

# PUBLICATION

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## Industry May Be Foreshadowing More CFPB Challenges

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In our last newsletter, we [discussed](#) the CFPB's proposed amendments to its rule regarding the confidential treatment of information obtained from supervised or regulated entities in connection with the exercise of the Bureau's authorities. This amendment would allow the CFPB to greatly expand their discretion as to who they share the privileged information of supervised or regulated entities that the Bureau collects. The public comment period closed for the proposed amendment on October 24 and while only 28 comments were received, a review of these comments shows strong opposition and not-so-subtle indications of an interesting legal challenge if the CFPB adopts the amendments as proposed.

The American Bar Association (ABA) weighed in with their comment letter signed by ABA President and Baker Donelson Shareholder, Linda Klein. The ABA argued that "the attorney-client privilege is a bedrock legal principle of our free society," and as the U.S. Supreme Court has noted, it is "the oldest of the privileges for confidential communications known to the common law." They go on to point out that the privilege is protected by statute at 12 U.S.C. § 1821(t) which states that: "A covered agency [including the CFPB and the other federal agencies], in any capacity, 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 – (A) any other covered agency, in any capacity; or (B) any other agency of the Federal Government (as defined in section 6 of title 18)." If the CFPB moves forward with this amendment, the ABA points out, the Bureau could share information with entities beyond the scope of this statute and arguably waive attorney client privilege of a covered agency.

In a footnote the ABA states that, "In the months since the Proposed Rule was issued, the U.S. Court of Appeals for the D.C. Circuit released an opinion in *PHH Corp. v. Consumer Financial Protection Bureau* that provides useful guidance for the Bureau's next steps here. While *PHH* involved statutes of limitations and the Proposed Rule involves the attorney-client privilege, they both reflect Bureau efforts to bend long-standing legal principles to better suit the Bureau's goals. In *PHH*, the Court of Appeals reasserted the power of such traditional principles, finding both that Congress did not authorize such a fundamental change, and that it was unfair to strip away time-honored protections without such express authorization. In the face of a Bureau argument that it would wisely exercise its discretion, the Court explained that "'trust us' is ordinarily not enough" to justify a change in policy. Applying the wisdom of the *PHH* Court to the Proposed Rule, the Bureau may wish to pause and reconsider whether it should propose diminishing protections long afforded attorney-client communications and attorney work product."

The Electronic Transactions Association (ETA) also submitted a [comment letter](#) wherein they raise concerns over the amendments by pointing to the *PHH* case as precedent and urges the CFPB to reconsider. In their letter they stated in part, "As the court in *PHH Corp. v. CFPB* noted, 'The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision-making and abuse of power....' The Proposed Rule similarly concentrates authority in the Associate Director and creates a troubling conflict of interest. We strongly recommend the Bureau reject this proposal and return to a structure in which an officer in a more impartial role, the General Counsel, determines whether to approve CSI requests." The ETA encourages the

Bureau to adopt a final rule that fits within the boundaries of the Bureau's authority under Dodd-Frank, stating, "otherwise, the Bureau risks exposing itself to criticism or litigation for regulatory overreach."

Finally, the House Financial Services Committee submitted a comment letter which asks Director Cordray to "provide the Committee with the statutory authority on which the Bureau relies for amending 12 C.F.R. § 1070.42 in this manner, and please further indicate what legal safeguards exist to prevent the Bureau from abusing the power it proposes to grant itself in this proposal." With multiple comments indicating a credible legal challenge, it will be interesting to see if the CFPB amends its proposal in this post-*PHH* regulatory environment, or if they hold their ground and issue a final amendment mirroring this proposal. Either way, we are starting to see more cracks in the CFPB's previously solid foundation. If you have any questions regarding your organization's current compliance under any of the CFPB current rules or best practices on any upcoming amendments, please contact a member of Baker Donelson's CFPB team.