

Lenders Compliance Group

[Twitter](#) - [LinkedIn](#) - [Facebook](#)

Monday, July 9, 2012

CFPB: Treatment of Privileged Information - Final Rule

The Consumer Financial Protection Bureau (the "CFPB" or "Bureau") issued its Final Rule ("Rule") on July 5, 2012, adopting its Proposed Rule, without modification, regarding the confidential treatment of information by adding a new section providing that **the submission by any person of any information to the Bureau in the course of the Bureau's supervisory or regulatory processes does not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity.***

Also, the CFPB has amended its regulations to provide that its provision of privileged information to another Federal or State agency does not waive any applicable privilege, whether the privilege belongs to the CFPB or any other person.

The **Final Rule implements the Proposed Rule, without modification**, regarding the confidential treatment of information. The effective date is August 6, 2012.

To put the Final Rule in context, you might want to read my April 2012 review of the CFPB's Proposed Rule with respect to the treatment of privileged information. Entitled "[The CFPB's Treatment of Confidentiality and Privilege](#)" (April 2012), my article outlined important considerations and also offers an [Action Plan](#).

"CFPB's Treatment of Confidentiality and Privilege"

Newsletter: [HERE](#). (Abbreviated Version - March 2012)

Website Article: [HERE](#). (Full Text - March 2012)

Article Download: [HERE](#). (Publication - April 2012)

IN THIS ARTICLE

- [Proposed Rule](#)
- [Certain Objections](#)
- [Certain Clarifications](#)
- [Summary](#)

Proposed Rule

On March 15, 2012, the CFPB published a notice and request for comment regarding its proposal to add a new section to its rules relating to the confidential treatment of information that would provide that any person's submission of information to the CFPB in the course of the CFPB's supervisory or regulatory processes will not waive any privilege such person may claim with respect to such information as to any other person or entity.

According to the CFPB, the proposed rule was intended to provide protections for the confidentiality of privileged information substantively identical to the statutory provisions that apply to the submission of privileged information to the prudential regulators, and State and foreign bank regulators.

In effect, the notice of proposed rulemaking reiterated the position set forth in CFPB Bulletin 12-01 ("Bulletin") that the submission of privileged information to the CFPB would not, under existing law, result in a waiver of any applicable privilege, and explained that the Bureau was



SUITE OF SERVICES

CONTACT US

[View my JDSUPRA portfolio](#)

RECENT ARTICLES



OUR OTHER WEBSITES



exercising its rulemaking authority to codify this result in order to provide maximum assurances of confidentiality to the entities subject to its supervisory or regulatory authority.

The proposed rule was intended to govern any claim, in Federal or State court, that a person has waived any applicable privilege, including the privilege for attorney work product, by providing such information to the Bureau in the exercise of its supervisory or regulatory processes.

Certain Objections

I will provide a sketch of the objections raised by twenty trade associations (with one letter being submitted on behalf of five trade associations), eight individual financial institutions, and two individuals.

Objection

The Rule will have the effect of chilling attorney-client communications within supervised entities.

Note: According to the CFPB, the Rule encourages and strengthens communications between supervised entities and their attorneys by providing additional protections for the confidentiality of those communications. The Rule itself does not require the submission of privileged information, but instead merely provides protections for privileged information that is submitted to the CFPB, voluntarily or otherwise.

Objection

The Bureau should not adopt the proposed rule, but wait for Congress to address the institutions' concerns regarding privilege waiver through the enactment of legislation.

Objection

Some commenters disagreed with the Bureau's position, stated in the notice of proposed rulemaking, that the Bureau has the authority to compel privileged information and that the submission of privileged information to the Bureau pursuant to this authority does not waive any applicable privilege because it is not voluntary; therefore, for this reason, the Rule will not effectively preserve the privileged nature of information submitted to the Bureau.

Objection

Commenters expressed concern regarding the Bureau's disclosure to other agencies of attorney-client or work product privileged information submitted to the CFPB in the course of its supervisory process.

Certain Clarifications

Comment: Clarify whether the Rule would apply to claims that institutions have waived protections afforded to attorney work product by submitting such information to the CFPB.

Clarification: According to the Bureau, it does intend the Rule's reference to "privilege" to encompass "any privilege" that applies to information submitted by it, including the attorney work product protection.

Comment: Clarify that the Rule would apply to the submission of privileged information by insured depository institutions or credit unions with \$10,000,000 or less in assets, as defined in section 1026(a) of the Dodd-Frank Act.

Clarification: Although prudential regulators retain primary supervisory authority over these institutions, the Bureau has authority, at its discretion, to participate in the prudential regulators' examinations of these institutions on a sampling basis.

Comment: Clarify through reaffirmation if the Bureau's policy, as expressed in Bulletin, will request privileged information only in limited circumstances.

Clarification: The Bureau adheres to its policy to request submission of privileged information only when it determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources. Further, the CFPB also continues to adhere to its policy of giving "due consideration to supervised institutions' requests to limit the form and scope of any supervisory request for privileged information."

Comment: Clarify the Bureau's disclosure to other agencies of attorney-client or work product privileged information submitted to the Bureau in the course of its supervisory process.

