

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1070

[Docket No. CFPB-2012-0010]

RIN: 3170-AA20

Confidential Treatment of Privileged Information.

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau or CFPB) is publishing for notice and comment proposed amendments to 12 CFR part 1070, subpart D, its rules relating to the confidential treatment of information obtained from persons in connection with its exercise of authorities under Federal consumer financial law. The proposed amendments will add a new section to these rules providing that the submission by any person of any information to the Bureau in the course of the Bureau's supervisory or regulatory processes will not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity. In addition, the Bureau is proposing to readopt 12 CFR 1070.47(c) in modified form to provide that the Bureau's provision of privileged information to another Federal or State agency does not waive any applicable privilege, whether the privilege belongs to the Bureau or any other person.

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS AFTER FEDERAL REGISTER PUBLICATION].

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. You may submit comments by any of the following methods:

- Electronic: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552.
- Hand Delivery/Courier: Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552 on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Submit only information that you wish to make available publicly. Do not include sensitive personal information, such as account numbers or Social Security numbers. Comments will not be edited to

remove any identifying or contact information, such as name and address information, email addresses, or telephone numbers.

FOR FURTHER INFORMATION CONTACT: John R. Coleman, Senior Litigation Counsel at (202) 435-7254, Office of General Counsel, Consumer Financial Protection Bureau.

SUPPLEMENTARY INFORMATION:

I. Background

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established the Bureau as an independent agency within the Federal Reserve System responsible for regulating the offering and provision of consumer financial products and services under the Federal consumer financial laws.¹ On July 21, 2011, the Bureau assumed the authority to supervise insured depository institutions and credit unions with total assets of more than \$10,000,000,000, as well as their affiliates and service providers, for compliance with Federal consumer financial law and other related purposes.² This supervisory authority transferred to the Bureau from the prudential regulators, and all “powers and duties” of the prudential regulators “relating” to this transferred authority were granted to the Bureau.³ Congress also provided the

¹ See Public Law 111-203, section 1011(a) (2010).

² See Dodd-Frank Act § 1025(b)(1), (d), 12 U.S.C. 5515(b)(1), (d); see also Dodd-Frank Act § 1029A, 12 U.S.C. 5511 note (stating that this provision becomes effective on the designated transfer date, established by the Secretary of the Treasury as July 21, 2011). The Bureau also has certain supervisory authorities with respect to other depository institutions and credit unions, as well as the service providers to a substantial number of such institutions. See Dodd-Frank Act § 1026(b), (c), (e), 12 U.S.C. 5516(b), (c), (e).

³ See Dodd-Frank Act § 1061, 12 U.S.C. 5581. 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 Dodd-Frank Act § 1002(24), 12 U.S.C. 5481(24).

Bureau with nearly identical authority to supervise certain nondepository institutions.⁴

The entities subject to the Bureau's supervisory authority are referred to herein as "supervised entities."

In exercising its supervisory authority, the Bureau will at times request from its supervised entities information that may be subject to one or more statutory or common law privileges, including, for example, the attorney-client privilege and attorney work product protection. The prudential regulators have taken the position that a supervised institution's submission of privileged information to its regulator does not waive any applicable privilege with respect to any third person, a position Congress codified in 2006 through amendments to the National Credit Union Act and the Federal Deposit Insurance Act.⁵

The Dodd-Frank Act does not explicitly address whether the submission of privileged information to the Bureau in the course of the Bureau's supervisory or regulatory processes will affect any privilege a supervised entity may claim with respect to such information. Congress, however, did provide that all the powers and duties of the prudential regulators relating to their transferred consumer financial protection functions would be granted to the Bureau, and this grant of authority encompasses the ability to receive privileged information from supervised entities without effecting a waiver. Moreover, Congress delegated authority to the Bureau to "prescribe rules regarding the confidential treatment of information obtained from persons in connection with the

⁴ See Dodd-Frank Act § 1024(b), 12 U.S.C. 5514(b). The Bureau also has supervisory authority over service providers to such institutions. See Dodd-Frank Act § 1024(e), 12 U.S.C. 5514(e).

