CBA | CONSUMER BANKERS ASSOCIATION

Statement of the Consumer Bankers Association
To the
Subcommittee on Financial Institutions and Consumer Credit
of the Committee on Financial Services
U.S. House of Representatives

February 8, 2012

The Consumer Bankers Association ("CBA") appreciates the opportunity to provide the following statement on H.R. 3871, a bill to amend the Consumer Financial Protection Act of 2010 to preserve privilege for information submitted to the Bureau of Consumer Financial Protection ("CFPB" or "Bureau").

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

CBA member banks routinely rely on attorney-client or attorney work-product privilege when seeking legal services, which, if released publicly could be damaging to the institution and potentially used by adverse parties in litigation. The public policy benefit of a privilege is long established, as it allows a person or company to freely communicate with counsel and to receive objective and complete legal advice without fear of disclosure. Removing the privilege would likely hinder that open communication, with potential negative consequences for both the banks involved and ultimately the consumers they serve.

It is well established that a privilege can be waived or destroyed if the information is shared with third parties. Many courts have found an exception, however, when the information is not shared voluntarily, but is compelled during the supervisory process or otherwise by a

financial institution's regulator. To reinforce this exception, Congress amended the Federal Deposit Insurance Act (FDI Act) in 2006 to state, "[T]he 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…shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information…as to any person or entity other than such agency, supervisor, or authority" (12 U.S.C. 1828(x)(1)). However, since the statute was enacted prior to the passage of the Dodd-Frank Act, it does not define "Federal banking agency" to include the CFPB.

On January 4, 2012, the CFPB issued a Bulletin (CFPB Bulletin 12-01) to address the effect on a covered institution's privilege when information is provided to the CFPB pursuant to a supervisory request.

The Bulletin states, "[T]he provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information." That claim is supported in the Bulletin by several points: First, the Bureau notes that courts have held the supervisory request by a regulatory agency not to be voluntary, and thus not to waive any privilege that attached to the information being requested.

Second, the Bureau states that Congress intended the CFPB's exam authority to be equivalent to the prudential regulators, by transferring to it "all powers and duties" with respect to that authority from the prudential regulators. Since 12 U.S.C. section 1828(x) provides that submission of information to a federal banking agency, defined to include the prudential regulators, would not result in a waiver of privilege as to any other person or entity, it is the Bureau's contention that such authority resides in the Bureau as well.

The Bulletin further states that, when a supervised institution is faced with a claim of waiver, the Bureau will take all reasonable and appropriate actions to rebut such a claim. The Bureau

will not consider waiver concerns to be a valid reason for withholding privileged information.

The Bulletin will help to reduce concerns that the privilege would be lost when privileged information is provided to the CFPB. Nevertheless, our member banks remain concerned that the validity of each waiver claim will only be certain following a costly challenge, which they fully expect plaintiffs to attempt, notwithstanding the unequivocal statement by the CFPB. The result may be a great deal of unnecessary litigation.

Absolute and unambiguous protection of the privilege can only arise from Congress's action, specifically statutory modification that would expressly state that persons submitting privileged materials to the CFPB pursuant to a supervisory request will not be deemed to have waived the privilege and that the CFPB is a "covered agency" under 12 U.S.C. 1821(t).

Therefore we strongly urge Congress to take two reasonable and simple actions: First, Congress should adopt HR 3871, which clarifies that the submission of information to the CFPB in the course of any supervisory or regulatory process does not waive or otherwise affect any privilege that may be claimed as to anyone other than the Bureau itself. This will put to rest any question about the potential for the loss of privilege that might otherwise arise. The swift adoption of this measure is necessary, as the CFPB has begun to supervise institutions within its jurisdiction, which include more than one hundred banks, thrifts and credit unions and tens of thousands of nonbank financial services providers, and we fully expect that the supervisory process will involve requests by the Bureau for privileged information.

Second, we urge Congress to amend HR 3871 to include an additional protection accorded to the other Federal banking agencies under section 11(t) of the FDI Act (12 U.S.C. 1821(t)) and not presently available to the CFPB. Under that section, a covered agency, as defined, does not waive any privilege by transferring information to another covered agency or any

other agency of the Federal government. In short, the section extends the same protections as 12 U.S.C. 1828(x) when the privileged information is subsequently shared with other federal agencies. "Covered agency" is not currently defined to include the CFPB. So even if information does not lose its privilege by virtue of its submission to the CFPB, it may subsequently lose its privileged status if the CFPB shares it with another federal agency or department. Since the CFPB has clearly stated it intends to share information with other agencies and departments under its authority granted by the Dodd-Frank Act, the protections provided by 12 U.S.C. 1821(t) would be necessary to fully ensure that the privilege is not waived when privileged information is provided to the CFPB.

Thank you for the opportunity to present our views on this matter.