Banking Regulators' Examination Authority Does Not Override Attorney-Client Privilege

CLEARY GOTTLIEB STEEN & HAMILTON LLP

COVINGTON & BURLING LLP

Davis Polk

Debevoise & Plimpton

Simpson Thacher & Bartlett LLP

SULLIVAN & CROMWELL LLP

WILMER CUTLER PICKERING HALE AND DORR LLP ®

May 16, 2018

Bank Regulators' Legal Authority to Compel the Production of Material That Is Protected by Attorney-Client Privilege[1]

Banking Regulators' Examination Authority Does Not Override Attorney-Client Privilege

SUMMARY

Notwithstanding the venerable status of the attorney-client privilege and the important purposes it serves, the federal bank regulators and the Consumer Financial Protection Bureau have taken the position that they have the legal authority to override the privilege and compel supervised institutions to produce information protected by the privilege. Seven law firms, including Sullivan & Cromwell LLP, have prepared a memorandum analyzing the regulators' position. This memorandum, which was shared with the relevant regulators, analyzes the regulators' position and explains why it is not legally sustainable.

INTRODUCTION

The attorney-client privilege (the "Privilege") is deeply enshrined in the common law.[2] In protecting the confidentiality of communications between lawyers and their clients, the Privilege both bars the admission of such communications as evidence in legal proceedings and insulates the communications from compelled disclosure by government authorities. Accordingly, absent an explicit exception, neither courts nor government authorities may require a client or the client's lawyer to produce or reveal privileged information.

The fundamental importance of the Privilege to our legal system has been recognized time and again by the Supreme Court, which has rejected attempts to abrogate the Privilege unless the intent to override it is explicitly stated by Congress. Government agencies, including the Department of Justice ("DOJ") and the Securities and Exchange Commission (the "SEC"), also have acknowledged the virtual inviolability of

the Privilege and have endorsed the importance of preserving it despite their desire to obtain important information in fulfilling their investigative mandates.

Notwithstanding the venerable status of the Privilege, the federal bank regulators – the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Office of the Comptroller of the Currency (the "OCC"), and the Federal Deposit Insurance Corporation (the "FDIC") – and the Consumer Financial Protection Bureau (the "CFPB") (collectively, the "Agencies") have taken the position that they have the legal authority to override the Privilege and *compel* the institutions that they supervise, or with respect to which they have enforcement authority, to produce information protected by the Privilege. The Agencies appear to ground this position in their statutory examination authority, as well as in a purported need to obtain privileged material in order to fulfill the Agencies' prudential duties. This Memorandum analyzes whether the Agencies' position is legally sustainable and concludes that neither their examination and visitorial powers nor any other asserted rationale overrides and supersedes the Privilege.

BACKGROUND

A. THE ATTORNEY-CLIENT PRIVILEGE

The Privilege is an essential element of our legal system and is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290). The Privilege is not just a legal doctrine; it advances crucial objectives of our legal and judicial system.

The purpose of the Privilege is to encourage full and frank communication between attorneys and their clients, and "thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. As the Supreme Court has long recognized, by encouraging clients to speak candidly with their lawyers, the Privilege enables lawyers to give sound legal advice, which serves the public interest. *See, e.g.*, *id.*; *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications."); *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (the purpose of the Privilege is "to encourage clients to make full disclosure to their attorneys."); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (the Privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). For these reasons, courts have repeatedly expressed the view that, unlike other privileges, the Privilege cannot be overcome by a showing of

substantial need. *See, e.g.*, *United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012); *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997), *cert. denied sub nom McGraw v. Better Gov't Bureau, Inc.*, 522 U.S. 1047 (1998).[3]

The Supreme Court has made clear that the Privilege applies irrespective of whether the client is an individual or corporation. *Upjohn*, 449 U.S. at 390 ("In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter."); *see also Commodities Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."). Courts have long recognized that corporations operate in a complex regulatory environment and often need the advice of counsel to ensure they are complying with the law. *See, e.g.*, *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential."). The banking industry, with its complex web of governing statutes and regulations, is especially in need of legal advice.[4] The Privilege protects communications with both in-house and external counsel. *See, e.g.*, *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) ("It is well settled that the attorney client-privilege applies to communications between the corporation and its attorneys, whether corporate staff or outside counsel."); *United States v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993) ("It is undisputed that communications between a corporation and its inside counsel are protected in the same manner and to the same degree as communications with outside counsel.").

The corporate Privilege encourages corporate clients to speak openly and freely with their attorneys without fear of disclosure to third parties. As a result of the near-universally recognized inviolability of the Privilege, attorneys are better able to advise corporate clients, thereby promoting compliance with law.