⁵ See Financial Services Regulatory Relief Act of 2006 (FSRRA), Pub. L. No. 109-351, § 607 (2006), codified at 12 U.S.C. 1785(j), 1828(x).

exercise of its authorities under Federal consumer financial law.”⁶ Pursuant to this and other rulemaking authority, including the authority to prescribe rules it determines are “necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof,”⁷ the Bureau proposes to promulgate a rule providing that a person’s submission of information to the Bureau in the course of its supervisory or regulatory processes does not thereby waive any privilege the person may claim with respect to such information as to any person other than the Bureau.

On July 28, 2011, the Bureau issued a rule providing that “[t]he provision by the CFPB of any confidential information pursuant to [12 CFR part 1070, subpart D] does not constitute a waiver, or otherwise affect, any privilege any agency or person may claim with respect to such information under federal law.” 12 CFR 1070.47(c). The Bureau proposes to readopt this rule in modified form to clarify that it is intended to be a rule with the force and effect of law and to provide the public with an additional opportunity to comment upon the rule and the Bureau’s rationale for issuing the rule. The Bureau is in the process of reviewing comments received on the interim final rule that is codified at 12 CFR part 1070, and intends to issue a final rule in response to those comments.

⁶ See Dodd-Frank Act § 1022(c)(6)(A), 12 U.S.C. 5512(c)(6)(A). “Federal consumer financial law” includes Title X of the Dodd-Frank Act and all rules promulgated thereunder. See Dodd-Frank Act § 1002(14), 12 U.S.C. 5481(14).

⁷ See Dodd-Frank Act § 1022(b)(1), 12 U.S.C. 5512(b)(1).

II. Summary of Proposed Rule

A. Addition of 12 CFR. 1070.48

The Bureau proposes to add the following new section to its rules governing the confidential treatment of information:

§ 1070.48 Privileges not affected by disclosure to the CFPB.

(a) In General. The submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB 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 the CFPB.

(b) Rule of Construction. Paragraph (a) shall not be construed as implying or establishing that—

(1) Any person waives any privilege applicable to information that is submitted or transferred under circumstances to which paragraph (a) does not apply; or

(2) Any person would waive any privilege applicable to any information by submitting the information to the Bureau but for this section.

This rule is substantively identical to the statutory provisions that apply to the submission of privileged information to the prudential regulators, State bank and credit union supervisors, and foreign banking authorities in the course of their supervisory or

regulatory processes.⁸ Once effective, the proposed rule is intended to govern all claims, in Federal and State court, that an entity has waived any applicable privilege by providing information requested by the Bureau pursuant to its supervisory or regulatory authority.

As noted, the Bureau has exclusive authority to supervise depository institutions and credit unions with more than \$10,000,000,000 in assets, as well as their affiliates and service providers, for purposes of assessing such institutions' 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 such entities; and detecting and assessing associated risks to consumers and markets for consumer financial products and services.⁹ The Bureau believes, based on the historical experience of the prudential regulators and state banking supervisors, and its experience to date, that effective supervision may often require review of supervised entities' privileged information. For example, part of a strong compliance program is self-monitoring for consumer protection issues. Supervised entities often employ inside or outside counsel to conduct analyses regarding whether the entity is in compliance with Federal consumer financial law. The Bureau may require access to these analyses, which may be subject to the attorney-client privilege, to assess effectively the adequacy of supervised entities' compliance with Federal consumer financial law as well as these entities' systems and procedures for compliance with Federal consumer financial law.

The experience of the prudential regulators prior to the enactment of the Financial Services Regulatory Relief Act (FSRRA) also demonstrates the need for the proposed

⁸ See 12 U.S.C. 1785(j), 1828(x).

⁹ See Dodd-Frank Act § 1025(b)(1); 12 U.S.C. 5515(b)(1). The Bureau will supervise nondepository supervised entities for the same purposes. See Dodd-Frank Act § 1024(b), 12 U.S.C. 5514(b).

rule. For example, the Office of the Comptroller of the Currency (OCC) has consistently taken the position that the submission of privileged information to its examiners is not “voluntary” and therefore does not result in the waiver of any applicable privilege with respect to third parties.¹⁰ Nonetheless, the OCC supported enactment of the statutory “selective waiver” provision (codified at 12 U.S.C. 1828(x)) in order to provide greater assurance to its supervised entities that their submission of privileged information to the OCC would not thereby waive any applicable privilege with respect to third parties.¹¹ According to the OCC, the provision would “improve [its] ability to obtain information from regulated entities” and “significantly enhance the free flow of information between the OCC and the institutions [it] supervise[s].”¹²

