Attorney-Client Privilege

CFPB Adopts Final Rule to Protect Privileged Bank Info

The Consumer Financial Protection Bureau (CFPB) has moved ahead with a final rule on the protection of privileged information submitted by banks and other financial institutions during the supervisory process, despite industry concerns about its effectiveness.

The final rule published June 28 states that submission of information to the CFPB in the course of supervision or regulation would not result in a waiver of the attorney-client privilege or other legal shields, nor would a waiver occur if the CFPB shares that information with state agencies or state attorneys general.

Such protections would prevent third parties from petitioning courts for access to banks' sensitive documents for use in civil complaints and similar actions, according to the rule.

''We are committed to safeguarding the confidential information of the institutions we supervise to ensure the bureau is best equipped to do its job and protect consumers,'' CFPB Director Richard Cordray said. ''This new rule supports the free flow of information that is essential to an effective supervision program.''

The privilege rule applies to large banks and credit unions with more than $10 billion in assets, as well as non-bank financial firms of all sizes that are directly supervised by the consumer bureau.

Although most industry trade organizations view the regulation as helpful, some argued during the comment period that action by Congress is needed to prevent third parties from accessing sensitive information.

The groups fear that third parties may seek discovery of privileged materials on grounds that a waiver has occurred because the institution handed over the documents voluntarily to the CFPB.

Agency Urged to Wait for Congress

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness said promulgation of a rule ''is certainly more helpful than harmful,'' but also argued that the action ''cannot substitute for enactment of statutory anti-waiver protection.''

A joint letter from the Clearing House Association, the American Bankers Association, the Consumer Bankers Association, and the Financial Services Roundtable April 16 also expressed a preference for legislation as the ''clearest and most appropriate way to protect any privileges applicable to information provided to the Bureau.''

The disagreement stems from an oversight in the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB. The law did not explicitly give the CFPB the same authority as other banking regulators in guarding supervisory information from scrutiny by outside parties and the public.

The CFPB maintains that such authority transferred over from other banking regulators when the CFPB inherited responsibility for enforcing consumer financial protection laws. The bureau said it supports a legislative fix, but does not view it as a necessity for safeguarding information.

''Delegated rulemaking authority is designed to relieve Congress of the obligation to anticipate and address every issue that arises in an agency's administration of the laws entrusted to its care,'' the final rule said.

In March, the House approved a bill (H.R. 4014) by unanimous consent to amend section 18(x) of the Federal Deposit Insurance Act to specify that bank information handed over to the CFPB during exams does not waive attorney-client privilege and other protections.

But passage without a roll-call vote stalled in the Senate after two unidentified senators voiced objections on grounds that other areas of the CFPB and the Dodd-Frank should be open for amendments as well.

By Mike Ferullo

Corporate Compliance

Experts 'Demystify' Internal Investigations in New Guide

A compliance program provides many benefits. It instructs employees on ethical behavior, provides a game plan for reacting to reports of wrongdoing, and enables the company to perform an internal investigation that demonstrates independence and credibility.

A group of litigation attorneys with Holland & Knight LLP recently developed a guide on corporate internal investigations after working with clients and finding that executives often have little knowledge of the process.

''We hope to demystify the process for executives who may have very little experience with this . . . to give them a bird's eye view,'' Stacey Wang, a litigation associate in Holland & Knight's west coast litigation group, told BNA June 20.

While there is a greater awareness among corporations of the need for increased compliance, many still lack internal experience on how to deal with law enforcement or address triggers that may necessitate an internal investigation, according to Vince Farhat, a partner at Holland & Knight.

Farhat, along with Wang and Holland & Knight partner Vito Costanzo, wrote *Corporate Internal Investigations: A User Guide for Companies* as a primer on how to determine whether to launch a probe within a company.

Consider the Source

Some companies become defensive and adopt a ''circle the wagons'' approach when faced with an allegation of wrongdoing, and this is often a mistake, Costanzo told BNA. Often, it is better to uncover the facts and circumstances surrounding the allegations than it is to dismiss it out of hand without any inquiry, he said.

The decision of whether to pursue an internal investigation involves a balancing act of potential benefits and consequences, Costanzo said.

For example, an investigation into a claim may be disruptive or distracting to management and potentially cause morale problems; however, it could also provide peace of mind to management, and employees will take procedures and policies more seriously if they know the company will investigate wrongdoing, he said.

Also key to determining whether to conduct an investigation is the credibility of the source of the allegation. A company will want to consider whether the source is a former or disgruntled employee, a legitimate whistleblower, a competitor, or even a busybody who wishes to cause damage to the company, Costanzo said.

The decision may also be triggered by a routine internal audit, a board member or manager learning of suspected impropriety, or an anonymous tip, he added.

