

CFPB Privilege Waiver Proposal Raises Questions and Concerns

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On March 12, 2012, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) issued a proposed rule that would codify (by regulation) the doctrine of “selective waiver” as applied to information provided by supervised entities to the CFPB (the “Proposal”). Under the selective waiver doctrine, the disclosure of otherwise privileged materials to a party outside the attorney-client relationship (in this case the government) would not act as a waiver of applicable privileges to other third parties. Under the Proposal, the provision of documents to the CFPB that are otherwise subject to the attorney-client privilege or work product doctrine, would retain their privileged nature. In other words, the Proposal would provide that the act of producing such materials to the CFPB would not prevent the disclosing party from asserting the privilege as to other potential adversaries, including other governmental agencies. As discussed below, the Proposal raises several important concerns.

Existing Law

The vast majority of courts have rejected selective waiver. See *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993); *In re Qwest Communications Intern. Inc. Sec. Litig.*, No. 06-1070, 2006 WL 1668246 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (6th Cir. 2002); *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981). Other courts, however, have taken a practical, fact-based approach and have permitted companies to disclose a privileged document; for example, the results of an internal investigation, to the government without causing a waiver of privilege. See, e.g., *Police & Fire Ret. Sys. of the City of Detroit v. SafeNet, Inc.*, No. 06 Civ. 5797, 2010 WL 935317 (S.D.N.Y. Mar. 12, 2010).

Concerns

If the CFPB's Proposal sounds familiar, it should. The Proposal's provisions on selective waiver of privileged information provided to the CFPB are substantively identical to those raised in the CFPB's January 4, 2012, [Bulletin 12-01](#). The lack of legal certainty created by the prior CFPB bulletin is arguably not diminished by the Proposal. Moreover, the CFPB's legal reasoning in the Proposal is subject to challenge in several respects, most likely in its assessment of the powers it has inherited from the prudential regulators, and its view of the purpose of the codification of selective waiver contained in the Financial Services Regulatory Relief Act of 2006 ("FSRRA").

As the primary basis for its purported authority to promulgate the Proposal, the CFPB claims that the ability to demand otherwise privileged materials from a supervised entity is part of the general examination "powers and duties" transferred from the prudential regulators. The Proposal states: "This broad grant of authority provides the Bureau with supervisory authority equivalent to that of the prudential regulators, which includes the authority to request and receive information without effecting a waiver of any privilege a supervised entity may claim with respect to that information in response to a request or demand by a third party."

However, the CFPB fails to recognize an argument that the ability to demand production of privileged materials without destroying the privilege may never have been a "power" of the prudential regulators that could have been transferred. For example, the National Bank Act provides the Office of the Comptroller of the Currency ("OCC") with the "power to make a thorough examination of all the affairs of the bank and in doing so [the Comptroller of the Currency] shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank[.]" 12 U.S.C. § 481. While this section has been revised over the years since its original enactment in 1864, it has not been amended since 1991 – 15 years before the FSRRA. This begs the question: If the OCC already had the ability to demand production of privileged materials as part of its general authority to examine the books and records of national banks without destroying the privilege, then why was there a need to codify that power in FSRRA? It may be argued that the ability to review an institution's privileged materials without destroying the privilege never existed prior to the FSRRA, and therefore it could not have been among the "powers" that transferred to the CFPB.

The second concern in the CFPB's reasoning is its view of the codification of the selective waiver through the FSRRA as somehow creating a new "power" of the named agencies. The FSRRA provides in pertinent part: "The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as 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 such agency, supervisor, or authority." 12 U.S.C. § 1828(x)(1).

The CFPB appears to take the position that under FSRRA, an agency may demand, and the supervised entity may not refuse to provide, privileged materials. For example, the Proposal notes: "Supervised entities often employ inside or outside counsel to conduct analyses regarding whether the entity is in compliance with Federal consumer financial law. The Bureau *may require* access to these analyses, which may be subject to the attorney-client privilege, to assess effectively the adequacy of supervised entities' compliance with Federal consumer financial law as well as these entities' systems and procedures for compliance with Federal consumer financial law." (emphasis added)

The CFPB's view does not appear to be supported by the plain language of the FSRRA. Rather than create a new power of the agencies, this provision only creates a layer of additional protection for the disclosing party. In other words, it does not vitiate the ability of a supervised entity to assert applicable privileges.

Beyond the foundational concerns underlying the CFPB's approach, the Bureau's commitment to solving the selective waiver dilemma administratively seems inconsistent with explicit guidance provided by relevant members of Congress. Specifically, in a January 30, 2012, [letter](#) from Rep. Spencer Bachus (R-Ala.), Chairman of the House Financial Services Committee, Chairman Bachus advised: "It is our view that the CFPB should not request privileged material from depository institutions, credit unions and their affiliates until our Committee can discuss this at a hearing and Congress can enact a *legislative fix*." (emphasis added). Chairman Bachus' view that the solution to facilitating open communication between the Bureau and its supervised entities must derive from a "legislative fix," strongly suggests that the remedy must come from Congress, not the Bureau. Indeed, a bi-partisan bill is now moving in Congress, and our Washington, D.C. colleague [Mark Oesterle](#), former Chief Republican Counsel to the U.S. Senate



Committee on Banking, Housing, and Urban Affairs, can connect institutions with key members of Congress to advance this legislation.

We can assist institutions and other stakeholders with the preparation and submission of comment letters to the CFPB. In the event that the Proposal is promulgated in final form prior to Congress amending 12 U.S.C. § 1828(x), it is crucial that affected institutions provide substantive input.

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