Similarly, although the Bureau believes that supervised entities do not waive any applicable privilege with respect to third parties by providing privileged information to the Bureau, the Bureau proposes issuing 12 CFR 1070.48 to provide greater assurances to supervised entities and thereby facilitate the Bureau’s supervisory and regulatory processes. Certain supervised entities have expressed concern that providing privileged information to Bureau supervisory personnel could waive the entities’ privilege with

¹⁰ See OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991); Statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, before the U.S. House Subcommittees on General Oversight and Investigations and on Financial Institutions and Consumer Credit, Committee on Financial Services, on Coordination and Information Sharing among Financial Institution Regulators, 20 No. 2 OCC Q.J. 45, 2001 WL 1002162 (Mar. 6, 2001).

¹¹ See Statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, before the Senate Committee on Banking, Housing and Urban Affairs, Hearing: Consideration of Regulatory Relief Proposals, 2006 WLNR 3558037 (Mar. 1, 2006).

¹² *Id.*; see also Testimony of Donald L. Kohn, Member of the Board of Governors of the Federal Reserve System, before the Senate Committee on Banking, Housing and Urban Affairs, Regulatory Relief – Part 1, 2006 WLNR 3557970 (Mar. 2, 2006) (supporting passage of the selective waiver provision because it would “[f]acilitate the flow of information during the supervisory process by clarifying that depository institutions and others do not waive any privilege they may have with respect to information when they provide the information to a federal, state, or foreign banking authority as part of the supervisory process.”).

respect to third parties. This concern is based on judicial decisions holding that entities have waived the attorney-client privilege or the work product privilege with respect to third parties by providing information outside of the supervisory context to other Federal agencies, primarily the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).¹³ In addition, the statutory selective waiver provisions contained in the National Credit Union Act and the Federal Deposit Insurance Act do not explicitly apply to information submitted to the Bureau.¹⁴

In response to these concerns, on January 4, 2012, the Bureau's General Counsel issued a letter, CFPB Bulletin 12-01, expressing the Bureau's considered view that the submission of privileged information to the Bureau in response to requests made pursuant to the Bureau's supervisory authority does not result in the waiver of any applicable privilege a supervised entity may claim in response to a request or demand for the same information by a third party.¹⁵ In its letter, the Bureau explained that, like the prudential regulators, its supervisory authority encompasses the authority to compel supervised entities to provide privileged information and, therefore, a supervised entity's submission of privileged information to the Bureau in response to a request is not a voluntary

¹³ See, e.g., *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (holding that providing information to DOJ and the SEC in the course of their investigation waived the protections of the attorney-client privilege and work product doctrine applicable to that information); *In re Columbia Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (holding that providing information to the DOJ pursuant to its investigation of Columbia's billing practices waived any claim that the information was subject to the attorney-client privilege or work product doctrine); *Westinghouse Elec. Corp. v. Phillipines*, 951 F.2d 1414 (3d Cir. 1991) (holding that the disclosure of documents to the SEC and the DOJ in order to cooperate with their investigations waived the attorney-client privilege and the work product doctrine with respect to those documents); *but see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (holding that providing information to the SEC in the course of its investigation did not result in a waiver of attorney-client privilege with respect to third parties).

¹⁴ See 12 U.S.C. §§ 1785(j), 1828(x); *see also* 12 U.S.C. § 1813(z) (defining Federal banking agency as the OCC, the Board, and the FDIC).

¹⁵ This letter is available on the Bureau's website at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

disclosure that would result in the waiver of any applicable privilege. Although CFPB Bulletin 12-01 was addressed to the Bureau's supervision of large depository institutions and credit unions and their affiliates, the same reasoning applies to the Bureau's supervisory authority over other entities. Courts have affirmed this view, rejecting claims that supervised entities have waived applicable privileges by providing information to their supervisors.¹⁶

Further, when Congress transferred to the Bureau the prudential regulators' authority to conduct examinations to assess compliance with Federal consumer financial law by large depository institutions and credit unions and their affiliates, it also granted to the Bureau "all powers and duties . . . relating" to those transferred authorities.¹⁷ This broad grant of authority provides the Bureau with supervisory authority equivalent to that of the prudential regulators, which includes the authority to request and receive