B. RECOGNITION BY OTHER GOVERNMENT AGENCIES OF THE CRITICAL IMPORTANCE OF PROTECTION OF THE PRIVILEGE

Both DOJ and the SEC have recognized the critical importance of the Privilege and have taken steps to protect it, even though access to privileged information could aid those agencies in meeting their vital mandates. DOJ has been explicit about the importance of protecting the Privilege, notwithstanding its understandable interest in obtaining information from companies regarding their and their personnel's compliance with the law. Indeed, DOJ issued two significant memoranda on the subject, first in 2006 and then in 2008, each aimed at addressing the then-growing concern about DOJ's subversion of the Privilege by its practice at the time of seeking "voluntary" privilege waivers as a condition of cooperation credit.

Prior to 2006, DOJ prosecutors were guided by nine factors when assessing whether to charge a corporation. One of those factors was the "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate . . . including . . . the waiver of corporate attorney-client and work product protection."[5] Because prosecutors had been instructed to consider corporations' waiver of the Privilege as an element of cooperation, requests for such waivers – and the expectation of waiver – were routine. That practice received significant criticism from former government officials, industry groups, and others,[6] and it was eventually eliminated through replacement guidelines.

The first step in that replacement was a memorandum issued by then-Deputy Attorney General Paul J. McNulty that required prosecutors to show legitimate need for privileged information and to obtain senior supervisory approval before prosecutors could request waivers of the Privilege and work product protections from companies under investigation.[7] Less than two years later, acknowledging arguments that the McNulty memorandum did not afford sufficient protection for the Privilege, the next Deputy Attorney General, Mark Filip, asked Congress for the opportunity to make further changes to DOJ's policy "before pursuing legislation in this area."[8] The following month, the Filip memorandum was issued and provided comprehensive protection for the Privilege by prohibiting DOJ from offering cooperation credit in exchange for privilege waivers.[9] The Filip memorandum, which was codified in the United States Attorneys' Manual,[10] made clear that cooperation credit depended on disclosure of relevant facts and not on the waiver of the Privilege or work product protection.

The SEC's current position on waiver of the Privilege relies upon its ability to access the pertinent underlying facts rather than on efforts to coerce the production of privileged material pertaining to or analyzing those facts. A footnote to the SEC's 2001 Seaboard Report noted that waiver of the Privilege and work product protection may be "a means (where necessary) to provide relevant and sometimes critical information to the Commission staff."[11] Following issuance of the Seaboard Report, the SEC was criticized for essentially compelling privilege waivers by labeling companies that did not waive privilege as "uncooperative." In a 2008 speech, then-SEC Commissioner Paul Atkins acknowledged:

> As the SEC and other Federal agencies press to have the attorney-client privilege waived, the entire privilege is weakened. As knowledge of its weakening spreads, corporate employees will be less candid and forthcoming, corporate internal investigations will be less trustworthy, and shareholders and government investigators will be frustrated in their efforts to prevent misdeeds.[12]

Later in 2008, the SEC released its Enforcement Manual, which guides its staff in their "investigation of potential violations of federal securities laws." Section 4.3 of the Manual, titled "Waiver of Privilege," which remains in force, states:

> The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection. As a matter of public policy, the SEC wants to encourage individuals, corporate officers and

> employees to consult counsel about the requirements and potential violations of the securities laws.[13]

The SEC also recognizes that cooperation and waiver of privilege are not synonymous: "Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim for cooperation."[14]

DOJ's and the SEC's need for information to enforce the nation's laws and obtain justice is no less than the Agencies' need for information about the institutions they supervise. Yet, DOJ and the SEC have recognized that their need for information does not require them to eviscerate the Privilege and the crucial purposes the Privilege serves in our legal system.[15]

C. THE AGENCIES' POSITION ON THE PRIVILEGE

Notwithstanding the venerable stature, and virtually inviolable nature, of the Privilege, and the absence of an express determination by Congress to abrogate it for banking institutions, the Agencies have asserted that they may freely override it based on their statutory examination authority. They have maintained that there are no limits on the use of their authority to demand or request that subject banks disclose privileged documents as part of their ongoing supervision of the banks, and even to seek privileged internal investigation documents. As institutions subject to ongoing examination and supervision, banks face significant pressure to disclose these privileged communications.[16] Moreover, the Agencies have taken the even more extreme approach of demanding privileged communications in the context of enforcement investigations because, they contend, there is no cognizable distinction between their examination and their enforcement authority in this context. This contrasts sharply with DOJ's and the SEC's positions discussed above, which – recognizing the critical importance of the Privilege – provide that a valid claim of privilege cannot negatively affect cooperation credit, notwithstanding those agencies' vital interests in protecting the public.

