January 27, 2020

Via Electronic Mail

New York State Department of Financial Services
1 State Street
New York, New York, 10004

Re: Proposed 3 NYCRR Part 7, Superintendent's Regulations: Information Subject to Confidential Treatment Under Section 36.10 of the Banking Law

The Bank Policy Institute\(^1\) appreciates the opportunity to comment on the proposal (the “Proposal”) issued by the New York Department of Financial Services (the “Department” or the “NYDFS”) to streamline the process for entities licensed, chartered, authorized, registered, or supervised (together, “regulated entities”) by the Department to disclose the Department’s confidential supervisory information (“CSI”) to legal counsel and independent auditors.\(^2\)

We appreciate the Superintendent’s commitment to deliver on a promise to engage in an open dialogue with the financial services industry and the Department’s willingness to take a fresh look at its current approach that requires regulated entities to receive prior written approval of the Department each time they seek to disclose CSI to legal counsel and independent auditors.

By authorizing regulated entities to disclose CSI to their counsel or auditor without seeking prior authorization from the Department so long as there is a written agreement between the regulated entity and its counselor or auditor in which legal counsel or independent auditor agrees to certain contractual provisions intended to safeguard the Department’s CSI, the Proposal would create a more efficient and predictable regulatory structure for the application of the Department’s CSI framework under Section 36.10 of the New York Banking Law (“NYBL”).

Statutory and regulatory restrictions on the disclosure of CSI serve important policy interests. These restrictions encourage free and open communication between the regulator and the regulated entity, creating an atmosphere that is beneficial to supervisors charged with ensuring that institutions under their supervision are operated in a safe and sound and legally compliant manner. In addition, because bank supervisors communicate with banking organizations in a candid manner that is unique among regulatory relationships, unfettered CSI disclosure could unjustifiably impair public confidence in individual institutions or in the financial system as a whole.\(^3\)

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1. The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth.

2. See Proposed 3 NYCRR Part 7 (the “Proposal”).

3. See, e.g., In re Knoxville News-Sentinel Co., Inc., 723 F.2d at 476–77 (6th Cir. 1983) (underscoring Congressional recognition that disclosure of CSI “might undermine public confidence and cause unwarranted runs on banks” and “the need to preserve the close
To promote these policy interests effectively, state law such as the NYBL and supervisory agencies such as the Department limit disclosure of CSI and authorize release only in delineated situations.

The Proposal takes important steps toward clarifying the Department’s views that are welcome and encouraging. This letter describes remaining ambiguities and uncertainties in the Proposal and recommends several clarifications to facilitate effective and efficient compliance by regulated entities.

We also discuss in this letter additional recommendations to further clarify the scope of the definition of CSI and requirements that would promote a regulated entity’s ability to effectively and efficiently handle CSI in accordance with the Department’s requirements and expectations and/or policy objectives.

I. Executive Summary

The letter is organized as follows.

- Section II identifies the following key recommendations relating to disclosure of CSI to legal counsel and independent auditors under § 7.2(b) as well as other requirements set forth in the Proposal.

  - The final rule should permit the disclosure of CSI to auditors and outside legal counsel when necessary or appropriate for business purposes, as determined by the regulated entity.

  - To the extent the written agreement requirement is retained, to minimize ambiguity and unintended violations of the CSI rules, the Department should clarify the requirements set out in §§ 7.2(b)(3)-(b)(5) governing the terms of the written agreement between the regulated entity and its legal counsel or independent auditor in order to improve the clarity and workability of the framework.

    The final regulation should permit CSI disclosure to counsel and auditors under a “necessary or appropriate for business standards” standard rather than a “need to know” standard.

    The Department should clarify obligations that may be imposed on legal counsel or independent auditors in connection with requests to produce CSI rather than to simply require that they “agree to assert on behalf of the Department all such legal privileges and protections as the Department may request”.

    The Department should remove the requirement that the legal counsel or independent auditor agrees to obtain any required prior consent or approval from any other state or federal agency as it appears to be unnecessary.

  - The Department should confirm that litigation vendors and similar service providers providing services to external and internal counsel may review CSI consistent with and to the extent necessary or appropriate for their roles so long as a confidentiality agreement is in place.

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relationship between banks and their supervising agencies”) (citing Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978)).

