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# The Attorney-Client Privilege—Selective Compulsion, Selective Waiver and Selective Disclosure: Is Bank Regulation Exceptional?

Bruce A. Green\*

Federal laws and regulatory policies relating to banks and other financial institutions supervised by the federal banking agencies take a unique approach to the attorney-client privilege. As this article discusses, either these laws and policies are incoherent and insupportable given the assumptions underlying the ordinary law, or the laws and policies challenge those underlying assumptions and suggest the need to reconsider them—or both.

## I. Introduction

Attorneys have ethical and fiduciary duties to keep their communications with clients confidential. The attorney-client privilege protects the confidentiality of these communications. The privilege is in part an evidentiary rule that bars the admission of the confidential communications in adjudication, unless one of the specific judicially-recognized exceptions to the privilege is established or the client waives the privilege.<sup>1</sup> But it is more than that: The privilege also protects against the compelled disclosure of attorney-client confidential communications.<sup>2</sup> Courts and administrative agencies may not command a client, the client's lawyer or one of their agents to produce a document or reveal information that is privileged. If, on the other hand, one of the court-recognized exceptions to the privilege is established<sup>3</sup> or the client waives the protections of the privilege, other

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1. *See, e.g.*, *United States v. Nagle*, 2010 U.S. Dist. LEXIS 104711 (M.D. Pa. 2010) (prosecution may not introduce attorney-client privileged document obtained from an employee's workplace computer); *see generally* PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 2:2 at 56 (2012 ed.) (“While it is an established principle that the public has a right ‘to every man’s evidence,’ the attorney-client privilege is an exception to the rule.”).

2. *See, e.g.*, *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 540-41 (9th Cir. 1985).

3. Over time, the courts have recognized several specific exceptions to the attorney-client privilege. For example, under the “crime-fraud” exception, the courts will not permit the privilege to be used for the purpose of furthering criminal or fraudulent transactions. *See United States v. Zolin*, 491 U.S. 554, 563 (1989); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007).

third parties may then obtain and use the communications in litigation, administrative proceedings, or adjudications, and for a host of other purposes. One way a client waives the privilege is by voluntarily disclosing privileged communications to a third party.

Bank regulation has spawned significant exceptions to the general rules and customary industry and agency practices involving the attorney-client privilege in at least three key respects. First, federal banking agencies, including both the prudential bank regulators<sup>4</sup> and the recently established Consumer Financial Protection Bureau (“the Bureau” or “CFPB”), assert that they have the legal authority selectively to compel banks and other financial institutions they supervise to disclose attorney-client privileged information.<sup>5</sup> Although Congress claims the general power (which it rarely invokes) to compel parties to produce privileged information,<sup>6</sup> most federal executive-branch agencies generally do not. Others such as the SEC and the Department of Justice (DOJ) often would like access to parties’ privileged communications. Sometimes they induce subjects of criminal or regulatory investigations to waive their privileges by rewarding them with leniency for doing so, and much has been written about these agencies’ evolving internal policies regarding whether and how they reward privilege waivers.<sup>7</sup> But

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4. These regulators are Federal Reserve System’s Board of Governors, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Authority, and the Office of the Comptroller of the Currency (OCC).

5. CFPB Final Rule, Confidential Treatment of Privileged Information (June 28, 2012) (“Final Rule”) (effective Aug. 6, 2012), 77 FR 39617 (July 5, 2012). This essay uses “banks” as shorthand, although much of the discussion applies to certain other regulated entities, such as credit unions.

6. See MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 40-41 (2009); see also Michael D. Bopp & Delisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J.L. & PUB. POL’Y 897 (2012). Disclosing privileged material in response to congressional compulsion does not waive the privilege vis-a-vis third parties. ROSENBERG, *supra*, at 43.

One other exception, and a more analogous one, is bankruptcy courts’ right to privileged information in exercising their supervisory authority. See Rice, *supra* note 1, § 9:27 at 101 (discussing *In re 50-Off Stores, Inc.*, 213 B.R. 646 (Bankr. W.D. Tex. 1997)).

7. See, e.g., Michael Ariens, “*Playing Chicken*”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239 (2009); Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229 (2009); Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199 (2010); John Hasnas, *Between Scylla and Charybdis: Ethical Dilemmas of Corporate Counsel; in the World of the Holder Memorandum*, 44 VAL. U.L. REV. 1199 (2010); Brendan J. Keefe, Note, *Revisions of the Thompson Memorandum and Avoiding the Stein Problems: A Review of the Federal Policy on the Prosecution of Business Organizations*, 42 CONN. L. REV. 273 (2009); Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921 (2009). See also, American Bar Association Fact Sheet, “Protecting the Attorney-Client Privilege, the Work Product Doctrine and Employee Legal Rights: Comprehensive Reform Still Critically Needed,” October 2012, available at <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/abafactsheetoctober2012.authcheckdam.pdf>.

executive agencies generally do not claim power like that of bank regulators to command entities to produce privileged materials.<sup>8</sup>

Second, when banks disclose privileged material to bank regulators, even if voluntarily, banks retain the privilege with respect to third parties pursuant to specific federal statutory authority.<sup>9</sup> This, too, is unusual. For the most part, federal law rejects the idea that entities can make “selective waivers” of the attorney-client privilege, absent such express statutory authority.<sup>10</sup> Several years ago, the Federal Rules Advisory Committee considered proposing an exception to the waiver principle when *any* party discloses privileged information to *any* federal agency undertaking regulatory, investigative or enforcement action, but the Committee decided to eliminate the selective waiver provision from the more modest proposal that eventually became new Federal Rule of Evidence 502.<sup>11</sup>

Third, under agency policy, once bank regulators obtain privileged information from a bank, whether through compulsion or voluntarily, the regulators reserve the right to share the information with any other agency, including federal law enforcement and tax authorities and state attorneys general, notwithstanding the selective waiver statute. In part, regulators rely on another federal

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Copies of the various privilege waiver policies adopted by DOJ, the SEC, the U.S. Sentencing Commission and numerous other federal agencies, as well information regarding the ABA’s long-standing efforts to reverse or modify these policies, are available at [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_legal\\_profession/acprivilege.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/acprivilege.html).

8. A distinction might be made when a federal agency, not in the role of regulator but as executor, takes control of an insolvent entity. *Commodity Futures Trading Com’n v. Weintraub*, 471 U.S. 343, 358 (1985) (“the trustee of a corporation in bankruptcy has the power to waive the corporation’s attorney-client privilege with respect to prebankruptcy communications”).

9. 12 U.S.C. § 1828(x), Financial Services Regulatory Relief Act of 2006 (Pub. L. No. 109-351), quoted in note 53, *infra*. See generally Alex C. Lakatos & Golaleh “Lili” Kazemi, *Keeping Half the Cat in the Bag: Selective Waiver of Privileged Materials Pursuant to 1828(x)*, 129 *BANKING L.J.* 242 (2012).

