

111TH CONGRESS
1ST SESSION

H. R. 4326

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

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Mr. SCOTT of Virginia (for himself, Mr. CONYERS, Mr. SMITH of Texas, Mr. NADLER of New York, Mr. DELAHUNT, Mr. COBLE, and Mr. DANIEL E. LUNGREN of California) introduced the following bill; which was 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) 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 “(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 ney 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 organiza-
tions.”.

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