The Agencies appear to ground their position in their statutory examination and visitorial powers,[17] as well as a purported need to obtain privileged information to help ensure safety and soundness and police potential violations of law. For example, in a 1991 Interpretive Letter, the OCC maintained that it could obtain privileged information because national banks are required under 12 U.S.C. § 161 to publish "reports of condition . . . 'containing such information as [the Comptroller] may prescribe,' as well as 'special reports from any particular association whenever in [the Comptroller's] judgment the same are necessary for his use in the performance of his supervisory duties.'" OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991). The letter also cites 12 U.S.C. § 481, which gives the OCC the authority to "make a thorough examination of all the affairs of the bank. . . ." *Id.* Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel for the OCC, summarized the agency's perspective:

> Since banks have no discretion as to the information they must disclose to supervising agencies, the authority for bank examiners to enter upon bank premises and review all of a bank's books and records is plenary. Thus, self-evaluative, attorney-client and work-product communications maintained anywhere in a bank's books and records fall properly within the scope of the banking agencies' examination authority and may be shared with the examining agency by the supervised institution.

20 NO. 2 OCC Q.J. 45 (O.C.C.), 2001 WL 1002162, at 49–50 (2001).

The Federal Reserve has taken a similar position. Supervisory Release 97-17, issued by the Federal Reserve on June 6, 1997, states:

> Recently, some financial institutions have restricted examiner access to records maintained at the institutions by claiming that the documents are protected from disclosure by certain legal privileges, such as the attorney-client privilege. . . . Under the Federal Reserve's statutory examination authority, examiners may review all books and records maintained on the premises of a financial institution that is subject to Federal Reserve supervision. The authority extends to all documents on the premises.

In May 2012, Scott Alvarez, General Counsel of the Federal Reserve, reiterated this position:

> The Federal Reserve examines, on a regular basis, institutions for which we have been granted supervisory authority by Congress and, through that authority, has complete and unfettered access to an institution's most sensitive financial information and processes, including information that would otherwise be privileged and not subject to public disclosure.[18]

The CFPB and FDIC also share this stance. In a January 2012 CFPB Bulletin, the CFPB explained that, "[l]ike the prudential regulators, the Bureau has broad authority to require reports and conduct examinations of supervised institutions." CFPB Bulletin 12-01 at 1. In a 2012 rule titled "Confidential Treatment of Privileged Information," the CFPB stated: "The Bureau continues to adhere to the position that it can compel privileged information pursuant to its supervisory authority." 77 Fed. Reg. 39617, 39619 (2012). Similarly, the FDIC has expressed the view that it has statutory authority to access privileged bank records as part of its routine examinations, including documents reflecting "whether the bank has sought and obtained appropriate legal advice . . . on matters such as compliance with lending limits or other relevant statutes."[19]

The Agencies have also maintained that the enactment of 12 U.S.C. § 1828(x) in 2006 *sub silentio* supports their argument that their examination and visitorial powers override the Privilege. That statute provides that the submission of information to an Agency, or certain other designated agencies, does not constitute a waiver of privilege as to any third party.[20]

Finally, the Agencies appear to take the view that disclosure of privileged material is necessary in some cases to enable them to discharge their duty to supervise financial institutions, specifically their interest in swiftly addressing safety and soundness issues or discovering violations of law or related aggravating circumstances.

As will be discussed below, however, each of these rationales is invalid. Any claim that the Agencies' statutory examination authority permits them to overcome the Privilege is directly and thoroughly repudiated by binding judicial precedent and fundamental principles of statutory construction. The Federal Reserve itself has recognized an uncertainty with respect to this rationale, stating that it would be left to the courts to decide whether the "statutory authority to conduct on-site examinations overrides any legal privilege the financial institution may have not to disclose the information."[21] SR 97-17.

DISCUSSION

As an initial matter, any Agency authorization to override the Privilege must be statutorily-based. Although some in the Agencies have argued that their visitorial powers are of unlimited breadth because they derive from the common law powers of a sovereign to inspect chartered corporations, we have found no judicial support for the proposition that the Agencies have visitorial powers under court-made common law that are broader than those granted them by a specific statute defining their visitorial powers. Indeed, the Supreme Court appears to have rejected any such general proposition, noting that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed." *O'Melveny v. FDIC*, 512 U.S. 79, 86 (1994).[22] The Agencies themselves have publicly recognized that their examination authority is statutorily based. *See, e.g.*, SR 97-17 ("Under the Federal Reserve's *statutory* examination authority, examiners may review all books and records maintained on the premises of a financial institution that is subject to Federal Reserve supervision." (emphasis added)); 20 No. 2 OCC Q.J. 45 (O.C.C.), 2001 WL 1002162, at 50 (supervised institutions' privileged information obtained by federal banking agencies remains privileged because "it was obtained through statutory compulsion"); OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991) (citing 12 U.S.C. §§ 161 and 481 as the basis for the OCC's visitorial powers).

