August 6, 2012

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW Washington, DC 20551

Re: **FR Y–14A/Q/M OMB Control Number: 7100–0341.** (Capital Plans; Proposed Agency Information Collection Activities)

Dear Ms. Johnson:

The Clearing House Association L.L.C., ("The Clearing House"), The Risk Management Association / The Advanced Measurement Approaches Group ("The RMA / AMAG"), The Financial Services Roundtable ("The Roundtable") and the American Bankers Association (the "ABA" and, together with The Clearing House, The RMA / AMAG and The Roundtable, the "Associations")[1] are writing to request reconsideration of the proposal (the "Original Proposal") by the Board of Governors of the Federal Reserve System (the "Federal Reserve") to require large bank holding companies to provide confidential, highly sensitive information relating to banks' individual litigation reserves to the Federal Reserve as part of the Comprehensive Capital Analysis and Review ("CCAR") process. For the reasons discussed below, disclosure of this information would be potentially very damaging to banks whenever they are defendants in litigation, irrespective of the merits of the claim, and thus inimical to the safety and soundness of banking institutions. Disclosure would also create fundamental unfairness for bank defendants, most clearly in the case of claims by the Federal Reserve itself and claims of other Governmental agencies, but also more broadly.

We are appreciative that the Federal Reserve has been willing to consider alternatives to the disclosure of individual litigation reserves. Following a discussion of the reasons why the Associations are so concerned about the Original Proposal, we set

[1] The Associations collectively represent financial institutions accounting for a substantial majority of banking and financial assets in the United States. Descriptions of the Associations are provided immediately following the signature page of this letter.

forth our views of the alternatives and, in particular, our preference for Method 4 proposed by the Federal Reserve, subject to resolution of certain issues and concerns, as outlined herein.

Concerns about the Original Proposal

We assume it is beyond dispute that an adverse party's knowledge of the amounts of a bank's reserves for individual litigation matters would be extremely detrimental to the bank's position in settlement negotiations. If a bank has reserved $X for a litigation matter, and that becomes known to the plaintiff, a settlement below $X becomes highly improbable. Indeed, if a plaintiff is made aware of a bank's reserve, that plaintiff may argue that it is a statement against interest or an admission of a party opponent and attempt to have the reserve amount introduced at trial (or at least before the court to influence its views). In short, once a reserve is known, the bank's ability to argue for damages below $X would be severely compromised. Accordingly, a bank that establishes its litigation reserves conscientiously and conservatively would place itself at a serious financial and competitive disadvantage if the amounts of the reserves became known.

This fundamental point can be illustrated by considering the imposition of a similar requirement on plaintiffs. Is it even imaginable that plaintiffs or their counsel would be required to provide their estimate of the anticipated value of a settlement? The obvious negative answer would be for the same reason as should apply to a defendant bank. The plaintiff's position would be severely compromised. How, then, can it possibly be reasonable to require that defendant banks alone provide this information?

We understand, of course, that the litigation information would be provided to the Federal Reserve on a confidential basis, and we are deeply appreciative of the Federal Reserve's strong record of maintaining the confidentiality of information that has been provided to it.[2] The problem, however, is that the Federal Reserve might be obligated to, or feel itself obligated to, release the litigation reserve information to others that have demonstrated less care in protecting confidential bank information. As just one recent, but telling, example, a Congressionally appointed commission, the Financial Crisis Inquiry Commission, included portions of confidential bank examination reports on its website.

We further understand that the Federal Reserve can give banks no assurance that it will not provide the litigation reserve information to Congress or other

[2] We are, however, concerned by a recent Federal Reserve determination to make disclosure of certain mortgage foreclosure information filed confidentially on the basis that it was "in the public interest".

Government authorities. In the absence of such assurance, banks would be placed at great risk.

A further significant concern arises from the necessarily substantial attorney input into the determination of litigation reserves. Without attempting to debate here the question of the banking agencies' authority to obtain from banks information protected by the attorney-client privilege, work product doctrine or similar protection, the banking agencies should proceed with caution in seeking such information and infringing upon those rights.[3] The agencies should not seek such information unless there is a compelling "need to know" and no available substitute.

The request for litigation reserves becomes particularly troubling when the reserves relate to litigation between the bank and the Federal Reserve itself or a potential enforcement action by the Federal Reserve against the bank. The bank would then be providing the Federal Reserve with the bank's own assessment of its vulnerability, thereby virtually destroying the bank's ability to defend itself. We submit that such a situation is profoundly unfair. This special problem is not limited to the Federal Reserve. If the bank is in litigation with, or under investigation by, another Government agency, and that agency obtains the bank's litigation reserve information from the Federal Reserve, the bank will be severely disadvantaged.