10. Although a few federal courts have recognized the selective waiver doctrine and allowed parties to submit privileged materials to federal agencies without waiving the privilege as to third parties, most federal circuits have rejected selective waiver and concluded that such submissions waive the privilege as to all third parties. See *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (“the theory of ‘selective waiver’ initially accepted by the Eighth Circuit . . . [has been] rejected by every other circuit to consider the issue since”) (citing decisions of the 1st, 2nd, 3rd, 4th, 6th, 7th, 10th, D.C. and Federal Circuits); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002) (summarizing the status of the law in the various circuits and stating that like most others, the Sixth Circuit would refuse to recognize the doctrine).

11. See generally Patrick M. Emery, Comment, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the National Debate*, 27 *J.L. & COM.* 231 (2009); Lisa Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 *FORDHAM L. REV.* 129 (2007). Although the Committee declined to recommend the original proposal, it ultimately embraced a more limited Federal Rule of Evidence 502, adopted in 2008, which protects against accidental waiver of attorney-client privilege and work product protections and substantially narrows the scope of subject matter waiver in connection with privileged materials produced to federal agencies or during federal court litigation. See Pub. L. No. 110-322 (S. 2450).

statute<sup>12</sup> that allows them to share information with other federal agencies without affecting the privileged status of the information, but the statute cannot fairly be read even to implicitly authorize regulators to disclose banks' privileged material to state agencies. In any event, the idea that banks may disclose privileged material to a bank regulator without waiving the privilege as to third parties, but that the regulators may freely disclose the privileged material to third parties for their use, departs from the conventional understanding of "selective waiver," which is that the client controls waiver of the privilege.

This state of affairs raises questions about the wisdom of the federal laws and regulatory policies, but also it raises questions about the conventional privilege doctrine: Is the public interest best served if bank regulators can compel banks to disclose confidential attorney-client communications, even with express statutory protections against third party access? If so, is bank regulation unique in this respect, or would the public be best served if other regulatory and law enforcement agencies, such as the SEC or the DOJ, had a similar power, and if entities could generally disclose privileged material to these other public agencies without waiving the privilege generally? This essay addresses these questions.

## II. The Bank's Attorney-Client Privilege

The attorney-client privilege is based on the empirical assumption that the privilege encourages parties to use and confide in lawyers and that the public

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12. See 12 U.S.C. § 1821(t), which provides:  
Agencies may share information without waiving privilege.

(1) In general. A covered agency, 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, United States Code).

(2) Definitions. For purposes of this subsection:

(A) Covered agency. The term "covered agency" means any of the following:

(i) Any Federal banking agency.

(ii) The Farm Credit Administration.

(iii) The Farm Credit System Insurance Corporation.

(iv) The National Credit Union Administration.

(v) The General Accounting Office [Government Accountability Office].

(vi) The Bureau of Consumer Financial Protection.

(vii) Federal Housing Finance Agency.

(B) Privilege. The term "privilege" includes any work-product, attorney-client, or other privilege recognized under Federal or State law.

(3) 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.

benefits as a result. Skeptics might question the utility of the privilege in general or in the case of regulated entities such as banks in particular, but courts and regulators assume that the privilege benefits society by protecting the right to effective legal counsel and promoting legal compliance by banks and other corporate and individual clients. Consider the following scenario.

*Act 1.* The Intergalactic Bank of America (“the Bank”) has a profitable business lending money to home buyers and owners. The Vice President (“VP”) for the Bank’s residential mortgage business considers adopting and implementing new policies to encourage home owners to refinance their mortgages to take advantage of lower interest rates. To develop this idea, the VP consults many professionals within the Bank and outside consultants, including accountants and MBAs, all of whom are bound by fiduciary or contractual duties of confidentiality. To ensure that implementing the new policies will comply with federal consumer law, the VP also consults confidentially with lawyers in the office of the Bank’s General Counsel. The lawyers analyze the proposed policies, learn how the Bank plans to implement them, and then give advice how to do so in a lawful manner. The lawyers and the VP take familiar measures to try to ensure that the communications between them remain confidential.

*Act 2.* Customers sue the Bank for violations of federal consumer laws. Prior to trial, they attempt to discover the VP’s communications with the Bank’s in-house counsel before the mortgage refinance policies were implemented. The customers plausibly argue that this information may be probative or may lead to other probative information to establish the Bank’s misconduct, and therefore discovery of the Bank’s attorney-client communications will serve the public interest in fair and reliable adjudications. Nonetheless, finding that the communications were confidential when they occurred and that the Bank preserved their confidentiality, the court rules that the communications are privileged and therefore inaccessible and inadmissible.

*The attorney-client privilege.* The starting point for the court’s ruling is familiar: the common law governing attorney-client privilege. In general, when a client and lawyer communicate confidentially to enable the lawyer to render legal advice or assistance to the client, the law protects the client from being compelled to disclose the communications and from their evidentiary use in legal proceedings, probative though the communications may be.<sup>13</sup> The rationale is utilitarian: The public interest in promoting parties’ compliance with the law, the right to effective counsel, and fair outcomes of adjudication are best achieved if parties

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13. See RICE, *supra* note 1, at § 201 (citing 8 WIGMORE, EVIDENCE § 2292, at 904 (McNaughten rev. ed. 1961)).

with legal issues obtain lawyers' assistance based on complete information; but it is assumed that parties will not engage lawyers and communicate candidly with them unless the law respects the confidentiality of the communications.<sup>14</sup> Although the public has an interest in making probative evidence available to parties in litigation and, ultimately, to the fact finder, the privilege assumes that the greater public good is achieved by encouraging attorney-client communications through legal recognition of their confidentiality. In theory, the privilege applies only insofar as it is necessary to serve its ends.<sup>15</sup> Treatises are filled with citations to cases navigating its boundaries.<sup>16</sup>

*Application of the privilege to corporations.* The rationale for the privilege is assumed to apply equally to entities, such as private corporations and public agencies, as to individuals with legal needs.<sup>17</sup> Because a corporation can act only through its individual representatives, the privilege generally applies to confidential communications between a corporate officer or employee and the corporation's lawyer both when the lawyer imparts advice and when the lawyer seeks to learn relevant facts on which to base legal advice or other legal assistance.<sup>18</sup> Underlying the corporate attorney-client privilege is an empirical assumption that courts and regulators accept—namely, that corporate representatives would not as readily seek legal assistance on behalf of the corporation and confide fully and truthfully in the corporation's lawyers without the privilege.

*Empirical questions raised.* Skeptics might argue that corporations will often use lawyers the same way with or without the privilege and that, on balance, the public would therefore be better served if corporate representatives' communications with lawyers, like their communications with other professionals, could be discovered and used in legal proceedings.<sup>19</sup> For example, when the VP goes to the Bank's in-house lawyers to obtain advice about new mortgage refinancing policies, and when other Bank representatives seek legal advice about regulatory compliance, considerations other than the attorney-client privilege may determine how much information Bank representatives disclose. Perhaps most significant will be the representatives' awareness that they are not the client and that

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14. See, e.g., *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

15. See, e.g., *In re LTV Securities Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

16. See, e.g., EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* (5th ed. 2007); JOHN W. GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* 3d (2012 ed.); RICE, *supra* note 1; VINCENT S. WALKOWICK ET AL., *THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION* (5th ed. 2012).

