BANK POLICY INSTITUTE

November 9, 2020

George Bogdan, Esq.
New York State Department of Financial Services
One State Street
New York, NY 10004

Re: Proposed Regulations: Information Subject to Confidential Treatment Under Section 36.10 of the Banking Law (ID No. DFS-36-20-00007-P)

Dear Mr. Bogdan:

The Bank Policy Institute[1] appreciates the opportunity to provide our comments on the revised proposal (the "**Revised Proposal**") by the New York State Department of Financial Services (the "**Department**" or the **NYDFS**") regarding the treatment of the Department's confidential supervisory information ("**CSI**") by entities licensed, chartered, authorized, registered, or supervised (together, "**regulated entities**") by the Department under the New York Banking Law ("**NYBL**"). We are grateful for your consideration of the comments we submitted on January 27, 2020 (the "**January 27th Letter**") on the NYDFS' original proposal, along with the comments from other stakeholders and interested parties. The Revised Proposal represents a substantial improvement over the NYDFS' initial proposal, and we commend the Department for its helpful, thoughtful and important work.[2]

We want to emphasize again that BPI and its member-owner banks are deeply committed to the shared public and private sector objectives the Revised Proposal is intended to advance: ensuring the confidentiality and integrity of CSI to encourage free and open communication between the regulator and the regulated entity and fostering an environment that promotes a more fully informed evaluation by supervisors of the institutions under their supervision. To

[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 "**Initial Proposal**").

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 Revised Proposal takes important steps toward clarifying the Department's views that are welcome and encouraging. We believe that the Revised Proposal includes helpful provisions that will serve important policy goals, and we believe the changes that the NYDFS has made that are designed to make the framework more efficient and clear have strengthened and improved the Revised Proposal. For example, the NYDFS: (i) clarified language in Part 7.2(b) to better fit typical attorney engagements, (ii) removed unnecessary provisions such as Part 7.2(b)(5), (iii) added Part 7.2(c) to helpfully clarify that CSI may be shared, when necessary and appropriate, with the directors, officers and employees of affiliated entities within a regulated entity's corporate group, and (iv) broadened the exception for outside counsel and auditors under Part 7.2(b) to cover auditors offering external or internal auditing as well as accounting services. In addition, the assessment of public comments issued by the Department concurrently with the regulation (the "**Assessment of Public Comment**") helpfully clarified that routine business records submitted or examined by the Department do not automatically become CSI in possession of the submitting regulated entity, even though they are CSI when in the NYDFS' possession. In this regard, the Department noted that all materials it gathers while conducting supervisory activities are CSI in its possession and shall not be disclosed to the public or any other third party. However, documents created by the regulated entity for routine business purposes, which are in its possession, are not considered CSI.[3]

While acknowledging this important progress, we believe that elements of the Revised Proposal can be made still more effective and consistent with the NYDFS' goals, and we respectfully offer recommendations for its further revision. These recommendations are intended to enhance regulated entities' safety and soundness, and enable them to respond to supervisory requests in a timelier manner. In addition, our recommendations would more closely harmonize the NYDFS' CSI requirements with those of the Federal Reserve and other important agencies that also supervise regulated entities and/or their affiliates. Having different protocols related to the protection of CSI complicates and hinders the efficiency of banks' efforts to ensure compliance with CSI restrictions in practice

I. Executive Summary

For the reasons described in greater detail below, the NYDFS should take the following steps to improve the Revised Proposal:[4]

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[3] While the NYDFS helpfully clarified this point in its regulatory change summary, it declined, without explanation, to explicitly state it in the rule. We would encourage the NYDFS to do so.

[4] The January 27th Letter recommended that the NYDFS revise the initial proposal 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. This approach 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. The Revised Proposal retained the contractually-based regulatory requirement. While not reiterated below, for the same reasons described in the January 27th Letter, we continue

- The Department should amend the Revised Proposal to permit regulated entities to share CSI with third-party service providers, other than only attorneys and independent auditors, with an appropriate need for the information to discharge their engagements with regulated entities provided that the service provider has entered into a written agreement with the regulated 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.

- The Department should amend the Revised Proposal to (i) permit on-site examiners to approve requests to share bank-generated materials that contain CSI with other bank regulators on an expedited basis, and (ii) affirm that regulated entities should not be required to act as intermediary for the provision of other CSI sought by other governance agencies.

- 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 Revised Proposal

A. The Department should amend the Revised Proposal to permit regulated entities to share CSI with third-party service providers, other than only attorneys and independent auditors, with an appropriate need for the information to discharge their engagements with regulated entities provided that the service provider has entered into a written agreement with the regulated 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.

The Revised Proposal does not provide a framework for permitted CSI disclosures to its "other service providers" that may require access to CSI, including consultants, contingent workers, independent contractors and technology providers.[5] Accordingly, regulated institutions would still have to get prior approval to share NYDFS CSI with each of these service providers.

