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VIA E-MAIL (REGS.COMMENTS@FEDERALRESERVE.GOV)

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Docket No. R-1665 / RIN No. 7100 AF 51 – Comments on the Board's Proposed Changes to Its Rules Governing the Disclosure of Confidential Supervisory Information

Dear Ms. Misback:

I submit this comment letter on behalf of the Brooklyn Bar Association's Banking Committee (the "Committee"). The Committee generally supports as salutary the proposed amendments to the Board's rules concerning a supervised financial institution's disclosure of confidential supervisory information to its legal counsel.[1] Nevertheless, the Committee has concerns regarding certain aspects of the proposed amendments, and offers the following suggestions for simplification and improvement.

12 C.F.R. § 261.20(b)(2)(i) currently provides that a supervised financial institution lawfully in possession of confidential supervisory information may disclose that information to its legal counsel only on the premises of the supervised financial institution. For a supervised financial institution to disclose confidential supervisory information to its legal counsel for use "off premises" – *e.g.*, at the legal counsel's offices – the financial institution must receive the prior authorization of the Board.

Proposed 12 C.F.R. § 261.21(b)(3) would modernize the Board's regulations by providing that a supervised financial institution may disclose confidential supervisory information to its legal counsel off-premises:

[1] *See* Board, *Rules Regarding the Availability of Information*, 84 Fed. Reg. 27,976, 27,976-90 (June 17, 2019).

(3) *Legal counsel and auditors*. In connection with the provision of legal or auditing services to the supervised financial institution, the supervised financial institution may disclose confidential supervisory information to its legal counsel or auditors so long as the disclosure is necessary to the legal counsel's or auditor's engagement and the legal counsel or auditor is engaged by the supervised financial institution pursuant to a written agreement under which the legal counsel or auditor agrees that:

(i) It will treat the confidential supervisory information in accordance with this subpart;

(ii) It will not use the confidential supervisory information for any purpose other than in connection with the particular engagement with the supervised financial institution;

(iii) It will strictly limit disclosure of the confidential supervisory information to those of its staff who have a need to know the information for the purposes of the engagement and who are bound by written agreement to keep the information confidential in accordance with this subpart;

(iv) It will not disclose the confidential supervisory information to any third party for any purpose without the prior written approval of the General Counsel; and

(v) It will return or certify the destruction of the confidential supervisory information or, in the case of electronic files, render the files effectively inaccessible through access control measures or other means, at the conclusion of the engagement.[2]

The Committee applauds the overall thrust of the Board's proposal to permit supervised financial institutions to disclose confidential supervisory information to their legal counsel off-premises. It is eminently sensible to allow supervised financial institutions to disclose confidential supervisory information to their legal counsel, off-premises, without the need for prior approval by the Board. Clearly, a supervised financial institution is entitled to the timely and informed advice of counsel regarding its supervisory relationships and intra-agency appeal and other rights. Upon receiving a report of examination, for example, a supervised financial institution should be able to disclose that report to counsel immediately in order to obtain counsel's timely and informed advice.

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[2] *Id.* at 27,988.

While the overall theme of the Board's proposed revisions is sound, the Committee believes that the written agreement that would be required by proposed 12 C.F.R. § 261.21(b)(3) is unnecessary. Lawyers and law firms are bound by professional and ethical obligations, and are accustomed to safeguarding confidential information. Moreover, the notice of proposed rulemaking does not give any indication that there has ever been a problem with any attorney or law firm failing to appropriately safeguard confidential supervisory information – let alone any sort of widespread problem. The proposed rule does not require that supervised financial institutions and their directors, officers, and staff execute a similar written agreement. Neither does it subject the Board and its staff to the requirement of a similar written agreement. It unclear why heightened or more burdensome requirements should be imposed on financial institution counsel than on those organizations and individuals.

Notably, the Office of the Comptroller of the Currency ("OCC"), the National Credit Union Administration ("NCUA"), and the Bureau of Consumer Financial Protection ("CFPB") do not require similar written representations from attorneys for financial institutions. The OCC provides that a supervised financial institution may disclose confidential supervisory information "to a person or organization . . . officially connected . . . as . . . attorney" when it is "necessary or appropriate for business purposes."[3] The NCUA provides that confidential supervisory information may not be disclosed "to any person other than those . . . credit union officers, employees, or agents properly entitled to such information for the performance of their official duties."[4] (In the Committee's experience, the NCUA interprets "agents" to include attorneys.) The CFPB provides that supervised financial institutions may disclose confidential supervisory information to their "legal counsel" "to the extent that the disclosure of such confidential supervisory information is relevant to the performance of such individuals' assigned duties."[5] None of these agencies require a written agreement from counsel, as the Board now proposes to require.

In addition to being unnecessary, the Committee is concerned that the Board's proposed requirements for the written agreement are unclear and might be interpreted by Board staff or others in burdensome and unanticipated respects. For example, the proposed rule would require that "the legal counsel . . . is engaged by the supervised financial institution pursuant to a written agreement under which the legal counsel . . . agrees" to the required representations regarding confidential supervisory information. Does this mean that the required confidential supervisory information representations must be contained in a legal counsel's engagement letter, as opposed to a separate writing? If so, what is the reason for this requirement, which would create unnecessary complications, for example, when a law firm is operating under an existing engagement letter with a supervised financial institution? The proposed rule also provides that

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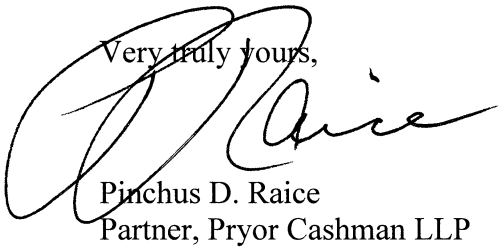
[3] 12 C.F.R. § 4.37(b)(2).
[4] 12 C.F.R. § 792.30.
[5] 12 C.F.R. § 1070.42(b)(2)(i).

legal counsel must agree to limit "disclosure of the confidential supervisory information to those of its staff . . . who are bound by written agreement to keep the information confidential in accordance with this subpart." Does this require that each lawyer and staff person at a law firm who will handle confidential supervisory information, even temporarily, must sign some sort of separate, individualized written agreement? If so, why would such individual agreements be necessary when the proposed rule would already require the law firm to agree to be bound by the required conditions?

The Committee respectfully suggests that Board should solicit input from the OCC, the NCUA, and the CFPB as to those agencies' experiences with their more streamlined and less burdensome regulations pertaining to the disclosure of confidential supervisory information to legal counsel. The Committee also respectfully suggests that 12 C.F.R. § 261.21(b)(3) should provide, with respect to legal counsel: "In connection with the provision of legal services to the supervised financial institution, the supervised financial institution may disclose confidential supervisory information to its legal counsel."

Thank you for your courtesies.

Very truly yours,



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