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April 12, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Bureau of Consumer Financial Protection Proposed Rule on Confidential Treatment of Privileged Information; Docket No. CFPB-2012-0010; RIN 3170-AA20, 77 Fed. Reg. 15286 (March 15, 2012)

Dear Ms. Jackson:

On behalf of the American Bar Association ("ABA"), I write to express our views regarding the above-referenced proposed rule (the "Proposed Rule") that seeks to clarify that the submission of privileged information to the Consumer Financial Protection Bureau ("CFPB" or "Bureau") by any person in the course of the Bureau's supervisory or regulatory processes will not waive or otherwise affect the privilege as to third parties.[1] Although the ABA appreciates the Bureau's efforts to bring greater certainty to this important area and to protect the privileged status of confidential information once it is provided to the Bureau by supervised or regulated entities, the ABA is concerned that several key aspects of the Proposed Rule could undermine and weaken, rather than safeguard, fundamental attorney-client privilege and work product protections.

In sum and as more fully explained below, the ABA has serious concerns regarding the assertions in the Proposed Rule's commentary that the Bureau can require or compel supervised entities to submit privileged information in connection with the Bureau's supervisory and regulatory processes. In addition, the ABA is concerned that, because the Proposed Rule is based in part on this unfounded assertion of the Bureau's authority to compel production of privileged materials, the Proposed Rule may not protect the privileged status of that information, thereby placing supervised entities at risk of losing the privilege with respect to materials furnished to the Bureau. Unlike the Proposed Rule, legislation recently approved by the House (H.R. 4014) and now pending in the Senate would preserve the privileged status of materials submitted to the Bureau.

[1] These ABA comments were prepared in coordination with the ABA Task Force on Financial Markets Regulatory Reform. The ABA Task Force is comprised of 15 prominent financial services lawyers who have served in the top levels of government and private practice. The Task Force includes former general counsels of the Securities and Exchange Commission ("SEC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Treasury Department, as well as members and liaisons who have held high-level positions with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency ("OCC"), and the SEC. Also included on the Task Force is a founder of Public Citizen Litigation Group and leading academics in the law relating to financial entities and administrative law. The complete Task Force roster is available at: http://apps.americanbar.org/buslaw/committees/CL116000pub/materials/publicroster.pdf

The ABA therefore urges the Bureau to withdraw the Proposed Rule and to encourage Congress to promptly enact the legislation as the best means to address and resolve the problem of third-party privilege waiver.

The Importance of the Attorney-Client Privilege and the Work Product Doctrine and the ABA's Long-Standing Efforts to Protect these Fundamental Rights

The attorney-client privilege is a bedrock legal principle that enables individual and organizational clients to communicate with their lawyers in confidence and encourages clients to seek out and obtain guidance enabling them to conform their conduct to the law. The privilege also facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of society at large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries, to the detriment of their clients. The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that may have the effect of eroding these protections.[2]

Since 2004, the ABA and numerous State and local bar associations have worked closely with a broad coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the ACLU—to challenge and attempt to reverse or modify Federal agency policies that seek to require or pressure companies to waive their attorney-client privilege and work product protections during investigations and other agency proceedings. These policies include the Justice Department's "Holder" and "Thompson" memoranda, the SEC's "Seaboard Report," and similar policies adopted by numerous other agencies.

Towards that end, the ABA and various representatives of the coalition testified several times before the Senate and House Judiciary Committees in 2006 and 2007 and expressed both their serious concerns over these policies and their support for legislation to prohibit all Federal agencies from seeking waiver of the privilege or work product protections.[3] In addition, the ABA sent letters to the Justice Department ("DOJ") (May 2006); the U.S. Sentencing Commission (March 2006); the Commodity Futures Trading Commission ("CFTC") (July 2006); the Department of Housing and Urban Development ("HUD") (December 2006 and February 2011); the SEC (February 2007); the General Services Administration ("GSA"), the Defense Department and the National Aeronautics and Space Administration ("NASA") (June 2008); the Treasury

[2] *See* ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, available at http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf.

