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CLE Materials for

Exams and Investigations: Pro Tips for Resolving Them on Your Terms

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Moderator: Sabeena Ahmed Liconte (CCO/Head of Legal, ICBC Standard Securities)

Speakers: Anthony Mansfield (Managing Partner, Allen Overy Shearman Sterling)
Janet McCormick (Chief Compliance Officer for the FCM, UBS)
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Addressing Privilege Issues in NFA Exams

By: Chad Silverman, Peter Varlan and Matthew Harris[1]

The National Futures Association ("NFA") conducts periodic on-site examinations of its members, which include commodity pool operators, commodity trading advisors, introducing brokers, retail foreign exchange dealers/forex dealer members and swap dealers.[2] An NFA examination can involve review of potentially any books and records related to a members commodities business. In any regulatory examination, enforcement action or other inquiry, treatment of privilege materials is a consequential issue, as disclosing privilege materials to a third party can result in waiver or other consequences. Unlike other regulators and self-regulatory organizations ("SROs"), the NFA has adopted a policy of not recognizing claims of privilege as a basis for withholding or redacting documents requested by the NFA.[3] This policy may place NFA members who are undergoing examinations into a difficult balancing act of cooperating with NFA examiners while protecting their privilege. This articles examines the privileges that may be implicated in examinations, discusses the implications of the NFA's position to not recognize privilege and concludes with practical recommendations for NFA members who have been asked to produce privilege material in connection with an NFA examination.

I. The Attorney-Client, Attorney Work Product and Bank Examination Privileges

NFA members responding to examination requests may be confronted with materials potentially protected by three types of privilege: (i) attorney-client privilege, (ii) attorney work product, and (iii) the bank examination privilege. Understanding the nature of these privileges is critical for determining how to navigate requests to produce information potentially protected by the privilege in an examination.

A. The Attorney-Client and Attorney Work Product Privileges

The attorney-client privilege, recognized as "the oldest of the privileges," generally protects any confidential communication between a lawyer and client from disclosure to third parties.[4] Invoking the privilege requires showing that a communication (i) was between client

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2 *See* Examinations FAQs, NFA (last accessed Mar. 24, 2026), https://www.nfa.futures.org/faqs/members/examinations.html; Swap Examination FAQs, NFA (last accessed Mar. 24, 2026), https://www.nfa.futures.org/faqs/members/swap-examination.html.

3 Confidential Treatment of Section 4s Implementing Regulations Submissions, NFA (last accessed Mar. 24, 2026) (advising members "that it is NFA's longstanding policy not to recognize a claim of privilege (including attorney-client privilege) as a proper basis for withholding documents from NFA or redacting information from them"), https://www.nfa.futures.org/members/sd/4s-process/request-confidential-treatment-section-4s-implementing-regulations.html.

4 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

and counsel, (ii) was intended to be, and was in fact kept, confidential, and (iii) made for the purpose of obtaining or providing legal advice.[5]

The purpose of the attorney-client privilege is to "encourage full and frank communications between attorneys and their clients," based on the need for a lawyer to be fully informed of all that is related to a client's case or need for legal advice.[6] The privilege recognizes that if these conversations were subject to disclosure to adversaries or other third parties, that clients or attorneys may not choose to speak as freely in order to avoid the negative consequences of disclosure.[7] The Supreme Court has recognized that this purpose not only serves the interests of individual clients, but also the "broader public interests in the observance of law and administration of justice."[8]

A closely related privilege is the work product doctrine, which protects any documents prepared "in anticipation of litigation or for trial."[9] The goal of the attorney work product doctrine is to protect an attorney's mental impressions, in the form of "interviews, statements, memoranda, correspondence, briefs," "and countless other tangible and intangible ways" in his or her representation of a client.[10] This is so-called "opinion" work product and is afforded near-absolute protection and is virtually undiscoverable. "Fact" work product, by contrast, consists of factual material gathered in anticipation of litigation. If such material is made in anticipation of litigation, the party seeking discovery must show a substantial need for the materials and undue hardship in obtaining the document by any other means.[11]

While imperative to successful legal representation, both the attorney-client privilege and the work product doctrine are subject to waiver. The client holds the privilege, and only the client may choose to waive it.[12] The privilege can be intentionally waived by disclosing the privileged information to a third party because after disclosure, the rationale for the privilege—confidentiality—no longer applies.[13] In addition to intentional waiver, if a privileged communication or document is unintentionally disclosed, the privilege may be deemed to have been waived unless the privilege holder took reasonable steps to prevent the disclosure and

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5 *See, e.g.*, *United States v. Constr. Prods. Rsch., Inc.*, 73 F.3d 464, 473 (2d Cir. 1996).

