ABA strongly supported CFPB provisions
Congress clears legislation to protect privileged information

The Senate gave final approval Dec. 11 to H.R. 4014, legislation strongly supported by the ABA to protect privileged information submitted to the Consumer Financial Protection Bureau (CFPB).

After clearing the Senate and House, the legislation was presented to President Obama, who is expected to sign it.

The bill, H.R. 4014, clarifies that when banks and other supervised entities submit privileged information to the CFPB, which was established by the Dodd-Frank Act of 2010, the privilege will not be waived as to any third parties and the CFPB can share the information with other federal agencies without affecting its privileged status. Because existing law accorded similar protections to the other major federal bank regulators such as the FDIC and the Federal Reserve Board but not explicitly to the newly created CFPB, H.R. 4014 will provide much needed certainty to business lawyers and their clients by creating a single, consistent standard for the treatment of privileged information submitted to all federal banking agencies.

“It is very encouraging to see the Senate and the House come together to protect cardinal values like the attorney-client privilege,” ABA President Lauren G. Bellows said. She had urged Senate leaders this fall to promptly take up the legislation during the lame duck session after the House overwhelmingly passed the bill in March. Bellows said the legislation would safeguard the privilege while also helping to “ensure a more integrated, consistent and coordinated approach to the regulation of financial service providers.”

“This is a clear win for lawyers, their clients and the public,” Bellows said, “The attorney-client privilege is a bedrock legal principle that is essential to providing effective counsel. This legislation removes the barriers that may have discouraged clients – be they banks or average consumers – from seeking legal advice. In fact, this new legislation encourages clients to obtain their lawyers’ guidance to comply with the law.”

By creating a uniform standard for the treatment of privileged information submitted to any of the federal banking agencies, including CFPB, the legislation will advance key financial regulatory reform principles adopted by the ABA in 2009 that were developed by the association's Task Force on Financial Markets Regulatory Reform. The ABA worked closely with the U.S. Chamber of Commerce and 13 state and local bars across the country to advocate for prompt Senate passage of the legislation. Those bars were the Alabama State Bar, the Illinois State Bar Association, The Mississippi Bar, The Missouri Bar, the State Bar of Nevada, the New York State Bar Association, the Association of the Bar of the City of New York, the North Carolina Bar Association, the Ohio State Bar Association, the Oregon State Bar, the Pennsylvania Bar Association, the South Carolina Bar, and the Tennessee Bar Association.
### Independence of the Legal Profession

S. 1483 would subject many lawyers to anti-money laundering and suspicious activity reporting requirements under the Bank Secrecy Act when they help clients establish companies. S. 3394 and H.R. 4014 would amend the Federal Deposit Insurance Act to clarify that when banks or other supervised entities submit privileged information to the Consumer Financial Protection Bureau during examination or other regulatory processes, the privilege would not be waived as to third parties.

**ABA Position:** Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. Supports S. 3394 and H.R. 4014. See front page.

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<thead>
<tr>
<th>House</th>
<th>Senate</th>
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<tr>
<td>H.R. 4014 on 3/26/12.</td>
<td>S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11. S. 3394 was referred to the Banking, Housing and Urban Affairs Committee on 7/17/12. Senate passed H.R. 4014 on 12/11/12.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 6.</td>
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### Judicial Independence


**ABA Position:** Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 6.

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<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on S. 1945 on 12/6/11 and approved the bill on 2/9/12.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 6.</td>
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### Legal Services Corporation

P.L. 112-175 (H.J. Res. 117) a fiscal year 2013 continuing resolution funding the government through 3/27/13, maintains LSC funding at its fiscal year 2012 level of $348 million. H.R. 5326, fiscal year 2013 appropriations legislation, includes $328 million the LSC. The Senate Appropriations Committee included $402 million in its FY 2013 bill.

**ABA Position:** Supports an independent, well-funded LSC. See page 3.

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### Rule of Law


**ABA Position:** Supports. See page 3.

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Senate fails to approve disabilities treaty

The Senate was unable to garner a two-thirds vote this month to pass a resolution of advice and consent to ratification of the Convention on the Rights of Persons with Disabilities (CRPD), a treaty strongly supported by the ABA.

Although eight Republicans joined Democrats voting in favor of the treaty, the 61-38 vote fell five votes short of the 66 required.

