



**ILLINOIS STATE  
BAR ASSOCIATION**

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November 2, 2012

The Honorable Mark Kirk  
United States Senate  
Washington, D.C. 20510

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

Dear Senator Kirk:

The Illinois State Bar Association appreciates your cosponsorship and support of S. 3394 designed to protect the attorney-client privilege and respectfully requests your help in securing final Senate passage of this important legislation during the November session. 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.<sup>1</sup>

Unfortunately, when Congress created the Consumer Financial Protection Bureau in 2010 as part of the Dodd-Frank Act and granted it authority to

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<sup>1</sup> 12 U.S.C. § 1828(x); 12 U.S.C. § 1821(t).

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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 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.<sup>2</sup>

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.

Although S. 3394 and the similar House-passed bill, H.R. 4014 enjoy strong bipartisan support in Congress, a final Senate vote on the legislation was delayed when Senator Jim DeMint placed a hold on the bill until Senate leaders schedule an up-or-down vote to repeal the entire Dodd-Frank Act. It would be unfortunate if his hold – however well-intentioned it may be – prevented final passage of S. 3394 this year leaving banks and other business clients' with a eroded attorney-client privilege in their dealings with the CFPB. Therefore, we would appreciate any assistance you could provide in persuading Senator DeMint to release his hold on this vital legislation so that the Senate can pass the measure on an expedited basis during the November session.

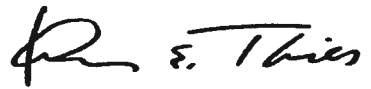
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<sup>2</sup> The ABA's previous letters to key Senate leaders and to the CFPB expressing support for S. 3394 and H.R. 4014 and concerns over the CFPB's inability to protect the privilege in the absence of such legislation are available at:  
[http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012sep20\\_cfpbprivilegedmaterials\\_l.authcheckdam.pdf](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](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclientprivileges_l.authcheckdam.pdf).

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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,

A handwritten signature in black ink, appearing to read "John E. Thies". The signature is written in a cursive style with a large initial "J" and "E".

John E. Thies  
President  
Illinois State Bar Association