

CFPB Bulletin 12-01

To: Chief Executive Officers of Depository Institutions, Credit Unions, and their
Affiliates Subject to the Bureau’s Supervision Authority

Re: The Bureau’s Supervision Authority and Treatment of Confidential Supervisory
Information

Date: January 4, 2012

The Consumer Financial Protection Bureau (“Bureau”) is issuing this letter to provide guidance regarding its collection of information through the supervisory process and the confidentiality protections that this process provides to supervised institutions. The Bureau will work closely with supervised institutions to ensure an effective and cooperative supervisory process.

A. The Bureau’s Supervision Authority

On July 21, 2011, the Bureau assumed the authority to supervise insured depository institutions and credit unions with total assets of more than \$10 billion and their affiliates (collectively, “supervised institutions”) for compliance with Federal consumer financial law and other related purposes. This supervisory authority transferred to the Bureau from the prudential regulators.¹ *See* 12 U.S.C. § 5581. Like the prudential regulators, the Bureau has broad authority to require reports and conduct examinations of its supervised institutions.² The Bureau exercises this authority for certain purposes, including assessing compliance with the requirements of Federal consumer financial law; obtaining information about the activities subject to such laws and the associated compliance systems or procedures of supervised entities; and detecting and assessing associated risks to consumers and markets for consumer financial products and services. *See* 12 U.S.C. § 5515(b)(1).

Once the Bureau has issued a request for information that it has determined serves one or more of these purposes, supervised institutions are required to provide all

¹ The prudential regulators are the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Administration (“NCUA”), and the former Office of Thrift Supervision (“OTS”). *See* 12 U.S.C. § 5481(24).

² *See* 12 U.S.C. § 5515(b)(1) (authorizing the Bureau to “require reports and conduct examinations” of large depository institutions and credit unions and their affiliates). The Bureau also has certain supervisory authorities with respect to other depository institutions and credit unions. *See* 12 U.S.C. § 5516(b).

documents and other information responsive to the request. Supervised institutions may not selectively withhold responsive documents based on their judgment that such materials are not necessary to the Bureau’s execution of its responsibilities or that other materials would be sufficient to suit the Bureau’s needs. The supervisory process is based on the supervisor’s full and unfettered access to information, and the supervisor is entitled—indeed, duty bound—to ensure that it thoroughly understands the institution in question and has access to all information that, in its independent judgment, may bear on its supervisory responsibilities. Failure to provide information required by the Bureau is a violation of law for which the Bureau will pursue all available remedies. *See* 12 U.S.C. §§ 5536(a)(2), 5565.

B. Provision of Privileged Information to the Bureau

Certain supervised institutions have expressed concern that providing privileged information, such as documents protected by the attorney-client privilege, to Bureau examiners could waive the institutions’ privilege with respect to third parties. The Bureau recognizes the importance of this issue. As explained below, the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information. Further, if a supervised institution were ever faced with a claim of waiver, the Bureau would take all reasonable and appropriate actions to rebut such a claim.

First, because entities must comply with the Bureau’s supervisory requests for information, the provision of privileged information to the Bureau would not be considered voluntary and would thus not waive any privilege that attached to such information. *See, e.g., Boston Auction Co., Ltd. v. Western Farm Credit Bank*, 925 F. Supp. 1478, 1482 (D. Hawaii 1996) (holding that the disclosure of privileged documents to the Farm Credit Administration requested pursuant to its examination authority was not voluntary and therefore did not waive the attorney-client privilege). The OCC articulated this view at greater length in a 1991 interpretative letter.³ Consistent with the policy articulated by the OCC in that letter, the Bureau would not object if supervised institutions take steps to memorialize privilege claims when conveying privileged documents or information to the Bureau.