17. *Commodities Futures Trading Com'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.")

18. *Upjohn v. United States*, 449 U.S. 383 (1981).

19. See, e.g., Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982); see generally RICE, *supra* note 1, at § 4:10.

whatever they tell the lawyers can be disclosed to other decision makers within the Bank. In this respect, consultation with counsel is very different in an entity representation from an individual representation. Given that the communications may not be confidential vis-a-vis the Bank, and that the Bank will have the authority to disclose the communications to others outside the Bank if it so chooses, the Bank constituents may already be guarded. Conversely, they may be impervious to the prospect that others, whether within or outside the Bank, can discover their communications. They might assume that any disclosure will have no adverse consequence for them as long as they act properly, and that the impact of disclosure on the Bank is not of personal concern. They might care about protecting the Bank's interests but perceive that future disclosures of attorney-client communications will not prejudice the Bank. They might worry that the Bank may be prejudiced by future disclosures but perceive that the likelihood of future disclosures is too small to worry about. They might worry about the risk of prejudicial disclosures but nevertheless perceive that withholding information from the Bank's counsel poses greater risks of prejudice to themselves or the Bank. For any of these reasons, Bank constituents may be unaffected by the prospect that third parties in a lawsuit or in other legal contexts may try to compel production of their confidential communications with Bank counsel.

Similar possibilities might be raised in other situations in which a company's constituents consult counsel or consider doing so on behalf of the company, but particular doubts might be raised about the privilege's significance for closely regulated entities such as banks. In theory, banks might employ lawyers to advise about legal compliance to the same extent with or without a privilege, both because it is in banks' long-term financial interest to comply with the law and because regulators require them to have strong compliance programs that include lawyers. Even if the privilege were entirely eliminated, so that lawyers were treated more like accountants and other professional consultants whose confidentiality obligations are not backed by a legally recognized privilege, most banks' policies would still likely require bank officers and employees to disclose relevant information to the bank's lawyers. Bank constituents would be expected to comply, just as they are expected to make honest disclosures to auditors and others serving the bank who are not covered by legal privileges. On top of that, transparency might promote candor: Knowing that attorney-client communications may later be scrutinized by regulators or other third parties might influence bank representatives to be especially forthcoming with the bank's lawyers, since a lack of candor could be discovered and lead to unfavorable action against the constituents personally or the bank. Finally, even assuming that attorney-client communications may be subtly affected by the absence of the privilege, artful lawyers may be able to overcome corporate constituents' reticence, and even if they do not, the differences may be too insignificant to affect the quality of their advice. The calculation in this situation, when a bank seeks legal advice before acting, might be very different from the bank's calculation when it seeks advice in anticipation of, or in connection with, litigation based on prior con-



duct: the prospect that the opposing party would have access to attorney-client communications might more likely lead to guarded communications once the battle lines are drawn.

There have been no serious efforts to study whether, as skeptics might argue, the privilege has little impact on entities generally, or on highly regulated entities such as banks in particular. It is not clear that the necessary empirical evidence could be obtained in any case. Based on common sense, intuition and anecdote, the corporate attorney-client privilege presupposes that the privilege functions essentially the same for all clients in all contexts. The paradigm is the individual client who, if unable safely to confide in a lawyer, may simply go unrepresented or may communicate only guardedly and incompletely, thereby losing the opportunity for competent legal advice. For regulated banks, it is assumed that if bank representatives know that their communications with the bank's counsel are accessible to third parties, they may withhold information from the bank's lawyers to prevent third parties from using their candid information against the bank, the bank's lawyers may give less reliable advice about the law, and the bank could be rendered less able to comply with the law, to the detriment of the public no less than the bank.

Even if courts might question this assumption, they might give banks the benefit of the privilege for any of several reasons. They might conclude that it is difficult to distinguish between the situations where the privilege does and does not affect entities' use of counsel, and that given the clear and substantial societal benefits provided by the privilege in general, it is better to err on the side of being overprotective of confidentiality. They might conclude that it is hard to draw bright lines between these situations where the privilege is and is not useful, but that unclear lines would chill some clients from confiding in counsel in situations where the privilege should apply. Or courts might conclude that making distinctions between banks and other entities subject to federal banking agency supervision and entities regulated by other non-banking regulatory agencies is inherently arbitrary or calls for the exercise of legislative judgment best left to Congress.

### **III. Selective Compulsion of Banks' Privileged Information**

Federal agencies do not generally question the validity of the underlying public policy considerations that justify giving entities the benefit of the attorney-client privilege. Indeed, federal agencies assume that when they function as clients, they need the privilege as much as private entities. They conduct their own communications with counsel in confidence and seek the benefit of the privilege with regard to such communications.

The theory of the attorney-client privilege rests on the understanding that *no one* can compel access to privileged information, because clients would be "chilled" from confiding fully in their attorneys if they knew that *anyone* outside the privileged relationship could obtain the communications against the client's

will.<sup>20</sup> But the prudential bank regulators and the Consumer Financial Protection Bureau regard themselves as the rare exception—at least when it comes to seeking others' privileged information. Consider the next Act in the scenario.

*Act 3.* While exercising its statutory authority to examine very large depository institutions (those with more than \$10 billion in deposits)<sup>21</sup> to ensure their compliance with consumer financial laws,<sup>22</sup> the CFPB inquires into the Bank's mortgage policies and practices, as well as complaints brought by mortgage consumers. Eventually, the Bureau asks what the Bank's lawyers were told and what advice they gave when the mortgage refinancing policies were first considered. The Bureau insists that it is entitled to the information in order to determine, among other things, whether the Bank took adequate internal measures to ensure compliance with the consumer laws. The Bank perceives that it has no realistic choice but to comply. Based on their review of all the Bank's relevant records, including privileged materials, the Bureau's examiners conclude that the Bank may have violated federal consumer financial law. The Bureau's examiners share the privileged information with the Bureau's enforcement attorneys, who then threaten to bring a legal action unless the Bank institutes reforms. Although the Bank believes that any violations were the fault of rogue employees and were practically unavoidable at such a large institution, it agrees to make changes in its personnel, internal practices, compliance measures, and structure in order to promote future compliance with the law.

Based on the relevant law, the CFPB's published regulatory policies asserting the right of its examiners to access privileged information from banks and other supervised entities, recent examples of CFPB enforcement attorneys accompanying CFPB examiners during bank examinations, and the longstanding practice of banks submitting privileged materials to the prudential bank regulators during examinations, this is a realistic scenario. Bank regulators assert not only a greater need than others for attorney-client privileged information but

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20. RICE, *supra* note 1, § 2.2 at 52 ("It is believed that the protection must be absolute in order to further the privilege's end—encouraging candor and full disclosure by the client. If the protection were not absolute, it would not be predictable, and the client could not rely on it. Absent a waiver of the privilege, therefore, the privilege precludes the disclosure of the communications, regardless of the need that might be demonstrated for the information in them.").

21. 2 U.S.C. § 5515.

