April 16, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2012-0010; RIN 3170-AA20

Dear Ms. Jackson:

The Clearing House Association,[1] American Bankers Association,[2] The Financial Services Roundtable,[3] the Consumer Bankers Association,[4] and the American Financial Services

[1] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org.

[2] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

[3] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine and account directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

Association[5] ("the Associations") submit this comment to the Consumer Financial Protection Bureau ("the Bureau") in response to the Bureau's notice and request for comment on its proposed rule amending 12 C.F.R. part 1070, subpart D, relating to the confidential treatment of privileged[6] information.[7] The proposed rule has two parts. First, it would add a new section 1070.48 to clarify that an entity does not waive any applicable privilege by providing privileged information to the Bureau.[8] This proposed new section is substantively identical to the statutory privilege preservation provisions that apply to the submission of privileged information to the prudential regulators.[9] Second, the proposed rule would amend section 1070.47(c) to clarify that, with respect to any privileged information received by the Bureau, the Bureau's sharing of such information with any Federal or State agency will not waive any privilege otherwise applicable to such information.[10]

The Associations strongly support the proposed addition and amendment: to the extent that a person provides privileged information to the Bureau during the supervisory process, or the Bureau shares such information with any Federal or State agency, it is imperative that any privilege attaching to such information continue to apply with respect to third parties.[11] At the same time, for the reasons set forth below, the Associations believe that it is essential for the Bureau to (1) continue to support a statutory amendment that would expressly clarify the protection of privileged information provided to and shared by the Bureau, consistent with the express statutory protection provided for privileged information provided to and shared by the prudential regulators; (2) expressly reaffirm in its final rule the Bureau's recognition of the importance of the privileges to our legal system and of the need to limit its requests for privileged information when possible; and (3) expressly reaffirm in its final rule the

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[4] The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[5] The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice since 1916. AFSA's 350 members include consumer and commercial finance companies, vehicle finance and leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers. For more information, visit http://www.afsaonline.org.

[6] Unless otherwise specified, the terms "privileges" and "privileged" include the attorney-client privilege and the attorney work-product doctrine.

[7] Confidential Treatment of Privileged Information, 77 Fed. Reg. 15286 (Mar. 15, 2012).

[8] *See id.* at 15287.

[9] *Id.* (citing 12 U.S.C. § 1828(x)) For purposes of this comment letter, the "prudential regulators" are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation.

[10] *See id.* at 15289.

[11] The Associations do not address in this letter the issue of whether the Bureau has authority to compel production of privileged information in the first instance.

Bureau's policy that limits the sharing of privileged information with nonsupervisory agencies. The Associations also ask the Bureau to address in the final rule steps that a supervised entity should generally take to designate materials as privileged when it provides such materials to the Bureau.

1. Continued Need for Clarifying Legislation to Enhance Legal Certainty

The Associations support the addition of 12 C.F.R. § 1070.48 and amendment to 12 C.F.R. § 1070.47(c), but we also believe that statutory amendments to 12 U.S.C. §§ 1828(x) and 1821(t) are the clearest and most appropriate way to protect any privileges applicable to information provided to the Bureau. In a virtually identical set of circumstances in 2006, prior to the enactment of section 1828(x), the prudential regulators supported enactment of that statutory privilege preservation provision to promote maximum legal certainty. At that time, the prudential regulators took the position that, even in the absence of express statutory protection, a bank's submission of privileged information to a prudential regulator in response to the regulator's request was not a voluntary disclosure and therefore would not result in the waiver of any applicable privileges—but they simultaneously supported enactment of section 1828(x) to resolve any legal uncertainty. We believe the Bureau should take a similar position in the current circumstances: it should promulgate a privilege protection rule, while at the same time continuing to support a legislative amendment to provide express statutory protection to promote maximum legal certainty.[12]