• To the extent the Department retains record-keeping requirements under § 7.2(c) of the Proposal, they should be consistent with existing documentation retention practices and be reasonably limited in scope and duration to avoid imposing unnecessary burden on regulated entities.

➢ Section III identifies the following other key suggested revisions to proposed Part 7 for the Department’s consideration.

• The Department should clarify and confirm that documents and information created by a regulated entity for its own business purposes are not CSI when in the entity’s possession, and therefore may be shared without the Department’s approval under the finalized Part 7.

• The Department should clarify – in the final regulation or appropriate guidance – that sharing CSI with the directors, officers and employees of affiliates of a regulated entity when necessary or appropriate for business purposes is permissible to avoid inadvertent breaches that could arise as a result of inconsistent interpretation or application.

• The Department should extend the exception to the prohibition on CSI disclosure provided for in § 7.2 of the Proposal to outside counsel retained to represent individual directors, officers, employees, or former employees in the context of a government investigation where the investigating body has access to CSI and plans to use CSI in connection with interviewing such individuals or otherwise interacting with counsel.

• The Department should amend the Proposal to permit regulated entities to share CSI with other consultants and other third-party service providers under circumstances in which the third party has entered into a written agreement to provide services to the entity and has agreed in writing that it is aware of restrictions on CSI disclosure and will not use CSI for any purpose other than as set forth in its agreement to provide services to the entity.

• The Department should amend the Proposal to (i) permit regulated entities to obtain general exemptions to share Department CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x), including appropriate mechanisms for sharing CSI with foreign banking agencies and supervisors, and (ii) where a general exemption has not been obtained, permit on-site examiners to approve requests to share Department CSI with other regulators.

• The Department should address the sharing of CSI in the context of merger and acquisition transactions to facilitate both pre-announcement due diligence and post-announcement integration.

II. Recommendations Relating to the Requirements Set Forth in the Proposal

A. The final rule should permit the disclosure of CSI to auditors and outside legal counsel when necessary or appropriate for business purposes, as determined by the regulated entity.

The Proposal would significantly alter the Department’s current approach to CSI disclosures by authorizing a regulated entity to disclose CSI to its legal counsel and independent auditors without the need for the Department’s prior written authorization so long as certain conditions have been met. We broadly support this

4 The language of § 7.2(b) of the Proposal should be amended in the following respect to clarify that the section is intended to govern disclosure of CSI to outside counsel and auditors (to clarify that the requirements do not apply to in-house counsel or internal auditors who are employees or officers of the regulated entity): “Notwithstanding the requirements of subdivision (a) of this section,
modification, which should generally allow regulated entities to discuss CSI with counsel and auditors without the Department's prior written approval.

The Proposal would, however, also impose certain restrictions, required to be set forth in a written agreement, on sharing CSI with outside counsel and auditors. Specifically, auditors and outside counsel would, inter alia, (i) be required to strictly limit access within their staffs to those who have a "need to know," (ii) be required to take certain actions if it receives any demand or request for the CSI, and (iii) be required to obtain certain consents or approvals from other states or federal agencies where required.

We recommend that the Department revise the rules to provide that a regulated entity has the discretion to disclose CSI to persons at such institution's auditor and/or outside counsel when "necessary or appropriate for business purposes," with the regulated entity having the discretion to determine when such disclosure satisfies the "necessary or appropriate" test. The "necessary or appropriate for business purposes" would avoid the imposition of a contractually-based regulatory requirement that is superfluous given the professional obligations of legal counsel and auditors to keep client confidences confidential.

B. To the extent the written agreement requirement is retained, to minimize ambiguity and unintended violations of the CSI rules, the Department should clarify the requirements set out in §§ 7.2(b)(3)-(b)(5) governing the terms of the written agreement between the regulated entity and its legal counsel or independent auditor in order to improve the clarity and workability of the framework.

To the extent that the Department continues to believe there should be a regulatory requirement for a written agreement that includes certain provisions agreed to by the legal counsel or independent auditor relating to the use and disclosure of CSI, we recommend several modifications to the conditions for disclosure set out in §§ 7.2(b)(3)-(b)(5) of the Proposal.

1. The final regulation should permit CSI disclosure to counsel and auditors under a "necessary or appropriate for business standards" standard rather than a "need to know" standard.