Second, and independently, Congress intended the Bureau’s examination authority to be equivalent to that of the prudential regulators. As noted, the prudential regulators’ “examination authority” with respect to certain institutions’ compliance with Federal consumer financial law transferred to the Bureau on July 21, 2011, and, as of that date, the Bureau was also granted “all powers and duties” that had been vested in the prudential regulators “relating” to such examination authority. *See* 12 U.S.C. § 5581. Under section 607 of the Financial Services Regulatory Relief Act of 2006, the prudential

³ *See* OCC Interpretative Letter, 1991 WL 338409 (Dec. 3, 1991).

regulators have the power to receive privileged information from supervised entities (whether or not deemed voluntarily provided) without effecting a waiver of privilege.⁴ Accordingly, the examination authority and all related “powers and duties” assigned by statute to the Bureau encompass the ability to receive privileged information from supervised entities without effecting a waiver. The Bureau’s authority in this regard is consistent with the scheme of coordinated supervision established by Congress,⁵ and, by promoting parity in the supervision of large and small depository institutions, furthers Congress’s goal of consistent enforcement of Federal consumer financial law.⁶

For these reasons, the Bureau will not consider waiver concerns to be a valid basis for the withholding of privileged information responsive to a supervisory request. Review of a supervised institution’s privileged materials may often be the most efficient means for a supervisor to understand and assess an issue, and the Bureau will request such material as appropriate. At the same time, the Bureau recognizes the importance of the attorney-client privilege and other privileges to our legal system. Accordingly, the Bureau will give due consideration to supervised institutions’ requests to limit the form and scope of any supervisory request for privileged information. The Bureau’s policy is to request privileged information only when the Bureau determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources. Further, upon request, the Bureau will provide a demand identifying the privileged information sought and confirming that the materials will be treated confidentially in accordance with this letter and applicable Bureau rules. Finally, as noted, the Bureau is prepared to take all reasonable and appropriate steps to assist supervised institutions in rebutting any claim that they have waived privileges by providing information to the Bureau.

C. The Bureau’s Treatment of Confidential Supervisory Information

The Bureau’s supervision program depends upon the full and frank exchange of information concerning supervised institutions’ operations and compliance with Federal

⁴ See 12 U.S.C. § 1828(x) (submission of privileged information to a Federal banking agency, a state bank regulator, or a foreign banking authority would not result in a waiver as to any other person or entity); *see also* 12 U.S.C. § 1785(j) (same with respect to disclosure of information to the NCUA, State credit union supervisors, or foreign banking authorities).

⁵ For example, a prudential regulator and the Bureau are required to each have access to the other’s reports of examination; coordinate their examinations of large depository institutions and credit unions and their affiliates; and share draft reports of examination for comment, and take any comments into consideration, before issuing a final report or taking supervisory action. See 12 U.S.C. §§ 5512(c)(6)(B), (C); 5515(b), (e).

⁶ See 12 U.S.C. § 5511(a), (b)(4).

consumer financial law. Consistent with the policies of the prudential regulators,⁷ the Bureau's policy is to treat information obtained in the supervisory process as confidential and privileged.⁸ For example, the Bureau will treat all such information as exempt from disclosure under Exemption 8 of the Freedom of Information Act.⁹ Also consistent with the policies of the prudential regulators,¹⁰ the Bureau recognizes that the sharing of such information with other government agencies may in some circumstances be

⁷ See, e.g., 12 C.F.R. § 4.36(b) ("It is the OCC's policy regarding non-public OCC information that such information is confidential and privileged. Accordingly, the OCC will not normally disclose this information to third parties."); 12 C.F.R. § 261.22(a) ("It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged" and the Board "will not authorize disclosure [of confidential supervisory information] unless the person requesting disclosure is able to show a substantial need for such information that outweighs the need to maintain confidentiality."); 12 C.F.R. § 309.6(b)(10) (Under FDIC policy, "[a]ll steps practicable shall be taken to protect the confidentiality of exempt records and information."); 12 C.F.R. § 792.30 (NCUA policy prohibiting the disclosure of confidential supervisory information except in limited circumstances).

⁸ See 12 C.F.R. § 1070.41.

⁹ See 5 U.S.C. § 552(b)(8). Such information may be protected from disclosure by other FOIA exemptions as well. See, e.g., 5 U.S.C. § 552(b)(4).