Notwithstanding the National Bank Act's conception of national banks as "instrumentalities of the federal government," *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and the breadth of the Agencies' statutory examination and visitorial powers as enumerated in Title 12, those statutory provisions do not provide the requisite express authorization that would enable the Agencies to override the Privilege. This absence of any explicit statutory language providing for an express override of the Privilege should be the end of the matter. That is, under binding and long-standing judicial precedent, common law privileges cannot be overridden by statute unless the intent to override is explicitly stated by Congress. Accordingly, the Privilege remains intact. This would hold true even if the Agencies' ability to discharge

their examination and enforcement functions depended on their access to privileged material, but, in any event, it does not.

A. BINDING JUDICIAL PRECEDENT

It has been firmly established, for over 125 years, that a statute does not supersede common law rights unless that override is expressly stated. In *Bassett v. United States*, 137 U.S. 496, 505-06 (1890), the Supreme Court squarely held that a statute abrogates common law privileges only if "the language declaring the legislative will [is] so clear as to prevent doubt as to its intent and limit." More recently in *Upjohn*, the Supreme Court recognized that a statute remains "subject to . . . traditional privileges and limitations" unless the statutory provision at issue and its legislative history "suggest an intent on the part of Congress to preclude application of [a traditional limitation like] the work-product doctrine." 449 U.S. at 398.

Time and again, the Supreme Court has reaffirmed this fundamental precept. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress does not write upon a clean slate. In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." (citation and internal quotation marks omitted)); *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982) (explaining prior holding, which "found it incredible 'that Congress . . . would impinge on a tradition so well grounded in history and reason' without some indication of intent more explicit than the general language of the statute" (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951))). This precedent reflects the well-established principle of statutory construction that "if a common-law right is to be taken away, it must be noted clearly by the legislature . . . [which] must speak directly to the question addressed by the common law." 3 *Sutherland Statutory Construction* § 61:1 (7th ed.).

Applying these fundamental principles, the Federal Circuit rejected the Veterans Administration's argument that the Equal Access to Justice Act – which permitted parties to recover attorney's fees upon submission of an "itemized statement" from the attorney for services provided – "supersedes the attorney-client privilege." *Avgoustis v. Shinseki*, 639 F.3d 1340, 1341 (Fed. Cir. 2011). The Veterans Administration had challenged the sufficiency of task descriptions in bills submitted to it for reimbursement, while the plaintiff asserted the Privilege over additional detail. The court concluded that, "[h]ere, there is no statutory language abrogating the privilege," as required by longstanding Supreme Court precedent. *Id.* at 1342-43 (citing *Bassett*, 137 U.S. at 505-06; *Upjohn*, 449 U.S. at 398).

Similarly, both the Ninth and Seventh Circuit Courts of Appeals have rejected claims that a statute's disclosure requirements impliedly override valid assertions of common law privileges. *United States v. Forrester*, 616 F.3d 929, 942 (9th Cir. 2010); *United States v. Danovaro*, 877 F.2d 583, 588 (7th Cir.

1999). Both courts considered a statute that mandates disclosure of a wiretap application if its fruits are to be used in court, and they both held that the common law privilege to withhold information in order to protect informants took precedence over the statute's requirement. As Judge Easterbrook wrote, "Statutes requiring disclosure, but silent on the question of privilege, do not override customary privileges. The privilege to withhold information important to the safety of an informant was established long before Congress enacted Title III." *Danovaro*, 877 F.2d at 588 (citing *Upjohn*, 449 U.S. at 397-98).

In the face of these authorities, there can be no legitimate suggestion that statutory breadth substitutes for statutory specificity. Multiple cases stand for the direct proposition that broad investigatory and examination authority does not override the Privilege absent specific expression of Congressional intent. In *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318, 325 (1915), the Supreme Court refused to hold that the Interstate Commerce Commission's broad authority to inspect and examine any and all accounts, records and memoranda kept by carriers subject to the Interstate Commerce Act extended to the inspection of privileged correspondence. As the Court explained:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject to examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. . . . [W]e do not think that the section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize.

A similar result occurred in *Civil Aeronautics Board v. Air Transport Association*, 201 F. Supp. 318 (D.D.C. 1961). The court rejected the Civil Aeronautics Board's (the "CAB") effort to enforce a subpoena and compel production of materials protected by the Privilege. The CAB argued that the Privilege could not be asserted because of the broad investigatory powers conferred on the CAB by the Federal Aviation Act. In rejecting this argument, the court stated:

> The Court is of the opinion that the attorney-client privilege may be asserted in the proceeding pending before the Civil Aeronautics Board and involved in this action. The attorney-client privilege is deeply imbedded and is part of the warp and woof of the common law. In order to abrogate it in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity. The very existence of the right of counsel necessitates the attorney-client privilege in order that a client and his attorney may communicate between themselves freely and confidentially.