¹⁶ See, e.g., *Boston Auction Co. v. W. Farm Credit Bank*, 925 F. Supp. 1478, 1481-82 (D. Hawaii 1996) (no waiver where documents provided to examiners from the Farm Credit Administration because disclosure not voluntary); *Vanguard Sav. & Loan Assn v. Banks*, No. 93-cv-4267, 1995 WL 555871, at *5 (E.D.Pa. Sept. 18, 1995) (holding that the disclosure of work product privileged information to state bank regulator is "involuntary" and, therefore, does not waive the privilege); *United States v. Buco*, Crim. No. 90-10252-H, 1991 WL 82459, at *2 (D. Mass. May 13, 1991) (holding that "the public interest served by encouraging the free flow of information between the banks and their federal regulators is substantial; a rule which provided that a bank generally waived its attorney-client privilege as to materials submitted to federal regulators would substantially impair that interest."). Moreover, in recognition of the need for a frank, informal, and relatively continuous flow of communication between supervisory agencies and the financial institutions they supervise, courts have long held that supervisory agencies do not waive the protections of the bank examination privilege (an offshoot of the deliberative process privilege) by sharing privileged information with their supervised entities. See *Overby v. United States Fid. & Guar. Co.*, 224 F.2d 158, 163 (5th Cir. 1955) ("We do not think that any privilege [of the OCC] has been waived by putting copies of the documents in the hands of directors of the bank."); *In re Subpoena Served Upon the Comptroller of the Currency, and Sec'y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 635 (D.C. Cir. 1992) ("We do not think that sharing a bank examination report or other supervisory information with the subject depository institution can reasonably be thought to bear upon the continuing need for the privilege."). The sound reasons underlying the preservation of the supervisory agency's privilege when it provides information to a supervised entity apply equally to the communication of privileged information in the opposite direction, and support preservation of the supervised entity's privilege when it provides privileged information to its supervisor.

¹⁷ See Dodd-Frank Act § 1061(b), 12 U.S.C. 5581(b).

information without effecting a waiver of any privilege a supervised entity may claim with respect to that information in response to a request or demand by a third party.

This conclusion is consistent with the coordinated scheme of supervision established by Title X of the Dodd-Frank Act. The prudential regulators and the Bureau share responsibility for supervising large depository institutions and credit unions and are required to coordinate their examinations and consult regarding draft reports of examination.¹⁸ As noted, a supervised entity's submission of privileged information to a prudential regulator does not waive the privilege with respect to third parties.¹⁹ In addition, a prudential regulator's provision of a supervised entity's privileged information to the Bureau does not waive "any privilege applicable to [the] information."²⁰ It would be incongruous for Congress to provide a mechanism whereby a person could pass privileged information through a prudential regulator to the Bureau without waiving any applicable privilege, but could not provide the information directly to the Bureau without waiving the privilege.

Furthermore, the prudential regulators retain primary responsibility for supervising smaller depository institutions and credit unions for compliance with Federal consumer financial law.²¹ A central purpose of Title X of the Dodd-Frank Act was to enhance the supervision of all entities for compliance with Federal consumer financial law and to ensure that Federal consumer financial law is enforced consistently.²² These goals would be undermined if a supervised entity's ability to provide privileged

¹⁸ See Dodd-Frank Act § 1025(b), (e), 12 U.S.C. 5515(b), (e).

¹⁹ See 12 U.S.C. 1828(x), 1785(j).

²⁰ See 12 U.S.C. 1821(t).

²¹ See Dodd-Frank Act § 1061(c)(1)(B), 12 U.S.C. 5581(c)(1)(B).

²² See Dodd-Frank Act § 1021(a), 12 U.S.C. 5511(a).

information to supervisory personnel without risking a waiver were to depend upon the entity's size.

Statutes should be construed as a coherent whole and in a manner consistent with their purpose. Accordingly, the Bureau construes its examination authority to be equivalent to that of the prudential regulators in this respect, and continues to adhere to the position that the submission of privileged information in response to requests made pursuant to the Bureau's examination authority does not result in a waiver of any privilege with respect to third parties. Nonetheless, in order to provide maximum assurance to its supervised entities, the Bureau is proposing to exercise its delegated rulemaking authority to prescribe a rule intended to govern any third party's claim in Federal or State court that a supervised entity has waived any applicable privilege by providing information to the Bureau in the course of its supervisory or regulatory processes.

