

**Wm. T. (Bill) Robinson III**  
President

**AMERICAN BAR ASSOCIATION**

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February 21, 2012

The Honorable Tim Johnson  
Chairman  
Committee on Banking, Housing  
and Urban Affairs  
United States Senate  
Washington, DC 20510

The Honorable Richard Shelby  
Ranking Member  
Committee on Banking, Housing  
and Urban Affairs  
United States Senate  
Washington, DC 20510

Re: Consistency Regarding Privileged Materials Submitted to Banking Regulators

Dear Chairman Johnson and Ranking Member Shelby:

On behalf of the American Bar Association (“ABA”), which has almost 400,000 members, I write to express our support for S. 2099 or other similar legislation that would create a single, consistent standard for the treatment of privileged information submitted to all Federal agencies that supervise banks, including the newly created Consumer Financial Protection Bureau (“CFPB” or “Bureau”).

The attorney-client privilege is a bedrock legal principle that enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance to conform their conduct to the law. The privilege also facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of society at large. The ABA strongly supports the preservation of the attorney-client privilege and opposes government policies, practices and procedures that have the effect of eroding the privilege.<sup>1</sup>

In addition to our strong commitment to protecting the attorney-client privilege, the ABA—working through its Task Force on Financial Markets Regulatory Reform—has developed a number of key principles for financial regulatory reform that were adopted by the ABA House of Delegates in 2009.<sup>2</sup> As described in more detail below, S. 2099 advances three of those important principles:

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<sup>1</sup> See ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, available at [http://www.americanbar.org/content/dam/aba/directories/policy/2005\\_am\\_111.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf).

<sup>2</sup> The financial reform principles contained in ABA Resolution 301 and adopted in August 2009 are available online at: [http://www.americanbar.org/content/dam/aba/directories/policy/2009\\_am\\_301.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2009_am_301.authcheckdam.pdf)

- The regulation and supervision of financial intermediaries, products, and services should be integrated and comprehensive to the extent appropriate to protect investors and consumers of financial products . . . .
- Functionally similar products and services should be subject to the same or essentially equivalent regulation . . . .
- Federal, state and territorial examination, regulation, supervision and enforcement with regard to the financial services industry should operate in a complementary and coordinated manner.<sup>3</sup>

As you know, it is settled law that privileged materials shared with Federal banking agencies remain privileged as to all other parties. Under 12 U.S.C. § 1828(x):

The submission by any person of any information to any Federal banking agency . . . 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 . . . .

The advent of the Bureau requires that this statute be updated. “Federal banking agency” is a defined term in the Federal Deposit Insurance Act, and that definition does not explicitly include the new Bureau. Although the CFPB has recently issued guidance asserting that 12 U.S.C. § 1828(x) applies to its receipt of privileged materials, Bureau Director Richard Cordray has acknowledged that there is “real concern” over the issue, and expressed support for legislation that would resolve any doubt. *See* Testimony of Richard Cordray before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the House Committee on Oversight and Government Reform, January 24, 2012; Testimony of Richard Cordray before the U.S. Senate Committee on Banking, Housing and Urban Affairs, January 31, 2012.

By explicitly applying the same privilege standards to information submitted to the CFPB that currently apply to any submissions to a “Federal banking agency,” S. 2099 would help ensure a more integrated, consistent and coordinated approach to the regulation of financial services providers. In particular, this legislation would align current law with past practices by promoting uniform treatment of privileged materials by the Federal banking regulators and the CFPB.<sup>4</sup>

Prior to the creation of the Bureau, the Federal banking agencies examined depository institutions for compliance with consumer protection laws, and such examinations could include the review of privileged materials without causing a waiver of the privilege. *See* 12 U.S.C. § 1828. Unfortunately, when the Bureau examines the same institutions today for compliance with the

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<sup>3</sup> *See* ABA Resolution 301, Principles 1, 2, and 7, respectively.

<sup>4</sup> While the ABA has not taken a position on the underlying merits of the “examination privilege” under 12 U.S.C. § 1828(x) or the broader concept of “selective waiver” that allows an entity to submit privileged materials to agencies without waiving the privilege as to third parties, Section 1828(x) is a well-established provision of Federal banking law. Therefore, to the extent that the protections of this Section apply to the Federal banking agencies, the ABA strongly believes that they should also apply to the Bureau.

same consumer protection laws, *see* 12 U.S.C. §§ 5515-5516, there is uncertainty over whether the examination may include the review of privileged materials without causing a waiver of the privilege. S. 2099 would place CFPB examinations on the same footing as prior consumer protection examinations conducted by Federal bank regulators with regard to privilege.

Explicitly extending protection for privileged materials submitted to the CFPB would also ensure consistency of regulation across financial institutions. Under the Consumer Financial Protection Act, the prudential regulators continue to examine smaller depository institutions and credit unions for compliance with consumer protection laws, while the Bureau examines larger insured depository institutions and certain other financial services providers for compliance with the same statutes. *See* 12 U.S.C. §§ 5514-5516. Absent legislation, smaller financial institutions may share privileged materials with their consumer protection examiner without a risk of waiver, *see* 12 U.S.C. § 1828(x), while larger institutions face uncertainty when they share privileged materials with the Bureau. S. 2099 would eliminate this inconsistency.

S. 2099 also takes the important step of adding the Bureau to the list of agencies that may share privileged information with other agencies specified in the statute without causing a waiver. Under 12 U.S.C. § 1821(t):

A covered agency, in any capacity, shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by—

- (A) any other covered agency, in any capacity; or
- (B) any other agency of the Federal Government (as defined in section 6 of title 18, United States Code).

However, unlike the Federal banking agencies, the Bureau is not yet included in the definition of a “covered agency.” *See* 12 U.S.C. § 1821(t)(2). S. 2099 would make the Bureau a “covered agency” and thereby place it on the same footing as the prudential regulators when it shares privileged information with other covered agencies or other agencies of the Federal government referenced in the statute. This change makes particular sense in light of the existing statutory requirement that the Bureau and prudential regulators share draft reports of examination with each other. *See* 12 U.S.C. § 5515(e). Absent legislation, privileged information within a draft CFPB report could lose its privileged status when shared with the prudential regulators, while privileged information in the draft report of a prudential regulator would remain privileged even after being received by the CFPB. S. 2099 would eliminate this inconsistency.

For all these reasons, the ABA supports the prompt enactment of S. 2099 or other similar legislation. The ABA’s support for including the CFPB in the coverage of 12 U.S.C. § 1828(x) and 12 U.S.C. § 1821(t) reflects the critical role that those two statutes play in limiting the potential adverse consequences of the review of privileged materials by Federal banking agencies.

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Thank you for your leadership on this important issue and for considering the views of the ABA. If you have any questions regarding our views, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,

A handwritten signature in black ink, appearing to read "Wm. T. Robinson III", enclosed within a large, stylized circular flourish.

Wm. T. (Bill) Robinson III

cc: Members of the Senate Banking, Housing and Urban Affairs Committee  
The Honorable Richard Cordray, Director, Consumer Financial Protection Bureau  
The Honorable Leonard Kennedy, General Counsel, Consumer Financial Protection Bureau  
Thomas M. Susman, Director, ABA Governmental Affairs Office