As the prudential regulators did prior to the enactment of section 1828(x), the Bureau maintains in the proposed rule that a supervised entity's submission of privileged information to the agency is not a voluntary disclosure that would result in the waiver of any applicable privileges.[13] Nonetheless, third party litigants may seek discovery of privileged materials that have been provided to the Bureau, claiming that waiver has occurred. Under these circumstances, the Associations urge the Bureau to promote maximum legal certainty, and to ensure any such challenges can be effectively rebuffed, by continuing to support legislation to amend sections 1828(x) and 1821(t).[14] Such legislation would provide the same

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[12] *See Consideration of Regulatory Relief Proposals: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. (2006) (prepared statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel of the Office of the Comptroller of the Currency) (supporting the statutory privilege preservation provision "to resolve the uncertainty so as to ensure that banks may freely provide information to regulators without fear that any applicable privilege may be waived," given "conflicting court decisions on the issue"); *id.* (prepared statement of Donald L. Kohn, Member, Board of Governors of the Federal Reserve System) (supporting amendment that would "clarify[] 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").

[13] *See* 77 Fed. Reg. 15288; CFPB Bulletin 12-01 (Jan. 4, 2012).

[14] *See How Will the CFPB Function Under Richard Cordray?: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) (testimony of Richard Cordray, Director of the Consumer Financial Protection Bureau) (supporting a legislative fix).

express statutory privilege protection—and therefore the same legal certainty—for privileged information provided to and shared by the Bureau as is currently afforded to privileged information provided to and shared by the prudential regulators.

2. Reaffirmation of Importance of Privilege and Need to Limit Requests for Privileged Information

The Associations strongly support the Bureau's statements in Bulletin 12-01 regarding the importance of the privileges and the need for a careful Bureau approach to seeking privileged information. The Supreme Court has long recognized the attorney-client privilege as necessary "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."[15] The 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."[16] Similar "strong public policy" considerations support the work-product doctrine.[17] Absent the protection afforded by that doctrine, "much of what is now put down in writing would remain unwritten"; "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial"; and "the interests of the clients and the cause of justice would be poorly served."[18]

Against this background, we urge the Bureau to reaffirm its statements recognizing the importance of the privileges in the text of the final rule adopting new section 1070.48, or at least in the preamble. Specifically, the Bureau stated in Bulletin 12-01 that it:

- Recognizes "the importance of the attorney-client privilege and other privileges to our legal system";[19]
- Affirms the "policy . . . to request privileged information only when the Bureau determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources";[20]

[15] *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (internal quotations and citations omitted).

[16] *Id.*

[17] *Id.* at 397–98 (citing *United States v. Nobles*, 422 U.S. 225, 236–40 (1975)).

[18] *Id.* at 398 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

[19] CFPB Bulletin 12-01, at 3 (Jan. 4, 2012).

[20] *Id.*

- "[W]ill give due consideration to supervised institutions' requests to limit the form and scope of any supervisory request for privileged information";[21]

- "[I]s prepared to take all reasonable and appropriate steps to assist supervised institutions in rebutting any claim that they have waived privileges by providing information to the Bureau;" and[22]

- "[W]ill provide a demand identifying the privileged information sought."[23]

In the same vein, with respect to protection of supervised entities' privileged information, the Bureau recently emphasized that it is "working with financial institutions to try to allay their concerns and help them see that we recognize the problem and we want to do all we can both to do our work effectively, which is important, and to be mindful of that concern for them, which is a real concern."[24]

All of these statements appropriately recognize both the sensitivity and the importance of privileged information as well as the fundamental need to protect the free flow of information between supervised entities and their attorneys relating to attorney advice and attorney work-product. These or similar statements do not appear, however, in the text of the proposed rule or even in the preamble; to the contrary, the only relevant statement in the current proposal speaks solely to the usefulness of obtaining privileged information "to assess effectively the adequacy of supervised entities' compliance with Federal consumer financial law."[25] Given the Bureau's recognition of the sensitivity and importance of privileged information, the Associations strongly believe that a higher standard than mere "effectiveness" should be used for determining whether to seek privileged information. It may often be less efficient—but more appropriate—for the Bureau to obtain essentially the same information from available non-privileged sources. As a result, we ask the Bureau to reaffirm its prior statements recognizing the sensitivity and importance of privileged information, and the need to limit carefully its requests for such information, by appropriately incorporating such statements in the text of the final rule—where their import will be most clear and powerful—or at least in the preamble.