The convention, which was adopted by the U.N. General Assembly in 2006 and went into force in 2008, has been ratified by 126 countries. The convention requires parties to the treaty “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

In a Dec. 3 letter to all senators, ABA Governmental Affairs Director Thomas M. Susman explained that the World Health Organization estimates that more than 650 million people – approximately 10 percent of the world’s population – live with disabilities and unfortunately are often excluded from the mainstream of society in education, employment and housing.

“The CRPD sets forth globally accepted legal standards on disability rights and clarifies the application of human rights principles to persons with disabilities,” Susman wrote, emphasizing that the treaty also serves as an authoritative reference point for the development and refinement of relevant disability law and policy and is intended as an instrument covering all disabilities and is applicable across economic sectors.

“Global implementation of the CRPD will benefit not only citizens of countries that have not previously ensured protection of these rights, but also Americans with disabilities and their families traveling to or working within those counties,” he said.

Responding to critics of the convention who claim that it would threaten U.S. sovereignty and open the United States up to lawsuits, Senate Foreign Relations Committee Chairman John F. Kerry (D-Mass.) maintained that the treaty will not create any new rights that do not otherwise exist in U.S. law. The U.S. obligations under the treaty are to prevent discrimination on the basis of disability only with respect to rights already recognized and implemented under U.S. law, he explained.

The ABA concurs that ratification will not require changes in domestic law and “would send a clear signal to the world of our support for the human rights principles of the convention.”

Ratification of the convention would allow the United States to participate fully in the annual Conference of States Parties to the convention. In addition, the United States would be able to seek a seat on the Committee on the Rights of Persons with Disabilities, an independent advisory group that monitors implementation of the convention.

IOLTA impacted by Senate’s block of FDIC extension

A program that fully insures non-interest-bearing transaction accounts, including Interest on Lawyers’ Trust Accounts (IOLTA) funds that are channeled to legal services programs, is set to expire Dec. 31 after a vote to extend the program was blocked over a budgetary point of order.

S. 3637 would have extended the Transaction Account Guarantee (TAG) program for two years. The Senate failed by a 50-42 vote to garner the 60 votes necessary to waive budget rules and vote on the bill after Sen. Patrick J. Toomey (R-Pa.) pointed out that the Congressional Budget Office has stated that industry fees that fund the TAG program would fall short of potential insurance payouts.

The Federal Deposit Insurance Corporation (FDIC) created the TAG program in 2008 during a time of severe instability in the U.S. financial system. Normally, the FDIC insures each individual’s funds held at a given financial institution up to a maximum of $250,000, but TAG fully insures non-interest-bearing transaction accounts for the entire amount. As a result of advocacy by the ABA, state and local bar associations and other legal groups, IOLTA programs have been covered the TAG program since its inception.

Once the TAG program expires, IOLTAs and all other accounts currently enjoying full protection will revert back to the $250,000 per person and per institution limit for FDIC protection.

IOLTA accounts contain client funds held by a lawyers on behalf of a client that are nominal in amount or large sums held for a short period of time and typically include court filing fees, real estate closings, settlements and retainers.

More than 30 years ago, the FDIC and Federal Reserve granted an exception to banking regulations that allowed interest to be paid for charitable purposes to a third party such as the IOLTA program. Today, all 50 states, the District of Columbia and the Virgin Islands have established IOLTA programs; 46 jurisdictions require lawyers to deposit into IOLTA those client funds that cannot earn net interest for the client. The interest from these pooled accounts is paid to IOLTA programs for grants to provide free civil legal services to the poor, administration of justice and law-related education.
Reforms needed to address school to prison pipeline

“There is growing evidence that our public schools overly rely upon suspension, expulsions and referrals to law enforcement in managing student behavior,” ABA President Laurel G. Bellows said in a statement submitted for a Dec. 12 hearing on the “school to prison pipeline,” a cycle perpetuated by school discipline practices that unnecessarily remove students from the classroom.

In her statement to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, Bellows emphasized that these practices have a disproportionate impact on students of color, students with disabilities and other subgroups, and result in increased juvenile justice system involvement for suspended or expelled students.

“Student involvement in the juvenile justice system in turn substantially increases the likelihood that these students will later serve time in our nation’s prisons and face life-long collateral consequences creating barriers to adult success and productivity,” she said.

She noted that ABA policy adopted in 2001 opposes, in principle, “‘zero tolerance’ policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student’s history.”