We ask that the Department take a fresh look at the Revised Proposal's approach in this regard. In particular, we recommend that Part 7 include an exception to allow service provider access to CSI –without prior Department approval– if the provider (i) has an appropriate need for the information to discharge its engagement with a regulated entity, and (ii) is under written contract to provide services to the regulated entity (e.g., in connection with the remediation of supervisory issues) and the written agreement contains the same types of contractual provisions

to believe this type of requirement is unnecessary. Moreover, for the reasons described in the January 27th Letter, we continue to believe that Part 7 should permit CSI disclosures, without prior approval, to service providers engaged by legal counsel or auditors to assist in serving the regulated entity.

[5] The Assessment of Public Comment simply notes that the Revised Proposal does not address any type of service provider other than attorneys and independent auditors without providing explanation.

that would be required under the Revised Proposal for legal counsel and independent auditors. One additional safeguard could be a requirement that a regulated entity maintain a log of third-party CSI disclosure for subsequent examiner review. The recommended approach would be consistent with the one recently adopted by the Federal Reserve as well as the OCC's.[6]

We believe that regulated entity's policies, procedures, and controls that apply to the disclosure of CSI, in addition to the maintenance of appropriate records, would provide the regulated entity with reasonable assurance of accountability and compliance with the requirements and are sufficiently robust to ensure that Department CSI is not further disseminated.

The NYDFS' proposed approach would lead to unnecessary inefficiencies, burdens and delay in retaining service providers that require CSI to carry out their work.[7] Moreover, confusion may ensue from different CSI requirements notwithstanding the overlapping supervisory jurisdictions of the NYDFS and Federal Reserve in many cases. The additional burden – which federally-chartered or licensed institutions would not have – on both the Department staff and regulated entities associated with the prior approval requirement in this context is especially acute given the critical role that consultants play in assisting firms in meeting supervisory and regulatory requirements. There may also be time-sensitive situations in which it would be harmful to the regulated entity to wait 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, and especially in light of the disclosure-related safeguards that we support, providing for a conditional exclusion in this regard should not materially increase the risk that sensitive information would be inappropriately disclosed and would itself promote compliance and avert unnecessary exhaustion of scarce resources.

B. The Department should amend the Revised Proposal to (i) permit on-site examiners to approve requests to share bank-generated materials that contain CSI with other bank regulators on an expedited basis, and (ii) affirm that regulated entities should not be required to act as intermediary for the provision of other CSI sought by other governance agencies.

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[6] *See* 85 FR 57616. Under the Federal Reserve's revised CSI regulation, which went into effect on October 15th, its CSI may be shared with a service provider engaged by a supervised financial institution to the extent certain safeguards, designed to ensure that Federal Reserve CSI is not further disseminated, have been put in place. The OCC also permits the disclosure of CSI to third party consultants by an OCC supervised institution if the third party consultant enters into a written contract, agrees to abide by OCC rules and use CSI only to provide services. 12 C.F.R. § 4.37(b)(2).

[7] Under the post-crisis regulatory framework, financial institutions routinely engage consultants to assist with a variety of safety-and-soundness-enhancing measures.

Moreover, active candidates for executive positions at banks often require access to CSI as part of the hiring/recruiting process to assure an appropriately informed exchange of ideas on how that candidate might assist a regulatory entity's progress if hired and a smooth transition once the candidate has assumed his or her office.

The Revised Proposal would allow a regulated entity to share CSI with other regulators – including Federal bank supervisory authorities – only with the written consent of both the NYDFS' Senior Deputy Superintendent of Banking and the General Counsel of the NYDFS, or their respective delegates, prior to disclosure.[8] The Revised Proposal neither provides for a streamlined procedure for regulated entities to share bank-generated materials containing CSI (including, e.g., board of directors or committee minutes, meeting materials that contain CSI, management information system reports and risk reports which is often sought by bank supervisory authorities) with other government agencies nor acknowledges that regulated entities should not be required to act as intermediaries for the provision of CSI to other agencies.[9] To the contrary, regulated entities would continue to be required to seek separate approvals from two NYDFS officials.

Federal and state authorities (including the NYDFS) regularly seek full access to board minutes and other materials including another agency's CSI. To the extent examiners continue to seek full access to board minutes and other materials that include another agency's CSI, the NYDFS should enter into, or expand the scope of existing, protocols with relevant federal banking regulators that either permits supervised institutions to share CSI with the agency or, alternatively, one regulator should seek to receive CSI information directly from the relevant agency rather than from the financial institution itself. Otherwise, at a minimum, the NYDFS should allow a regulated entity to disclose CSI contained in documents prepared by or for the entity for its business purposes to its federal and state financial supervisory agencies/bank regulators, as long as its point of contact at the NYDFS concurs. This would create efficiencies by streamlining internal processes, while still affording the NYSDFS an opportunity to determine if such disclosures are appropriate. So long as examiners continue to seek this information, the supervisory process will continue to be frustrated and delayed in some cases until the NYDFS adopts new approaches allowing regulated entities to share CSI with other regulators.

