

United States House of Representatives
Committee on Financial Services
Washington, D.C. 20515

January 30, 2012

The Honorable Richard Cordray
Consumer Financial Protection Bureau
1801 L Street, N.W.
Washington, DC 20036

Dear Mr. Cordray:

On January 24, 2012, you appeared as a witness before the House Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs during its hearing, "How will the CFPB Function under Richard Cordray?" At that hearing, Members asked about a critical omission in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) that could result in regulated institutions waiving privileges against third parties when they provide privileged information to the Consumer Financial Protection Bureau (CFPB). You acknowledged in your testimony that this was "an oversight that Congress may want to look at and may want to fix."¹ You also said that you "would be supportive" of a legislative solution.²

Even though many supervised institutions have expressed concerns that providing the CFPB privileged information could waive the institutions' privilege with respect to third parties, in a bulletin sent to the chief executive officers of institutions subject to the CFPB's supervision authority, the CFPB General Counsel has expressed the view that these institutions have little to fear. In that bulletin, Leonard J. Kennedy wrote that "the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information."³ He added that "if a supervised institution were ever faced with a claim of waiver, the Bureau would take all reasonable and appropriate actions to rebut such a claim."⁴

Yet, in spite of this attempt to reassure the institutions it regulates, it is clear that the CFPB recognizes a potential problem. The CFPB has promised to rebut a third party's claim, but nothing exists to foreclose such a claim. Without legal certainty, and so long as the CFPB takes the position that the "failure to provide information required by the Bureau is a violation of law for which the Bureau will pursue all available remedies," the attorney-client privilege and work-product privilege will be at risk.⁵ A statutory change will ensure that privileged information remains privileged.

¹ See *How will the CFPB Function Under Richard Cordray?: Hearing Before the Subcomm. on TARP, Fin. Serv. & Bailouts of Pub. & Private Programs of the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012)* (statement of Richard Cordray, Director, U.S. Consumer Fin. Prot. Bureau).

² *Id.*

³ LEONARD J. KENNEDY, U.S. CONSUMER FIN. PROT. BUREAU, BULL. NO. 12-01, THE BUREAU'S SUPERVISION AUTHORITY AND TREATMENT OF CONFIDENTIAL SUPERVISORY INFORMATION (2012).

⁴ *Id.*

⁵ *Id.*; see 12 U.S.C. §§ 5536(a)(2), 5565.

The Honorable Richard Cordray

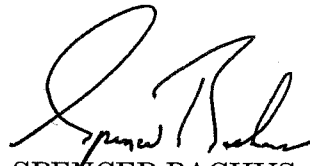
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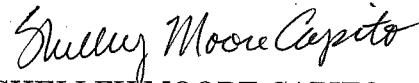
The Subcommittee on Financial Institutions and Consumer Credit will hold a legislative hearing on February 8, 2012, to examine this and other issues related to the CFPB. Other agencies have effectively regulated institutions and accessed relevant information without risking the waiver of privileges. Our Committee will work quickly so that there is not any extended uncertainty, but, it is our view that the CFPB should not request privileged material from depository institutions, credit unions and their affiliates until our Committee can discuss this at a hearing and Congress can enact a legislative fix.

Thank you for your consideration of our views.

Sincerely,



SPENCER BACHUS
Chairman



SHELLEY MOORE CAPITO
Chairman
Subcommittee on Financial Institutions
and Consumer Credit