June 28, 2012

Michael Emancipator, Esq.
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RE: 11-- FOI – 00077; 2012 – APP – 00007

Dear Mr. Emancipator:

By letter dated February 9, 2011, Leigh Anne Terry of your firm submitted a Freedom of Information Act (FOIA) request seeking "a complete copy of the NCUA's corporate credit union system plan, currently being implemented and having been reviewed/approved by the NCUA Board, which is the basis for NCUA's post-September 24, 2010 conservatorship and NCUA Guaranteed Notes offerings."

By letter dated May 1, 2012, NCUA Staff Attorney Linda Dent responded to the request, denying it in part by withholding 112 pages of responsive documents in full and partially redacting information from some other responsive pages. As explained by Ms. Dent, the withheld materials qualified for protection under one or more FOIA exemptions, as codified at 5 U.S.C. §§ 552(b)(4), (5), and (8). Ms. Dent correctly noted that exemption (b)(4) protects from disclosure trade secrets and confidential or privileged commercial or financial information obtained from a person. Exemption (b)(5) protects from disclosure information that may be withheld under the deliberative process privilege or under civil discovery, attorney-client, or attorney-work product privileges. Exemption (b)(8) protects matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

You filed an appeal by letter dated May 30, 2012. In your appeal, you argued that the information you requested is clearly releasable under FOIA and is not qualified for protection. Your letter recited your view of the scope and applicability of the noted exemptions and concluded that the NCUA should not withhold the responsive documents. You challenged whether exemption (b)(4) was properly invoked in this case, because the institutions that are the subject of the request are already in liquidation. You also challenged the application of exemption (b)(5) and argued that it should not be used to withhold from production documents that are reflective of final agency action, as opposed to responsive material that is pre-decisional or material. Finally, while you acknowledged that exemption (b)(8) applies in the case of institutions that have been closed, you challenged whether it has been applied too broadly to withhold documents in this case that might, in your view, be legitimately disclosed.

With the exception of one document, discussed below, your appeal is denied, and the agency's initial determination with respect to the applicability of the noted exemptions to the responsive materials is upheld.

A substantial amount of the materials withheld in this case were considered exempt from disclosure based on exemption (b)(4). 5 U.S.C. §552(b)(4). In your appeal, you questioned whether the rationale underlying that exemption was applicable in this case. You stated that the subjects of the requested information are credit unions that have already been closed for liquidation. Therefore, you asserted that the release of documents related to them would have no adverse impact on their competitive position, since they had already been closed and were out of business.

Your argument mischaracterizes the nature of the documents to which the exemption was applied. Responsive materials in this case included materials provided to us by Barclays Capital (Barclays), the firm that NCUA retained to assist it in developing and executing a strategy for evaluating and funding legacy assets, including through sale or securitization.

Exemption 4 protects commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). The term "commercial" has been broadly interpreted to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978). The Barclays documents easily fit within this definition. Information "obtained from a person" has been held to include information obtained from a wide range of entities including individuals, associations, corporations and public and private entities, other than agencies. *See Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The Barclays documents meet the standard of having been "obtained from a person" under *Nadler*.

Case law has developed along two different tracks in providing guidance for making the determination as to whether commercial or financial information submitted to an agency is "confidential" for purposes of the exemption. The leading case is *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In that case, the court of appeals for the D.C. Circuit held that information voluntarily submitted to an agency is categorically protected, provided that "it is of a kind that the provider would not customarily release to the public." *Id.* at 879–880.

In the context of government contracts, material submitted by a third party is considered to have been provided involuntarily if the specifics pertaining to the submission were required by the government, such as, for example, discrete pricing information included in an agency request for proposal. *See Mallinckrodt, Inc. v. West*, 140 F. Supp. 2d 1 (D.D.C. 2000). In this case, Barclays developed and submitted a proposal in response to NCUA's specific request, which identified particular requirements. Under the circumstances, evaluation of the responsive material is appropriate under the involuntary submission standard. That standard requires a showing that disclosure of the responsive documents would be likely to have either of the following effects:

impairment of the Government's ability to obtain necessary information in the future; or substantial harm to the competitive position of the person from whom the information was obtained. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Given the proprietary nature of the material contained in the Barclays documents, it is clear that their release to the public would have both of these effects. Obtaining strategic financial advice from an investment services firm would be much more difficult if the agency were not able to assure the firm that confidentiality of its analyses and recommendations would be preserved. Similarly, public release of the firm's strategies and pricing structure could cause substantial competitive harm to the firm.

We have determined that one document that was withheld from the initial response on the basis of exemption (b)(4) warrants reconsideration. The document set out a proposed timeline for the unwinding of certain derivatives investments held by two corporate credit unions and was attached as an appendix to a Board Action Memorandum seeking approval to engage Barclays as an advisor for that process. The Board approved the retention of Barclays and the investments were sold. A copy of the document is enclosed.

As explained by Ms. Dent, some responsive material in this case consisted of pre-decisional memoranda and confidential legal advice. This material qualified for withholding based on exemption (b)(5) of FOIA, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

To qualify for the deliberative process privilege, an agency must show that the documents are both "pre-decisional" and "deliberative." Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision, and documents are deliberative when they comprise part of the process by which government decisions are made. *See Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D.N.Y. 2005). The rationale underlying the privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny. *See Assembly of State of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). We relied on this exemption to withhold a draft version of a contract for third party services that the agency was considering to support its liquidation efforts. Contrary to the suggestion made in your appeal, we did not rely on this rationale to withhold any documents reflecting final agency determinations. Where material was withheld from a memo adopted by the Board as a final decision, the redaction was based on the attorney-client privilege, which is also included within the range of exemption (b)(5). *See Mead Data Central, Inc. v. U.S. Dep't. of the Air Force*, 566 F. 2d 242, 252 (D.C. Cir. 1977).

Finally, your appeal questioned the application of exemption (b)(8) to some of the materials involved in this case. You acknowledged that the exemption, which applies to documents contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or

supervision of financial institutions, extends to both open and closed institutions. You have suggested, however, that the agency should voluntarily limit its application of the exemption in this case, so that it would extend only to documents that are actually part of an examination, and then only to such portions of the examination that need to be withheld to preserve the likelihood of cooperation between institution employees and agency examiners.

We decline to adopt such a limited reading of exemption (b)(8). Courts have interpreted exemption (b)(8) broadly and have not restricted its all-inclusive scope. *See Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978). Examination reports, as well as their follow-up and internal memoranda containing specific information about named financial institutions, have been withheld pursuant to exemption (b)(8). *See Atkinson v. FDIC*, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. 1980), and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833, slip op. (M.D. Tenn. 1990). In general, all records, regardless of the source, of a financial institution's financial condition and operations that are in the possession of a federal agency responsible for its regulation or supervision are exempt. *See McCullough v. FDIC*, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at 7-8 (D.D.C. 1980). This principle of broadly construing exemption (b)(8) was confirmed in another recent case decided by the federal court in the District of Columbia. *See Judicial Watch, Inc. v. United States Dep't of the Treasury*, 2011 U.S. Dist. LEXIS 74121 (D.D.C. 2011).

As you may be aware, NCUA has produced and made public a substantial volume of information about the disruption in the corporate credit union industry and its impact. For example, Material Loss Reviews prepared by NCUA's Inspector General concerning each of the five failed corporate credit unions are posted on the agency website, and another entire section of the website is devoted to discussing the agency's plan for the resolution of the corporate credit union system.

Pursuant to 5 U.S.C. §552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Michael McKenna
General Counsel

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Enclosure

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