Proposed § 7.2(b)(3) imposes a requirement that the legal counsel or independent auditor of a regulated entity must agree not to disclose the CSI to its employees, officers, or directors, except on a "need to know" basis. We recommend that the Department clarify that the legal counsel or independent auditor of a regulated entity may disclose CSI to its employees/officers/directors so long as it is "necessary or appropriate for business purposes" to do so in view of the nature and scope of the engagement. Without further clarification, a "need to know" standard will inevitably lead to confusion relating to whether a particular individual has a "need to know" CSI in connection with any particular engagement (and who will act as arbiter in making judgments in this regard) and, accordingly, potentially frustrate the ability of legal counsel or an independent auditor to serve its client in an efficient and effective manner. The "necessary or appropriate for business purposes" standard would serve as adequate guardrails on disclosure but

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5 To the extent a written agreement requirement is retained, any inconsistencies or conflicts with any comparable requirements at the federal level should also be taken into account to minimize unnecessary compliance burdens.

6 As a general matter, the regulated entity (as the client) and the legal counsel/independent auditor should of course have the ability to agree on specific terms relating to the manner in which the legal counsel/independent auditor carries out its work (e.g., including agreeing upon those specific individuals at the legal counsel/independent auditor who will work on a particular project).
at the same time avoid the imposition of a regulatory requirement that is overly restrictive and superfluous given the professional obligations of legal counsel and auditors to keep client confidences confidential.

2. The Department should clarify obligations that may be imposed on legal counsel or independent auditors in connection with requests to produce CSI rather than to simply require that they “agree to assert on behalf of the Department all such legal privileges and protections as the Department may request.”

Proposed § 7.2(b)(4) imposes on legal counsel and independent auditors a requirement to assert legal privileges and protections on behalf of the Department to the extent legal counsel/auditor receives any demand or request for CSI. The use of the term “legal privileges and protections” in this context is likely to lead to confusion and uncertain application without further clarification. The Proposal should clarify that the obligations of the regulated entity or, when appropriate, legal counsel and/or auditor, consist of promptly, and in writing, informing the Department of the demand or request and declining the disclosure of the information unless either (i) authorized by the Department as well as any other holder of a privilege relating to any protected information, such as the regulated entity, or (ii) otherwise ordered by a court in a judicial proceeding in which the Department (as well as the regulated entity, as appropriate) has had the opportunity to appear and oppose discovery. This approach would promote clarity, including establishing that the regulated entity/legal counsel/independent auditor is not expected to defy, for example, a court order or enforceable subpoena compelling the production of CSI belonging to the Department, and avoid any potential situations where a party with permissible access to CSI is put into an untenable situation.

3. The Department should remove the requirement that the legal counsel or independent auditor agrees to obtain any required prior consent or approval from any other state or federal agency as it appears to be unnecessary.

Proposed § 7.2(b)(5) would require legal counsel and independent auditors to agree to obtain necessary approvals from other agencies as a pre-condition for a regulated entity to disclose Department CSI to such legal counsel/independent auditor. This suggests that it is the responsibility of the legal counsel or audit firm to obtain required approvals from other regulators whereas under every CSI framework that we are aware of this would be the responsibility of the regulated entity (i.e., rather than the responsibility of legal counsel or the audit firm). For example, it is, in our experience, the regulated entity’s—not outside counsel’s or the independent auditor’s—responsibility to make any required requests to the applicable supervisory agencies for authorization to disclose a joint report of examination to outside counsel/independent auditor. Nonetheless, proposed § 7.2(b)(5) as written imposes this responsibility on the regulated entity’s outside counsel/independent auditor. To the extent the Department is seeking to address the possibility (which we believe would be remote) of another CSI framework imposing this responsibility on outside counsel or independent consultant, the Department should clarify its intention. Otherwise, the Department should remove this requirement as a condition to disclosure pursuant to § 7.2(b) as it appears to be unnecessary.

C. The Department should confirm that litigation vendors and similar service providers providing services to external and internal counsel may review CSI consistent with and to the extent necessary or appropriate for their roles so long as a confidentiality agreement is in place.

