

NEW YORK
CITY BAR

COMMITTEE ON BANKING LAW

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December 11, 2012

By Facsimile and First-Class Mail

Hon. Kirsten R. Gillibrand
United States Senate
Russell Senate Office Building
Washington, D.C. 20510

Re: Support for Conforming Privilege Non-Waiver Provisions of S.3394

Dear Senator Gillibrand,

The Committee on Banking Law of the Association of the Bar of the City of New York supports the prompt enactment of S.3394, which you are co-sponsoring.¹ We are writing to urge the enactment of S.3394 before the conclusion of the current session of Congress.

¹ Several members of the Committee are lawyers with federal agencies. All of those Committee members have abstained from deliberations concerning this letter and the position taken by the Committee in it.

The City Bar was founded in 1870 to promote reforms in the law, to facilitate and improve the administration of justice, and to elevate the standard of integrity, honor, and courtesy in the legal profession. The Banking Law Committee is one of the City Bar's standing committees. It explores current legal issues affecting banks and bank holding companies operating in the U.S. and abroad. The Committee is composed of members drawn from law firms, financial institutions, state and federal banking agencies, legal aid groups, and law schools (professors and students) with diverse points of view.

The bill would amend federal banking law to clarify that the submission of privileged information to the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) in the course of its supervisory or regulatory activities, or the sharing of that information between the CFPB and other specified agencies, would not result in a waiver of the privilege as to any third party.² The amendments in S.3394 would conform existing law to make clear that the CFPB is included in provisions already applicable to federal banking agencies.

The Federal Deposit Insurance Act now provides that the submission to any “federal banking agency” in the course of its supervisory or regulatory activities of information that is subject to a legally recognized privilege will not result in a waiver of the privilege as to any third party.³ *See* 12 U.S.C. § 1828(x). The Act separately provides that if a “covered agency” (as defined in the Act to include any “federal banking agency” and certain other federal agencies) shares such information with another covered agency, that information sharing also will not effect a privilege waiver as to any third party. *See* 12 U.S.C. § 1821(t).

These statutory provisions serve an important public purpose by permitting banks and other financial organizations to share, as such organizations may determine to be appropriate, privileged information with their federal regulators during examinations while ensuring that the information submitted will remain privileged as to any third party. (It is important to note that the provisions of the Act do not require a supervised entity to share privileged information with the applicable regulator. The amendments proposed in S.3394 also would not require such sharing of privileged information.)

The CFPB was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) as an agency within the Federal Reserve System with responsibility for regulating the offering and provision of consumer financial services under federal consumer financial laws. That responsibility includes supervision, examination, and enforcement authority with respect to persons covered by federal consumer financial laws.

In the exercise of its statutory authority, the CFPB conducts examinations of banks and other covered persons. However, the Dodd-Frank Act did not amend the definition of “federal banking agency” or the definition of “covered agency” in the Federal Deposit Insurance Act to expressly include the CFPB. There is, as a result, at least some risk that a court could question whether the non-waiver protection afforded under 12 U.S.C. §§ 1821(t) and 1828(x) applies to privileged materials submitted to the Bureau, to privileged materials that may be shared by the Bureau with other federal agencies, or to privileged materials that may be shared with the Bureau by other federal agencies.

² The Banking Law Committee is not taking a position on the portions of S.3394 that concern mandatory ATM fee disclosures.

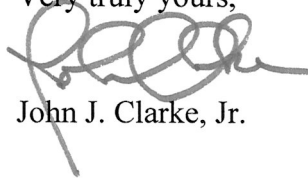
³ “Federal banking agency” is defined to include the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. *See* 12 U.S.C. § 1813(z).

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The CFPB has adopted regulations to address this issue. *See* 12 C.F.R. §§ 1047(c), 1048. However, the express inclusion of the CFPB in the statutory text of 12 U.S.C. §§ 1821(t) and 1828(x) would provide the best assurance that an assertion of waiver by a third party would not be successful in the relevant circumstances. The amendments to those provisions that are proposed in S.3394 would ensure that there is a single, consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks and other financial institutions. The certainty and consistency afforded by these amendments is important to promoting full and frank dialogue between the CFPB and the institutions it supervises.

We appreciate your support of S.3394 and urge you to help secure final Senate passage of this important legislation during the current session.

Very truly yours,

A handwritten signature in black ink, appearing to read "John J. Clarke, Jr.", written over a horizontal line.

John J. Clarke, Jr.

cc.: Members of the Banking Law Committee

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United States Senate
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Washington D.C. 20510

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These statutory provisions serve an important public purpose by permitting banks and other financial organizations to share, as such organizations may determine to be appropriate, privileged information with their federal regulators during examinations while ensuring that the information submitted will remain privileged as to any third party. (It is important to note that the provisions of the Act do not require a supervised entity to share privileged information with the applicable regulator. The amendments proposed in S.3394 also would not require such sharing of privileged information.)

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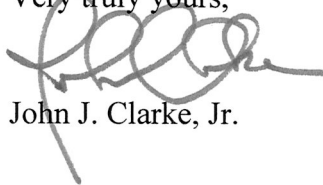
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John J. Clarke, Jr.

cc.: Members of the Banking Law Committee