Additional policy adopted by the ABA in 2009 urges federal agencies to assure accountability and to ensure that no group of students is disparately subject to school discipline or exclusion. Research, she said, has begun to cast doubt on the effectiveness of harsh discipline policies and reveals that the majority of incidents for which students are excluded from school are related to nonviolent disciplinary offenses such as tardiness, absenteeism, disrespect and altercations between students.

Bellows said the ABA recommends the following actions: end harsh discipline policies that do not make schools safer but instead push youth out; provide full procedural protections and counsel to youth in disciplinary hearings; end criminalization of truancy, disability-related behavior and other school-related conduct; ensure a path for return to school; implement strong civil rights monitoring and enforcement of school district practices; and support the implementation of evidence-based disciplinary practices.

The ABA also strongly supports reauthorization and amendment of the Juvenile Justice and Delinquency Prevention Act to include, among other things, provisions to strengthen the current Disproportionate Minority Contact core protection and the Deinstitutionalization of Status Offenders core protection prohibiting the locked detention of status offenders, which include truants, curfew violators, runaways, and youth who disobey their parents.

The Department of Justice, the Department of Education and other agencies are working in partnership to develop solutions to the school to prison pipeline issues through the Supportive School Discipline Initiative (SSDI) established in July 2011. The four key strategies of the SSCI include: building a national consensus for action; identifying research and data collection needs; issuing guidance for school personnel and law enforcement officials; and building awareness, knowledge and skills regarding disciplinary practices with the priority of keeping students in school, learning and safe.
Human Rights Commission addresses trafficking

The 112th Congress failed to reauthorize the Trafficking Victims Protection Act, but the ongoing crisis of human trafficking and forced labor is still a subject of discussion on Capitol Hill.

Last month, Reps. James McGovern (D-Mass.) and Frank Wolf (R-Va.), who co-chair the Tom Lantos Human Rights Commission, called a hearing Nov. 28 to examine trafficking and exploitation as it affects all countries. The commission, created in 2008 after the death of the Congressional Human Rights Caucus Co-Founder Rep. Tom Lantos (D-Calif.), is tasked with promoting, defending, and advocating for international human rights.

The International Labour Organization estimates that more than 21 million people were victims of forced labor this year, dramatically higher than the 12.3 million victims reported in 2005.

Witnesses at the hearing spoke about the emotional and physical toll of forced or bonded labor and described the fear many victims feel while trying to support their families under insurmountable debt. They testified that the anti-trafficking community at large has called for more openness about the issue in business and federal contracting.

Mary C. Ellison, director of policy for the Polaris Project, a non-profit organizations dedicated to creating a world without slavery, said that international human trafficking and forced labor affect every country in the world and the United States is a leading destination country for trafficking of foreign nationals in addition to having internal trafficking within the country. She said that given the staggering dimensions of the problem, she welcomed the growing momentum building to address the issue.

Other witnesses appearing at the hearing included representatives from the Protection Project at Johns Hopkins University, the Harvard Kennedy School of Government, and the AFL-CIO Solidarity Center.

President Obama recently called the practice of human trafficking “barbaric” and “evil” and said “it has no place in the civilized world.” In September, the president signed an executive order to strengthen the protections against trafficking in persons in federal contracting. The executive order requires federal contracting regulations to expressly prohibit contractors and subcontractors from engaging in specific trafficking-related activities and requires contractors whose work abroad exceeds $500,000 to maintain compliance plans that address trafficking. In addition, the executive order establishes a process to identify industries and sectors that have a history of human trafficking and enhances compliance on domestic contracts as well as augmenting training to help agencies detect trafficking violations. The president also called for a comprehensive plan for future action on strengthening services for trafficking victims.

At the ABA, President Laurel G. Bellows has created a Task Force on Human Trafficking. Calling trafficking a “silent crime” that is “a scourge that has to be eradicated,” she has made the issue one of her top priorities.