[3] In November 2007, the House of Representatives overwhelmingly approved the "Attorney-Client Privilege Protection Act" (H.R. 3013), which would prohibit all Federal agencies from seeking the production of information or materials protected by the attorney-client privilege or the work product doctrine. While the bill has not yet been enacted into law, the House action in 2007—and the reintroduction of the same bill during the 111th Congress by House Judiciary Committee Chairman Lamar Smith (R-TX) and Ranking Member John Conyers (D-MI) as H.R. 4326—demonstrate the strong and ongoing bipartisan opposition in Congress to Federal agency policies seeking waiver of the privilege.

Department's Office of Foreign Assets Control (November 2008); the Internal Revenue Service (May 2010), and other agencies urging them to reverse their various privilege waiver policies.[4]

These efforts by the ABA and its State and local bar, coalition, and congressional allies over the past 8 years demonstrate the legal and business communities' strong commitment to preserving the attorney-client privilege and the work product doctrine and their serious concerns over Federal agency policies that would erode these important legal protections. As explained in more detail below, DOJ, the Sentencing Commission, the CFTC and numerous other agencies responded favorably to these concerns by reversing or substantially modifying their privilege waiver policies in order to better protect these fundamental legal rights.[5]

The Bureau's Proposed Rule on Confidential Treatment of Privileged Information

In the Proposed Rule, the Bureau has proposed several amendments to 12 CFR part 1070, subpart D, in an effort to provide greater certainty regarding confidential treatment of privileged information submitted to the Bureau in the course of its supervisory or regulatory processes. First, Proposed Section 1070.48 ("Privileges Not Affected by Disclosure to the CFPB") seeks to protect the privileged status of information that supervised and regulated entities provide to the Bureau by clarifying that such submissions will not result in waiver as to third parties. Proposed Section 1070.48 provides in pertinent part as follows:

> The submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB…. [6]

Second, the Proposed Rule also seeks to clarify that when the Bureau receives privileged information from a supervised or regulated entity and then shares the information with another governmental agency, the privilege would not be waived as to third parties. In particular, proposed Section 1070.47(c) ("Non-waiver") provides in pertinent part as follows:

> The CFPB shall not be deemed to have waived any privilege applicable to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency….[7]

In explaining the need for the Proposed Rule, the CFPB states that Title X of the Dodd-Frank Act granted it the authority to supervise insured depository institutions and credit unions with assets over $10 billion, those entities' affiliates and service providers, and certain non-depository

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[4] The ABA's and the coalition's various letters, comments, and testimony to Congress and to these Federal agencies, as well as the agencies' original and revised policies and the text of H.R. 3013 and H.R. 4326, are available at http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/acprivilege.html

[5] *See* discussion below at pages 7-8 and footnote 18.

[6] *See* Proposed Rule, 77 Fed. Reg. at 15287.

[7] *See id.* at 15289.

institutions.[8] The Bureau further notes that "in exercising its supervisory authority, the Bureau will at times request from its supervisory entities information that may be subject to one or more statutory or common law privileges, including, for example, the attorney-client privilege and attorney work product protection."[9] Because Congress in the Dodd-Frank Act did not explicitly address the issue of whether the submission of privileged information to the Bureau in the course of its supervisory or regulatory processes would waive the privilege as to third parties—nor the related issue of whether the Bureau's sharing of privileged information with other Federal or State governmental entities would result in third-party waiver—the Bureau issued the Proposed Rule in an effort to clarify both of these important issues.

The ABA's Concerns Regarding the Bureau's Proposed Rule

Although the ABA recognizes and appreciates the CFPB's efforts to preserve the privileged status of information that supervised entities submit to the Bureau, the ABA nonetheless opposes the Proposed Rule for several important reasons.