Clarification: The CFPB refers to the Bulletin, reiterating that it will not routinely share confidential supervisory information with agencies that are not engaged in supervision.



FHA FORUM



VETERANS MORTGAGE FORUM

ARCHIVE

NEWSLETTER

MORTGAGE BANKING WEBSITES

ARCHIVE OF POSTS

- ▼ 2012 (22)
 - ▼ July (2)
 - [CFPB: Treatment of Privileged Information - Final ...](#)
 - [CFPB: Next Up, Reverse Mortgages!](#)
 - ▶ June (2)
 - ▶ May (2)
 - ▶ April (3)
 - ▶ March (5)
 - ▶ February (2)
 - ▶ January (6)
- ▶ 2011 (106)
- ▶ 2010 (86)
- ▶ 2009 (8)

Except where required by law, the Bureau's policy is to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations.

The CFPB's position is that the significance of the law enforcement interest at stake will be an important consideration in any such review. However, even the furtherance of a significant law enforcement interest will not always be sufficient, according to the Bureau, and, therefore, it may still decline to share confidential supervisory information based on other considerations, including the integrity of the supervisory process and the importance of preserving the confidentiality of the information.

Furthermore, the CFPB states that its policy applies to its treatment of all confidential supervisory information, including the instances in which it is asked to share with a law enforcement agency confidential supervisory information that is also subject to the attorney-client or work product privileges. The CFPB claims that the Bulletin provides a "presumption" against sharing confidential supervisory information would be even stronger in such instances.

Summary

This Final Rule amends the CFPB's rules relating to the confidential treatment of information [12 CFR part 1070, subpart D] in order to facilitate the exercise of the Bureau's authorities by ensuring that "the confidentiality of privileged information is not vitiated by any person's disclosure of such information to the Bureau in the course of its supervisory or regulatory processes," or by the CFPB's exchange of privileged information with another Federal or State agency.

NOTE: The CFPB also indicated in this issuance that it is in the process of reviewing comments received on other aspects of the interim final rule that governs the Bureau's disclosure of records and information [76 FR 44242 (July 22, 2011) (codified at 12 CFR part 1070)], which will be promulgated soon in a final rule in response to those comments.

Library



Consumer Financial Protection Bureau

Confidential Treatment of Privileged Information

Final Rule

July 5, 2012

* Jonathan Fox is the President & Managing Director of Lenders Compliance Group



Labels: [CFPB](#), [CFPB Bulletin 12-01](#), [Confidential Information](#), [Confidentiality](#), [Consumer Financial Protection](#), [Dodd-Frank Act](#), [Privileged Information](#)

[Home](#)

[Older Post](#)

Subscribe to: [Post Comments \(Atom\)](#)

[Web Toolbar by Wibiva](#)

LENDERS COMPLIANCE GROUP is the first full-service, mortgage risk management firm in the country, specializing exclusively in residential mortgage compliance and offering a full suite of services in mortgage banking. We are pioneers in outsourcing solutions for residential mortgage compliance. We offer our clients real-world, practical solutions to mortgage compliance issues, with an emphasis focused on operational assessment and improvement, benchmarking methodologies, Best Practices, regulatory compliance, and mortgage risk management.

Information contained in this website is not intended to be and is not a source of legal advice. The views expressed are those of the contributing authors, as well as news services and websites linked hereto, and do not necessarily reflect the views or policies of Lenders Compliance Group (LCG), any governmental agency, business entity, organization, or institution. LCG makes no representation concerning and does not guarantee the source, originality, accuracy, completeness, or reliability of any statement

Tags | Labels | Keywords | Categories

[Affiliated Business Arrangements](#) [Affiliated Service Providers](#) [Alternative Modification](#) [Borrower Eligibility](#) [CFPA](#) [compare ratio task force](#) [compare ratios](#) [Consumer Financial Protection Agency](#) [Core Compliance](#) [Credit Reports](#) [Department of Housing and Urban Development](#) [Department of Labor](#) [Employment Law](#) [Escrows](#) [Fair Labor Standards Act](#) [Fannie Mae](#) [Fannie Mae Loan Quality Initiative](#) [fha defaults](#) [Good Faith Estimate](#) [HAMP](#) [Home Affordable Modification Program](#) [HUD](#) [HUD-1](#) [Settlement Statement](#) [Lending Compliance](#) [Loan Modifications](#) [Loan Officer Compensation](#) [loss mitigation](#) [Loss Mitigation Compliance](#) [Mortgage Compliance](#) [mortgage defaults](#) [Mortgage Disclosures](#) [mortgage fraud](#) [Mortgage News](#) [Mortgage Originator Compensation](#) [Permanent Modifications](#) [Prepayment Penalties](#) [real estate fraud](#) [Regulation X](#) [Regulation Z](#) [RESPA](#) [Risk Ratings](#) [Service Release](#) [Premiums](#) [Servicing](#) [Settlement Cost Booklet](#) [Settlement Service Providers](#) [Trial Modifications](#) [Truth in Lending Act](#) [Yield Spread Premiums](#)