The Department should confirm that litigation (and other legal service) vendors and similar service providers providing services to internal and outside counsel may review CSI consistent with, and to the extent necessary for, their roles (i.e., on a “necessary or appropriate” basis), provided that a confidentiality agreement is in place requiring

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7 Even if the Department ultimately determines to grant a request to disclose CSI in the context of litigation, it is critical to note that the documents or information in question may otherwise be protected from production to litigants on the basis of the institution’s attorney-client privilege, work product protection or other grounds.
such service providers to keep CSI confidential consistent with the Department’s rules. This is a particularly important and recurring issue, because one of the functions of litigation vendors is to identify CSI so that it will not be inadvertently produced in discovery.

D. To the extent the Department retains any record-keeping requirements under § 7.2(c) of the Proposal, they should be consistent with existing industry documentation retention practices and be reasonably limited in scope and duration to avoid imposing unnecessary burden on regulated entities.

Among other things, Section 7.2(c) requires a regulated entity to keep a written record of all CSI it discloses to a third party in accordance with the regulation.\(^8\) Documentation retention requirements written in broad terms like this (i.e., a “all CSI disclosed”) might suggest a requirement for a regulated entity to maintain a detailed log requiring the expenditure of considerable resources to closely review volumes of information provided to outside counsel and/or auditors for possible CSI and to keep the log up to date as matters open and close over time. No similar requirement has been imposed by any of the federal banking agencies with respect to their CSI frameworks. Especially in view of the professional obligations of the parties entitled to receive CSI under § 7.2 and restrictions (e.g., non-disclosure and use restrictions) that would be imposed on any authorized recipients of CSI, we do not believe that the Department needs to impose a record-keeping requirement that deviates from the federal approach. Nonetheless, to the extent that the Department chooses to retain a documentation requirement along these lines, it should be reasonably limited to avoid imposing unnecessary burdens.

To the extent that the Department retains any record-keeping requirements, it should be narrowed to those sufficient to support the Department’s interests with respect to the disclosure of CSI. Rather than a retention obligation of an indeterminate amount of time, we believe that a more reasonable and appropriate approach would provide for parameters consistent with existing retention practices. In particular, upon request, within a reasonable period of time, a regulated entity should be able to identify third parties previously provided access to CSI over the past five-years (i.e., up to a five-year look back period).

III. Other Issues for the Department’s Consideration

In addition to the foregoing recommendations, BPI encourages the Department take this opportunity to further clarify its CSI regulations. These changes are consistent with proposed Part 7 and the Department’s policy objectives.

A. The Department should clarify and confirm that documents and information created by a regulated entity for its own business purposes are not CSI when in the entity’s possession, and therefore may be shared without the Department’s approval under the finalized Part 7.

Section 7.1 of the Proposal defines CSI as “information subject to confidential treatment and protected from disclosure pursuant to Section 36(10) of the NYBL.” The NYBL, in turn, defines CSI broadly to encompass “all reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination …”

It would be helpful if the Department could clarify and confirm in the final rules that the definition of CSI is not intended to include documents and information created for business purposes simply because the Department obtains a copy. In other words, a document obtained by the Department should not be transformed into CSI where it was created for the institution’s own business purposes. If this were not the case, the implications would be staggering given the Department’s broad supervisory powers – i.e., virtually any information created by a supervised

\(^8\) Under the Proposal, Section 7.2(c) would also require regulated entities to keep a copy of each party’s written agreement with legal counsel and independent auditor receiving CSI pursuant to the regulation.
institutions could be transformed into CSI. Examples include a regulated entity’s policies and procedures and board of directors meeting materials and minutes.

On the other hand, the current practice is that non-public business purpose documents may be treated as CSI when they are in the Department’s possession, as is the related supervisor correspondence, but the business documents themselves are not otherwise the Department’s CSI when in the supervised financial institution’s own possession. An interpretation or acknowledgement by the Department that would comport with current practices would be consistent with the important policy considerations of keeping confidential communications relating to the supervisory, investigatory and enforcement objectives of the Department (which, in certain circumstances, could be inferred from the content of documents in the Department’s possession) while permitting regulated entities to share their business records and information with other regulators without, as a result, being subject to future restrictions on the disclosure of such documents.