22. *E.g.*, Fair Credit Reporting Act, the Secure and Fair Enforcement for Mortgage Licensing Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Truth in Savings Act, the Interstate Land Sales and Full Disclosure Act, the Consumer Leasing Act, the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, and the Truth in Lending Act.

also a unique right to compel production of privileged material from the entities they supervise.<sup>23</sup>

An early assertion of this authority is a 1991 Interpretive Letter<sup>24</sup> in which the OCC's Deputy Chief Counsel maintained that OCC examiners could require national banks to produce privileged documents. The Letter cited the statutory authority of the Comptroller of the Currency to call for "reports of condition" "containing such information as he may prescribe" and the statutory authority of bank examiners to "make a thorough examination of all the affairs of the bank."<sup>25</sup> He explained that "[t]he examination process depends upon a free, unhindered flow of information between the OCC and the banks it regulates." Further, he took the view that, although compelled production of privilege material did not waive a bank's privileges as to any third parties, the OCC "reserve[d] the right to introduce such documents into evidence in administrative or judicial proceedings, or to refer documents to other government agencies in appropriate cases."

In May 2012, the Federal Reserve's General Counsel explained the view that his institution maintained the same power. He told a congressional committee: "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."<sup>26</sup>

The CFPB also has asserted similar authority to require banks and other supervised entities to submit privileged information, first with the issuance of the CFPB Bulletin 12-01 in January 2012<sup>27</sup> and then with the publication of its final rule on Confidential Treatment of Privileged Information in July 2012.<sup>28</sup>

No federal statute expressly authorizes bank regulators to compel production of privileged information, courts have not recognized this authority expressly, and the American Bar Association ("ABA"), among others, disputes the bank regulators' claims that they have such authority.<sup>29</sup> It is hard to see why bank

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23. See Lakatos & Kazemi, *supra* note 9, at 244 & 267 nn. 10 & 11 (citing 1997 Federal Reserve memorandum and 2000 OCC handbook).

24. OCC Interpretive Letter, 1991 WL 338409 (O.C.C.) (Dec. 3, 1991).

25. *Id.* (citing 12 U.S.C. §§ 161 & 481).

26. 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>.

27. See CFPB Bulletin 12-01 (Jan. 24, 2012), *available at* [http://files.consumerfinance.gov/f/2012/01/GC\\_bulletin\\_12-01.pdf](http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf).

28. See CFPB Final Rule on Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617 (July 5, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-07-05/pdf/2012-16247.pdf>.

29. See, e.g., April 12, 2012 Letter of Wm. T. Robinson, President, ABA, to Monica Jackson, Office of the Executive Secretary, CFPB, at 4-6 (asserting that no federal statute grants bank regulators authority to compel production of privileged information and no judicial decision has

regulators' general statutory authority to supervise and conduct examinations of banks and other entities entitles it to demand privileged material when it is conventionally understood that other public agencies with regulatory or investigative authority over other companies lack that power.<sup>30</sup> One would expect, given the privilege's long pedigree, that if Congress meant to limit its application in the bank examination context by statute, Congress would expressly say so. Nonetheless, it appears that banks regularly accede to examiners' requests for privileged materials, perceiving that, as a practical matter, they have little choice: it is not worth antagonizing the regulators.<sup>31</sup>

It is not clear why bank regulators, alone among regulatory and law enforcement authorities, believe that they should be allowed to force regulated entities to disclose privileged material. In his congressional testimony, however, the Federal

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recognized such authority), *available at* [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13\\_attorneyclientprivileges\\_l.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclientprivileges_l.authcheckdam.pdf).

30. *See, e.g.*, *Civil Aeronautics Bd. v. Air Transp. Ass'n*, 201 F. Supp. 318, 318 (D.D.C. 1961) ("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."); *Petition of Southern Pacific Transp. Co. for Declaratory Order*, 365 I.C.C. 816, 1982 ICC LEXIS 31 (1982); *Southern California Gas Co. v. Pub. Utilities Comm'n*, 784 P.2d 1373, 1376-77 (Ca. 1990); *see also* *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

31. According to a former FDIC General Counsel:

As a part of routine bank examinations, the examiners will review entire loan and asset files of the bank, as well as reviewing regular audits and risk controls in place. The banking agencies take the view that they are entitled (by statute) to see all documents that comprise part of a bank's records whether privileged or not, and generally have legal staff prepared to seek injunctions or orders of prohibition on a safety and soundness basis where documents are not made available to the examiners, on the basis of privilege or any other basis. In the case of the larger banks where there are a number of examiners on site full time, these requests may also relate to on-going not yet completed transactions. In the course of these reviews, the examiners review whether the bank has sought and obtained appropriate legal advice, most generally on matters such as compliance with lending limits or other relevant statutes (e.g., Section 23A/23B limiting loans to affiliates and state analogues, insider lending limits, etc.). Where banks are ignoring advice, or not obtaining it prudently, it will be written up as part of the confidential report of examination. In fact the usual report on examination has a section entitled "violations of law." These examination practices are generally understood and rarely result in any sort of litigation. . . . [I]n my eleven years as FDIC General Counsel over the course of tens of thousands of exams, review of privileged legal advice by examiners rarely got challenged and one lower decision determining that it worked a third party waiver resulted in the existing federal statutory fix. . . . These situations should be contrasted with situations where agencies are contemplating enforcement actions. In those situations, the regulators recognize both legal and work product privileges.

E-mail of William F. Kroener III (Jan. 2, 2013) (on file with author).

Reserve's General Counsel gave some hints. He observed that bank examinations differ in two significant respects from other public regulatory investigations.

First, bank regulators must act swiftly to ensure the banks' safety and soundness, as well as to address potential violations of law. Presumably, the agency's regulatory efforts would be slowed if banks withheld privileged information, whether because banks' efforts to separate privileged from non-privileged information would delay banks' non-privileged disclosures or because the agency can ascertain the relevant facts more quickly from privileged material.

Second, the General Counsel noted that safety and soundness concerns do not typically give rise to third party claims. He may have been implying that the bank regulators' policy of demanding privileged material will not discourage bank personnel from being candid with a bank's lawyers, because banks do not worry about regulatory efforts designed to promote their soundness but only about private civil actions, which are unlikely to follow. Although the ordinary assumption underlying the attorney-client privilege is that clients who care about confidentiality want to keep their communications with counsel confidential from all third parties, and that the ability of any third party to learn of the communications will discourage candor, the General Counsel may have assumed that banks see prudential regulators more like joint venturers or co-parties with whom banks share common interests than like independent auditors, much less antagonists.<sup>32</sup> Alternatively, the General Counsel simply may have been expressing confidence in the effectiveness of the 12 U.S.C. § 1828(x) in preventing third party waiver when privileged information is submitted to the federal banking agencies and in those agencies' general policy of not sharing such information with any other agency not covered by 12 U.S.C. § 1821.

