MORTGAGE BANKERS ASSOCIATION

April 19, 2022

Mr. Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: CFPB supervisory requests for privileged information from nonbanks

Dear Director Chopra:

An agency has no power to act unless and until Congress confers power upon it.[1] I write to express MBA's[2] deep concern and to seek information regarding the Consumer Financial Protection Bureau's ("CFPB's") efforts to obtain privileged attorney-client communications and attorney work product from nondepository covered persons during supervisory examinations.

The U.S. Supreme Court has recognized that the attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."[3] Its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[4] The privilege recognizes that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[5] The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[6]

[1] *Louisiana Public Service Com'm v. F.C.C.*, 476 U.S. 355, 374 (1986).

[2] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 390,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,100 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[3] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290).

[4] *Id*. See also *Fisher v. United States*, 425 U.S. 391, 403 (1975).

[5] *Id*. See also *Trammel v. United States*, 445 U.S. 40, 51 (1980).

[6] *Id*. (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

For well over a century, the U.S. Supreme Court has held that a statute abrogates common law privileges only if "the language declaring the legislative will [is] so clear as to prevent doubt as to its intent and limit."[7] Applying this bedrock principle, federal appeals courts have consistently held that "[s]tatutes requiring disclosure, but silent on the question of privilege, do not override customary privileges."[8]

In enacting the Dodd-Frank Act,[9] Congress created the CFPB and granted it general authority to "require reports and conduct examinations" of certain nondepository covered persons.[10] However, nothing in the Dodd-Frank Act (or in any other statute) grants the CFPB specific authority to require nondepository covered persons to provide privileged or work product-protected information during supervisory examinations.[11] Congress's silence in this regard,

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[7] *Bassett v. United States*, 137 U.S. 496, 505-06 (1890). See also *United States v. Louisville & Nashville Railroad Co*., 236 U.S. 318, 336 (1915) ("The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance."); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982) (explaining that the Court in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), "found it incredible 'that Congress . . . would impinge on a tradition so well grounded in history and reason' without some indication of intent more explicit than the general language of the statute."); *Upjohn*, supra note 2 at 398 (holding that the statutory provision at issue and legislative history did not "suggest[ ] an intent on the part of Congress to preclude application of [a traditional limitation like] the work-product doctrine."); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Where a common-law principle is well established … the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress does not write upon a clean slate. In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.").

[8] *United States v. Danovaro*, 877 F.2d 583, 588 (7th Cir. 1999) (citing *Upjohn*, supra note 2, at 397-98)); *United States v. Forrester*, 616 F.3d 929, 942 (9th Cir. 2010). See also *Civil Aeronautics Bd. v. Air Transp. Ass'n*, 201 F. Supp. 318, 318 (D.D.C. 1961) ("The attorney-client privilege is deeply imbedded and is part of the warp and woof of the common law. In order to abrogate it in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity."); *Avgoustis v. Shinseki*, 639 F.3d 1340, 1343 (Fed. Cir. 2011) (finding that "there is no statutory language abrogating the privilege" and "the legislative history does not suggest that the privilege was being abrogated.").

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203, 124 Stat. 1376 (July 21, 2010).

[10] 12 U.S.C. 5514(b)(1). Section 1061 of the Dodd-Frank Act (codified at 12 U.S.C. 5581) also transferred to the CFPB from designated transferor agencies (i.e., the Fed, FDIC, FTC, NCUA, OCC, OTS, and HUD) certain consumer financial protection functions. The CFPB has argued that all "powers and duties" of the transferor agencies "relating" to this transferred authority were also granted to the CFPB. See, e.g., 77 F.R. 15286. Without considering or conceding the merits of this argument, to the extent that the CFPB construes this statutory section to be a distinct or supplementary source of supervisory examination authority, reliance on such authority in this instance is unavailing because it applies – if at all – only to depository institutions with greater than $10 billion in total assets, and none of the transferor agencies possessed supervisory examination authority over nondepository covered persons as of the day before July 21, 2011.

[11] For example, the Dodd-Frank Act contains no statutory language abrogating attorney-client privilege, including with respect to CFPB supervision and examination authorities, and the relevant committee reports do not state or suggest that the Act was intended to supersede the attorney-client privilege. See S. Rept. No. 111-176 and H. Rept.

coupled with clear and binding precedent from the Supreme Court, calls into question the CFPB's legal authority to seek or obtain such privileged information.[12]

To date, the CFPB has not addressed this legal question directly. In 2012, the CFPB issued a bulletin asserting that "supervised institutions are required to provide all documents or other information" responsive to a supervisory information request.[13] However, the CFPB addressed the bulletin to depository institutions and their affiliates, not nondepository covered persons, and did not cite any statutory provision in support of its implied authority to compel production of privileged communications or materials.[14]

Also in 2012, in a background discussion of a proposed confidentiality rule, the CFPB stated that "in exercising its supervisory authority, the Bureau will at times request from its supervisory entities information that may be subject to one or more statutory or common law privileges,

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No. 111-517. In fact, Title X of the Dodd-Frank Act specifically presumes the continued availability of common law privileges, for instance in making objections during examination pursuant to a civil investigative demand (12 U.S.C. 5562(c)(13)(D)(iv)) or in setting forth grounds in a petition for an order modifying or setting aside a civil investigative demand (12 U.S.C. 5562(f)(3)).