For example, further clarification of the scope of what is and is not CSI would also be helpful in situations where a regulated entity is responding to a supervisory observation or directive that the institution should modify or enhance its controls or other policies and procedures to address a supervisory concern. The policies and procedures and other business documents that address these modifications and enhancements should not be considered CSI unless they disclose that the modifications or enhancements are being undertaken in response to a supervisory observation or communication and disclose the existence of such supervisory observation or communication. Similarly, even if the Department has requested modification of a business purpose document (such as revising a policy or procedure or supplementing financial records to incorporate new metrics relating to the data presented), the resulting business purpose document is not CSI in the hands of the regulated entity, although the Department’s request or other feedback to the institution would be treated as CSI. By expressly confirming that documents and information created for business purposes are not CSI in the institution’s own possession (absent a reference to supervisory observation or communication) the Department would assist institutions in effectively identifying what information should be included within the CSI umbrella, without unduly infringing on the Department’s interests in keeping certain information confidential.

B. The Department should clarify – in the final regulation or appropriate guidance – that sharing CSI with the directors, officers and employees of affiliates of a regulated entity when necessary or appropriate for business purposes is permissible to avoid inadvertent breaches that could arise as a result of inconsistent interpretation or application.

The Department should revise the final rules by permitting a regulated entity to disclose CSI to the directors, officers and employees of its parent companies and affiliates “when necessary or appropriate for business purposes,” with regulated entities having the discretion to determine when such disclosures are “necessary or appropriate.” Consistent with past advocacy, we support flexibility for regulated entities to share CSI with affiliates, including, but not limited to, directors, officers, and employees of parent holding companies.

We are concerned that without such clarification, the restrictions, as a general matter, will lead to unpredictable and inconsistent results in practice. Many regulated entities implement policies and programs enterprise-wide. Clarification would remove any ambiguity about sharing CSI within an organization in the context of, for example, dual-hatted employees, officers, and management among U.S. subsidiaries and a New York state-licensed branch or other regulated entity.

This set of issues could prove especially difficult with respect to members of boards of directors and top-level management teams, all of whom have fiduciary duties and may require access to a wide range of CSI across the entire corporate group.

We recommend that the Department issue guidance clarifying that regulated entities may disclose CSI to directors, officers and employees of its affiliates (at least 50% owned by the parent company) “when necessary or
appropriate for business purposes," with entities having the discretion to determine when such disclosures are “necessary or appropriate.” This approach would have the dual benefits of significantly (i) reducing the risk of unpredictable or inconsistent application of the CSI framework in practice without expanding the universe of individuals who would be entitled to access CSI unduly, and (ii) promoting uniformity by being more consistent with the Federal Reserve’s rules. This is particularly important given the various forms CSI may take, including information required to be prepared by large teams within a regulated entity in response to requests for information from examiners, as well as substantial, enterprise-wide projects designed to modify or develop business processes.

We also recommend that the Department specifically clarify in a final rule or guidance that a regulated entity’s determination that disclosure of CSI within the organization is “necessary or appropriate for business purposes” generally will not be challenged by the Department staff as long as there are reasonable protocols in place for safeguarding the information (for example, a Code of Conduct, policies to protect confidential information and training) and those protocols are followed. The regulated entity is best placed to determine who needs access to CSI in order to discharge his or her duties or perform his or her job effectively. Guidance from the Department would provide regulated entities with certainty and help regulated entities avoid situations where there is a difference in views regarding whether the disclosure CSI was “necessary or appropriate for business purposes.”

C. The Department should amend the Proposal to permit regulated entities to share CSI with other consultants and other third-party service providers under circumstances in which the third party has entered into a written agreement to provide services to the entity and has agreed in writing that it is aware of restrictions on CSI disclosure and will not use CSI for any purpose other than as set forth in its agreement to provide services to the entity.

The Proposal does not specifically address the manner in which a regulated entity obtains permission to disclose CSI to its “other service providers” that may require access to CSI, including consultants, contingent workers, independent contractors and technology providers. Rather than seeking the approval of the Department as currently required, we suggest that the Department adopt requirements for these third-party service providers so that an institution’s examiner-in-charge can approve the disclosure of CSI to a consultant—without prior Department approval—if the consultant is under written contract to provide services to the institution (e.g., in connection with the remediation of supervisory issues) and the consultant has a written agreement that contains the same contract provisions required for legal counsel and outside auditors. The additional burden on both the Department staff and regulated entities associated with the prior approval requirement in this context is especially acute in light of the critical role that consultants play in assisting regulated entities in meeting a broad range of regulatory requirements. There may also be time-sensitive situations in which it would be harmful to the institution to wait for a request for prior approval to be granted (e.g., instances in which experts must be brought in quickly to help contain a data breach or cyber event where immediate action is imperative). Accordingly, aligning the Department’s rules with federal standards in this regard should not materially increase the risk that sensitive information would be inappropriately disclosed. One additional safeguard could be a requirement that a regulated entity maintain a log of third-party CSI disclosure for subsequent examiner review.

