

AMENDING THE FEDERAL DEPOSIT INSURANCE ACT WITH RESPECT TO
INFORMATION PROVIDED TO THE BUREAU OF CONSUMER FINANCIAL
PROTECTION

MARCH 20, 2012.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. BACHUS, from the Committee on Financial Services,
submitted the following,

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4014]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 4014) to amend the Federal Deposit Insurance Act with respect to information provided to the Bureau of Consumer Financial Protection, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

The purpose of H.R. 4014 is to clarify that institutions regulated by the Consumer Financial Protection Bureau (CFPB) have not risked and will not waive applicable legal privileges as to third parties when they have shared or will provide information to the CFPB. The bill also makes clear that the CFPB can share such information with other Federal agencies without impacting a regulated institution's attorney-client privilege or work-product immunity as it applies to third parties. This statutory change will ensure that privileged information remains privileged.

Specifically, H.R. 4014 amends Section 11(t)(2)(A) of the Federal Deposit Insurance Act (the Act) by adding the CFPB to the list of covered agencies that may share information with other covered or Federal agencies without waiving any privilege applicable to the information. The other covered agencies currently include any Federal banking agency, the Farm Credit Administration, the Farm Credit System Insurance Corporation, the National Credit Union

Administration, the Government Accountability Office, and the Federal Housing Finance Agency.

The bill also amends Section 18(x) of the Act to reemphasize that the submission by any person of any information to the CFPB in the course of any supervisory or regulatory process does not waive, destroy, or otherwise affect any privilege the person may claim with respect to third parties. It is the Committee's intent that "any person" shall be construed to include any individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, firm, society, joint stock company, or other entity.

BACKGROUND AND NEED FOR LEGISLATION

Many supervised institutions have expressed concern that providing the CFPB privileged information could waive the institutions' privilege with respect to third parties. In response to these concerns, the CFPB stated in a bulletin that it would take reasonable and appropriate actions to assist supervised institutions in rebutting any claim that they have waived privileges by providing information to the CFPB. The CFPB has also issued a proposed rule stating that any person who submits information to the CFPB has not waived any applicable privileges. The proposed rule even provides that no waiver occurs when the CFPB shares privileged information with any state or federal agency. Richard Cordray of the CFPB has also expressed support for a legislative clarification.¹

H.R. 4014, introduced by Representative Bill Huizenga, addresses these concerns. It clarifies that a supervised institution that has submitted information to the CFPB has not waived applicable privileges, and that privilege is not waived if the CFPB shares such information with other Federal agencies.

HEARING

The Subcommittee on Financial Institutions and Consumer Credit held a legislative hearing on February 8, 2012 entitled "Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau." The following witnesses testified:

- Mr. Michael J. Hunter, Chief Operating Officer, American Bankers Association
- Mr. Andrew J. Pincus, Partner, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce
- Mr. Chris Stinebert, President and Chief Executive Officer, American Financial Services Association
- Mr. Arthur E. Wilmarth, Jr., Professor of Law, The George Washington University

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on February 16, 2012 and ordered H.R. 4014 favorably reported to the House by voice vote.

¹ See *How will the CFPB Function Under Richard Cordray?: Hearing Before the Subcomm. on TARP, Fin. Serv. & Bailouts of Pub. & Private Programs of the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012)* (statement of Richard Cordray, Director, U.S. Consumer Fin. Prot. Bureau).

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The Committee did not take any record votes on H.R. 4014 on February 16, 2012. A motion by Chairman Bachus to report the bill to the House with a favorable recommendation was agreed to by voice vote.

During consideration of H.R. 4014, the following motion was considered by the Committee:

A motion offered by Mr. Bachus of Alabama to move the previous question on H.R. 4014 was agreed to by voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held a hearing and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The objective of H.R. 4014 is to clarify that institutions regulated by the Consumer Financial Protection Bureau (CFPB) have not risked and will not waive applicable legal privileges as to third parties when they have shared or will provide information to the CFPB. Another objective of the bill is to make clear that the CFPB can share such information with other Federal agencies without impacting a regulated institution's attorney-client privilege or work-product immunity as it applies to third parties. This statutory change will ensure that privileged information remains privileged.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

MARCH 19, 2012.

Hon. SPENCER BACHUS,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4014, a bill to amend the Federal Deposit Insurance Act with respect to information provided to the Bureau of Consumer Financial Protection.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4014—A bill to amend the Federal Deposit Insurance Act with respect to information provided to the Bureau of Consumer Financial Protection

H.R. 4014 would clarify that sharing privileged information with the Consumer Financial Protection Bureau (CFPB) does not waive certain legal privileges and would not open that information or a financial institution up to a third-party subpoena. CBO estimates that enacting this legislation would have no impact on the federal budget; therefore, pay-as-you-go procedures do not apply.

H.R. 4014 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under current law, sharing privileged information with a covered agency during the course of a supervisory or regulatory process does not waive attorney-client, work-product, or other privileges recognized under federal or state law. Covered agencies include, for example, any federal banking agency, the Farm Credit Administration, the Government Accountability Office, and the Federal Housing Finance Agency.

H.R. 4014 would add the CFPB to the list of covered agencies, thus protecting information shared with the bureau in a similar manner. The CFPB has indicated that it would follow this practice in absence of legislation and has recently issued a proposed rule-making to that effect. Enacting this legislation would eliminate any uncertainty about whether the CFPB can protect such information.

The CBO staff contact for this estimate is Daniel Hoople. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

SEC. 18. (a) * * *

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(x) PRIVILEGES NOT AFFECTED BY DISCLOSURE TO BANKING AGENCY OR SUPERVISOR.—

(1) IN GENERAL.—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 agency] *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 agency] *such Bureau, agency*, supervisor, or authority.

(2) RULE OF CONSTRUCTION.—No provision of paragraph (1) may be construed as implying or establishing that—

(A) * * *

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

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MINORITY VIEWS

We are pleased to support this bill. The legislation does not do anything to weaken the underlying law that established the Consumer Financial Protection Bureau (“CFPB”), but provides clarity regarding the treatment of confidential information submitted to CFPB by the institutions it regulates.

We understood that the maintenance of privilege is implicit in the law, but since the question has been raised, it is a good idea to make it explicit. By making this explicit, we remove a potential obstacle to institutions cooperating with the CFPB, and allow the agency to better carry out its mission of protecting consumers.

BARNEY FRANK.
GARY L. ACKERMAN.
JOE DONNELLY.
MICHAEL E. CAPUANO.
ANDRÉ CARSON.
GWEN MOORE.
CAROLYN MCCARTHY.
MELVIN L. WATT.
RUBÉN HINOJOSA.
WM. LACY CLAY.
JOE BACA.
KEITH ELLISON.
JAMES HIMES.
CAROLYN B. MALONEY.

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