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Annual Review of the Field

Top security experts convened Nov. 29-30 in Washington, D.C., for the 22nd Annual Review of the Field of National Security Law, an event cosponsored by the ABA Standing Committee on Law and National Security. A panel moderated by William C. Banks, director of the Institute for National Security and Counterterrorism at Syracuse University, focused on the role of the courts in national security law. Those appearing on the panel were from left: Banks (at podium); The Honorable James Robertson (Ret.), judge, U.S. District Court for the District of Columbia Circuit; Robert Chesney, the Charles I. Francis professor of law at the University of Texas (Austin) School of Law; Deborah Pearlstein, assistant professor of law, Cardozo School of Law; and the Honorable Brett M. Kavanaugh, judge, U.S. Court of Appeals for the District of Columbia Circuit. Other cosponsors of the event were the Center for National Security Law at the University of Virginia School of Law; the Center on Law, Ethics and National Security at Duke University School of Law; and the Center on National Security and the Law at Georgetown University Law Center.
Federal judges file class action salary lawsuit

Seven federal judges filed a class action lawsuit Nov. 30 in the U.S. Court of Federal Claims seeking back pay that Article III judges who are serving or served any time from 2006 to the present are owed for cost-of-living adjustments (COLAs) they did not receive in six of the past 17 years.

The lawsuit, Sarah Evans Barker, et al. v. United States, follows the Oct. 5 decision by the en banc U.S. Court of Appeals for the Federal Circuit in Beer v. United States. Both cases arose out of the Ethics Reform Act of 1989, which established a procedure for automatic annual COLAs for judges and other senior government officials based on the employee cost index to take effect whenever a COLA was conferred on federal workers paid according to the General Schedule.

In 1995, 1996, 1997 and 1999, however, Congress passed blocking legislation that denied judges, members of Congress and certain executive branch officials their scheduled COLAs. In 2007 and 2010, COLAs were denied because Congress failed to enact authorizing legislation to allow federal judges to receive salary adjustments as it believed was required under Section 140 of P.L. 97-92. Section 140, originally enacted in 1981 as part of an appropriations bill and made permanent in 2001, bars funds each year from being expended to increase federal judicial salaries “except as may be specifically authorized by Act of Congress hereafter enacted.”

The Beer decision ruled that Congress violated the Constitution’s compensation clause when it blocked COLAs for federal judges in 1995, 1996, 1997 and 1999 and improperly withheld COLAs in 2007 and 2010 based on erroneous interpretation of Section 140. The Beer case was remanded to the U.S. Court of Federal Claims, which was directed to calculate monetary damages owed to the six appellants in that case as “the additional compensation to which appellants were entitled since Jan. 13, 2003 – the maximum period for which they can seek relief under the applicable statute of limitations.”

The federal government has until January to appeal the Beer decision to the Supreme Court.

The plaintiffs in the Barker case are asserting their claim for relief based on the same arguments that were successful in the Beer case but are asking for broader relief.

In addition to seeking immediate monetary relief, the plaintiffs are requesting declaratory relief, asking Congress to rule that: Congress may not in the future withhold the salary adjustments promised to plaintiffs and the class by the 1989 act; the current salaries of plaintiffs and the class must be set to the uniform salary to which the judges would have been entitled before salary adjustments were unlawfully withheld; and future salary adjustments promised to plaintiffs and the class by the 1989 act must be calculated according to that base uniform salary.

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Judicial Vacancies/Confirmations — 112th Congress* (as of 12/20/12)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tbody>
<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>0</td>
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<td>0</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
<td>15</td>
<td>7</td>
<td>14</td>
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<tr>
<td>US District Courts (678 judgeships)</td>
<td>58</td>
<td>27</td>
<td>96</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>2</td>
<td>2</td>
<td>0</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>75</strong></td>
<td><strong>36</strong></td>
<td><strong>110</strong></td>
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*Includes territorial judgeships
JUDICIAL NOMINATIONS: At the urging of the ABA and others concerned about the high vacancy rate in the federal judiciary, the Senate picked up the pace of confirming judicial nominees during the lame duck session of Congress. In an e-mail alert, the ABA asked ABA members in states with nominees pending on the floor to urge the Senate leadership to schedule up-or-down votes on 15 federal district court nominees who had been waiting more than four months for a confirmation vote. All 15 nominees had the support of their home-state senators, regardless of party affiliation, and 13 of them had been reported by the Senate Judiciary Committee with strong bipartisan support. Nine of those nominees would fill seats that the Administrative Office of the U.S. Courts had classified as “judicial emergencies.” A “judicial emergency” is defined as any vacancy where weighted filings are in excess of 600 per judgeship, any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship, and any court with more than one authorized judgeship and only one active judge. The ABA maintained that failure to vote on pending nominees before adjournment would waste taxpayer dollars and government resources because the president and Senate would have to go through the entire process again to fill the same vacancies once the new 113th Congress begins. Because of the persistent efforts of the ABA and other concerned groups, the administration and the Senate majority made the filling of judicial vacancies a higher priority during the 112th Congress. After confirming only 64 Article III judges during the 111th Congress, the Senate had confirmed 110 judges as the 112th Congress moved toward adjournment in late December and the vacancy rate was reduced to approximately 8 percent after hovering well above 10 percent for over 30 months.