D. The Department should amend the Proposal to (i) permit regulated entities to obtain general exemptions to share Department CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x), including appropriate mechanisms for sharing CSI with foreign banking agencies and supervisors, and (ii) where a general exemption has not been obtained, permit on-site examiners to approve requests to share Department CSI with other regulators.

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9 See 12 C.F.R. Part 261.

10 Under the post-crisis regulatory framework, financial institutions routinely engage consultants to assist with a variety of safety-and-soundness-enhancing measures.
The Proposal does not specifically address the manner in which a regulated entity obtains permission to disclose CSI to federal bank regulators (i.e., the FDIC, the Federal Reserve and the Consumer Financial Protection Bureau). We believe that the Department’s current approach creates unnecessary friction with other bank regulators and foreign supervisors, with little measurable benefit where the other supervisor has a legitimate interest in the information and has adequate controls in place to ensure that Department CSI is not further disseminated.

To illustrate, bank regulators routinely request to review certain documents that may contain CSI of another regulator, most commonly board of director materials, management committee packages, management information system reports and risk reports. The CSI contained in such materials is generally high-level and in nearly all cases available to other regulators with jurisdiction over the regulated entity in the form of a report of examination. Requiring regulated entities to seek authorization to share this information with other regulators each time the regulated entity seeks to share routinely shared materials requires time and resources from both the agencies and the financial institutions they supervise.

In order to reduce unnecessary friction with other bank regulators and provide clarity for regulated entities, the Department should clarify its expectations. The Department could create a simplified process to permit a regulated entity to obtain general exemptions for sharing CSI with the other banking agencies and supervisors (i.e. those referenced in 12 U.S.C. § 1828(x)). Such exemption requests, and the Department’s consideration and approval of them, could be tailored to the entity and its particular supervisory circumstances.\(^{11}\) The procedures we have recommended, permitting regulated entities to seek to obtain a general exemption for sharing Department CSI with other banking agencies and supervisors, would create a consistent and streamlined approach beneficial to both regulated entities and their respective regulators.\(^{12}\)

To the extent that a regulated entity has not obtained a general exemption, the Department should modify current regulatory practice by directing regulated entities to make these sharing requests (i.e., on a one-off basis) through their examiner-in-charge. An examiner process should create a more streamlined and efficient approval mechanism for both the Department and the regulated entity with respect to Department CSI that is routinely shared among agencies with concurrent jurisdiction (i.e. reports of examination and supervisory correspondence). To be effective, any new proposed framework should not only grant on-site examiners delegated authority to make decisions on CSI, but should also clarify that the examiner-in-charge would only approve such request or under a limited universe of complex situations, refer them to the Department’s Legal Division.

E. The Department should extend the exception to the prohibition on CSI disclosure provided for in § 7.2 of the Proposal to outside counsel retained to represent individual directors, officers, employees or former employees in the context of a government investigation where the investigating body has access to CSI and plans to use CSI in connection with interviewing such individuals or otherwise interacting with counsel.

\(^{11}\) For example, a domestic top-tier bank holding company with a Department regulated insurance agency subsidiary may have different needs in respect of sharing Department CSI than the intermediate holding company of a foreign bank with a state nonmember bank subsidiary that is subject to joint examination by the FDIC and the Department.

\(^{12}\) We note, however, that a framework promoting streamlined mechanisms to share Department CSI with other banking agencies and supervisors that have a legitimate interest in such information should not be viewed as requiring regulated entities to provide privileged (or any other) information to these other supervisors, including privileged information previously provided to the Department that may also be CSI. Nor should the streamlined mechanisms for sharing CSI with these other supervisors be viewed as providing a basis for a supervisor who receives privileged material voluntarily submitted under 12 U.S.C. § 1828(x) to share those privileged materials with any other agency.
We recommend that the Department consider extending the exception to the prohibition on CSI disclosure set out in § 7.2 of the Proposal to outside counsel retained to represent individual directors, officers, employees, or former employees of a regulated entity in the context of a Department investigation. Extending the exception to outside counsel for individual directors, officers, employees, or former employees in this limited circumstance would facilitate a fairer and more efficient process in the context of government investigations without inappropriately sharing CSI with a wider audience without the Department’s approval.