In addition to applying to claims regarding large depository institutions and credit unions and their affiliates, the proposed rule will apply to third parties' claims that nondepository institutions or other persons have waived any applicable privilege by providing information to the Bureau in the course of its supervisory or regulatory processes. In enacting Title X of the Dodd-Frank Act, Congress authorized the Bureau to exercise its authority to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."²³ Indeed, Congress directed the Bureau to "seek to implement and, where applicable, enforce Federal consumer financial law consistently

²³ See Dodd-Frank Act § 1021(b)(4), 12 U.S.C. 5511(b)(4).

for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”²⁴ The Bureau’s exercise of supervisory and regulatory authority over nondepository institutions and other persons must, therefore, be consistent with its exercise of supervisory and regulatory authority over large depository institutions and credit unions and their affiliates. Accordingly, consistent with the broad language of 12 U.S.C. 1828(x) adopted by the proposed rule, the Bureau intends for the proposed rule to apply to the submission of privileged information by any person subject to the Bureau’s supervisory or regulatory authority.

Once effective, the rule is intended to govern all claims by third parties in Federal or State court that any person has waived any applicable privilege by providing information to the Bureau, even if the submission of such information to the Bureau occurred prior to the date the rule became effective. Furthermore, as the Bureau stated in CFPB Bulletin 12-01, the Bureau is prepared to take all reasonable and appropriate steps to assist supervised entities in rebutting any claims made in Federal or State court, both before and after the rule’s effective date, that supervised entities have waived any privilege by providing privileged information to the Bureau.

B. Amendment of 12 CFR 1070.47

The Bureau also proposes to readopt in modified form its rule regarding the effect upon any applicable privilege when the Bureau discloses information pursuant to its authority under subpart D of its Rules Relating to the Disclosure of Records and Information. The proposed rule would provide as follows:

²⁴ See Dodd-Frank Act § 1021(a), 12 U.S.C. 5511(a) (emphasis added); *see also* S. Rep. No. 111-176, at 168 (describing as one of the purposes of section 1025 of the Dodd-Frank Act as eliminating opportunities for “regulatory arbitrage”).

(c) Non-waiver.

(1) In General. The CFPB 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, any Federal or State agency.

(2) Rule of Construction. Paragraph (1) shall not be construed as implying that any person waives any privilege applicable to any information because paragraph (1) does not apply to the transfer or use of that information.

Under subpart D, appropriate Bureau personnel are authorized to disclose confidential information to certain individuals and entities in certain circumstances. For example, the Bureau is authorized to disclose, in appropriate circumstances, confidential information to another Federal or State agency.²⁵ On July 28, 2011, the Bureau issued an interim final rule, which provides that “[t]he provision by the CFPB of any confidential information pursuant to this subpart does not constitute a waiver, or otherwise affect, any privilege any agency or person may claim with respect to such information under federal law.”²⁶ In the preamble, the Bureau stated that this paragraph was intended to clarify “that disclosures of confidential information pursuant to subpart D are *not intended* and should not be construed to constitute a waiver of any privileges that are otherwise available to the CFPB or to any agency or person with respect to this confidential information.”²⁷ The Bureau requested comments on its interim final rule, but did not receive any comments on this particular provision.

²⁵ See 12 CFR 1070.43.

²⁶ See 12 CFR 1070.47(c).

²⁷ See Interim Final Rule, 76 FR 45372, 45375-76 (July 28, 2011) (emphasis added).

The Bureau proposes to readopt this rule in slightly modified form to clarify that it is intended not merely to express the Bureau’s intent not to waive any applicable privilege, but to provide the applicable rule of decision for any claim, in Federal or State court, that the Bureau has waived any applicable privilege—whether the privilege belongs to the Bureau, another Federal or State agency, or a regulated entity—by sharing information with a Federal or State agency pursuant to subpart D.²⁸ The Bureau also proposes to limit the rule to disclosures to Federal and State agencies. Congress generally directed the Bureau to coordinate its regulatory activities with other Federal and State agencies “to promote consistent regulatory treatment of consumer financial and investment products and services.”²⁹ In addition, Congress specifically directed the Bureau to share draft and final reports of examination with other Federal and State agencies, and authorized the Bureau to engage in joint investigations with other Federal and State agencies.³⁰ The coordinated intergovernmental action envisioned by Title X of the Dodd-Frank Act would be significantly hampered if the Bureau were not able to exchange privileged information with these agencies freely. The Bureau believes that courts would be unlikely to find a waiver of privilege in these circumstances. Nonetheless, in order to provide assurances comparable to those provided by 12 U.S.C. 1821(t), the Bureau proposes to adopt a rule providing that “[t]he Bureau shall not be deemed to have waived any privilege applicable to any information by transferring that information or permitting that information to be used by any Federal or State agency.” In

