

ADVISORY | Financial Institutions

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CFPB ADOPTS FINAL PRIVILEGE PRESERVATION RULE

The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) has adopted a final rule regarding the protection of attorney-client privileged and work product materials provided to the Bureau.¹ This Final Rule:

- Adds a new section 12 C.F.R. § 1070.48, which specifies that a supervised entity does not waive any applicable privilege with respect to third parties by providing privileged information to the Bureau. New section 1070.48 is substantively identical to 12 U.S.C. § 1828(x), the statutory privilege preservation provision that protects the submission of privileged information to the prudential regulators.
- Amends 12 C.F.R. § 1070.47(c) to clarify that the sharing of any privileged information by the Bureau with any Federal or State agency will not waive any applicable privileges. This provision covers privileged information submitted to the Bureau by supervised entities as well as privileged information created by the Bureau. Although similar to the prudential regulators’ information-sharing provision, 12 U.S.C. § 1821(t), section 1070.47(c) is broader in that it prevents waiver when the CFPB shares privileged information with both Federal *and* State agencies. By contrast, section 1821(t) only protects against waiver when prudential regulators share information with Federal agencies.

These provisions will become effective 30 days after the date of publication in the Federal Register.

In the commentary to the rule, the CFPB has indicated a willingness to work with supervised entities to its limit requests for privileged information. The CFPB reaffirmed that it:

- Recognizes “the important interests served by the common law privileges, in particular the attorney-client privilege.”²
- Will “adhere 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.”³
- Will “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.”⁴

The CFPB also has sought to assure supervised entities that it will limit sharing such entities’ privileged information with law enforcement or other nonsupervisory agencies. In particular, the CFPB made clear that:

¹ See CFPB Final Rule, Confidential Treatment of Privileged Information (June 28, 2012) (“Final Rule”).

² *Id.* at 14.

³ *Id.*

⁴ *Id.* (citing CFPB Bulletin 12-01, at 3).

- It will follow a policy of sharing “confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances.”⁵
- The “presumption against sharing confidential supervisory information would be even stronger” in the instance that the Bureau is asked to share privileged information with law enforcement agencies.⁶
- All privileged information shared with another agency remains the property of the CFPB, and receiving agencies may not further disclose such information without the Bureau’s consent.⁷

In issuing the Final Rule, the CFPB shifted the reasoning for its authority to promulgate the rule. Most notably, the CFPB emphasized that the “validity and effectiveness of the rule” do not depend “on [its] authority to compel privileged information.”⁸ Although the Bureau continued to assert that it has authority to compel production of privileged information, it downplayed reliance on its prior assertion that supervised entities do not waive any applicable privileges by submitting privileged information to the Bureau because such submissions are not voluntary.⁹ This distinction has practical implications as well. Under this new interpretation, the Bureau has made clear that it intends for the Final Rule to protect against waiver related to the voluntary as well as involuntary submissions of privileged information to the Bureau.¹⁰

Rather than relying on the voluntary/involuntary distinction, the Bureau asserted that its authority to issue the Final Rule derives from the general grant of rulemaking authority under section 1022(b)(1) of the Dodd-Frank Act as well as the specific grant of authority to write rules regarding the confidential treatment of information under section 1022(c)(6)(A) of the Dodd-Frank Act.¹¹ With respect to large depository institutions and their affiliates, the CFPB also claimed that it had authority to promulgate the rule by virtue of the transfer of supervisory powers from the prudential regulators to the Bureau under section 1061(b) of the Dodd-Frank Act. The CFPB continued to assert that this transfer of supervisory powers includes the statutory privilege preservation provision governing submissions to prudential regulators in 12 U.S.C. § 1828(x).¹²

In a further effort to bolster its claim of authority to promulgate the new privilege preservation rule, the CFPB sought to rebut arguments that Congress’ silence or failure to amend 12 U.S.C. § 1828(x) to include the CFPB suggested that Congress did not intend to include the CFPB within section 1828(x)’s protections. Thus, the CFPB contended that nothing in the Federal Deposit Insurance Act or the Dodd-Frank Act suggests that Congress intended large depository institutions subject to CFPB supervision to be entitled to less protection for privileged information than smaller depository institutions that continue to be subject to supervision by the prudential regulators with respect to Federal consumer financial laws.¹³

Even with this Final Rule, a legislative amendment to 12 U.S.C. §§ 1828(x) and 1821(t) would offer the greatest assurance that any privileged information submitted to the Bureau does not result in waiver of any applicable privileges. In this regard, the CFPB reaffirmed that it “continues to support

⁵ *Id.* at 15 (citing Bulletin 12-01, at 5). At the same time, however, the Bureau declined to define the term “State agency” in section 1070.47(c) so as to exclude State attorneys general.

⁶ *Id.* at 16.

⁷ *Id.* at 18 (citing 12 C.F.R. § 1070.47(a)).

⁸ *Id.* at 8.

⁹ See, e.g., CFPB Bulletin 12-01, at 2 (Jan. 4, 2012).

¹⁰ Final Rule at 8 n. 23.

¹¹ *Id.* at 9-10 n. 28 & 29.

¹² *Id.* at 10.

¹³ *Id.* at 11-12.

appropriate legislation.”¹⁴ That said, however, the CFPB made clear that “the possibility of future congressional action does not counsel against the Bureau’s exercise of its existing authority to protect the confidentiality of information it obtains in the course of its supervisory or regulatory process.”¹⁵

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¹⁴ *Id.* at 7.

¹⁵ *Id.*