



May 21, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20006

Re: Docket No. CFPB-2012-0010; RIN3170-AA20
Bureau of Consumer Financial Protection Proposed Rule on Confidential Treatment of
Privileged Information

Dear Ms. Jackson:

These comments are submitted on behalf of the Commercial Law League of America (“CLLA”) in response to the proposed rule by the Consumer Financial Protection Bureau (the “Bureau”) published on March 15, 2012, regarding the Confidential Treatment of Privileged Information (the “Proposed Rule”). 77 Red. Reg. 15286. The Proposed Rule, in the Bureau’s estimation, would allow the Bureau to *compel* supervised entities and banks to submit privileged information to the Bureau in connection with the Bureau’s supervisory and regulatory processes. As outlined below, the CLLA has serious concerns regarding the legality of the Proposed Rule because it directly contradicts attorney-client privilege and the work product doctrine, which together form the foundation for our legal system.

The Proposed Rule’s Contradiction with the Attorney-Client Privilege and Work Product Doctrine

Two bedrocks of our legal system are the ability for attorneys to speak honestly and openly with their clients and vigorously fight for their clients’ rights.¹ The attorney-client privilege encourages clients to seek guidance on an array of issues to which serious legal consequences may attach if addressed without such guidance. In addition, the work product doctrine is the lynch pin of our adversarial system and allows attorneys to vigorously prepare for representation without fear that their strategy will be revealed to opposing counsel.

With this in mind, the Proposed Rule contains two proposals: (1) Proposed Section 1070.48 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 a waiver of such privilege as to third parties;² (2)

¹ 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).

² Proposed Section 1070.48 provides in pertinent party 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
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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 government agency, the privilege would not be waived as to a third party.³ Although the Bureau should be applauded for acknowledging these concerns, its efforts do not adequately safeguard; and, in fact, threaten the very basis of the legal system. The Proposed Rule directly contradicts the principles underlying both the attorney-client privilege and the attorney work product doctrine. Specifically, the Proposed Rule should not be adopted because: 1) it would chill attorney-client communications; 2) the Bureau lacks authority to compel the sharing of this type of information; and, 3) the Rule promotes the sharing of confidential information.

A. The Proposed Rule Chills Attorney/Client Communication

The Proposed Rule will have a marked chilling effect on attorney-client communications and may result in clients foregoing legal representation when such representation is greatly needed. *See Gordon v. Boyles*, 9 P.3d 1006 (Colo. 2000) (protecting confidential communications between an attorney and a client not only facilitates the full development of facts essential to proper representation of a client but also encourages the general public to seek early legal assistance). It is widely known that lawyers for banks and other supervised entities play an essential role in helping their clients comply with the law. To fulfill this important role, lawyers must enjoy the trust and confidence of the entities' officers and directors and be provided with all information in an open and uninhibited manner. Only in this type of environment can an attorney provide appropriate legal advice to their clients.

By opening these communications to external review by multiple audiences, the Proposed Rule violates the firmly-entrenched principle that this "recognized privilege[] . . . [is] traditionally deemed worthy of maximum legal protection." *In re Public Defendant Serv.*, 831 A.2d 890, 900 (D.C. 2003); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Indeed, "[i]f the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Thus, this new Rule may have the consequence of undermining "one of a private lawyer's most important public functions in American society – fostering voluntary compliance with law." The Honorable Dick Thornburgh, *Waiver of the Attorney-Client Privilege: A Balance Approach*, Washington Legal Foundation (2006).

By enacting the Proposed Rule and pressuring supervised entities to submit privileged and strategic communications to the Bureau, the attorney-client privilege is rendered ineffective. Lawyers and clients alike would lose confidence that their communications would remain confidential. This will, in turn, affect the willingness of clients to be candid with their lawyers. If clients cannot exercise candor with their lawyers, a client's fundamental right to counsel is placed in jeopardy. Therefore, at the very least, the Proposed Rule places a strain on an entity's constitutional right to be represented.

B. The Bureau Lacks Authority to Compel Entities to Submit Information

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 . . .

See Proposed Rule, 77 Fed. Reg. at 15287.

³ Section 1070.47(c) provides in pertinent part: "The CFPB shall not be deemed to have waived any privilege application to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency . . ." *See id.* at 15289.

The Bureau does not have the authority or power to require or compel entities to submit privileged materials as part of the Bureau's supervisory or regulatory processes. First, the Dodd-Frank Act does not grant the Bureau the authority to compel the production of privileged material and work product. Although the Title X of the Act explicitly grants the CFPB the authority to monitor supervised entities, collect information regarding those entities, prescribe rules regarding the confidential treatment of such information, and prescribe certain rules appropriate to enforce Federal consumer protection laws, neither the Dodd-Frank Act, nor any other federal statute, confers upon the Bureau the authority to *compel or require* entities to submit privileged or work product information.⁴

In fact, the Bureau recognizes that it lacks the statutory and appellate authority to compel the submission of privileged material. The Bureau cites to three Federal district court opinions in the Proposed Rule in support of its claim that a bank does not waive its privileges as to third parties by producing information to bank examiners because the submissions were required, and hence, not voluntary.⁵ In each of these cited cases, the court protected the privilege against third-party waiver by concluding that the materials were not produced "voluntarily." It should also be noted that none of these cases involved a supervised entity challenging the banking agency's alleged authority to *compel* the production of privileged information.

Therefore, it should be concluded that Congress' enactment of 12 U.S.C 1828(x) clarified that any privileged or work product materials that banks share with other agencies remains privileged as to all other parties. Furthermore, the fact that Congress believed it needed a statute to establish this protection refutes the Bureau's claim that such protection is inherent in the federal regulation.

C. The Proposed Rule Promotes the Sharing of Privileged Information

The attorney work product doctrine protects tangible and intangible material that is collected or prepared in anticipation of litigation, such as written materials, charts, notes of conversations, private investigations, and insights. The Supreme Court has stated that this material shall not be shared absent the most compelling of circumstances. It was stated:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). The Bureau's Proposed Rule fails to recognize the high burden required for production of this type of material. Furthermore, it subverts the adversarial nature of our justice system by providing an opposing party potentially unlimited access to the attorney's preparatory and advisory process during the pendency of a regulatory or supervisory action.

Additionally, the Proposed Rule is troubling because the Bureau contemplates sharing attorney work product with state-level authorities, such as attorney generals. *See* 77 Fed. Reg. 15286, 15289 ((March

⁴ *See e.g.*, Dodd-Frank Act 1022(c); *see* Dodd-Frank Act 1022(b)(1).

⁵ *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).

15, 2012) (“[t]he coordinated intergovernmental action envisioned by Title X of the Dodd-Frank Act would be significantly hampered if the Bureau were not able to exchange privileged information with these agencies freely.”). If attorneys’ legal theories and trial strategies were shared directly with such prosecutorial bodies, the adversarial system would cease to exist and the work product doctrine would become a “toothless tiger.” Implementation of the proposed rule would convert these entities’ attorneys into unwilling government investigators.

Conclusion

In conclusion, the CLLA recommends that the Bureau decline to adopt the Rule and withdraw the Rule from further consideration. Thank you for considering the views of the CLLA on these important issues.

Respectfully submitted,

The Commercial Law League of America