²⁸ The Bureau believes that the prudential regulators’ ability to transfer information to other Federal agencies without effecting a waiver is also a “power[] . . . relating” to the transferred supervision authority that was granted to the Bureau by section 1061 of the Dodd-Frank Act.

²⁹ See Dodd-Frank Act § 1015, 12 U.S.C. 5495.

³⁰ See Dodd-Frank Act §§ 1022(c)(6)(C), 1025(e), 1052(a); 12 U.S.C. 5512(c)(6)(C); 5515(e); 5562(a).

other contexts in which the Bureau discloses information pursuant to subpart D, the Bureau expects determinations regarding privilege waiver to be made by the courts pursuant to otherwise applicable law.

III. Legal Authority

A. Rulemaking Authority

The Bureau’s proposed rule is based on its authority to “prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial laws.”³¹ As explained above, the proposed 12 CFR 1070.48 will ensure that the confidential and privileged nature of information obtained by the Bureau in the course of any supervisory or regulatory process is not waived, destroyed, or modified by compliance with the Bureau’s requests for information. The proposed amendment to 12 CFR 1070.47(c) ensures that the sharing of information with Federal and State agencies mandated or authorized by Title X of the Dodd-Frank Act does not affect the confidential and privileged nature of the information.

In addition, the Bureau relies on its general rulemaking authority to “prescribe rules . . . as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”³² The supervision and other authorities provided by Title X of the Dodd-Frank Act are components of “Federal consumer financial law.” As explained above, the proposed rules are necessary and appropriate measures to ensure that the Bureau is able to implement these authorities, and to do so consistently “without regard to the status of a person as a depository institution, in order to promote fair

³¹ See Dodd-Frank Act § 1022(c)(6)(A); 12 U.S.C. § 5512(c)(6)(A).

³² See Dodd-Frank Act § 1022(b)(1), 12 U.S.C. 5512(b)(1).

competition.”³³ By providing greater certainty to supervised entities, this rule will also prevent evasions of the Bureau’s supervisory and other authorities based on concerns about the risk of waiving privilege.

Finally, the Bureau also relies on its authority to “prescribe rules to facilitate the supervision of [nondepository institutions] and assessment and detection of risks to consumers.”³⁴ For the reasons discussed above, the proposed rule will facilitate the Bureau’s supervision of nondepository institutions and thereby enhance the Bureau’s ability to assess and detect risks to consumers.

B. Section 1022(b)(2) of the Dodd-Frank Act

In developing the proposed rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.³⁵

The proposed rule provides that the submission by any person of information to the Bureau in the course of the Bureau’s supervisory or regulatory processes does not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity. The proposed

³³ See Dodd-Frank Act § 1021(b)(4), 12 U.S.C. 5511(b)(4); *see also* Dodd-Frank Act § 1021(a), 12 U.S.C. 5511(a).

³⁴ See Dodd-Frank Act § 1024(b)(7)(A), 12 U.S.C. 5514(b)(7)(A). This rulemaking does not concern supervisory requirements or coordinated registration systems for nondepository institutions. Accordingly, the Bureau has determined that consultation with state agencies is not appropriate. *See* Dodd-Frank Act § 1024(b)(7)(D); 12 U.S.C. 5514(b)(7)(D).

³⁵ Specifically, section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas. The manner and extent to which the provisions of section 1022(b)(2) apply to a rule of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

rule also provides that the Bureau's provision of privileged information to another Federal or State agency does not waive any applicable privilege.