After the Dodd-Frank Act established the CFPB in the 2010,<sup>33</sup> the Bureau took the position that, like the prudential bank regulators, it has authority to compel production of privileged material,<sup>34</sup> although in recognition of the privilege's role in encouraging candor with counsel, it would seek privileged information

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32. Co-parties and others with a common legal interest are generally able to share privileged information, pursuant to a confidentiality agreement, without thereby waiving the attorney-client privilege. *See, e.g.,* *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002). However, under the case law, government regulatory agencies are not regarded as having a common interest with the entities and individuals they regulate but are regarded as antagonists. *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984). Even independent auditors fall outside the "common interest" or "joint defense" exception to the waiver doctrine: sharing information with an independent auditor waives the attorney-client privilege, if not the protection of the work product doctrine. *See generally* Daniel M. Reach, Note, *Keep Your Friends Close but Your Auditors Closer: Corporations Risk Waiver When Independent Auditors Request Work Product*, 23 U. FLA. J.L. & PUB. POL'Y 29 (2012).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Title X, Public Law 111-203, § 1011(a) (2010).

34. CFPB Bulletin 12-01, *supra* note 27.

selectively.<sup>35</sup> The Bureau's explanation was primarily that it was the successor to aspects of the prudential regulators' authority, so that if the others could compel privileged disclosures, it could do so, too.<sup>36</sup>

The Bureau did not consider whether the apparent justifications for other regulators' asserted authority to compel banks to disclose privileged material applied equally to it. For example, the Bureau did not claim that its investigations needed to be swift or that alleged consumer law violations it investigated were rarely the subject of third party claims. The Bureau suggested some other justifications, however. It asserted that, because banks' consumer law compliance programs sometimes rely on lawyers, the Bureau must investigate the lawyers' work to fulfill its supervisory responsibility to ensure the adequacy of these compliance programs.<sup>37</sup> It also claimed that, for the Bureau to perform its supervisory work effectively, there needed to be a "free flow of information" from regulated entities and "a trusting and open relationship," which presumably would not be achieved without full disclosure.<sup>38</sup>

The Bureau may have accepted that its ability to compel the production of privileged material might discourage bank constituents from being forthcoming with counsel, but perceived that the public benefit of promoting informed legal advice was outweighed by the regulatory benefits that flow from regulators' access to banks' attorney-client communications. The Bureau's thinking may have been that the privilege reflects a balancing between the public interest in promoting parties' candid disclosures to counsel and the public interest in making probative evidence available in legal proceedings. The privilege's utility in protecting the right to effective counsel and promoting banks' compliance with the law may ordinarily outweigh the countervailing interest in reliable adjudications. But, in the Bureau's view, the balance may tip the other way if one adds in the public interest in making relevant information available to public regulators for the performance of their supervisory responsibilities.

Whether this reasoning is compelling, or even plausible, depends in large part on empirical assumptions about the privilege's general utility, on one hand, and the value of banks' privileged information to the bank regulators, on the other. But it seems doubtful that the Bureau is the best-positioned public body to decide what assumptions should be made and how to strike the necessary

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35. Final Rule, *supra* note 5, 77 F.R. at 39620 ("[T]he Bureau recognizes the important interests served by the common law privileges, in particular the attorney-client privilege. The Bureau understands that compliance with Federal consumer financial law is served by policies that do not discourage those subject to its supervisory or regulatory authority from seeking the advice of counsel. Accordingly, the Bureau continues to adhere to its policy to request submission of privileged information only when it determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources.").

36. CFPB Bulletin 12-01, *supra* note 27, at 1-3.

37. Final Rule, *supra* note 5, 77 F.R. at 39617-18.

38. *Id.* at 39619-20.

balance. The Bureau's natural tendency will be to favor the tangible interest in obtaining privileged information over the intangible, immeasurable interest in promoting candid attorney-client communications.

#### IV. Banks' "Selective Waiver" by Disclosing to Bank Regulators

The ordinary rule is that disclosing privileged information to an outsider waives the privilege, allowing others to obtain at least the formerly privileged information that was disclosed, and perhaps other privileged information on the same subject matter. Bank disclosures to bank regulators are treated differently, however, not only when disclosures are compelled but also when they are entirely voluntary. Consider the next Act.

*Act 4.* The Bank's troubles are not over, because lawyers initiate a class action lawsuit alleging that the Bank engaged in consumer fraud in its mortgage refinancing practices. In discovery, class counsel seeks all the information that the Bank previously provided to the Bureau, including the material that, at least when first created, was protected by the attorney-client privilege. Class counsel asserts that the Bank waived its privileges by providing this material to the regulatory agency. Indeed, class counsel asserts that the Bank waived its privileges not only with respect to what the Bank provided to the Bureau but also with respect to any additional privileged material on the same subject matters. Therefore, class counsel demands production of all otherwise privileged material on the subject of the Bank's mortgage refinancing policy and practices regardless of whether the Bank gave it to the Bureau. The Bank objects, however, asserting that it did not waive its privileges by providing the protected material to the Bureau, and the court agrees.

*Waiver of the privilege by disclosure to a third party.* Much has been written on the concept of "selective waiver" of the attorney-client privilege.<sup>39</sup> As a general rule, a party implicitly waives the protection of the privilege by disclosing a protected attorney-client communication to a third party,<sup>40</sup> even when that third party is a federal agency.<sup>41</sup> The rationale is that, if the party is willing to divulge

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39. See, e.g., Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence* 502, 58 S.C. L. REV. 211 (2006); Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 39-59 (1997); RICE, *supra* note 1, at § 9:30; Liesa L. Richter, *Corporate Salvation or Damnation, Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129 (2007).

40. RICE, *supra* note 1, at § 9:29; *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 (1984); *United States v. Massachusetts Inst. of Technology*, 129 F.3d 681, 684 (1st Cir. 1997); *In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003).

41. See *supra* note 10.

the communication, then the legal guarantee of confidentiality probably was not necessary to induce the client to make the disclosure in the first place.<sup>42</sup> The protection of the privilege is all-or-nothing: once a party waives the privilege in this or another manner, the party cannot claim the privilege in any setting. In some cases, a party that waives the privilege also loses the protection of the privilege regarding undisclosed material on the same subject matter.<sup>43</sup>

One federal court of appeals has recognized an exception when a party discloses privileged information to a federal agency. The Eighth Circuit held in 1977 that a company that gave the SEC privileged information from its lawyers' internal investigation could still claim the privilege when private third parties later sought the information.<sup>44</sup> The court reasoned that, without this protection, companies might refrain from retaining lawyers to conduct internal investigations of potential wrongdoing—a concern that has not been borne out.<sup>45</sup> Since then, other federal courts of appeals, including most recently the Ninth Circuit, largely have rejected the concept of “selective waiver.”<sup>46</sup> As that court explained, selective waiver would not promote clients' full disclosure to lawyers, which is the premise of the attorney-client privilege; further, courts lack expertise to determine whether selective waiver would facilitate regulatory agencies' work, and thereby promote compliance with the law in general, by encouraging corporations voluntarily to disclose privileged information to these agencies.<sup>47</sup> Therefore, in the court's view, changes in the law are better left to Congress, which has occasionally considered proposed laws that would preserve the protection of the attorney-client privilege when regulated entities disclose information to regulatory agencies.<sup>48</sup>

The Ninth Circuit also rejected the possibility, left open by several other courts of appeals, of a “limited form of selective waiver” that would give effect to a federal regulatory agency's explicit confidentiality agreement with a party.<sup>49</sup> It explained that this approach would not “encourage frank conversation at the time” a lawyer renders legal advice and therefore “does little to serve the

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42. RICE, *supra* note 1, at § 9:81; *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (quoting Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982)); *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973).