As we stated at the outset, we believe that disclosure of confidential litigation reserve information will threaten the safety and soundness of banking institutions. Litigation against banks has exploded in the wake of the financial crisis and government enforcement actions have multiplied. If banks are significantly handicapped in their ability to defend themselves, their additional losses could amount to billions of dollars. Perhaps even more damagingly, banks' reputation and credibility would be severely damaged as they are forced to settle claims far above their legitimate settlement value. In this respect, banks would be unique among all American businesses in their Government-imposed vulnerability to litigation.

<u>Concerns about the Original Proposal</u>

The remaining question is whether the potentially devastating impact of disclosure of individual litigation reserves is offset by a compelling "need to know". We recognize that the adequacy of litigation reserves may be relevant to the assessment of a bank's capital position in stressed circumstances. Nonetheless, we question whether there is a compelling need for the Federal Reserve to review the individual litigation

[3] The attorney-client privilege is a bedrock common law protection, long regarded by the courts as a fundamental legal principle. *See Upjohn* v. *United States*, 449 U.S. 383, 389 (1981). Further, in *U.S.* v. *Deloitte*, 610 F.3d 129 (2010), the D.C. Circuit affirmed that work product protection extends to documents prepared in the course of determining appropriate litigation reserves, including audit documents where those documents contain the legal advice of counsel to the audit client.

reserves to make a capital adequacy determination. The bank examination process should provide the Federal Reserve with deep insight into the individual banks' processes for establishing litigation reserves. If those processes are unsatisfactory the Federal Reserve can model additional reserves to account for that inadequacy.

We also question the value of the information that the Federal Reserve would obtain from individual litigation reserves. That value is dependent on the Federal Reserve's ability to assess the adequacy of the individual reserves and substitute its own judgment for that of the bank. Not only is the judgment as to the appropriate litigation reserve level highly subjective, but it requires extensive knowledge of the case. With due respect, we believe that the Federal Reserve would not be in a position to make informed judgments about the adequacy of individual reserves. We also understand that the Federal Reserve may be seeking this information to be able to make judgments on a "horizontal" basis, comparing the levels of multiple banks' litigation reserves in seemingly similar cases. We believe that such a horizontal comparison is potentially highly misleading, as nominal similarities may mask profound differences in individual litigation matters. Even if the underlying claims are similar, there will inevitably be different facts and different levels of capacity and appetite to contest the claim.

Alternatives

As mentioned above, the Associations appreciate the Federal Reserve's efforts to develop alternatives that would reduce risk to the banks and we believe Method 4 has promise for the reasons set forth below. We also highlight below what we believe to be the critical deficiencies in the other Methods proposed by the Federal Reserve. Finally, we propose an additional method for your consideration that we believe may address the Federal Reserve's information collection needs while affording greater confidentiality protection for the legal reserve information.

Methods 1 & 5

These methods are similar in that they would require submission of legal reserve information on an event level basis with the actual amount of the reserve being part of the submission. Regardless of which method is employed to limit the disclosure of detailed descriptive information, providing reserve information with the actual loss amount would significantly jeopardize the bank's position. Therefore, we do not think that either of these two alternatives is acceptable.

Method 2

With this method, the Federal Reserve proposes to aggregate the information into a matrix by business line, event type, and time period. Although reserves are not submitted at the event level, there is a strong likelihood that the confidentiality of large individual reserves, or even small reserves, would be

jeopardized. For many units within the matrix, firms would often have few, if any, legal reserve events. Even for firms with a number of reserve events in a particular unit, a series of data submissions over time would enable specific reserves to be calculated.

Method 3

In this method, the Federal Reserve attempts to limit disclosure of the actual amount of individual reserves through a randomization process, but we fail to understand the value that this information would provide to the Federal Reserve for its stated purposes. Short of attempting to reverse the randomization method, the only actual information is the number of the legal reserve events and the total amount at the time of submission. Given that, we think that Method 4 below is superior to Method 3.

Method 4

Of all the methods presented by the Federal Reserve, we believe this method is the most viable. However, some instruction details are missing which causes the concerns laid out below. We look forward to further clarification of the details of this method to address these concerns.

Method 4 : Quarterly submission of the frequency data

The Federal Reserve's instructions are detailed and clear. The example table lays out the structure in a transparent manner; however, the example data create the appearance of the existence of numerous legal reserve events at a single institution, which does not reflect the reality for most banks. Some institutions are concerned about the fact that at some point in time a given cell within the table could have a value of "1" and hence indicate that a reserve has been established for a given legal matter which – together with other information submitted and addressed below – could jeopardize the position of the bank as a defendant in litigation. Therefore, the combination of the frequency data submission with a specific method for submitting reserve amount information is critical to the viability of Method 4.