201 F. Supp. at 318.

Beyond the absence of statutory language reflecting a Congressional intention to limit the Privilege, there is no legislative history of any section of Title 12 that reveals such a legislative intent. It is, therefore, not surprising that we have not located a single case in which a court has ruled that a banking regulator – or any federal agency – is entitled to compel the production of information as to which valid claims of the Privilege or work product attach and no common law exception applies. In response to the CFPB's claim of that plenary power to vitiate the Privilege, the American Bar Association also analyzed the governing authority and came to the same conclusion: "[T]he ABA is not aware of any reported Federal appellate court case holding that Federal banking regulators – or any other Federal agencies – can require production of privileged materials, nor do the Federal banking statutes contain such authority." Letter from ABA President William T. Robinson III to CFPB Executive Secretary Monica Jackson at 5 (Apr. 12, 2012).

B. PREEMPTION

The Agencies have suggested that, notwithstanding this countervailing and consistent judicial precedent, their statutory examination and visitorial powers preempt the Privilege. As noted above, however, even where Congress grants broad investigative authority, a common law privilege is not overridden absent statutory language evidencing a specific expression of congressional intent to do so. *See Louisville & N.R. Co.*, 236 U.S. at 324 (holding that the Interstate Commerce Committee's broad authority to examine records did not extend to privileged documents); *Avgoustis*, 639 F.3d at 1341 (holding that the Veterans Administration's entitlement to itemized statements of attorney services did not override the Privilege); *Civil Aeronautics Bd.*, 201 F. Supp. at 318 (holding that the CAB's extensive investigative powers did not extend to privileged documents). The statutes conferring examination and visitorial powers on the Agencies are silent as to the ability of those regulators to compel the production of information protected by the Privilege.

Moreover, a preemption analysis involves the supremacy of federal law over state law. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The Privilege, however, is enshrined in federal common law as well as state common law. *See Upjohn*, 449 U.S. at 389; *see also* Fed. R. Evid. 501 (providing that the "common law – as interpreted by the United States courts in light of reason and experience – governs a claim of privilege unless" the U.S. Constitution, a federal statute, or a Supreme Court rule "provides otherwise"). The Ninth Circuit has expressly affirmed that "[i]ssues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law." *Clarke*, at 129; *see also United States v. Zolin*, 491 U.S. 554, 568 (1989) (describing the Privilege as part of the "federal common law of privileges"); *Corporacion Venezonala de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (stating, in action under 12 U.S.C. § 632,[23] a statute conferring exclusive federal jurisdiction for all matters in which a Federal Reserve Bank is a party, that "where jurisdiction is based on a statute meant to give a federal forum to nationally chartered banks,"

courts should "apply a federal common law choice of law rule"). Accordingly, the Agencies' preemption argument fails on multiple, independent grounds.

C. ENACTMENT OF SECTION 1828(X)

The Agencies also have asserted that 12 U.S.C. § 1828(x) confirms their right to access institutions' privileged information. Neither the terms of this statutory provision nor its limited legislative history, however, refers to any affirmative right of regulators to compel the production of privileged materials, or evidences a Congressional intent or acknowledgement that such a supervening right exists. Rather, the statute merely confirms a bank's or any person's ability to voluntarily provide privileged information to certain regulators without effecting a general waiver of the Privilege. But nothing in Section 1828(x) gives the Agencies the authority to compel a waiver of the Privilege. If Congress had wanted or intended the Agencies to have the authority to compel production of privileged information, it would have been a simple matter to set forth expressly that authority in Section 1828(x). The Agencies did not seek such authority, and Congress did not grant it.

Moreover, the fact that Section 1828(x) provides some protection against waiver of the Privilege does not mean that supervised institutions no longer need the Privilege itself. At the outset, any privileged material that is in the hands of an Agency can be used against the supervised institution, including, as noted above, for enforcement purposes. In addition, there is no guarantee that the privileged information will remain solely with the Agency that initially received it. As Senator Specter recognized following DOJ's adoption of the policies in the Filip memorandum, even though DOJ itself was no longer in the practice of requesting privileged material, "other government agencies [that do request such material] refer matters to the Department of Justice, thus allowing in through the window what isn't allowed in through the door."[24] In addition to DOJ, the Agencies may, whether voluntarily or pursuant to legal compulsion, divulge privileged information to Congressional committees and other government agencies.[25] Although we believe that the non-waiver protection of Section 1828(x) would continue to apply regardless of who received the information, as a practical matter the value of the Privilege is diminished in correlation to the number of people who have access to the privileged information.[26] The candor that the Privilege is intended to promote is undermined when the communications are subject to public or even private view regardless of whether the communications are used directly or indirectly in a legal proceeding.

