



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

### **FLOOR SITUATION**

H.R. 3013 is being considered on the House floor under suspension of the rules and will require a two-thirds majority vote for passage. This legislation was introduced by Representative Bobby Scott (D-VA) on July 12, 2007. The bill was referred to the House Judiciary Committee. The Judiciary Subcommittee on Crime, Terrorism, and Homeland Security forwarded the bill to the full committee on July 24, 2007 by voice vote. On August 1, 2007, the Judiciary Committee reported the bill by voice vote.

H.R. 3013 is expected to be considered on the House floor on November 13, 2007.

\*Note: Senator Arlen Specter has introduced identical legislation in the Senate (S. 186), which has been referred to the Senate Judiciary Committee. The Committee has held hearings on the legislation. Senator Specter also introduced the legislation in the 109<sup>th</sup> Congress (S. 30).

### **BACKGROUND**

On January 20, 2003 Deputy Attorney General Larry Thompson issued a memo (known as the Thompson Memorandum) to U.S. Attorneys. The purpose of the memo was to provide a “set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization.”

Some have expressed concerns with portions of this memo, including a section that provides factors that prosecutors should consider in reaching a decision as to the “proper treatment of a corporate target.” Amongst those factors are

- 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 protection

Upon the memo's release, some had expressed concerns that a refusal to waive attorney-client privilege could lead to a more stringent charge on a corporation.

Deputy Attorney General Paul McNulty later (December 12, 2006) released a memo (known as the McNulty Memorandum), which replaced the guidelines outlined in the

Thompson Memorandum. The McNulty Memorandum states: “waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation. However, a company’s disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company’s voluntary disclosure. Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information.”

Senator Arlen Specter, the sponsor of the Senate companion bill to HR 3103 responded to the memo by saying “although the new McNulty memorandum, which replaces the memorandum issued by former Deputy Attorney General Larry Thompson, makes some improvements, the revision continues to erode the attorney-client relationship by allowing prosecutors to request privileged information backed by the hammer of prosecution if the request is denied.”

## **SUMMARY**

H.R. 3013 prohibits an agent or attorney of the United States from demanding, requesting, or conditioning 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.

*\*Note: “Attorney-client privilege” is defined as “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”*

*“Attorney work product” is defined as “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”*

The bill also prohibits an agent or attorney of the United States from conditioning a civil or criminal charging decision relating to an organization (or affiliated person) on one or more actions (outlined below), or from using one or more such actions as a factor in determining whether an organization or affiliated person is cooperating with the government. The actions are:

- any valid assertion of the attorney-client privilege or privilege for attorney work product;
- the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization;

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

*\*Note: The legislation also prohibits an agent or attorney of the United States from demanding or requesting that an organization, or person affiliated with that organization, not take any of these actions*

The bill does not 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. Additionally, the bill does not 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.

Thompson Memorandum: [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm)

McNulty Memorandum: [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf)

### **COST**

According to the Congressional Budget Office, “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.”

CBO Estimate: <http://www.cbo.gov/ftpdocs/85xx/doc8581/hr3013.pdf>

### **STAFF CONTACT**

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