1. The Bureau Lacks Legal Authority to Compel Supervised Entities to Submit Information and Materials Protected by the Attorney-Client Privilege and the Work Product Doctrine

The ABA has serious concerns regarding language in the Proposed Rule stating that the Bureau has the legal authority to force both depository and non-depository entities it supervises to produce information protected by the attorney-client privilege and the work product doctrine. In particular, the ABA disagrees with the Bureau's position that it may *require* or *compel* entities to submit these privileged materials as part of the Bureau's supervisory or regulatory processes[10] and that "…like the prudential regulators, its supervisory authority encompasses the authority to compel supervised entities to provide privileged information…and the same reasoning applies to the Bureau's supervisory authority over other entities."[11] The ABA also takes exception to the Bureau's reasoning that "a supervised entity's submission of privileged information to the Bureau in response to a request is not a voluntary disclosure that would result in the waiver of any applicable privilege."[12] In our view, these claims are not legally sound and if such purported authority were exercised by the Bureau, it would erode fundamental attorney-client privilege and work product protections.

Contrary to the Bureau's position, the Dodd-Frank Act does not grant the Bureau the authority to compel supervised entities to produce privileged or work product protected materials. Title X of the Dodd-Frank Act explicitly grants the CFPB the authority to monitor supervised entities, collect information about those entities, prescribe rules regarding the confidential treatment of such information,[13] and prescribe certain other rules that are necessary or appropriate to enable the

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[8] *See id.* at 15286.
[9] *Id.*
[10] *See id.* at 15286-15288.
[11] *See id.* at 15288. Similarly, the ABA disagrees with the Bureau's position that when supervised entities "employ inside or outside counsel to conduct analyses regarding whether the entity is in compliance with Federal consumer financial law…the Bureau may require access to these analyses, which may be subject to the attorney-client privilege…." *See id.* at 15287.
[12] *See id.* at 15288.
[13] *See e.g.*, Dodd-Frank Act § 1022(c).

Bureau to administer the Federal consumer protection laws.[14] However, nothing in the Dodd-Frank Act nor any other Federal statute grants the Bureau the authority to compel or require supervised entities to submit privileged or work product protected information. Although the ABA understands that banks often produce privileged materials to Federal banking agencies when requested to do so during examinations, the ABA is not aware of any reported Federal appellate court case holding that Federal banking regulators—or any other Federal agencies—can require production of privileged materials, nor do the Federal banking statutes contain such authority. Furthermore, the application of this alleged agency authority to compel production of privileged information with regard to non-banks is wholly unprecedented.

In apparent recognition of this lack of statutory or appellate court authority, the Bureau cites to three Federal district court opinions in the Proposed Rule—all of which were written by magistrate judges and only one of which is published—in support of its claim that a bank or savings and loan does not waive its privileges as to third parties by producing information to bank examiners because the submissions were required and hence not voluntary.[15] In each of these cases, the court sought to protect the privilege against claims of third-party waiver by concluding that the materials were not produced "voluntarily," but none of the cases involved a supervised entity challenging the banking agency's alleged authority to compel the entity to produce the privileged information in the first place. Because the magistrate judge opinions cited by the Bureau have no binding effect beyond those individual district courts and do not even directly address the issue of the Bureau's (or any other banking agency's) alleged authority to require supervised and regulated entities to waive their privileges and produce such information to the regulators, this authority cited by the Bureau is inconclusive at best.

The Bureau's claim that, just as with the prudential banking regulators like the FDIC and the OCC, it has the authority to compel production of privileged materials and the submission of such privileged materials by supervised entities therefore is involuntary is also undermined by Congress' determination to codify the selective waiver doctrine with regard to privileged information submitted to certain enumerated banking regulators. Section 607 of the Financial Services Regulatory Relief Act, enacted by Congress in October 2006, and codified as 12 U.S.C. § 1828(x), provides as follows:

> The submission by any person of any information to any Federal banking agency . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency . . . .

By enacting 12 U.S.C. § 1828(x), Congress clarified that any privileged or work product protected materials that banks share with Federal banking agencies remain privileged as to all other parties. However, the fact that Congress believed a statute was necessary to establish this protection

[14] *See* Dodd-Frank Act § 1022(b)(1).
[15] *See* Proposed Rule at 15288, citing *Boston Auction Co. v. W. Farm Credit Bank*, 925 F. Supp. 1478 (D. Hawaii 1996), *Vanguard Sav. & Loan Assn. v. Banks*, No. 93-cv-4267, 1995 WL 555871 (E.D. Pa. Sept. 18, 1995), and *United States v. Buco*, Crim. No. 90-10252-H, 1991 WL 82459 (D. Mass. May 13, 1991). The Bureau also cites to an "OCC Interpretive Letter," which like the magistrate judge opinions, has no binding legal effect with respect to the issue of the CFPB's alleged authority to compel production of privileged materials discussed in the Proposed Rule.

undermines the Bureau's claim that such protection is inherent in the Federal regulatory scheme and also undermines the Bureau's underlying premise that submissions of privileged information by supervised entities to Federal banking agencies are legally required and hence involuntary.