D. REGULATORY EFFICACY

Finally, while the absence of an express abrogation of the Privilege by Congress ends the analysis, there also is no merit to the suggestion that permitting attorneys and clients to maintain the Privilege over their communications risks eliminating or significantly impairing the ability of the Agencies to conduct effective examination or supervision of regulated institutions. Although the Agencies have suggested that they must be permitted access to privileged materials to help fulfill their mandate of ensuring the safety and soundness of the banking system, this argument ultimately is unsustainable because

> [t]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn, 449 U.S. at 396 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

DOJ has recognized this fundamental principle, as set forth in the United States Attorneys' Manual: "What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of [the Privilege], but rather the facts known to the corporation about the putative criminal misconduct under review," which "requires disclosure of relevant factual knowledge and not of discussions between [the entity under investigation] and [its] attorneys."[27] The Agencies similarly have unfettered authority to obtain the facts necessary for them to fulfill their mandate, including through their review of non-privileged documents and questioning of bank employees. There is no basis for the Agencies, alone among federal regulators,[28] to argue that their examination and enforcement responsibilities require them to obtain privileged material.

CONCLUSION

There is no valid legal basis for the Agencies to demand that supervised institutions disclose privileged material. As discussed, all the relevant case law and fundamental legal principles compel this conclusion.

Moreover, in view of this legal conclusion and the Privilege's crucial policy objectives, the Agencies should not attempt to subvert this result by "requesting" material protected by the Privilege. The reality is that, in most situations, financial institutions are reluctant to assert their legal rights regarding the Privilege because of a concern that a refusal to provide privileged information will damage the relationship with the regulator. DOJ's and the SEC's decisions to close the "backdoor" approach to obtaining privileged information (not demanding it but indicating that it was essential for cooperation credit) should be equally applicable to the Agencies. The Agencies should not seek to obtain privileged information by accepting that they have no legal right to it, but then still request the information with the implicit threat that a refusal will affect adversely regulatory relationships or even examination results. It is essential for this fundamental legal issue to be considered on an industry-wide basis.

* * *

ENDNOTES

[1] This memorandum was prepared with the participation of the Staff of The Clearing House Association and reflects the views of the seven law firms whose names appear in the caption and of The Clearing House. It is not intended to reflect the views of any other client of the seven law firms. This memorandum should not be considered or relied upon as legal advice.

[2] The Privilege emerged in English law in the early 1500s, around the same time as the right to trial by jury. *Emergence of Privileges*, The New Wigmore: A Treatise on Evidence: Evidentiary Privileges § 2.2 (Aspen Publishers) [hereinafter, "New Wigmore"]; *see also* 8 J. Wigmore, *Evidence* § 2290 (J. McNaughton ed. 1961). American courts imported the Privilege "relatively unchanged," and by 1830 the Privilege had become firmly established in American common law. Paul R. Rice, *Attorney-Client Privilege in the United States* § 1:12, at 38–39 (2d ed. 1999); New Wigmore, *supra*, § 2.5 (citing Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1083 (1978)).

[3] Only very limited exceptions to the Privilege exist. One example is when the client communicates with the lawyer in an attempt to use the lawyer's services to commit or cover up a crime. This so-called "crime-fraud exception" to the Privilege is quite narrow, and assures that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of obtaining advice for the commission of a fraud or crime. *See Alexander v. United States*, 201 U.S. 117, 121 (1906). Another example is if disclosure is necessary to prevent reasonably certain death or substantial bodily harm. *See* American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct* 1.6 (2013).

[4] For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 runs for almost 900 pages, and its implementing regulations have now reached over 25,000 pages. Banks must also navigate, among many other statutes, the Bank Secrecy Act of 1970, the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989, and the Gramm-Leach-Bliley Act of 1999.

[5] *See* Mem. from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003).

[6] *See, e.g.*, Letter from Griffin B. Bell, Former Attorney General, et al., to Alberto Gonzales, Attorney General, Re: Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work Product Doctrine (Sep. 5, 2006) ("The Department's carrot-and-stick approach to waiving attorney-client privilege and work product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues."); House Approval of Attorney-Client Privilege Protection Act of 2007 Immensely Important: Statement by Am. Bar Assoc. President William H. Neukom (Nov. 14, 2007) ("Protecting confidential attorney-client communications from government-compelled disclosure fosters voluntary compliance with the law. Government tactics that coerce disclosure, on the other hand, undermine this benefit and our adversarial system of justice, and can threaten the very survival of organizations, including even the largest, most robust corporations."); Press Release: U.S. Chamber Applauds House Passage of the Attorney-Client Privilege Protection Act of 2007 (Nov. 12, 2007) ("If people cannot trust the confidentiality of their legal advisors, they will be much less likely to raise and address problems, such as complying with laws – and uncovering fraud.").

