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Defending Liberty
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July 31, 2012

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Federal Reserve System Proposed Agency Information Collection Activities; Comment Request; FR Y-14A/Q/M; OMB Control Numbers: 7100-0341 and 7100-0319; 77 Fed. Reg. 10525 (February 22, 2012)

Dear Ms. Johnson:

On behalf of the American Bar Association ("ABA"), which has nearly 400,000 members, I write to express our serious concerns regarding the above-referenced proposed changes to the Comprehensive Capital Analysis and Review data collection schedules ("Proposal") to the extent that it would require bank holding companies to report their legal reserves for pending and probable litigation claims to the Board of Governors of the Federal Reserve System ("Board").[1]

Although the ABA appreciates the Board's efforts to gather additional data regarding the operational loss exposures of bank holding companies and hence preserve the safety and soundness of our banking system, the ABA is concerned that the new requirements contained in the Proposal could weaken fundamental attorney-client privilege and work product protections, undermine the confidential lawyer-client relationship and the right to effective counsel, and severely prejudice banks in defending against lawsuits. The ABA therefore urges the Board to withdraw that portion of the Proposal requiring enhanced disclosure of legal reserves.

The attorney-client privilege is a bedrock legal principle that enables individual and organizational clients to communicate with their lawyers in confidence and encourages clients to seek out and obtain guidance to conform their conduct to the law. The privilege also facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of society at large. The work product doctrine underpins our adversarial justice system and allows lawyers to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries,

[1] These ABA comments were prepared in coordination with the ABA Task Force on Financial Markets Regulatory Reform. The ABA Task Force is comprised of 15 prominent financial services lawyers who have served in the top levels of government and private practice. The Task Force includes former general counsels of the Securities and Exchange Commission ("SEC"), the Federal Deposit Insurance Corporation, and the Treasury Department, as well as members and liaisons who have held high-level positions with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the SEC. Also included on the Task Force is a founder of Public Citizen Litigation Group and leading academics in the law relating to financial entities and administrative law. The complete Task Force roster is available at: http://apps.americanbar.org/buslaw/committees/CL116000pub/materials/publicroster.pdf

to the detriment of their clients. The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding these protections.[2]

The Proposal would place both the attorney-client privilege and the work product doctrine in serious jeopardy by requiring banks to collect and disclose new quarterly loss data, including the type of loss event, when it occurred, the loss amount, the business line in which it occurred, and other relevant information.[3] As you know, banks and other companies establish their legal reserves for litigation claims in close consultation with their lawyers. Because those consultations almost always involve confidential communications between the client and the lawyer, as well as extensive legal analysis and the exercise of professional judgment by the lawyer in weighing the relative strengths of claims and defenses, the resulting legal reserve determinations are inherently privileged and work product protected. Therefore, requiring banks to report this privileged information to the Board, and the possibility that it later could be disclosed to other third parties, could seriously undermine and weaken the privilege, because as the U.S. Supreme Court has noted, "an uncertain privilege... is little better than no privilege at all." *Upjohn Co. v. United States,* 449 U.S. 383, 393 (1981).

The Board's Proposal also threatens to seriously undermine both the confidential lawyer-client relationship and the banks' fundamental right to counsel. Lawyers for banks play an essential role in helping them and their leaders understand and comply with applicable law and, when necessary, represent the entities in litigation. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the entity's officers, directors, and other leaders and must be provided with all relevant information in an open and uninhibited manner. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client's representatives and provide appropriate legal advice and assistance to the client.

By requiring banks to submit privileged and confidential legal reserves information to the Board, the Proposal risks chilling and seriously undermining the confidential lawyer-client relationship. Lawyers and their bank clients alike may lose confidence that their private communications and the lawyers' professional analysis, judgment, and advice will remain confidential. Even the risk that these confidential communications and the lawyer's mental impressions and advice may be subject to compelled disclosure would be likely to affect the willingness of bank clients to be fully candid with their lawyers and could have an adverse effect on lawyers' willingness to provide expert counsel to banks. In addition, such possible disclosure could discourage banks from seeking and obtaining the expert legal representation that they may need, thereby interfering in a substantial way with their fundamental right to counsel.

The ABA also is concerned that the Proposal could severely prejudice the banks' legal positions in pending and probable litigation matters. Any requirement that banks report detailed information concerning their legal reserves to the Board could harm the banks' position in litigation by informing their adversaries of how the banks and their lawyers weigh the strengths and weaknesses of the subject claims. In many cases, the new legal reserves disclosures could establish a de facto floor for the plaintiffs' settlement demands on those claims or, in some cases, a plaintiff could seek to introduce the legal reserves disclosures as a bank's "admission" of its liability or the amount of

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[2] *See* ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, available at http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf.
[3] *See* Proposal, 77 Fed. Reg. at 10528.

damages. Such a result would not only be patently unfair to the bank client, but it also would undermine the safety and soundness of our financial system by making banks less able to defend themselves in litigation, as well as further undermining the right to effective counsel and our nation's adversarial system of justice.

Although the Board recently published a notice in the Federal Register finalizing most of its Proposal, it acknowledged some of the concerns raised by various commenters regarding the new proposed disclosure requirements. In particular, the Board noted the commenters' concerns that:

> …the Federal Reserve may not be able to guarantee the confidentiality of the information in all cases; the data could become discoverable in third-party litigation; and should the information make its way into the public domain, it could significantly jeopardize the BHC's [bank holding companies'] position in litigation.[4]

To its credit, the Board also conceded that based on those comments and its subsequent discussions with the commenters, "the Federal Reserve's preliminary view is that these concerns are justified."[5]

The ABA shares these concerns that privileged and confidential legal reserves information submitted to the Board may not remain confidential, which in turn could waive the privilege as to third parties and severely prejudice the legal position of banks in litigation. We also share the concerns that have been raised regarding the difficulty the Board and other bank regulators could face in resisting future congressional attempts to obtain the data, which could further increase the risk of public disclosure and hence result in waiver of attorney-client privilege and work product protections as to all third parties.

For all these reasons, the ABA respectfully requests that the Board withdraw the Proposal to the extent it would require banks to report their legal reserves for pending and probable litigation claims. The ABA also urges the Board to continue its constructive dialogue with the legal profession, the banking community, and other stakeholders in order to craft new data collection procedures that would protect the safety and soundness of the banking system while preserving the attorney-client privilege, the work product doctrine, and the confidential lawyer-client relationship.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the Proposal, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or Associate Director Larson Frisby at (202) 662-1098.

Sincerely,

Wm. T. (Bill) Robinson III

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[4] *See* Federal Reserve System, "Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB with Request for Comments," 77 Fed. Reg. 32970, 32973 (June 4, 2012)

[5] *Id.* In that Announcement and a subsequent notice published on June 27, 2012, the Board extended the comment deadline on the remainder of the Proposal until August 6, 2012. *See* 77 Fed. Reg. 38289 (June 27, 2012).

cc: The Honorable Tim Johnson, Chairman, Senate Banking, Housing and Urban Affairs Committee
The Honorable Richard C. Shelby, Ranking Member, Senate Banking, Housing and Urban Affairs Committee
The Honorable Spencer Bachus, Chairman, House Financial Services Committee
The Honorable Barney Frank, Ranking Member, House Financial Services Committee
The Honorable Lamar Smith, Chairman, House Judiciary Committee
The Honorable John Conyers, Jr., Ranking Member, House Judiciary Committee
Members of the ABA Task Force on Financial Markets Regulatory Reform
Thomas M. Susman, Director, ABA Governmental Affairs Office