6 *Upjohn*, 449 U.S. at 389.

7 *Id.*

8 *Id.*

9 Fed. R. Civ. P. 26(b)(3)(A).

10 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

11 Fed. R. Civ. P. 26(b)(3)(A)(ii).

12 *See, e.g.*, *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987) ("[T]he privilege belongs solely to the client and may only be waived by him.").

13 *See In re Penn Cent. Com. Paper Litig.*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973); *see also* Fed. R. Evid. 502(a), (c) (addressing waiver of attorney-client and attorney work product privileges in federal court based on disclosures made in federal proceedings, to federal officials or agencies or in state proceedings).

rectify the error.[14] When privilege or the work product doctrine is waived, the communications or documents lose their protection and become subject to discovery in other litigation or investigations.

B. The Bank Examination Privilege

NFA members that are also banks subject to oversight by prudential regulators such as the Federal Reserve ("Fed"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC"), may also need to confront materials that are subject to the bank examination privilege. That privilege ensures that any opinions, recommendations or deliberations of the examiner, as well as any materials relating to the examination, are protected unless a party has good cause to obtain the information.[15]

Like the attorney-client privilege, the bank examination privilege is rooted in the common law.[16] The bank examination privilege serves a dual purpose: First, it encourages banks to communicate candidly with their regulators, facilitating more effective oversight. Second, it protects the integrity of the examination process by shielding the examiner's deliberative process from outside scrutiny. The privilege has since been codified in prudential regulator rules addressing confidential supervisory information.[17]

The bank examination privilege has one key difference from the attorney-client and attorney work product privileges. Unlike those privileges, the bank examination privilege is held by the prudential regulator, not the bank, and therefore cannot be waived by the bank. Accordingly, if information subject to the bank examination privilege is sought in litigation, investigations or examinations, the bank cannot produce the material without obtaining a waiver of the privilege from the prudential regulator upon a showing of good cause.[18]

State and foreign regulators may also have their own versions of the bank examination privilege or confidential supervisory information. For example, the European Central Bank ("ECB") has issued guidance that banks subject to its inspections are "expected, in accordance with the applicable law, to preserve the confidentiality of documents provided by the ECB or

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14 *See id.* 502(b).

15 *See In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992) (stating that the supervision of banks is an "iterative process of comment by the regulators and response by the bank"); *In re Bankers Trust Co*., 61 F.3d 465, 471 (6th Cir. 1995) (stating that the privilege covers "agency opinions and recommendations and banks' responses thereto"); *Principe v. Crossland Sav., FSB*, 149 F.R.D. 444, 447 (E.D.N.Y. 1993) (noting that "courts have recognized a privilege for materials relating to bank examination reports").

16 *See In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630; *In re Bankers Trust Co*., 61 F.3d 465; *Principe*, 149 F.R.D. 444.

17 *See, e.g.*, 12 C.F.R. § 261.20(a) (restricting disclosure of confidential supervisory information without consent of the Federal Reserve); 12 C.F.R. § 4.37(b) (same for OCC); 12 C.F.R. § 1070.41(a) (same for CFPB); 12 C.F.R. § 309.6 (same for FDIC).

18 *See In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d at 634.

[national competent authorities] in the context of the inspection process and its follow-up."[19] And the New York Department of Financial Services prohibits disclosure of confidential supervisory information "without the prior written approval of the Department and subject to any terms and conditions that are imposed by the Department on any such disclosure."[20]

In addition to the bank examination privilege, banks are also prohibited by statute from disclosing to third parties suspicious activity reports filed with the Treasury Department's Financial Crimes Enforcement Network when a bank detects a violation of money laundering activity or other suspicious activity.[21]

II. The NFA's Approach to Privilege

As discussed at the outset of this article, the NFA has adopted a "longstanding policy not to recognize a claim of privilege (including attorney-client privilege) as a proper basis for withholding documents from NFA or redacting information from them."[22] Although the NFA has not publicly explained its position as to why it will not recognize privilege, it appears that this policy stems from NFA Rule 2-5, which requires members to "cooperate promptly and fully with NFA in any NFA investigation, inquiry, audit, examination or proceeding" and "comply with any order issued" by the NFA.[23]

