
2 nization, or a current or former employee, officer, di-
3 rector, or agent of such organization, to refrain from
4 the conduct described in paragraph (2)(B).

5 “(c) INAPPLICABILITY.—Nothing in this section shall
6 be construed to prohibit an agent or attorney of the
7 United States from requesting or seeking any communica-
8 tion or material that—

9 “(1) the agent or attorney would not reasonably
10 know is subject to a claim of attorney-client privilege
11 or attorney work product; or

12 “(2) the agent or attorney reasonably believes is
13 not entitled to protection under the attorney-client
14 privilege or attorney work product doctrine.

15 “(d) VOLUNTARY DISCLOSURES.—

16 “(1) IN GENERAL.—Nothing in this section
17 may be construed to prohibit an organization from
18 making, or an agent or attorney of the United
19 States from accepting, a voluntary and unsolicited
20 offer to waive the protections of the attorney-client
21 privilege or attorney work product doctrine.

22 “(2) CONSIDERATION IN CHARGING DECI-
23 SIONS.—An agent or attorney of the United States
24 shall not consider the privileged or otherwise pro-
25 tected nature of the material voluntarily provided in

1 conformance with the terms of paragraph (1), or any
2 material redacted therefrom, in—

3 “(A) making a civil or criminal charging or
4 enforcement decision relating to an organiza-
5 tion, or a current or former employee, officer,
6 director, or agent of such organization; or

7 “(B) determining whether an organization,
8 or a current or former employee, officer, direc-
9 tor, or agent of such organization, is cooper-
10 ating with the Government.

11 “(3) OTHER CONSIDERATION.—Subject to the
12 limitations under subsection (b), an agent or attor-
13 ney of the United States may consider a voluntary
14 disclosure described in paragraph (1) for any other
15 purpose that is otherwise lawful.

16 “(e) NOT TO AFFECT EXAMINATION OR INSPECTION
17 ACCESS OTHERWISE PERMITTED.—This section does not
18 affect any other Federal statute that authorizes, in the
19 course of an examination or inspection, an agent or attor-
20 ney of the United States to require or compel the produc-
21 tion of attorney-client privileged material or attorney work
22 product.

23 “(f) CHARGING DECISIONS NOT TO INCLUDE DECI-
24 SIONS TO CHARGE UNDER INDEPENDENT PROHIBI-
25 TIONS.—Subsection (b)(2) shall not be construed to pro-

1 hibit charging an organization, or a current or former em-
2 ployee, officer, director, or agent of such organization, for
3 conduct described in clause (ii), (iii), or (iv) of subpara-
4 graph (B) of that subsection under a Federal law which
5 makes that conduct in itself an offense.”.

6 (b) CONFORMING AMENDMENT.—The table of sec-
7 tions for chapter 201 of title 18, United States Code, is
8 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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