

U.S. Consumer Financial Protection Bureau Issues Regulation Protecting Privileged Information from Waiver of Privilege

As discussed in our February 15, 2012, *DechertOnPoint* "[Building Consumer Financial Protection Bureau Relationships](#)," a significant controversy has arisen as to whether supervised institutions providing privileged information to the Consumer Financial Protection Bureau (CFPB) waive any privilege relating to such information. Underlying that question is the more fundamental issue that has not been affected by recent rules and bulletins issued by the CFPB: does the agency have the right, even if the privilege is maintained, to compel a supervised institution to hand over privileged materials?

On January 4, 2012, the CFPB issued Bulletin 12-01, in which it took the position that such a submission would not waive any privilege. The agency based its conclusion on two factors: (i) a supervised institution must comply with a CFPB request for information, and thus compliance is not voluntary; and (ii) section 18(x) of the Federal Deposit Insurance Act (FDI Act), which preserves the privilege for information submitted to the federal banking agencies and certain other agencies, should be interpreted to apply to the CFPB as a successor agency.

The Debate Over Privileged Material

In response to industry concerns, the CFPB issued a proposed regulation in March 2012, to codify its position regarding the treatment of privileged information. That same month, the House of Representatives passed H.R. 4014, which would make the protections offered by the FDI Act applicable to the CFPB. The legislation is pending in the Senate.

On June 28, 2012, the CFPB issued a final rule that is intended to provide broad protection for privileged information provided to the CFPB, and to maintain that protection if the CFPB transfers that information to a federal or state agency. The CFPB believes that it can issue regulations to resolve this issue when the federal banking agencies, faced with the identical issue, sought a change in the law. In contrast, the bank regulatory agencies, which also have significant rulemaking authority, may have focused on the fact that the maintenance of the privilege would impact third parties, as well as the supervised entities.

Where internal investigations are conducted by counsel, and third-party litigation often accompanies a perceived breach of consumer laws, supervised institutions will need to understand their rights and relevant legal precedents in connection with the requests for privileged materials from the CFPB. Institutions should also consider that the CFPB is claiming the authority to share an entity's privileged material with state agencies and preserve the entity's privilege, a

concept that is not included in the FDI Act with regard to the federal bank regulators. While supervised entities will want to avoid controversy in this area, and where most information requested by the CFPB may not raise significant issues, the possibility of collateral damage from the release of privileged material may be significant in some cases.

The CFPB's Argument Against a Privilege Waiver

In its final rule, the CFPB adopted a regulation that duplicates the provisions of the FDI Act. However, the CFPB retreated from its prior position that privilege was preserved because an institution could be compelled to provide privileged information to the CFPB. It cited several different rulemaking authorities included in the Dodd-Frank Act, and the CFPB's status as successor to the authorities of the federal prudential regulators as support for its ability to protect the privilege.¹

While the rule is primarily directed at the CFPB's supervision of large depository institutions, it will apply to smaller depository institutions that submit privileged material to the CFPB in the course of the agency's supervisory or regulatory processes.

CFPB Authority to Compel Production of Privileged Material

In the final rule, the CFPB took the position that the rule *itself* does not impose obligations on covered persons to provide information to the CFPB. The CFPB instead stated that such authority stems from the CFPB's supervisory authority under existing law. That

¹ The CFPB noted that some commenters had suggested that Congress's failure to amend section 18(x) when it enacted the Dodd-Frank Act raises the negative inference that Congress did not intend the CFPB to accomplish the same result through Congress's rulemaking authority. The CFPB responded by noting that section 18(x) itself provides that it should not be construed as suggesting that any person waives any privilege applicable to information that is submitted under any circumstance in which section 18(x) does not apply. The CFPB also argued that nothing in the FDI Act or the Dodd-Frank Act indicates that the FDI Act or the Dodd-Frank Act suggests that Congress intended CFPB-supervised entities to be entitled to less protection than smaller depository institutions that remain subject to consumer law supervision by the prudential regulatory agencies. The CFPB stated that it does not believe that Congress's silence regarding section 18(x) means that the CFPB lacks the rulemaking authority to issue its rule.

position is subject to doubt. As discussed in our prior *DechertOnPoint*, the U.S. Court of Appeals for the Ninth Circuit reached a contrary conclusion in a 1992 ruling in *Clarke v. American Commerce National Bank*, where the court refused to enforce an OCC administrative subpoena to a national bank to the extent that the subpoena sought attorney billing record information that, if disclosed to the OCC, would have revealed attorney-client privileged information — specifically litigation strategy.

The CFPB took issue with commenters who suggested that the rule would have the effect of chilling attorney-client communications within supervised entities, concluding that the rule encourages and strengthens communications between supervised entities and their attorneys by providing additional protections for the confidentiality of those communications. The CFPB stated that it will only seek privileged information from supervised entities when the agency determines it is material to its supervisory objective and that it cannot practicably obtain the same information from non-privileged sources.

It remains to be seen whether the CFPB will routinely seek privileged information from supervised entities because it is the most direct route to information a supervised entity may have about its record of compliance.

CFPB Transfer of Privileged Materials of Supervised Entities to Federal or State Government Entities

The CFPB's final rule also provides that that the CFPB will 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 other federal or state agency. The FDI Act provides for the protection of any privilege transferred by a covered agency to the federal prudential regulators and to other specified federal agencies. In contrast, the CFPB extends the protection to transfers to state government entities as well.

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