43. See generally RICE, *supra* note 1, at § 9:81; see, e.g., *United States v. Skeddle*, 989 F. Supp. 917, 919 (N.D. Ohio 1997). But see Federal Rule of Evidence 502 adopted in 2008, *supra* note 11.

44. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

45. See Bruce A. Green & Ellen S. Podgor, *Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013) (discussing how lawyers' internal investigations have become a multi-million dollar industry).

46. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012).

47. *Id.* at 1127-28.

48. *Id.* at 1128.

49. *Id.* at 1128-29.



'public ends' of adequate legal representation that the attorney-client privilege is designed to protect."<sup>50</sup> Although enforcing regulators' confidentiality agreements might "encourage cooperation with the government," the court noted, that is properly a matter for courts to leave to Congress.<sup>51</sup>

*Selective waiver by banks.* Prior to 2006, a private plaintiff might argue that a bank waived its privileges by acceding to an agency's demand. Several lower court decisions predating Section 1828(x) disagreed, however, and at least one of them relied on the understanding that the bank's disclosures were involuntary, whether as a legal or practical matter.<sup>52</sup> Banks lost the need to litigate whether their disclosures were compelled and therefore ineffective as waivers when Section 1828(x) was adopted to allow banks to disclose privileged material to bank regulators without waiving their privileges.<sup>53</sup> The law applies whether banks provide privileged material on their own initiative or in response to requests or demands.

Section 1828(x) has no meaningful legislative history. It was not a product of legislative study or debate. Whether the law implicitly acknowledges the prudential regulators' right to compel the production of privileged material is also

50. *Id.* at 1128 (quoting *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002)).

51. *Id.*

52. *Boston Auction Co. v. W. Farm Credit Bank*, 925 F. Supp. 1478, 1481-82 (D. Haw. 1996). The OCC had taken the same position in its 1991 interpretive letter. *See* OCC Interpretive Letter, *supra* note 24. In general, courts find that the privilege is not waived when disclosure is made under genuine compulsion—e.g., in obedience to an erroneous court order. *See, e.g.*, *Gov't Guar. Fund of Fin. v. Hyatt Corp.*, 182 F.R.D. 182, 187 (D.V.I. 1998); *Laxalt v. McClatchy*, 116 F.R.D. 438, 455 (D. Nev. 1987). However, disclosure may not be regarded as compelled if a party fails to take advantage of available means to resist. *See, e.g.*, *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1427 (3d Cir. 1991).

53. Section 1828(x) initially provided:

Privileges not affected by disclosure to banking agency or supervisor.

(1) In general. The submission by any person of any information to 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 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 agency, supervisor, or authority.

(2) Rule of construction. No provision of paragraph (1) may be construed as implying or establishing that—

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

(B) any person would waive any privilege applicable to any information by submitting the information to any Federal banking agency, State bank supervisor, or foreign banking authority, but for this subsection.

For purposes of this law, the term "Federal banking agency" means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation. 12 U.S.C. § 1462.

debatable. It is therefore unclear whether the law is meant to assist regulators by encouraging voluntary disclosures that might not otherwise occur, to protect banks from the ramifications of third party waiver when they agree to produce privileged information to bank regulatory agencies, or to serve other purposes.

When Congress established the CFPB, it did not initially extend Sections 1828(x) and 1821(t) to disclosures of privileged information to the Bureau. The Bureau nonetheless asserted that banks would not lose their privileges by complying with the Bureau's requests because banks were legally compelled to do so. In June 2012, the Bureau invoked its rulemaking authority in an attempt to codify this understanding, over the objection of the ABA and others who favored congressional action.<sup>54</sup> At the same, the Bureau represented that, out of deference to the privilege's important role in encouraging candor with counsel, it would seek privileged information only selectively<sup>55</sup> and that it would maintain a presumption against sharing confidential supervisory information with law enforcement agencies except in very limited circumstances.<sup>56</sup> Then, in December 2012, Congress amended Sections 1828(x) and 1821(t) to bring the CFPB within its aegis, thereby providing that banks preserved the protection of their privileges when they disclose privileged material to the Bureau.<sup>57</sup>

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54. Final Rule, *supra* note 5. Disagreeing with critics who argued that the rule would chill banks' communications with their attorneys, the Bureau asserted that the rule "encourages and strengthens communications between supervised entities and their attorneys by providing additional protections for the confidentiality of those communications." *Id.*, 77 F.R. at 39620-21. The assertion was plausible only if one accepted the Bureau's initial premise that it had implied statutory authority to compel banks to produce privileged information. In that event, the rule strengthened banks' ability to argue that disclosing privileged information to the Bureau did not waive the privilege vis-à-vis third parties.

55. *See supra* note 35.

56. Final Rule, *supra* note 5, 77 F.R. at 39621; *see also* CFPB Bulletin 12-01, *supra* note 27, at 4-5 ("[T]he Bureau's policy is to treat information obtained in the supervisory process as confidential and privileged. . . . [T]he Bureau recognizes that the sharing of such information with other government agencies may in some circumstances be appropriate, and, in some instances, required. . . . [¶] By contrast, the Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision." ). Notably, the Bureau's internal policy does not appear to give greater protection to banks' privileged information than to non-privileged information "obtained in the supervisory process" from banks. The policy regards all such information as subject to the Bureau's own privilege—the bank examiners' privilege—but does not appear to take into account that particular protection may be warranted for the subset of information that is attorney-client privileged.

57. P.L. 112-215. As amended, Section 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."

The result is that federal law unequivocally allows “selective waiver” of the attorney-client privilege with respect to privileged information submitted to any of the federal banking agencies, including the CFPB. Further the bank or other regulated entity apparently retains the privilege even if the regulator shares its privileged information with another agency covered by Sections 1828(x) and 1821(t).<sup>58</sup>

Under court decisions in most jurisdictions, regulated entities waive the privilege when they disclose privileged material to public regulators, thereby immediately making the material accessible to private parties in future litigation. The only clear exception is established by Sections 1828(x) and 1821(t), which allows banks or other supervised entities to disclose privileged information to the bank regulatory agencies listed in the statute without, at least initially, causing a waiver as to any third parties. Why should the law recognize this, but only this, exception?