[7] *See* Mem. from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys (Dec. 12, 2006).

[8] Letter from Mark Filip, Deputy Attorney General, to Hon. Patrick J. Leahy and Hon. Arlen Specter (July 9, 2008). The House of Representatives had already passed such legislation. *See* Attorney-Client Privilege Act of 2007, H.R. 3013, 110th Cong. (2007).

ENDNOTES (CONTINUED)

9 *See* Mem. from Mark Filip, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys (Aug. 28, 2008).

10 *See* 9 U.S. Attorneys' Manual §§ 28.710-20.

11 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Rel. No. 44969 (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm.

12 Atkins, Paul. Speech by SEC Commissioner: Remarks at the Federalist Society Lawyers' Chapter of Dallas, Texas (Jan. 18, 2008), https://www.sec.gov/news/speech/2008/spch011808psa.htm.

13 SEC Division of Enforcement, Office of Chief Counsel, Enforcement Manual (Oct. 28, 2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

14 *Id*.

15 Members of Congress have themselves recognized that permitting government agencies unfettered access to privileged information is unacceptable. On four separate occasions between 2006 and 2009, bills to codify the inalienability of the Privilege were introduced in the Senate or House of Representatives. Although ultimately they were not pursued – likely in large part because of DOJ's acknowledgment of the importance of the issue and its eventual decision to stop seeking privilege waivers – each time a bill was introduced it garnered significant support. *See* Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. § 3014(b)(1) (2006); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Attorney-Client Privilege Act of 2007, H.R. 3013, 110th Cong. (2007); Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009).

16 *See, e.g.*, American Bar Association Task Force on Attorney-Client Privilege Resolution and Report, at 14 (Aug. 8-9, 2005) ("[G]overnment agencies' requests for such [privileged] information leave corporations with no practical choice but to comply, since the agencies can employ their discretionary exercise of prosecutorial or enforcement authority under criminal law or civil regulation to impose a substantial cost on corporations that assert rather than waive the privilege.").

17 *See* 12 U.S.C. §§ 248 (Federal Reserve), 481 (OCC), 1820 (FDIC).

18 Testimony of Scott G. Alvarez, General Counsel, Federal Reserve, Before the U.S. House of Representatives Comm. on Financial Services (May 17, 2012), *available at* http://www.federalreserve.gov/newsevents/testimony/alvarez20120517a.htm.

19 *See* Bruce A. Green, *The Attorney-Client Privilege—Selective Compulsion, Selective Waiver, and Selective Disclosure: Is Bank Regulation Exceptional?*, 2013 J. Prof. Law. 85, 95 n.31 (quoting William F. Kroener, former FDIC General Counsel).

20 Enacted as part of the Financial Services Regulatory Relief Act of 2006, 18 U.S.C. § 1828(x) provides:

> The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.

ENDNOTES (CONTINUED)

[21] Likewise, it appears that, in one of the few reported cases to discuss the Privilege in the context of regulatory examination authority, the OCC did not maintain that its examination authority overrides the Privilege. *See Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir. 1992), *order on rehearing*, 977 F.2d 1533. The OCC limited its challenge to arguments that the materials in question, billing records, were not privileged or, if they were, were subject to the crime-fraud exception to the Privilege. Notably, the Ninth Circuit held that a portion of the material was privileged and required it to be redacted.

[22] In *O'Melveny*, the Court rejected the FDIC's argument that federal common law, rather than California law, should determine whether knowledge of corporate officers acting against the corporation's interest would be imputed to the corporation. 512 U.S. at 86-87.

[23] 12 U.S.C. § 632 provides that "all suits of a civil nature at common law or in equity to which any Federal Reserve bank shall be a party shall be deemed to arise under the laws of the United States."

[24] Jacqueline Bell, Specter Revives Attorney-Client Privilege Bill, Law 360 (Feb. 20, 2009).

[25] The OCC has acknowledged its practice of "regularly provid[ing] access to certain confidential supervisory information to other federal and state law enforcement and regulatory agencies." Statement of Julie L. Williams, 2001 WL 1002162 at *48–50. Similarly, the CFPB "recognizes that the sharing of [confidential supervisory] information with other government agencies may in some circumstances be appropriate, and, in some instances, required." CFPB Bulletin 12-01 at 5.