2. The Proposed Rule Would Undermine the Attorney-Client Privilege and the Work Product Doctrine, the Confidential Lawyer-Client Relationship, and the Fundamental Right to Counsel

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290). The purpose of the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* at 389. *See also Fisher v. United States*, 425 U.S. 391, 403 (1975). This strong rationale for the privilege has been recognized by the U.S. Supreme Court for well over a century and "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Co.* at 389, *citing Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Unfortunately, the Bureau's efforts to obtain privileged materials will undermine these fundamental principles in several important respects. First, even if the Bureau cannot require supervised entities to produce privileged and work product protected information and materials, its policy of seeking such information on a regular basis during examinations and other regulatory processes is contrary to the important public policy purposes that the privilege and the work product doctrine serve and could lead to the routine waiver of these protections as to the Bureau.[16] From a practical standpoint, a supervised entity often will have no choice but to waive when requested or instructed to do so, as the prospect of the Bureau labeling the entity as "uncooperative" if it exercises its legal rights and declines to produce the privileged materials could have a profound effect not just on the Bureau's subsequent supervisory and enforcement actions, but also on the entity's public image, stock price, and perceived creditworthiness. Such a policy of routine coerced waiver could seriously undermine and weaken the privilege, because as the U.S. Supreme Court has noted, "an uncertain privilege…is little better than no privilege at all." *Upjohn Co.* at 393.

Second, the Bureau's policy of requiring the submission of privileged and work product protected information may significantly undermine both the confidential lawyer-client relationship and the supervised entities' fundamental right to counsel. Lawyers for banks and other supervised entities play an essential role in helping these entities and their leaders to understand and comply with applicable law. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the entity's officers, directors, and other leaders, and must be provided with all relevant information in an open and uninhibited manner. Only in this way can the lawyer engage in a full

[16] *See e.g., Frankford Trust Co. v. Advest*, 1995 WL 491300 (E.D. Pa. Aug. 17, 1995)(Bank waived work product privilege as to the FDIC and State banking agency by producing privileged documents during examination and agencies later waived the examination privilege as to third parties by agreeing to produce the documents to them).

and frank discussion of the relevant legal issues with the client's representatives and provide appropriate legal advice to the client.

By pressuring supervised entities to submit privileged and work product protected materials to the Bureau in connection with its supervisory and regulatory processes, the Bureau's policy risks chilling and seriously undermining the confidential lawyer-client relationship. Lawyers and clients alike may lose confidence that their communications will remain confidential. Even the risk that confidential communications may be subject to compelled disclosure would be likely to affect the willingness of clients to be fully candid with their lawyers. In addition, any policy by the Bureau to regularly seek the production of privileged or work product protected materials and information could discourage supervised entities from seeking and obtaining the expert legal representation that they may need, thereby interfering in a substantial way with their fundamental right to counsel.

It is also important to note that while the prudential banking regulators such as the FDIC and the OCC have long taken the position, as the CFPB does in the Proposed Rule, that they can require the depository institutions they supervise to provide access to privileged information during examinations, the Bureau's Proposed Rule goes well beyond the other banking agencies' position by asserting that it can also compel all non-depository institutions it supervises to produce privileged information as well.[17]

This sweeping claim by the Bureau that it can require all entities it supervises and regulates, including both depository institutions and non-depository institutions, to submit privileged materials also runs counter to the clear trend among other leading Federal law enforcement and regulatory agencies that have recently reversed or modified their privilege waiver policies.[18] For example, DOJ replaced its previous privilege waiver policy in August 2008 with new corporate charging guidelines, known informally as the "Filip Memorandum," which direct prosecutors not to require—or even ask—companies and other organizations to produce information or materials protected by the attorney-client privilege or the work product doctrine during investigations. Instead, the revised DOJ policy states that in order to receive cooperation credit during investigations, entities need only produce the relevant factual information. In May 2009, Attorney General Holder strongly endorsed the new policy and noted that DOJ was "engaged in ongoing efforts outside the department to inform investigators and attorneys at other government agencies about the guidelines and are suggesting them as best practices…."