As explained above, the Bureau believes that the submission by any person of any information to the Bureau in the course of the Bureau's supervisory or regulatory processes, or the Bureau's transfer of privileged information to other Federal and State agencies, generally does not waive or otherwise affect any privilege a person may claim with respect to such information under Federal or State law as to any other person or entity. The proposed rule would codify this understanding in order to provide entities subject to the Bureau's supervisory or regulatory authority further assurances that the submission of privileged information to the Bureau, or the Bureau's subsequent transmission of the information to other government agencies, will not affect the privileged and confidential nature of the information. Because the proposed rule generally will not result in a determination regarding the privileged nature of information different than that which would have been reached in the absence of the rule, the proposed rule is not expected to impose any costs on consumers or covered persons or to impact consumers' access to consumer financial products or services. 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.

Assuming, however, that the proposed rule would result in a determination regarding the privileged nature of information different than that which would be reached under existing law, the proposed rule would benefit covered persons by protecting any applicable privilege a covered person that provides information to the Bureau may claim in response to a third party's claim of waiver. Furthermore, in that scenario, the proposed

rule could impose a potential cost on consumers or covered persons involved in subsequent third-party litigation regarding a supervised entity to the extent the rule, as opposed to existing law, prevents them from compelling privileged information subject to the rule pursuant to a theory of waiver.

Finally, the proposed rule has no unique impact on insured depository institutions or insured credit unions with less than \$10,000,000,000 in assets as described in section 1026 of the Dodd-Frank Act. Nor does the proposed rule have a unique impact on rural consumers.

The Bureau requests comments on the potential benefits, costs, and impacts of the proposal.

IV. Request for Comment

The Bureau invites comments on all aspects of this notice and the proposed rule, including the proposed rule's scope.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the

convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.

When an agency issues a rulemaking proposal, the RFA requires the agency to, “prepare and make available for public comment an initial regulatory flexibility analysis,” which will “describe the impact of the proposed rule on small entities.” The RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

An IRFA is not required for this proposal because, if adopted, it would not have a significant economic impact on a substantial number of small entities. The proposed rule does not impose obligations or standards of conduct on any entities. In any event, as noted, the submission by any person of any information to the Bureau in the course of the Bureau’s supervisory or regulatory processes or the Bureau’s later disclosure of such submitted material generally does not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity. The proposed rule is intended to codify this result in order to give further assurance to entities subject to the Bureau’s authority. Any requirement to provide information stems from the Bureau’s authority under existing law, not the proposed rule. To the extent that the proposed rule alters existing law, it protects any applicable privilege under Federal or State law that a covered person that provides information to the Bureau may claim.

Accordingly, the undersigned hereby certifies that, if promulgated, the proposed rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 1070, Subpart D

Confidential business information, Consumer protection, Privacy.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend 12 CFR part 1070, subpart D, as set forth below:

Part 1070--DISCLOSURES OF RECORDS AND INFORMATION

Subpart D—Confidential Information

1. The authority citation for part 1070 continues to read as follows:

Authority: 12 U.S.C. 3401; 12 U.S.C. 5481 et seq.; 5 U.S.C. 552; 5 U.S.C. 552a; 18 U.S.C. 1905; 18 U.S.C. 641; 44 U.S.C. ch. 30; 5 U.S.C. 301.

2. Amend § 1070.47 by revising paragraph (c) to read as follows:

§ 1070.47 Other Rules Regarding Disclosure of Confidential Information.

* * * * *

(c) Non-waiver.

(1) In General. The CFPB 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, any Federal or State agency.

(2) Rule of Construction. Paragraph (1) shall not be construed as implying that any person waives any privilege applicable to any information because paragraph (1) does not apply to the transfer or use of that information.

3. Add § 1070.48 to subpart D to read as follows:

§ 1070.48 Privileges not affected by disclosure to the CFPB.

(a) In General. The submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the Bureau 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 the CFPB.

(b) Rule of Construction. Paragraph (a) shall not be construed as implying or establishing that—

- (1) Any person waives any privilege applicable to information that is submitted or transferred under circumstances to which paragraph (a) does not apply; or
- (2) Any person would waive any privilege applicable to any information by submitting the information to the CFPB but for this section.

THIS SIGNATURE PAGE PERTAINS TO THE PROPOSED RULE ENTITLED
“CONFIDENTIAL TREATMENT OF PRIVILEGED INFORMATION”

Dated: March __, 2012

Richard Cordray,

Director, Bureau of Consumer Financial Protection.