USPTO CODE OF PROFESSIONAL RESPONSIBILITY: ABA President Laurel G. Belows submitted comments Dec. 17 to the U.S. Patent and Trademark Office urging the agency to base its new Patent and Trademark Rules of Professional Conduct on the ABA Model Rules of Professional Conduct (Model Rules) as they were updated in August 2012. The USPTO published a notice Oct. 18 proposing changes in its current rules for those representing clients before the agency. The USPTO indicated in the notice that its proposed changes reflected the ABA’s code only as updated through 2011, explaining that ABA’s 2012 revisions “have not been incorporated into these proposed rules since the states have not adopted those changes at this time.” The ABA’s 2012 revisions amended the Model Rules relating to technology and confidentiality, technology and client development, outsourcing, practice pending admission, admission by motion, and detection of conflicts of interest. The amendments reflected three years of work by the ABA Commission on Ethics 20/20 and updated the Model Rules in light of advances in technology and global legal practice developments. The ABA comments maintained that it would be prudent for the USPTO to provide greater guidance to the patent and trademark bar in these areas now rather than wait for state implementation and that the implementation process is well under way for Ethics 20/20 changes in the Model Code. The ABA comments also made several recommendations regarding the USPTO’s proposed new code and offered assistance to complete the process. The USPTO also is proposing revisions in its existing procedural rules governing disciplinary investigations and proceedings.

Mark Your Calendars!

ABA Day in Washington

April 16-18, 2013
ABA urges CBO scoring for secondary payer bill

The ABA urged the House Ways and Means Committee this month to request a scoring by the Congressional Budget Office for H.R. 5284, a bill that addresses confusion and uncertainty in situations where Medicare is a secondary rather than the primary payer of medical expenses related to workplace injuries.

Scoring projects the budgetary impact of legislation as well as the bill’s year-by-year effects on revenues or outlays.

In a Dec. 5 letter to committee Chairman Dave Camp (R-Mich.) and Ranking Member Sander Levin (D-Mich.), ABA Governmental Affairs Director Thomas M. Susman said that the Medicare secondary payer legislation is expected to raise revenue or be cost neutral. He emphasized that H.R. 5284 enjoys support from a group of rarely aligned interests, including injured workers, insurance groups, trial attorneys, self-insurers, and large and small employers.

Congress passed the Medicare Secondary Payer Act in 1980 as a way to control the expanding costs of the Medicare program by identifying specific conditions under which Medicare is a secondary payer when another source of funds for medical treatment is available. In 2001, the Centers for Medicare and Medicaid Services (CMS) determined that a Medicare Set-Aside Arrangement (MSA), which creates a trust account setting aside a portion of a settlement for future medical expenses, is the recommended method of protecting Medicare’s future.

Workers’ compensation settlements that overlap with Medicare coverage currently are subject to lengthy cumbersome review by CMS to ascertain appropriate set-aside coverage amounts for medical expenses.

Susman said the legislation, sponsored by Reps. Dave Reichert (R-Wash.) and Mike Thompson (D-Calif.), incorporates principles that reflect ABA policy by establishing clear criteria for when a set-aside may be reviewed by CMS, creating a time frame within which CMS must provide information regarding conditional payments, and establishing an appeal procedure if the parties dispute the CMS ruling regarding the allocation of settlement proceeds.

STATE LEGISLATIVE WORKSHOP: ABA Governmental Affairs Director Thomas M. Susman spoke Nov. 29 at the annual State Legislative Workshop, a gathering of the members of the Governmental Relations Section of the National Association of Bar Executives (NABE). Susman and other Governmental Affairs Office staff attended the workshop, which is an opportunity for the section members to meet face to face with ABA staff as well as leaders from national organizations focusing of state issues. The GAO supported the founding of the NABE Governmental Relations Section almost 30 years ago.

The monthly Washington Letter reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html. © 2012 American Bar Association. All rights reserved. Please address correspondence to:


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