In addition to DOJ, numerous other Federal agencies have also reversed their privilege waiver policies in recent years. For example, the U.S. Sentencing Commission voted unanimously to remove the waiver language from Section 8C2.5 of the Federal Sentencing Guidelines in April 2006, and the CFTC replaced its previous August 2004 waiver policy with a new Enforcement Advisory in March 2007 directing its staff to respect the privilege and work product protections during investigations. In addition, the SEC issued a new Enforcement Manual in January 2010

[17] *See* Proposed Rule at 15288.
[18] Copies of the previous and current privilege waiver policies of DOJ, CFTC, SEC, the Sentencing Commission, and other Federal agencies, the ABA's statements praising the revised polices, and other relevant materials are available at http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/acprivilege.html

that generally prohibits its staff from seeking such waivers. Also, the GSA, the Defense Department and NASA added language to their final Federal Acquisition Regulation on "Contractor Business Ethics Compliance Programs and Disclosure Requirements" in November 2008 that was designed to preserve attorney-client privilege and work product protections during government audits, investigations, and corrective actions involving Federal contractors. Therefore, the Bureau's statements in the Proposed Rule that it will regularly instruct supervised entities to produce privileged materials and thereby waive their privileges as to the Bureau, if not as to third parties, are clearly out of step with the growing consensus among other Federal law enforcement and regulatory agencies on this issue.

3. The Proposed Rule is Inadequate and May Not Preserve the Privileged Status of Materials Supervised Entities Submit to the Bureau

In addition to our concerns regarding commentary in the Proposed Rule stating that the Bureau will seek to require supervised entities to submit privileged materials during examinations, the ABA also is concerned that the text of the Proposed Rule will not be effective in preserving the privileged status of materials that supervised entities submit to the Bureau because the Bureau's position is based in part on the incorrect premise that it has the authority to compel production of such materials.

In the Proposed Rule, the Bureau explains that although it will at times request that supervised entities submit privileged information to the Bureau to facilitate its supervisory and regulatory processes, "certain supervised entities have expressed concern that providing privileged information to Bureau supervisory personnel could waive the entities' privilege with respect to third parties."[19] The Bureau also notes that this concern is based in part on numerous judicial decisions finding wavier as to third parties when entities provide privileged information outside the supervisory context to other Federal agencies such as DOJ, the SEC, and other agencies.[20] The ABA agrees that these concerns are well-founded. Although a few Federal courts have recognized the selective waiver doctrine and allowed parties to submit privileged materials to Federal agencies without waiving the privilege as to third parties, most Federal circuits have rejected selective waiver and concluded that such submissions waive the privilege as to all third parties.[21]

The Bureau seeks to distinguish the proposed selective waiver protections that its Proposed Rule would provide to supervised entities from the numerous Federal court cases referenced above because, in its view, "its supervisory authority encompasses the authority to compel supervised entities to provide privileged information and, therefore, a supervised entity's submission of privileged information to the Bureau in response to a request is not a voluntary disclosure that would result in the waiver of any applicable privilege."[22] As explained in detail above, however,

[19] *See* Proposed Rule at 15288.
[20] *See id.*
[21] *See* Proposed Rule at 15288, footnote 13. *See also, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), *cert. dismissed*, 539 U.S. 977 (2003)(summarizing the status of the law in the various circuits and stating that like the First, Third, Fourth, District of Columbia, and Federal Circuits, the Sixth Circuit would refuse to recognize the doctrine).
[22] *See* Proposed Rule at 15288.

neither the language of the Dodd-Frank Act nor any other Federal statute or appellate case law supports the Bureau's claim, and the enactment of 12 U.S.C. § 1828(x) casts further doubt on that claim. Therefore, because the Bureau's authority to compel the production of privileged material is uncertain at best, serious questions exist as to whether the submission of privileged materials to the Bureau would truly "involuntary." As a result, the Proposed Rule may not be effective in protecting the privileged status of information submitted to the Bureau.