[26] The Agencies "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 other agency of the Federal Government." 12 U.S.C. § 1821(t)(1). That provision expressly notes that it "shall not be construed as implying that any person waives any privilege applicable to any information because [it] does not apply to the transfer or use of that information." *Id.* at § 1821(t)(3).

[27] 9 U.S. Attorneys' Manual §§ 28.710-20.

[28] *See* Green, *supra* n. 18, at 85 (noting that the Agencies' position is "unique").

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Thomas C. Baxter Jr.	+1-212-558-4324	baxtert@sullcrom.com
Nicolas Bourtin	+1-212-558-3920	bourtinn@sullcrom.com
David H. Braff	+1-212-558-4705	braffd@sullcrom.com
Darrell S. Cafasso	+1-212-558-4605	cafassod@sullcrom.com
Whitney A. Chatterjee	+1-212-558-4883	chatterjeew@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Elizabeth T. Davy	+1-212-558-7257	davye@sullcrom.com
Theodore Edelman	+1-212-558-3436	edelmant@sullcrom.com
Stephen Ehrenberg	+1-212-558-3269	ehrenbergs@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Michael T. Escue	+1-212-558-3721	escuem@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
Brian T. Frawley	+1-212-558-4983	frawleyb@sullcrom.com
Nicole Friedlander	+1-212-558-4332	friedlandern@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Robert J. Giuffra Jr.	+1-212-558-3121	giuffrar@sullcrom.com
Wendy M. Goldberg	+1-212-558-7915	goldbergw@sullcrom.com
Charles C. Gray	+1-212-558-4410	grayc@sullcrom.com
Bradley A. Harsch	+1-212-558-3946	harschb@sullcrom.com
Tracy Richelle High	+1-212-558-4728	hight@sullcrom.com

Maya Krugman	+1-212-558-3288	krugmanm@sullcrom.com
Shari D. Leventhal	+1-212-558-4354	leventhals@sullcrom.com
Erik D. Lindauer	+1-212-558-3548	lindauere@sullcrom.com
Kathleen S. McArthur	+1-212-558-4321	mcarthurk@sullcrom.com
John P. Mead	+1-212-558-3764	meadj@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Maura E. Miller	+1-212-558-4130	millerme@sullcrom.com
Sharon L. Nelles	+1-212-558-4976	nelless@sullcrom.com
Camille L. Orme	+1-212-558-3373	ormec@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Richard C. Pepperman II	+1-212-558-3493	peppermanr@sullcrom.com
Yvonne S. Quinn	+1-212-558-3736	quinny@sullcrom.com
Kenneth M. Raisler	+1-212-558-4675	raislerk@sullcrom.com
Andrew H. Reynard	+1-212-558-7909	reynarda@sullcrom.com
William E. Schroeder	+1-212-558-3536	schroederw@sullcrom.com
Matthew A. Schwartz	+1-212-558-4197	schwartzmatthew@sullcrom.com
Jeffrey T. Scott	+1-212-558-3082	scottj@sullcrom.com
Samuel W. Seymour	+1-212-558-3156	seymours@sullcrom.com
Rebecca J. Simmons	+1-212-558-3175	simmonsr@sullcrom.com
Katherine J. Stoller	+1-212-558-4327	stollerk@sullcrom.com
Michael T. Tomaino Jr.	+1-212-558-4715	tomainom@sullcrom.com
William D. Torchiana	+1-212-558-4056	torchianaw@sullcrom.com
Donald J. Toumey	+1-212-558-4077	toumeyd@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Mark J. Welshimer	+1-212-558-3669	welshimerm@sullcrom.com
Stephanie G. Wheeler	+1-212-558-7384	wheelers@sullcrom.com
George H. White III	+1-212-558-4328	whiteg@sullcrom.com
Alexander J. Willscher	+1-212-558-4104	willschera@sullcrom.com
Michael M. Wiseman	+1-212-558-3846	wisemanm@sullcrom.com
Washington, D.C.		
Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
Stephen H. Meyer	+1-202-956-7605	meyerst@sullcrom.com
Jennifer L. Sutton	+1-202-956-7060	suttonj@sullcrom.com
Andrea R. Tokheim	+1-202-956-7015	tokheima@sullcrom.com
Samuel R. Woodall III	+1-202-956-7584	woodalls@sullcrom.com

Los Angeles		
Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
Tyler J. Friedman	+1-310-712-6684	friedmant@sullcrom.com
London		
Theodore Edelman	+44-20-7959-8450	edelmant@sullcrom.com
Paris		
William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com
Melbourne		
Robert Chu	+61-3-9635-1506	chur@sullcrom.com
Tokyo		
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com