NARCA
LEGAL COLLECTION PROFESSIONALS

April 16, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20006

Re: Docket No. CFPB-2012-0010; RIN 3170-AA20
Bureau of Consumer Financial Protection Proposed Rule on Confidential Treatment of Privileged Information

Dear Ms. Jackson:

These comments are submitted on behalf of the National Association of Retail Collection Attorneys ("NARCA") in response to the proposed rule by the Consumer Financial Protection Bureau (the "Bureau") published on March 15, 2012, regarding Confidential Treatment of Privileged Information (the "Proposed Rule"), 77 Fed. Reg. 15286. The National Association of Retail Collection Attorneys is a trade association dedicated to serving law firms engaged in the business of consumer debt collection. NARCA's mission is to preserve and protect the integrity and viability of legal collections with professionalism, ethical actions, and a service-oriented approach. In addition to applicable laws, state bar association licensing and certification, attorney members of NARCA are required to adhere to the NARCA Code of Professional Conduct and Ethics.
NARCA appreciates the opportunity to comment on the important statutory and policy considerations raised by the proposed rulemaking.

## I. Introduction

Section 1024 of the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5301, *et seq*.), grants the Bureau authority to supervise certain persons for compliance with Federal consumer financial laws. In exercising its supervisory authority, the Bureau notes that it will at times request information from its supervised entities that may be subject to one or more statutory or common law privileges, including the attorney-client privilege and attorney work product doctrine. The Bureau has previously taken the position, set forth in Bulletin 12-01, that it can demand attorney-client privileged material without the privilege being waived under a federal statute applicable to federal banking agencies, even though the underlying rule does not apply to the Bureau. *See* 12 U.S.C. § 1785(j), 1828(x). The Bureau now seeks to issue the Proposed Rule to "codify this understanding in order to provide entities subject to the Bureau's supervisory or regulatory authority further assurances that the submission of privileged information to the Bureau, or the Bureau's subsequent transmission of the information to other government agencies, will not

affect the privileged and confidential nature of the information." Federal Register 77:51 (March 15, 2012) p. 15290.

## II. Attorney-Client Privilege

While the Bureau's attempt to bring clarity to this issue is laudable, there is a significant threshold question whether the Bureau has the authority to unilaterally declare that privileged materials disclosed to the Bureau maintain their privileged status. It is a fundamental maxim of statutory interpretation that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *See, e.g.*, *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929). Here, Congress has specifically extended the protection of privileged information to certain federal banking agencies, but not to the Bureau. Without such statutory exemption, attorneys are left in a quandary to decide whether to turn over privileged materials and risk a court's determination that such disclosure has waived the attorney-client privilege (and likely constituted an ethical violation by the attorney), or to resist disclosing the privileged information.

Further, the Bureau's Proposed Rule, in the absence of clear legislative authority, has the potential to chill communications between attorney and client, and may result in the client foregoing legal representation at the exact moment such representation is the most beneficial. *See Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000) (protecting confidential communications between an attorney and a client not only facilitates the full development of facts essential to proper representation of a client but also encourages the general public to seek early legal assistance). This potential chilling effect is precisely why the attorney-client privilege has historically been considered of paramount importance, and is "one of the oldest recognized privileges for confidential communications and [is] traditionally deemed worthy of maximum legal protection." *In re Public Defender Serv.*, 831 A.2d 890, 900 (D.C. 2003); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Indeed, "[i]f the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The Bureau's Proposed Rule thus may have the unintended consequence of undermining "one of a private lawyer's most important public functions in American society – fostering voluntary compliance with law." The Honorable Dick Thornburgh, *Waiver of the Attorney-Client Privilege: A Balanced Approach*, Washington Legal Foundation (2006); *see also Upjohn*, 449 U.S. at 389 (purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.").

In light of these important statutory and policy considerations, NARCA believes that the Bureau should not adopt the Proposed Rule and should wait to request privileged information until Congress acts on pending legislation to amend 12 U.S.C. § 1828(x), thereby extending the statutory protection for privileged material to the Bureau.

## III. Work Product Doctrine and Sharing of Privileged Material

Two additional aspects of the Bureau's Proposed Rule also raise substantial practical and policy considerations of concern to NARCA. First, unlike Bulletin 12-01, which discusses only the attorney-client privilege, and 12 U.S.C. § 1828(x), which refers only generally to "privilege," the Proposed Rule explicitly references the work product doctrine, signaling the Bureau's intent to request both attorney-client and work product materials from supervised entities. Attorney work product is of a fundamentally different nature than other types of privileged material or communications, as it encompasses tangible material or its intangible equivalent that is collected or prepared in anticipation of litigation, such as written materials, charts, notes of conversations and investigations, and insights into the attorney's legal theories and trial strategies. *Black's Law Dictionary* (Abridged 7th ed. ed.) at 1298. Production of such material is inappropriate absent the most compelling of circumstances. As the Supreme Court has stated:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

*Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Accordingly, production or materials covered by work product protection is appropriate only where absolutely necessary or where denial of production would cause a "hardship or injustice." *Id*. at 509. The Bureau's Proposed Rule fails to recognize the high burden required of the proponent seeking production of an attorney's work product, even as compared to privileged material.

This encroachment on an attorney's work product protection becomes all the more troubling when considered together with the Bureau's stated intention to share privileged information with state agencies including, presumably, state attorneys general. *See* 77 Fed. Reg. 15286, 15289 ((March 15, 2012) ("[t]he coordinated intergovernmental action envisioned by Title X of the Dodd-Frank Act would be significantly hampered if the Bureau were not able to exchange privileged information with these agencies freely."). It is not clear from the Proposed Rule whether the Bureau intends that state attorneys general will be prohibited from using privileged and work product material in enforcement actions against supervised entities. Even if they are, however, the fact that privileged materials and the attorney's legal theories and trial strategies are susceptible to being shared directly with the prosecutorial body is deeply troubling and antithetical to the entire underpinnings of the attorney-client privilege and work product doctrine.

## IV. Conclusion

NARCA urges the Bureau to decline to adopt the Proposed Rule at this time, and to permit Congress to act on the pending bill extending the privilege protection to the Bureau. At that time, the Bureau will be in a better position to propose an implementing rule that comprehensively addresses the important legal and policy considerations raised by the disclosure and sharing of privileged materials. NARCA respectfully suggests that requiring the sharing of work product material will not be appropriate, even if the pending bill has passed, as there is a heightened standard for the disclosure of such material that is not authorized by the proposed legislation.

Respectfully Submitted,

Louis S. Freedman, President