Ironically, the adoption of the Bureau's Proposed Rule could cause, rather than discourage, litigation over the Bureau's alleged authority to require production of privileged materials. As the U.S. Circuit Court for the District of Columbia aptly stated in the *In re Sealed Case*, "[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels."[23] Many other courts have reached the same basic conclusion, explaining that it is the client's responsibility to zealously guard the privilege in order to prevent it from becoming waived.[24] Furthermore, the responsibility to guard the privilege applies even when the documents are requested by the government via subpoena.[25] Therefore, the Proposed Rule, if adopted, may have the unintended effect of encouraging costly litigation by many supervised and regulated entities that will be justifiably reluctant to produce privileged materials to the Bureau until they have exhausted all the legal challenges and taken the other steps that the applicable case law suggests may be required to avoid waiving the privilege.

While an uncertain privilege—as the Supreme Court stated in *Upjohn*—is little better than no privilege at all, the Bureau's Proposed Rule may be even worse, as it could create an illusion of certainty for many supervised and regulated entities. Although some diligent entities and their lawyers are likely to challenge the Bureau's demands for the submission of privileged materials as discussed above if the Proposed Rule becomes final, many other entities will rely on the rule and produce privileged materials to the Bureau with the expectation that the privilege will not be waived as to third parties.

These routine submissions of privileged information by many supervised and regulated entities—made freely by those entities based on the Bureau's assurances that it has the authority both to compel and protect the submissions and that they are "involuntary" despite the legal uncertainty—could result in the wholesale waiver of those entities' privileges, not just as to the Bureau but as to all third parties. Third parties, in turn, could gain unfair access to a substantial amount of

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[23] *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that inadvertent disclosure can waive the privilege).

[24] *See e.g., In re Qwest Communications Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006), *cert. denied*, 549 U.S. 1031 (2006) ("the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived").

[25] *See United States v. Philip Morris Inc.*, 212 F.R.D. 421, 425-426 (D.D.C. 2002) (tobacco companies waived privilege in making disclosures in response to congressional subpoena where they made no "more than a minimal effort to convince the Chairman and the Committee to recognize their privilege claims"); *see also* Edna Selan Epstein, 5 *The Attorney-Client Privilege and the Work-Product Doctrine*, 413 (ABA vol. 1 2007) ("[v]oluntary compliance with a subpoena, whether issued through judicial or some other governmental auspices, without fully exhausting attempts to defeat the subpoena or to pursue privilege claims vigorously, will generally be deemed a waiver"); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 n.14 (3d Cir. 1991) ("disclosure to the [Department of Justice]" was "voluntary even though it was prompted by a grand jury subpoena" because party did not "continue… to object to the subpoena and produce…the documents only after being ordered to do so…").

privileged and confidential information, thereby significantly prejudicing the supervised or regulated entities and further undermining the privilege and the confidential lawyer-client relationship. These entities would be placed at an unfair disadvantage in future litigation with those third parties and with any other parties who would then have the ability to successfully challenge any claim of privilege.

4. Enactment of Federal Legislation is the Most Effective Way to Preserve the Privileged Status of Materials Provided to the Bureau

As the Bureau has noted in the Proposed Rule and as explained above, while Congress previously enacted statutory provisions clarifying that banks and credit unions could provide privileged information to prudential regulators—and those regulators could share this information with other agencies—without waiving the privilege as to third parties, "the statutory selective waiver provisions contained in the National Credit Union Act and the Federal Deposit Insurance Act do not explicitly apply to information submitted to the Bureau."[26] The Bureau also has acknowledged that in its view the Proposed Rule "is substantively identical to the statutory provisions that apply to the submission of privileged information to the prudential regulators, State bank and credit union supervisors and foreign banking authorities in the course of their supervisory or regulatory processes."[27]

