

Building Consumer Financial Protection Bureau Relationships: Access to Documents

The Consumer Financial Protection Bureau (“CFPB”) is developing policies and procedures to begin its work, and it has begun planning targeted examinations of banks and nonbanks. Attention has already been focused on the issue of what information the CFPB has a right to request thanks to a bulletin issued by its General Counsel (“Bulletin”).

The Bulletin asserts that supervised institutions are required to provide *all* documents and information that are responsive to a proper request. “All documents” may include privileged information protected by the attorney-client privilege. While such documents may contain a roadmap that the agency would want to have to shortcut its investigation, providing such information to an agency could (i) jeopardize defense of the case, and (ii) waive the institution’s ability to protect against disclosure of such documents to third parties. That, of course, is a significant problem where there are risks of third-party litigation and other collateral actions that may occur.

Based on a 1991 Office of the Comptroller of the Currency (“OCC”) interpretative letter, and a 1996 federal district court opinion holding that the disclosure of privileged documents to the Farm Credit Administration requested under its examination authority was not voluntary and therefore did not waive the attorney-client privilege, the Bulletin concludes that the provision of privileged information to the CFPB would not constitute a waiver that would make it accessible by third parties. The Bulletin also concludes that the CFPB would therefore not consider waiver concerns to be a valid basis for a supervised institution to withhold privileged information in response to a proper request. The agency did indicate that it would request privileged information only when it determines that such information is material to its

supervisory objectives and it cannot practicably obtain the same information from non-privileged sources.

Whether the provision of privileged documents to bank regulators would result in a waiver of the privilege has long been an issue. In 2006, Congress finally amended the Federal Deposit Insurance Act to provide in Section 1828(x) that the submission of information to a Federal banking authority, state bank supervisor or foreign banking authority in the course of any supervisory or regulatory process would not waive or otherwise affect any privilege that otherwise existed. While Section 1828(x) protects an institution from a waiver claim by a third party that could result in disclosure of privileged materials, it does *not explicitly* require an institution to produce any privileged material to a Federal banking authority. That is significant since the U.S. Court of Appeals for the Ninth Circuit, in a 1992 ruling in *Clarke v. American Commerce National Bank*, refused to enforce an OCC administrative subpoena to a national bank to the extent that the Court found that the subpoena sought billing record information that, if disclosed to the OCC, would have revealed attorney-client privileged information (specifically, litigation strategy). The issue of whether Section 1828(x) gives the covered agencies authority to demand the production of privileged materials under their examination powers has not been determined by the courts.

The Bulletin contends that Section 1828(x) is applicable to the CFPB because the agency was granted all the powers and duties of the federal prudential regulators with respect to federal consumer law. However, the Bulletin does not address the fact that Congress in the Dodd-Frank Act amended the definition of a “Federal banking authority” to delete its reference to the Office of Thrift Supervision, but did not add the CFPB to the definition. Legislation has now been introduced in the House of Representatives and the Senate to address this issue by affording the same protection to the institutions that provide privileged information to the CFPB as is granted by Section 1828(x). But, as suggested above, this will address only one aspect of the problem. When such requests are made by regulators, companies should seek counsel on the many factors that may impact them, including:

- the approach taken by the agency;
- the existence of multiple proceedings in state and federal jurisdictions which may be impacted;
- the practical implications of providing or not providing the information;

- the extent to which information provided may be shared with other state or federal regulators or governmental authorities that may not be covered by any applicable protective language;
- the impact that a parallel criminal proceeding may have on the issues involved in providing materials to agencies with civil authority; and
- alternatives through which an agency may obtain, review and protect information.

We can expect that the CFPB and its supervised institutions will resolve these issues so that the infrequent instances when they arise will not adversely impact the overall relationships between them. It will take creativity and compromise by all parties to achieve that result.

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