Method 4 : Yearly submission of the Total Reserve Amount

The details for the methodology to submit the total reserve amount are not clear. We assume that, in this method, if a reserve is established in one year and increased in a subsequent year, then the initial reserve amount would be reported for the year the reserve was established, and the amount of the increase would be attributed to the year the increase was recognized in the financial statements. For example, a bank may have established two reserves in 2010, Reserve 1 for $100 and Reserve 2 for $900. The legal reserve balance submitted pursuant to Method 4 would be $1,000. In 2011, Reserve 1 is increased by $100, while Reserve 2 remains unchanged. The legal reserve balance submitted for 2011 would be $1,100.

The following are our concerns with this method:

> By way of continuing submissions subsequent to the original data submission, if a bank has only very few reserves established in a given year, then the amount for a given reserve can be inferred from the total amount. This concern is most relevant if only a single reserve is established for a given year, or if very few reserves are established and this data set contains one significant reserve.

> Some banks voiced the concern that it would be difficult and sometimes impossible for a financial institution to provide precise historical data on legal reserves that may have been made many years ago. To those banks, it does not seem reasonable for the Federal Reserve to request that all legal events since the oldest reserve, potentially even those that were settled in the interim, be included in the initial report.

The following alternative is proposed: In the initial report submitted by a financial institution (using as a form the Example for Method 4), the first column under Number of Legal Events would be entitled "Total Events 2010" and would include a total figure (i.e., frequency) of all legal events for which a reserve had been established by, and was still in place at the end of 2010, regardless of the date of the establishment of the reserve. The remaining columns would reflect actual events that take place during the listed quarters, starting from Q1 2011. This would establish a baseline for the Federal Reserve of almost two years of data.

Another alternative would be for financial institutions to submit a report just like the Example of Method 4, and not include legal event numbers where the initial reserve occurred before 2010 and is still outstanding. In this approach the Legal Reserve Balance would include reserve dollars but the year when the reserve initially occurred would not be reflected in the form because it occurred before 2010.

> As legal cases get settled over time, the loss amount would become part of the "non-reserve" dataset for which the Federal Reserve has finalized the instructions earlier. This could result in the amount for a given event present in <u>both</u> the "non-reserve" data set (after settlement) as well as the previously submitted and not updated total reserve amounts for multiple years (before settlement).

Additional Proposal

In view of the issues presented by each of the five Federal Reserve alternatives (even Method 4), we suggest that the Federal Reserve give further consideration to the "processed data option" that is described by the Risk Management Association and its AMA Group in their May 24, 2012 Supplemental Response and elaborated upon in a separate August 6, 2012 2nd Supplemental Response. In essence, it appears similar to Method 4 (based on industry assumptions about the characteristics of Method 4), but would provide the industry added confidentiality benefits because it would apply to all data - reserve and non-reserve data – combined.

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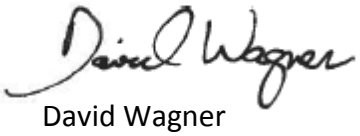
We thank you for this opportunity to comment and for consideration of our views. If you have any questions or need further information, please contact (i) at The Clearing House, David Wagner, its Senior Vice President Finance Affairs (e-mail – david.wagner@theclearinghouse.org, telephone number – (212) 613-9883; (ii) at RMA / AMAG, Edward J. DeMarco, Jr., its General Counsel and Director of Operational Risk and Regulatory Relations (e-mail – edemarco@rmahq.org, telephone number – (215) 446-4052); (iii) at The Roundtable, Richard M. Whiting, its Executive Director and General Counsel (e-mail – Rich@fsround.org, telephone number – (202) 589-2413); and (iv) at ABA, Hugh Carney, its Senior Counsel (e-mail - hcarney@aba.com, telephone number – (202) 663-5324).

Respectfully submitted,



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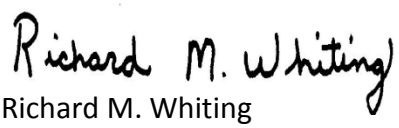

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The Associations

The Clearing House Association

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

The Risk Management Association / The Advanced Measurement Approaches Group

The Risk Management Association (RMA), a 501(c)(6) not-for-profit corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, is a member-driven professional association serving the financial services industry. Its sole purpose is to advance the use of sound risk principles in the financial services industry. RMA promotes an enterprise approach to risk management that focuses on credit risk, market risk, operational risk, securities lending, and regulatory issues.

The Advanced Measurement Approaches Group (AMAG) was formed in 2005 by RMA at the suggestion of the U.S. AMA-BQT (formerly the Inter-Agency Working Group on Operational Risk). The purpose of the AMAG is to share industry views on aspects of Advanced Measurement Approaches (AMA) implementation with the U.S. financial services federal regulatory agencies and promote the successful implementation of AMA. The Group consists of operational risk management professionals working at financial service organizations throughout the U.S.

The Financial Services Roundtable

The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine and account directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

American Bankers Association

The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees.