



**ILLINOIS STATE
BAR ASSOCIATION**

John E. Thies • *President*
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November 2, 2012

The Honorable Richard J. Durbin
Assistant Majority Leader
United States Senate
Washington, D.C. 20510

Re: Support for S. 3394
Protecting the Attorney-Client Privilege During CFPB Examinations

Dear Senator Durbin:

The Illinois State Bar Association respectfully requests your help in the November session by sponsoring or supporting S. 3394 protecting the attorney-client privilege. This legislation clarifies that when banks and other supervised entities submit attorney-client privileged information to the Consumer Financial Protection Bureau (CFPB), those submissions do not waive the privilege as to any third party. We have no position as to any other matters contained in S. 3394.

S. 3394 corrects a 2010 legislative oversight in which Congress failed to harmonize Title X of the Dodd-Frank Act with two key sections of the Federal Deposit Insurance Act. Those sections provide that when banks and other supervised entities provide federal banking regulators with the privileged information that the regulators contend is needed to conduct thorough examinations, the regulators can review and share that information with other federal agencies and the privileged information remains privileged as to all other third parties.¹

Unfortunately, when Congress created the Consumer Financial Protection Bureau in 2010 as part of the Dodd-Frank Act and granted it authority to examine and regulate large banks, it neglected to update the existing Federal Deposit Insurance Act by adding the CFPB to the list of federal banking agencies that are expressly covered by these two sections. This omission has created

¹ 12 U.S.C. § 1828(x); 12 U.S.C. § 1821(t).

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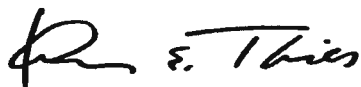
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uncertainty regarding whether banks can safely submit privileged information to the CFPB without inadvertently waiving the privilege as to all other third parties. Although the CFPB recently issued a new rule pledging to preserve the privileged status of information it receives from banks and other supervised entities, we share the concerns previously raised by the American Bar Association and others that the CFPB may not have the legal authority to protect the privilege without a legislative remedy.²

S. 3394 eliminates this uncertainty by amending the Federal Deposit Insurance Act to clarify that the CFPB, like the other federal banking regulators, can receive privileged information from banks and other supervised entities and then share that information with other federal agencies without waiving the privilege as to third parties. As a result, the legislation would create a single, consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks and other financial institutions. Therefore, we would appreciate your support for S. 3394 and your assistance in helping to secure final Senate passage of the legislation (or the similar House-passed bill, H.R. 4014) during the lame duck session in November.

If you have any questions or concerns about our position, please do not hesitate to contact us. Thank you for taking time to hear our views on behalf of our members and our clients.

Respectfully,



John E. Thies
President
Illinois State Bar Association

² The ABA's previous letters to key Senate leaders and to the CFPB expressing support for S. 3394 and H.R. 4014 and concerns over the CFPB's inability to protect the privilege in the absence of such legislation are available at:

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012sep20_cfpbprivilegedmaterials_l.authcheckdam.pdf and

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclientprivileges_l.authcheckdam.pdf.