The NFA's position stands in stark contrast to other regulators, including other SROs, that recognize privilege both in and outside the context of litigation. For example, FINRA has stated that a refusal to waive privilege does not impact the granting of credit for cooperation.[24] Federal regulators, like the CFTC,[25] Department of Justice[26] and SEC,[27] also recognize attorney-client privilege and the work product doctrine as a proper basis for withholding documents. The Department of Justice, in particular, has made clear in the Justice Manual that prosecutors should not ask for waiver of attorney-client privilege or work product protection as a condition for cooperation credit. And while the prudential regulators have taken the position that they may require banks to produce privileged materials, they do so pursuant to 12 U.S.C. § 1828(x), which

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19 European Central Bank, Guide to on-site inspections and internal model investigations, at 23 (Sept. 2018), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf.

20 3 N.Y.C.R.R. § 7.2(a).

21 31 U.S.C. § 5318(g).

22 Confidential Treatment of Section 4s Implementing Regulations Submissions, *supra* note 3.

23 NFA Compliance R. 2-5.

24 *See* FINRA, Regulatory Notice 08-70, n.9 (Nov. 28 2008).

25 *See* Commodity Futures Trading Commission Division of Enforcement, Enforcement Manual, at 44 (May 20, 2020), https://www.cftc.gov/sites/default/files/2021-05/EnforcementManual.pdf.

26 Department of Justice, Justice Manual, 9-28.710 - Attorney-Client and Work Product Protections (Aug. 2008), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

27 Securities and Exchange Commission Division of Enforcement, Enforcement Manual, at 76 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

allows banks to share privileged information with prudential regulators, and other state and foreign banking regulators, without waiving privilege.[28]

The NFA's policy of not respecting claims of privilege raises significant concerns for its members who are subject to examinations or enforcement proceedings. Members may be placed in the uncomfortable position of being asked to produce information that is subject to a claim of privilege where doing so would result in waiver of attorney-client privilege and, potentially, attorney work product privilege. This waiver could prevent the NFA-member from asserting a claim of privilege over the material in subsequent proceedings involving the NFA, as well as in other unrelated matters including private litigation or regulatory enforcement actions. Additionally, for confidential supervisory information subject to a claim of bank examiner's privilege, producing the information without obtaining a waiver from the relevant prudential regulator would violate the prudential regulator's rule against disclosure of confidential supervisory information.

III. Practical Steps For Practitioners

Firms that are faced with an NFA examination or enforcement action can take a number of steps to reduce the risk that they will be required to produce privileged information, which could result in a waiver or violate prudential regulator rules, while also maintaining a cooperative posture.

- **Raise Privilege Concerns Early**: NFA members who are subject to an exam or enforcement investigation that covers a subject area where there is a risk of disclosure of privileged information should raise the issue at the outset with NFA, pointing out the important values served by the privilege, and propose an agreement on how to provide the information without waiving privilege, including by withholding or redacting information subject to a claim of privilege and producing a privilege log to explain the basis for the privilege.

- **Create a Plan for Inadvertent Disclosure**: In addition to discussing with the NFA how to avoid producing privilege, firms should get the NFA's agreement on a process to clawback any privilege documents that are unintentionally produced in order to avoid claims of inadvertent waiver.

- **Consider the Need to Involve Counsel, including Foreign Counsel**: Member firms should assess the volume of material that may be subject to a claim of privilege, and the complexity of the privilege analysis, and consider engaging outside counsel to assist with conducting a privilege review. If there is a potential that foreign documents may be produced, member firms should consider engaging foreign counsel to advise on the confidentiality rules in the relevant jurisdictions.

- **Consider an *in camera* review to preserve confidentiality**: If faced with a situation where the NFA needs to review a document subject to attorney-client privilege in order to complete its examination, discuss allowing an *in camera*

[28] 12 U.S.C. § 1828(x).

review of the document in lieu of production to preserve confidentiality over the document.

IV. Conclusion

The NFA's policy of refusing to recognize claims of privilege places member firms who desire to cooperate with their SRO into a difficult position. However, engaging with the NFA on the issue, and pointing to the important public policy interests served by the privilege, can lead to solutions that ensure the NFA can fulfill its supervisory responsibilities without requiring the waiver of privilege.