The ABA shares the Bureau's view that there should be a single, consistent standard for the treatment of privileged information submitted to all Federal agencies that supervise depository institutions, including the Bureau.[28] Therefore, the ABA has endorsed bipartisan legislation, H.R. 4014,[29] which would amend the Federal Deposit Insurance Act to clarify that the Bureau, like the Federal banking regulators currently listed in the statute, can receive privileged and work product protected information from the institutions they supervise and share that information with certain other enumerated Federal agencies without waiving the privilege as to third parties.[30] By amending existing statutory law, the proposed legislation would ensure an integrated, consistent and coordinated approach to the regulation of financial service providers. In addition, unlike the

[26] *See* Proposed Rule at 15288 and the ABA's previous explanation of 12 U.S.C. § 1828(x), *supra,* at pages 5-6.
[27] *See* Proposed Rule at 15287.
[28] While the ABA has not taken a position on the underlying merits of the "examination privilege" under 12 U.S.C. § 1828(x) or the broader concept of "selective waiver" that allows an entity to submit privileged materials to agencies without waiving the privilege as to third parties, Section 1828(x) is a well-established provision of Federal banking law. Therefore, to the extent that the protections of this Section apply to the Federal banking agencies, the ABA strongly believes that they should also apply to the Bureau.
[29] The ABA's letter to House leaders endorsing H.R. 4014 and urging its prompt passage is available at http://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2012feb21_attyclientprivissue_l.authcheckdam.pdf. The similar ABA letter to the Senate endorsing an identical bill, S. 2099, is available at: http://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2012feb21_cfpbprivissue_l.authcheckdam.pdf
[30] Although H.R. 4014 would amend 12 U.S.C. §§ 1828(x) and 1821(t) to clarify that the Bureau, like the prudential regulators, can receive privileged information and then share it with *Federal* agencies listed in the statute without waiving the privilege as to third parties, neither the statute nor the bill state that the Bureau or the other regulators can share the information with *State* entities without waiving the privilege. As a result, the Bureau's assurances—stated in its Bulletin 12-01 issued on January 4, 2012—that it would "share confidential supervisory information with…State Attorneys General, only in very limited circumstances…" are inadequate because any sharing of privileged information with state authorities risks waiving the privilege as to third parties. Therefore, the Bureau should clarify that it will not share privileged information it receives with any other agency not expressly covered by 12 U.S.C. § 1821(t).

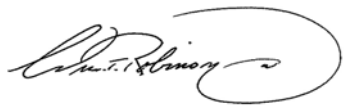
Proposed Rule, the legislation would clarify that the privileged status of materials provided by supervised entities to the Bureau would not be waived as to third parties, regardless of whether the information was provided to the Bureau voluntarily or involuntarily.

Conclusion

For all these reasons, the ABA respectfully requests that the Bureau withdraw the Proposed Rule and instead continue to encourage Congress to promptly enact H.R. 4014 as the most effective means of protecting the privileged status of information that supervised entities submit to the Bureau. If the Bureau decides to move forward with its Proposed Rule, the ABA urges it to modify the rule to clarify that while the Bureau expects supervised entities to provide all relevant factual information that may be requested during examinations and its other supervisory and regulatory practices, the Bureau will respect legitimate claims of attorney-client privilege and work product protection by supervised entities and will not seek to compel the production of privileged information or materials.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the Proposed Rule, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or Associate Director Larson Frisby at (202) 662-1098.

Sincerely,



Wm. T. (Bill) Robinson III

cc: The Honorable Tim Johnson, Chairman, Senate Banking, Housing and Urban Affairs Committee
The Honorable Richard C. Shelby, Ranking Member, Senate Banking, Housing and Urban Affairs Committee
The Honorable Spencer Bachus, Chairman, House Financial Services Committee
The Honorable Barney Frank, Ranking Member, House Financial Services Committee
The Honorable Lamar Smith, Chairman, House Judiciary Committee
The Honorable John Conyers, Jr., Ranking Member, House Judiciary Committee
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Thomas M. Susman, Director, ABA Governmental Affairs Office