F. The Department should address the sharing of CSI in the context of merger and acquisition transactions to facilitate both pre-announcement due diligence and post-announcement integration.

The Proposal does not address the sharing of CSI between parties to merger and acquisition transactions, which would facilitate more thorough due diligence and more informed integration planning. Prohibiting access to CSI under such circumstances runs counter to other bank regulatory policies and objectives and frustrates the ability of acquiring institutions to understand and make plans to address potential compliance, operational or other weaknesses of target institutions.

We strongly recommend that the Department set forth the principals involved and reasonable parameters for sharing CSI in the M&A context in order to meet the dual objectives of safeguarding CSI from improper disclosure and promoting thorough due diligence and thoughtful integration planning in connection with a merger or acquisition. The current approach to sharing CSI in the M&A context has complicated and limited the scope of pre-announcement due diligence and has hampered the efficient remediation of supervisory issues when transactions do proceed. Providing avenues and parameters for sharing CSI in the M&A context would, therefore, enable more informed decision-making (i.e., more comprehensive due diligence) prior to execution of transaction agreements and facilitate more efficient remediation efforts (i.e., more appropriately tailored integration planning) after institutions agree to proceed with a transaction.

The parameters on sharing of CSI that would accommodate thoughtful due diligence and thorough integration planning include: (i) limiting the sharing to certain identified individuals at the subject institutions, their respective outside counsel and advisors who sign confidentiality agreements; (ii) restricting the sharing to the due diligence phase occurring after substantial terms of the transaction have been agreed, any application preparation process in order to develop a more refined business plan and facilitate completion of other key aspects of an application and integration planning; (iii) restricting permissible disclosure to information that would have a substantial impact on the anticipated combined organization such as outstanding Matters Requiring Immediate Attention, Matters Requiring Attention, supervisory ratings (e.g., CAMELS ratings), other outstanding or contemplated supervisory actions such as Memoranda of Understanding or Board Resolutions, other restrictions imposed on the target institution, or potential enforcement actions and investigations in process; and (iv) requiring that the receiving parties be contractually bound to preclude any further disclosure or use of CSI other than in connection with the contemplated transaction (which may include specific firewall arrangements to be consistent with the handling of sensitive information generally), and then be required to return or destroy CSI (or terminate virtual access to the CSI) if the transaction is called off, or, in the case of a completed transaction, the party having possession of the CSI no

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13 Currently, because outside counsel in this context is counsel for the individual and not the supervised financial institution, parties have to seek the Department’s prior approval for counsel to review CSI, a hurdle that needs to be faced under already fraught circumstances.

14 Ideally, the Department would coordinate this change in policy together with other regulators, but the Department should not delay finalizing the proposal to achieve such a consensus.

15 The considerations that support sharing CSI in the M&A context apply to acquiring institutions, both parties to a merger of equals and, in some cases, target institutions.
longer has a separate basis for retaining the information.\textsuperscript{16} Providing access to CSI in this limited manner would help ensure that both parties are able to make informed decisions about a potential acquisition and better consider the safety and soundness of a proposed transaction. At the same time, the restrictions suggested above would substantially mitigate any risk that the information might be used for purposes outside of furthering legitimate supervisory objectives. Procedurally, the regulation should set forth that a disclosure under the limitations outlined above is an authorized disclosure of CSI.\textsuperscript{17}

We would welcome the opportunity to work with the Department in further developing the appropriate principles and parameters for sharing CSI in this context.

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The Bank Policy Institute appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (646) 736-3960 or by email at gregg.rozansky@bpi.com.

Respectfully submitted,

\[\text{Gregg Rozansky}\]
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\textsuperscript{16} In this context, it may also be appropriate to permit restricted “view only” access through a virtual data room or similar arrangement.

\textsuperscript{17} Alternatively, the regulation could set forth the outlined parameters as the criteria the Department will apply to approve such disclosures, provided that the approval process is expedited in light of the time sensitive nature of M&A transactions.