The exception is hard to square with the premise that banks, like other regulated entities, need the attorney-client privilege to promote candid communications that lead to greater voluntary legal compliance, and that the societal benefits of the privilege justify whatever impediments the privilege might pose to effective regulation. But Congress has not expressly endorsed this premise, at least in the context of bank supervision; otherwise it would have forbidden bank regulators from attempting to compel banks to disclose privileged information during examinations or otherwise. The exception makes sense only if one assumes that banks disclose privileged information when they are legally or practically compelled to do so, and that such compulsion by regulators is beneficial, even if it may impede the right to effective counsel or voluntary legal compliance. In that case, selective waiver, in theory, reduces the chilling effect of the bank regulators’ policy of compelling banks to disclose privileged information. Bank constituents may be less candid with counsel if they know that regulators can obtain their disclosures, but perhaps not as guarded as they would be if disclosures to bank regulators waived the privilege generally.

Sections 1828(x) and 1821(t), as a selective waiver exception exclusively for banks and other entities subject to the supervisory and other regulatory jurisdiction of the listed banking agencies, is harder to justify insofar as it applies to voluntary disclosures as well as compelled ones. Presumably, selective waiver

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58. The law, by its terms, does not protect the bank’s privilege, however, if the regulator shares its information with an agency that is not covered by these statutes or with a private party. In that event, the privilege may be “waived,” allowing the recipient to use the information and other third parties to gain access to it. On this reading, at least as a practical matter, once the bank discloses privileged information to the regulator, the regulator co-owns the privilege and has authority to waive it. *Cf. Frankford Trust Co. v. Advest*, 1995 WL 491300 (E.D. Pa. Aug. 17, 1995) (bank waived work product privilege as to the FDIC and State banking agency by producing privileged documents during examination and agencies later waived the examination privilege as to third parties by agreeing to produce the documents to them). Alternatively, banks might argue that regulators’ disclosure is unauthorized and therefore does not constitute a waiver, or that Section 1828(x) continues to protect the privileged status of the information.

encourages banks voluntarily to disclose privileged information that they would not otherwise disclose to the prudential bank regulators and the CFPB because they know that the information cannot be used against them by private plaintiffs (except in those “very limited circumstances” where the CFPB chooses to share the privileged information with other agencies not covered by Section 1821(t)). The regulators then perform their supervisory responsibilities more effectively, thereby making banks safer, sounder and more compliant with the law. But it is hard to see why, as a matter of policy, selective waiver makes more sense for banks and bank regulators than for other parties and regulators.

## V. Bank Regulators’ Selective Disclosure to Other Public Agencies

Both bank regulators’ claimed right to banks’ privileged information and the selective waiver statute presuppose that banks would be affected differently if their attorney-client communications were accessible to parties other than bank regulators. Yet the CFPB reserves the right to disclose regulated banks’ privileged information to other public agencies, including state attorneys general and criminal prosecutors, at least in exceptional circumstances. Consider the final Act of the hypothetical scenario:

*Act 5.* Concerned that the Bank’s mortgage practices amounted to federal criminal misconduct, the Department of Justice (“DOJ”) launches a grand jury investigation. DOJ asks the Bureau for whatever information the Bank gave it, including information that the Bank identified as privileged. The Bank objects. Nonetheless, after giving long, serious thought to DOJ’s request, the Bureau complies. While the Bureau’s sharing of the privileged information with DOJ—as a federal agency—does not initially waive the privilege as to third parties pursuant to Section 1821(t), the privilege is subsequently rendered meaningless when DOJ uses the privileged information to build a criminal case against the Bank and discloses the information to the public.

In the rule making process, the Bureau took the position that, after compelling banks to disclose privileged material, it could share that material with prosecutors in certain limited circumstances. This was consistent with the OCC’s 1991 Interpretive Letter.<sup>59</sup> The Bureau represented that it would disclose privileged information selectively, not routinely.<sup>60</sup> But in some cases, the Bureau

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59. See OCC Interpretive Letter, *supra* note 24.

60. CFPB Bulletin 12-01, *supra* note 27, at 5 (“[T]he Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision. Except where required by law, the Bureau’s policy is 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. The significance of the law enforcement interest at stake will be an important consideration in any such review. However, even the further-

said, it would be obligated to share banks' privileged material with other agencies: "The Bureau is required to provide to the Attorney General evidence of a potential violation of Federal criminal law, . . . and to provide to the Commissioner of Internal Revenue certain information related to possible tax law noncompliance."<sup>61</sup>

It seems impossible to square this policy with either the attorney-client privilege or with Section 1828(x), both of which presuppose that it is generally in the public interest for banks to benefit from the attorney-client privilege—a view that the Bureau purports to share—and that bank examiners' right to obtain banks' privileged material for their own purposes will not in itself impede banks from using lawyers effectively. Indeed, one might argue that Section 1828(x) implicitly forbids bank regulators from sharing privileged information with other agencies. Section 1828(x) expressly provides that sharing information with bank regulators does not waive or destroy privileges with regard to other agencies and authorities. Thus, a prosecutor clearly could not *compel* either a bank or the bank regulator to produce the bank's privileged material, since an ordinary function of the privilege is to forbid legal compulsion of attorney-client communications.

Bank regulators' answer to this appears to be that Section 1821(t)<sup>62</sup> implicitly authorizes them to share banks' privileged information with other federal agencies, insofar as the statute provides that sharing privileged material with another federal agency "shall not be deemed to have waived any privilege applicable" to the information. But this is not the only plausible reading of the law. In enacting Sections 1821(t) and 1828(x), Congress may have been agnostic or skeptical about whether bank regulators may compel banks' privileged material and then freely disseminate it. The statutes serve functions consistent with banks' preservation of the right to claim the privilege.<sup>63</sup> Further, even accepting

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ance of a significant law enforcement interest will not always be sufficient, and the Bureau may still 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."), quoted in Final Rule, *supra* note 5, 77 FR at 39621.

61. CFPB Bulletin, *supra* note 27, at 5 n.12. The Bureau took the position that the material would remain privileged after it was provided to another agency and that recipients could not disclose the material without the Bureau's permission. *Id.* at 5 n. 14 (citing 12 C.F.R. § 1070.47). Evidently, the Bureau was not referring to confidential attorney-client communications that are subject to the crime-fraud exception to the attorney-client privilege, and therefore not privileged from the start. Rather, it was referring to confidential communications that occurred for legitimate reasons but that might nevertheless be useful as evidence of a criminal violation.

62. 12 U.S.C. § 1821(t) provides: "A covered agency, 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 . . . any other covered agency, in any capacity; or . . . any other agency of the Federal Government." See note 12, *supra*.

63. Congress may have expected banks voluntarily to provide attorney-client privileged material to bank examiners but then to retain their privileges under Section 1828(x). In that event, if bank examiners shared the voluntarily produced material with other federal agencies, Section 1821(t) would preserve banks' attorney-client privilege. Further, Section 1821(t) preserves bank regulators'

regulators' reading of Sections 1821(t) and 1828(x), these statutes would seem implicitly to forbid bank regulators from sharing privileged information with state law enforcement agencies *not* covered by Section 1821(t), or with federal law enforcement agencies that do not expressly agree to keep the information confidential and thus prevent waiver as to all third parties. If one accepts regulators' argument that they have implied statutory authority under Section 1828(x) to compel banks to disclose privileged information along with implied statutory authority under Section 1821(t) to then disclose the information to any other federal agency (including one that could not itself have compelled the bank to produce the information), one would assume that the statutes mean to foreclose bank regulators who possess a client's privileged material from voluntarily providing that material to any of the non-federal agencies that are not expressly covered by Section 1821(t) or to any other third parties. Otherwise, the laws provide no comfort to banks when it says that their disclosures to bank regulators do not destroy their privileges.