Subsequent to the enactment of the Dodd-Frank Act, the 112th Congress enacted P.L. 112-215, 126 Stat. 1589 (Dec. 20, 2012), now codified at 12 U.S.C. 1821(t)(2)(A)(vi) and 1828(x), and the 113th Congress enacted P.L. 113-173, 128 Stat. 1899 (Sept. 26, 2014), now codified at 12 U.S.C. 5514(b)(3), respectively. Both laws address the sharing by and between federal and state agencies of a financial institution's privileged information and simply confirm a covered person's ability to voluntarily provide privileged information to one of the agencies without effecting a general waiver of the privilege as to third parties. See, e.g., H. Rept. 112-417 to accompany H.R. 4014 ("The objective of H.R. 4014 is to clarify that institutions regulated by the Consumer Financial Protection Bureau (CFPB) have not risked and will not waive applicable legal privileges *as to third parties* when they have shared or will provide information to the CFPB. Another objective of the bill is to make clear that the CFPB can share such information with other Federal agencies without impacting a regulated institution's attorney-client privilege or work-product immunity *as it applies to third parties*."). However, neither of these laws grant the CFPB the authority to compel the waiver of privilege or the production of privileged materials in a supervisory examination. Moreover, protection from general waiver as to third parties does not obviate the need for the privilege itself; sharing privileged communications with any party outside the attorney-client relationship – even if that party is a government agency – undermines the candor that the privilege is intended to promote.

[12] We note that the question of the CFPB's authority has also been raised in the context of federal bank supervision. See, e.g., *Memorandum Regarding Bank Regulators' Legal Authority to Compel the Production of Material That Is Protected by Attorney-Client Privilege* (May 16, 2018), available at https://www.stblaw.com/docs/default-source/Publications/2018_05_16_white-paper_bank-regulators-legal-authority-attorney-client-privilege.pdf (last visited April 7, 2022); Letter from ABA President William T. Robinson III to CFPB Executive Secretary Monica Jackson (Apr. 12, 2012), available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/comments-cfpb-priv-waiver-2012.pdf?logActivity=true (last visited April 7, 2022).

[13] CFPB Bull. No. 2012-01, *The Bureau's Supervision Authority and Treatment of Confidential Supervisory Information* (Jan. 4, 2012), available at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf (last visited April 7, 2022).

[14] Id. Moreover, as the CFPB has made clear by rule, supervisory guidance such as the bulletin does not have the force and effect of law. See 12 C.F.R 1074.2 and 1074.3; 86 FR 9268 (Feb. 12, 2021), available at https://www.govinfo.gov/content/pkg/FR-2021-02-12/pdf/2021-01524.pdf (last visited April 7, 2022).

including, for example, the attorney-client privilege and attorney work product protection."[15] However, here too the CFPB did not cite any statutory provision to support its claimed authority, and referred only to the historical experience of federal and state bank regulators and its own experience to support its judgment that effective supervision "may" often require review of supervised entities' privileged information.[16] In finalizing the rule, the CFPB stated that it "continues to adhere to the position that it can compel privileged information pursuant to its supervisory authority," noting that prudential regulators (i.e., the OCC and Fed) have previously taken a similar view (albeit in the context of bank supervision under statutes other than the Dodd-Frank Act), but again failing to cite any statutory provision to support its claim.[17]

Clarity is needed regarding this aspect of the CFPB's supervisory authority over nondepository covered persons. The CFPB has acknowledged that "compliance with Federal consumer financial law is served by policies that do not discourage those subject to its supervisory or regulatory authority from seeking the advice of counsel."[18] And yet in practice, financial institutions are pressured by CFPB examiners and supervisory managers to provide privileged information, which may make them less likely to engage counsel or obtain written advice, to the detriment of compliance.

In light of the foregoing and in the interest of the just administration of the law, we respectfully request that the CFPB publicly cite the statute in which Congress abrogated common law privileges with respect to CFPB supervision and examination activities and articulate the legal authority upon which it relies to request, demand, or obtain privileged attorney-client communications and attorney work product from nondepository covered persons during supervisory examinations.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association

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[15] See *Notice of Proposed Rulemaking, Confidential Treatment of Privileged Information*, 77 FR 15286 (Mar. 15, 2012), available at https://www.govinfo.gov/content/pkg/FR-2012-03-15/pdf/2012-6254.pdf (last visited April 7, 2022).

[16] Id at 15287. See also id. at 15290 ("Notably, the rule does not impose obligations on covered persons to provide information; rather, any requirement to provide information stems from the Bureau's authority under existing law.")

[17] See *Final Rule, Confidential Treatment of Privileged Information*, 77 FR 39617, 39619 (July 5, 2012), available at https://www.govinfo.gov/content/pkg/FR-2012-07-05/pdf/2012-16247.pdf (last visited April 7, 2022). Notably, the final rule did not codify the CFPB's claim of authority, nor does any portion of the final rule rely upon that claim of authority.

[18] Id. at 39620.