The types of examination requests described in the previous paragraph place regulated entities either (i) in an awkward position of potentially seeming uncooperative because of restrictions on the ability to share the CSI of another agency, and/or (ii) spending an inordinate amount of time "negotiating" with agency staff on issues such as whether the examiners would accept certified extracts of minutes related to a particular examination topic.

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[8] We encourage the Department to provide clarification related to how delegations of authority by the Senior Deputy Superintendent of Banking/General Counsel would be made known to regulated entities.

[9] 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.

The Assessment of Public Comment notes that the NYDFS has agreements in place to share CSI with other regulators but simply concludes the "Department cannot share information with every regulator or leave such disclosures in the discretion of regulated entities." Neither the Revised Proposal nor the Assessment of Public Comment, however, addresses why a more streamlined approach (e.g., such as the recommended approach set out in the January 27th Letter) was not adopted or addresses our concern that regulated entities are too often placed in the difficult situation of being expected to act as an intermediary between the NYDFS and some other agency demanding access to Department CSI. We see little to no benefit to the Department of the Revised Proposal's approach over a more streamlined process where another agency has a legitimate interest in the information and adequate controls in place to ensure that Department CSI is not further disseminated.

In view of the foregoing consideration, we recommend the following which is consistent with the Federal Reserve's recently adopted regulation:[10]

(i) **For Bank-Generated Materials that Contain Department CSI**: An institution may make requests to examiners to share CSI that is contained in documents prepared by or for the institution for its own business purposes with other bank regulators. Disclosure will be permitted upon a determination by the NYDFS examiner that [the other regulator] has a legitimate supervisory or regulatory interest in the [requested internally prepared CSI].

(ii) **For Other Forms of CSI:** The NYDFS recognizes that the supervised institution should not be put in a situation in which it is required to act as an intermediary between the NYDFS and the other agencies for the provision of other CSI (e.g., exam reports).

The January 27th Letter recommended that the NYDFS permit supervised financial institutions to obtain general exemptions to share NYDFS CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x). While we continue to support this recommendation, at a minimum, the NYDFS should amend the Revised Proposal to align it with the Federal Reserve's CSI regulation or create a similarly more streamlined and efficient process to obtain exemptions for sharing CSI with other banking agencies and supervisors. Absent an amendment to the Revised Proposal, we believe that the Department's proposed approach may

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[10] Historically (prior to the recent regulation), any disclosure by a supervised institution of Federal Reserve CSI to another regulatory body (e.g., other banking regulators, state and federal, or the Securities and Exchange Commission) required the prior written consent of the Federal Reserve's General Counsel. The revised approach set out in the Federal Reserve's regulation is intended to streamline the approval process.

The Federal Reserve regulation provides for disclosure of CSI about the institution that is contained in documents prepared by or for the institution for its own business purposes to the FDIC, OCC, CFPB, and the state financial supervisory agency (e.g., the NYDFS) that supervises that institution when the Reserve Bank point of contact determines that the receiving agency has a legitimate supervisory or regulatory interest in the information. A Reserve Bank point of contact's action under this paragraph may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures.

risk creating unnecessary friction with other bank regulators and foreign supervisors and require unnecessary bank and NYDFS resources, all to the detriment of regulated entities' justifiable interest in satisfying any such appropriate examination requests.

C. 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.

For the reasons described in greater detail in the January 27th Letter, we continue to strongly encourage the NYDFS to consider an exclusion to allow the sharing of CSI in the context of merger and acquisition transactions to facilitate both pre-announcement due diligence and/or post-announcement integration. At a minimum, the NYDFS should participate in inter-agency discussions relating to the topic for the following reasons:[11]

(i) limitations on the ability of an acquiror to obtain CSI related to the target deprive an acquiror of crucial information in the due diligence process, and

(ii) these limitations make it more difficult for an acquiror to develop a plan in advance of an acquisition to promptly address any weaknesses identified by the regulators.

The January 27th letter suggests information firewalls and other procedures that could be put in place in order to restrict the sharing of CSI to what is appropriate/necessary and to assure that it is not improperly disclosed. Procedures such as these should and could be put in place in order to substantially mitigate any risk that the CSI may be used for purposes outside legitimate supervisory objectives.

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BPI appreciates the opportunity to comment on the Revised Proposal. If you have any questions, please contact the undersigned by phone at (917) 863-5945 or by email at Gregg.Rozansky@bpi.com.

Respectfully submitted,

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[11] *See* 85 FR 57616. The Federal Reserve recently stated that guidance establishing parameters for M&A disclosures requires additional consideration and should be addressed on a consistent basis across the federal and state banking agencies and the CFPB.