¹⁰ See, e.g., 12 C.F.R. §§ 4.36(a) ("The OCC may make non-public OCC information available to a supervised entity and to other persons, that in the sole discretion of the Comptroller may be necessary or appropriate, without a request for records or testimony."); 4.37(c) ("When not prohibited by law, the Comptroller may make available to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and, in the Comptroller's sole discretion, to certain other government agencies of the United States and foreign governments, state agencies with authority to investigate violations of criminal law, and state bank and state savings association regulatory agencies, a copy of a report of examination, testimony, or other non-public OCC information for their use, when necessary, in the performance of their official duties."); 12 C.F.R. § 261.21(a) ("Upon written request, the Board may make available to appropriate law enforcement agencies and to other nonfinancial institution supervisory agencies for use where necessary in the performance of official duties, reports of examination and inspection, confidential supervisory information, and other confidential documents and information of the Board concerning banks, bank holding companies and their subsidiaries, U.S. branches and agencies of foreign banks, savings and loan holding companies and their subsidiaries, and other examined institutions."); 12 C.F.R. § 309.6(b)(4)(ii) (permitting the FDIC to "disclose to the proper federal or state prosecuting or investigatory authorities, or to any authorized officer or employee of such authority, copies of exempt records pertaining to irregularities discovered in depository institutions which are believed to constitute violations of any federal or state civil or criminal law, or unsafe or unsound banking practices."); 12 C.F.R. § 792.32 ("The NCUA Board, or any other person designated in writing, in its discretion and in appropriate circumstances, may disclose to proper federal or state authorities copies of exempt records pertaining to irregularities discovered in credit unions which may constitute either unsafe or unsound practices or violations of federal or state, civil or criminal law.").

appropriate,¹¹ and, in some instances, required.¹² For example, in accordance with the scheme of coordinated supervision established by Congress, the Bureau's policy is to exchange confidential supervisory information with the prudential regulators and state regulators that share supervisory jurisdiction over an institution supervised by the Bureau.

By contrast, the Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision. Except where required by law, the Bureau's policy is to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations.¹³ The significance of the law enforcement interest at stake will be an important consideration in any such review. However, even the furtherance of a significant law enforcement interest will not always be sufficient, and the Bureau may still decline to share confidential supervisory information based on other considerations, including the integrity of the supervisory process and the importance of preserving the confidentiality of the information.¹⁴ In these circumstances, the decision whether to provide confidential supervisory information to another agency will be made by the General Counsel, in consultation with appropriate Bureau personnel. *See* 12 C.F.R. § 1070.43(b).

By articulating its policy regarding its treatment of confidential supervisory information, the Bureau does not intend to limit its use of such information in administrative or judicial proceedings, subject to appropriate protective orders. Any

¹¹ *See* 12 C.F.R. §§ 1070.43(b) (permitting the Bureau to disclose confidential supervisory information to a federal or state agency with jurisdiction over the supervised institution that is the subject of the information). The Bureau's rules do not permit it to disclose confidential information obtained from other agencies without their permission. *See* 12 C.F.R. § 1070.41(d).

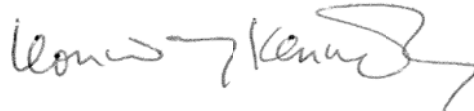
¹² For example, upon receiving reasonable assurances of confidentiality, the Bureau is required to share a report of examination, and any revisions to such a report, with a prudential regulator, State regulator, or other Federal agency with jurisdiction over the institution that is the subject of the report. 12 U.S.C. § 5512(c)(6)(C)(i). The Bureau is required to provide to the Attorney General evidence of a potential violation of Federal criminal law, 12 U.S.C. § 5566, and to provide to the Commissioner of Internal Revenue certain information related to possible tax law noncompliance. 12 U.S.C. § 5515(b)(5).

¹³ This review will include, among other things, the information requesting agencies are required to provide pursuant to 12 C.F.R. § 1070.43(b)(2), including the purpose for which the information is sought, the legal authority of the requesting agency, and the requesting agency's commitment to maintain the confidentiality of the information in accordance with the Bureau's regulations and any other conditions the Bureau may impose.

¹⁴ Any confidential supervisory information provided to another Federal or state agency remains the property of the Bureau, may not be disclosed without the Bureau's permission, and retains any applicable privilege. *See* 12 C.F.R. § 1070.47.

questions regarding the subject matter of this letter should be directed to the Office of General Counsel (202-435-7770).

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard J. Kennedy". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Leonard J. Kennedy
General Counsel
Consumer Financial Protection Bureau