The regulators' reading of the law makes the federal law truly incoherent. It may be that disclosure to bank regulators alone would not unduly "chill" bank constituents from being forthcoming with bank attorneys. But, assuming constituents care at all about disclosures to third parties, they will surely care that their privileged communications can be disclosed involuntarily to federal prosecutors, state attorneys general, or other law enforcement agencies not covered by Section 1821(t). It is implausible that banks, alone among private entities, are indifferent to the risk of criminal prosecution when they engage in attorney-client communications but worry exclusively about private lawsuits. Either they care about nobody and do not need the privilege or they worry about prosecutors and private litigants alike. Perhaps bank examiners' interactions with banks are regarded as friendly, but the same cannot be said of prosecutors' interactions or even the interactions between banks and enforcement attorneys within the bank regulators. Not surprisingly, the CFPB has made no effort to explain how it can, on one hand, claim to value a bank's attorney-client privilege, and on the other hand, assert the right to compel banks to submit privileged information during the examination process and then turn that material over to its own enforcement lawyers, to prosecutors, or to other federal or state law enforcement officials who would have the power to indict or bring enforcement actions against the bank or its employees.

## Conclusion

Taken together, federal laws and regulatory policies regarding banks' attorney-client privilege appear to be incoherent. Depending on one's empirical

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own bank examiners' privilege over material obtained in a bank examination and the shared with other agencies.

assumptions and policy preferences, one might plausibly argue any of three positions but not the one embodied by the laws and policies:

(1) Skeptics might plausibly argue that banks' attorney-client communications regarding legal compliance are not influenced at all by the privilege. For example, bank constituents' dealings with bank attorneys would be unaffected by the possibility that bank regulators will later compel the bank to disclose their confidential attorney-client communications and then share those communications with prosecutors or other government agencies not covered by Section 1821(t). If so, banks seeking legal advice should not have the privilege at all when their constituents talk to lawyers about proposed policies and transactions. The utilitarian premises of the privilege are not satisfied, and there is no reason for the privilege to frustrate the truth-seeking process. Lawmakers, regulators and professional organizations reject this view, however; the privilege is too deeply embedded in our jurisprudence and its justification, although rooted in common sense and experience not in systematic empirical study, is too compelling.

(2) Alternatively, one might argue that the privilege is just as important for banks as for others, and allowing anyone to compel banks to disclose privileged information will reduce the candor of banks' attorney-client communications, undermining the fundamental right to effective legal counsel and further resulting in less compliance with the law by banks. Therefore, bank regulators should not be allowed to compel or pressure banks or other supervised entities to disclose privileged information during examinations or otherwise, not even if the law allows selective waiver. This is the ABA's view, which reflects the common law judicial approach. The traditional assumption is that bank regulators' practice of compelling banks to disclose privileged information will undermine the confidential lawyer-client relationship, the candor of communications between banks and their counsel and, consequently, the quality of lawyers' advice and banks' legal compliance.

(3) Finally, it would be reasonable to argue that the privilege generally encourages banks' constituents to communicate candidly with banks' lawyers about legal compliance, but the prospect of disclosure to bank examiners alone and for their exclusive use may not seriously affect the nature of these communications; and any loss in terms of candor and, ultimately, legal compliance is outweighed by the regulatory benefits of disclosure. Therefore, allowing banking regulators to require banks and other supervised entities to submit privileged information in connection with routine examinations, without waiving the privilege generally, best serves the public interest. This may be the implicit premise of Section 1828(x). However, this reasoning would not justify CFPB policy, under which it reserves the right to share banks' privileged information with prosecutors, state attorneys general and other law enforcement agencies, at least in exceptional circumstances. It is implausible to imagine that banks' attorney-client communications would be unaffected by the risk that their privileged information may be disclosed to federal law enforcement officials or other federal agencies for use against the banks in civil or administrative enforcement actions or criminal

proceedings, or by the risk that the information may be disclosed to state authorities or others not covered by Section 1821(t) and subsequently discovered by private litigants, all to the severe prejudice of the banks.

Both the recent CFPB rule and Congress's recent expansion of Sections 1828(x) and 1821(t) should encourage discussion, and perhaps rethinking, about the attorney-client privilege. The profession, or at least the banking law bar, might continue to tacitly accept regulators' asserted right to access banks' privileged information during routine examinations, since the claim rests on plausible assumptions. But it is hard to identify any theory supporting bank regulators' recent claims that they have the right to share banks' privileged materials with other federal or state law enforcement agencies, particularly those that are either not expressly covered by Section 1821(t) or that may ultimately waive the privilege by publicly disclosing the bank's privileged information as part of an enforcement action.

Further, it is not obvious why, if Sections 1828(x) and 1821(t) and bank regulatory policy truly serve the public interest, selective waiver should be so narrowly limited. The SEC, for one, asserts that it has a comparable need for regulated entities' privileged information in order to ensure the integrity of the nation's capital markets, and that the law should therefore encourage disclosures to the SEC by allowing entities to make disclosures without generally waiving their privileges. If the bank regulators are right, is the SEC wrong? Or perhaps, on reflection, are Sections 1828(x) and 1821(t) not beneficial for the public after all?

The questions are challenging, in part, because relevant empirical information is hard or impossible to come by.<sup>64</sup> None of the relevant lawmaking bodies has an incentive to attempt to resolve them. The federal courts, in the context of adjudication, often regard the relevant regulatory interests as beyond their expertise. In the context of evidence rule making, the federal judiciary is unlikely to draw distinctions between prudential regulators and the CFPB, between bank regulators and other federal regulators with equally compelling missions, or between regulatory agencies and law enforcement officials, although any of those may be places where the lines should be drawn. Regulatory agencies such as the CFPB or the SEC will naturally overvalue their perceived regulatory interests when they adopt rules or propose legislation governing privileges.<sup>65</sup> Ultimately, these issues will be resolved either in Congress—which, so far at least, does not have a track record of seriously studying the questions—or by the federal appellate courts, if financial institutions can summon the courage to risk possible retaliation or sanctions by the powerful banking agencies that supervise them and pursue what could be protracted litigation on this important legal issue.

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64. See generally RICE, *supra* note 1, § 2.3 at 62.

65. *Id.* (“the ‘benefits [of the privilege] are all indirect and speculative [and] its obstruction is plain and concrete’”) (quoting WIGMORE ON EVIDENCE).



For those who study the law of lawyering, one takeaway is the complexity of confidentiality and privilege questions. The questions raised by the selective waiver statute illustrate this point. To take a non-doctrinaire position, one needs to have an informed view about how corporate constituents interact with lawyers and about how regulators interact with regulated entities in very particular contexts. Very few lawyers and academics possess the requisite knowledge and experience and it is hard to come by.