

Commercial Financial Services Brief: Protection for Privileged Information Disclosed to CFPB Clarified

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The Federal Deposit Insurance Act (FDIA) protects financial institutions that disclose privileged information to their regulators. This protection prevents financial institutions from being forced to choose between making mandatory disclosures of privileged information to their regulators and maintaining the protection of the attorney-client privilege for that information. Specifically, the FDIA in § 1821(t)(2)(A) and § 1828(x) provides that:

- *Federal banking agencies, the National Credit Union Administration, and other designated federal agencies will not be deemed to have waived any privilege, such as a work product, attorney-client, or other privilege recognized under federal or state law, that is applicable to any provided information, by transferring that information to or permitting that information to be used by any other designated agency or any other agency of the federal government as defined in 18 USC § 6;*
- *The submission by any person of any information to any federal banking agency (defined as the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation) for any purpose in the course of any supervisory or regulatory process of the agency will not be construed as waiving, destroying, or otherwise affecting any privilege the person may claim with respect to the information.*

Logically, the Consumer Financial Protection Bureau (CFPB) should have been added to this list of agencies when the Dodd-Frank Act, which created the CFPB, was enacted, but it was not. To address concerns about this, on January 4, 2012, the CFPB issued Bulletin 12-01 to institutions that it supervises that they need not fear waiver of privilege on privileged material that must be disclosed to the CFPB. This assurance, which seemed to be an unauthorized amendment of the statute, failed to reassure financial institutions and their legal counsel.

The CFPB then adopted a final rule for the protection of attorney-client privileged material and work product privileged material at 12 C.F.R. §§ 1070.47(c) and 1070.48. The rule is substantively identical to § 1828(x), but somewhat broader in scope. Notwithstanding the final rule, financial institutions and their legal counsel remained concerned about the potential for the loss of privilege protection for information disclosed to the CFPB. Accordingly, Congress was asked to provide certainty, and H.R. 4014, which passed Congress and was signed by the president on December 20, 2012, added the CFPB to the list of federal banking agencies included in the privilege protection provisions of the FDIA. Presumably the final rule, now supported by the



amended FDIA and by §§ 1022(b)(1) and (c) of the Dodd-Frank Act, which grant the CFPB broad rulemaking and monitoring authority, will be retained and information disclosed to the CFPB will now be afforded the same privilege protection as applies to other banking regulators.

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