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *How Will the CFPB Function Under Richard Cordray?: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) (testimony of Richard Cordray, Director of the Consumer Financial Protection Bureau).

[25] 77 Fed. Reg. 15287.

3. Reaffirmation of Need to Limit the Sharing of Privileged Information with Nonsupervisory Agencies

The Bureau also previously stated that, once it received privileged information from a supervised entity—which is plainly "confidential supervisory information"—its further sharing of such information with nonsupervisory government agencies would and should be carefully limited. Specifically, the Bureau stated in Bulletin 12-01 that it:

- "[W]ill not routinely share confidential supervisory information with agencies that are not engaged in supervision";[26]
- Affirms the "policy . . . to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations," "[e]xcept where required by law";[27] and
- "[M]ay . . . decline to share confidential supervisory information based on other considerations, including the integrity of the supervisory process and the importance of preserving the confidentiality of the information."[28]

In the context of privileged information, these statements also reflect an appropriate recognition of both the sensitivity and the importance of such information, as well as the need to prevent the possible waiver of privilege resulting from the sharing of such information with law enforcement and other nonsupervisory agencies. Again, however, the Bureau did not include these or similar statements in the proposed revision of section 1070.47(c), which is intended to govern the Bureau's sharing of privileged information with other agencies. Here, too, the Associations strongly urge the Bureau to reaffirm its prior statements by appropriately incorporating them in the text of the final rule, or at least in the preamble, and to limit the sharing of privileged information with nonsupervisory agencies accordingly.

To the extent that the Bureau does share privileged information with other Federal and State agencies, the Associations strongly urge that the Bureau expressly advise receiving agencies (i) that all such information is confidential and remains the property of the Bureau, and (ii) that receiving agencies may not further disclose such information without first consulting with and obtaining the written consent of the Bureau's General Counsel. This approach to the sharing of privileged information with other agencies is consistent with what

[26] CFPB Bulletin 12-01, at 5 (Jan. 4, 2012).

[27] *Id.*

[28] *Id.*

we understand to be both the letter and the intent of the Bureau's rule,[29] and it is important to the protection of privileged information that receiving agencies be clearly so advised.

4. Steps to Preserve Applicable Privileges

Finally, the Associations ask that the Bureau address in its final rule the steps that a supervised entity should take in order to designate materials as privileged when it provides such materials to the Bureau. Regardless of the form or scope of the privilege being asserted, it would be useful for the final rule to provide guidance as to procedures that supervised entities should generally employ in providing privileged materials to the Bureau, including appropriate legending. Such guidance will facilitate the process of providing privileged materials to the Bureau.

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In summary, the Associations support the proposed addition and amendment to 12 C.F.R. part 1070, subpart D, but consider it essential that the final rule reflect the clarifications discussed above. Thank you very much for considering our views. Please contact the undersigned if you have any questions or would like to discuss the issues addressed in this comment.

Sincerely,

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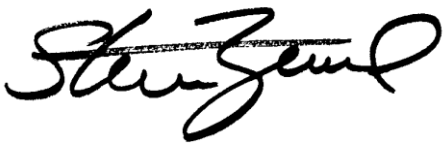

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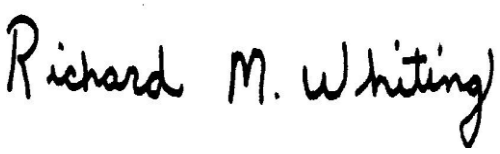

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[29] *See* 12 C.F.R. § 1070.47(a).

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