Two Automatic Steps to Take

When a company learns that litigation is reasonably likely, the company

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should take steps to preserve documents, Wang said. Obviously, the company should do the same if it learns of a government investigation.

A company cannot simply rely on routine document retention polices when litigation is anticipated. Routine actions that would result in the destruction of documents or information that may be relevant to the litigation or investigation should be suspended, Wang said.

Another important step that should be taken early in response to a triggering event or allegation is to establish the independence of the internal investigation, Wang said. An independent internal committee can be a committee of one, but the key is for that person to be independent, she added.

"Any delay in implementing these two steps can cause huge problems," Wang said.

GC as Compliance Officer

In recent years, regulators have been pushing for a separation between corporate compliance officers and in-house counsel offices, Farhat said. A corporation should have a separate compliance department or committee to avoid conflicts present when in-house counsel is involved, he explained.

Some high-profile cases have shown the challenges faced by companies when the compliance and general counsel functions come under one person or department, Wang said.

For example, in 2003, Senate Finance Committee Chairman Chuck Grassley criticized Tenet Healthcare for having placed one individual as both the general counsel and as chief compliance officer, Wang noted. Not only did the government fine Tenet Healthcare, but it later initiated an investigation against the individual in the conflicting roles.

More recently, WellCare Health Plans Inc.'s former general counsel and chief compliance officer was named individually in an action for securities violations and insider trading, she said.

"The general counsel is the defender of the company. The compliance officer is charged with compliance and setting a tone for the company. These are often at odds," Wang explained.

BY CHE ODOM

Holland & Knight's guide is available at http://www.hklaw.com/id29/.

In Brief

SEC Sets Meeting for Conflict Minerals, Resource Extraction Vote

The Securities and Exchange Commission announced July 2 that it will hold an open meeting Aug. 22 to consider whether to adopt proposals on the disclosure of conflict minerals and resource extractions, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The SEC issued proposals on the requirements in December 2010 (25 CCW 385, 12/29/10). Section 1502 of the Dodd-Frank Act directs the SEC to impose enhanced disclosure requirements on issuers that use tantalum, tin, gold, or tungsten—so-called "conflict minerals"—from the Democratic Republic of the Congo and neighboring countries. Section 1504 of the Act directs the SEC to issue rules to require resource extraction issuers to disclose, in annual reports, payments made to governments to "further the commercial development" of oil, natural gas, or minerals. Rules to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506 of Regulation D and Rule 144A will also be considered at the meeting.

Chevedden Asks for Panel Rehearing of 'KBR' Ruling

Shareholder activist John Chevedden June 25 petitioned a U.S. Court of Appeals for the Fifth Circuit panel to revisit its decision to allow KBR Inc. to omit his shareholder proposal from the company's 2012 proxy materials. In a June 11 ruling, the Fifth Circuit panel, comprised of Judges Thomas Reavley, Jerry Smith, and Edward Prado, affirmed a lower court holding that KBR could exclude the resolution, which called on the company to replace its staggered board with annually elected directors (27 CCW 187, 6/20/12). In his filing, Chevedden—who represents himself in the case—argued that the panel's reliance on the U.S. Supreme Court's decision in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), to conclude that 1934 Securities Exchange Act Section 14(a) creates a private right of action, conflicts with the rulings of three other circuits (*KBR Inc. v. Chevedden*, 5th Cir., No. 11-20921, 6/25/12).

SEC Settlements With Individuals Up in First Half of FY 2012

The Securities and Exchange Commission's settlements with individual defendants in the first half of fiscal year 2012 show a projected spike in such accords over 2011, according to a report released June 27 by NERA Economic Consulting. The increase has been spurred "primarily" by the SEC striking deals with insider trading defendants, the report explained. According to NERA, in the first half of FY 2012, the SEC settled 286 lawsuits against individuals, putting it on track for 572 settlements for the year. The figure would be the largest number of SEC settlements with individuals since 2005, the report said. Of the 286 settlements, 60 were with insider trading defendants, the group said. That figure puts the SEC on pace to settle 120 individual insider cases in FY 2012—an all-time high for such accords.

U.K. to Introduce Binding Shareholder Votes on Director Pay

Shareholders will be given binding votes on pay policy and exit payments under planned legislation to be introduced in the U.K.'s parliamentary year, which ends April 2013, Business Secretary Vince Cable said June 27. Describing the plans as the most comprehensive reforms of the framework for directors' remuneration in a decade, Cable said the measures include requiring businesses to report a single figure for the total pay directors received for the year and explain their approach to exit payments. The finalized plans on executive pay will be inserted in the Enterprise Regulatory Reform Bill which was introduced in parliament in May and is currently being debated. The Department for Business, Innovation and Skills, which Cable heads, said it plans to see enactment of these new plans by October 2013 at the latest.