Introduction

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§ 1.01 OVERVIEW

[1] Definition

The bank examination privilege is an evidentiary privilege rooted in federal common law.¹ It shields documents and information related to confidential regulatory examinations of banks and other financial institutions.²

The bank examination privilege is a crucial issue in banking litigation as well as a critical issue from a regulatory perspective. Bank examinations are "[t]he core of national bank supervision."³ The purpose of a bank examination is "to ensure compliance with laws and regulations . . . to identify weaknesses in lending, liquidity, and operational risk management, as well as other threats to safety and soundness, and then to compel change."⁴ Examiners aim to engage with bank management "early, when problems are most manageable."⁵

Many bank examinations are characterized by a continuous dialogue between the examiner and the bank.⁶ After gathering information from a bank, an examiner might share factual findings, opinions, and recommendations with bank management. An examiner's observations might run the spectrum from criticism to praise. To the extent that an examiner notes deficiencies or suggests changes, the examiner might invite bank management to respond.⁷ Such communications between an examiner and a financial institution are meant to be constructive and nonpublic.⁸ After all, a bank examination is not a lawsuit. Indeed, "[o]pen, adversarial, litigation between banks and their regulators is destabilizing and regulators seek to avoid it."⁹

Although banks and regulators place great value on the confidentiality of bank examinations, a party to a lawsuit might have different priorities. For example, a party litigating a claim against a bank might think of the bank’s examination records as an enticing cache of evidence. Specifically, such a party might imagine the possibility that the lawsuit is recapitulating legal or factual issues previously explored by a bank examiner from a regulatory viewpoint. With that possibility in mind, such a party
might envision gaining a litigation advantage by uncovering, in examination records, useful concessions by the bank or an examiner. Above all, a bank’s adversary might hope to locate a scathing examination report, and might picture the impact that such a report could make at trial.

Ordinarily, however, because bank examinations are not public proceedings, a bank’s adversary does not possess copies of the bank’s examination records at the outset of a case. In order to obtain such documents, a bank’s adversary might serve on the bank or its regulator, during the course of pretrial discovery, a demand for the production of such records. Such an attempt to pry open examination files frequently will meet with strenuous resistance from the bank and its regulator. Even when such documents cast a favorable light on the claims or defenses asserted by the bank, the bank and its regulator might oppose such a discovery demand on principle. Such a discovery dispute can be a key pivot point in a lawsuit. Not all examination records are relevant to private litigation. But in some cases, the production of such information can mark a major shift in the dynamics of a case.

The purpose of the bank examination privilege is to impose appropriate limitations on such uses of litigation discovery to breach the confidentiality of bank examinations. Most of the case law regarding the privilege derives from lawsuits that directly involve banks and other financial institutions as named parties. However, the privilege is not strictly limited to that type of case. The privilege is a general restriction on the ability of litigants to peer behind the curtain of the bank examination process.10

Like other evidentiary privileges, the bank examination privilege is an exception to the general principle that, at the trial of a cause of action, the public “has a right to every man’s evidence.”11 Evidentiary privileges “are in derogation for the search for truth,” and therefore “are not lightly created nor expansively construed.”12 But at times, “permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,” and in these circumstances courts recognize evidentiary privileges.13

The bank examination privilege is grounded in two such public policy concerns. The first such concern relates to the quality of bank supervision. By way of analogy, the attorney–client privilege “encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice.”14 The bank examination privilege has a similar rationale. To be sure, a bank is not an examiner’s client. In addition, pursuant to federal statutory law, regulators have the authority to conduct bank examinations, and banks are obligated to cooperate with such examinations.15 Nonetheless, for the examination process to work effectively, “[b]ank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank.”16
The bank examination privilege facilitates this give-and-take between examiners and banks. Under the umbrella of the privilege, “the banks feel free to ‘tell all’ to the examiner.” If examination reports too easily could be exploited in subsequent litigation, “this ‘tell all’ feeling could cease,” as “[t]he banks might feel it necessary to protect themselves against any adverse observation by an examiner . . .” In other words, “[v]oluntary full disclosure and cooperation . . . depends in part upon bank officers and employees’ understanding and confidence that the examiners directly involved in regulating a specific bank will not serve as expert witnesses against that bank in litigation essentially unrelated to the examination occasioning the disclosures.”

At the same time, “[a] break in confidentiality could have a ‘chilling effect’ on the ability of bank regulators to perform their duties.” Examiners would be “reluctant to capture the full breadth of their opinions and thoughts in written format for fear of future disclosure.” Put differently, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.”

The second concern underlying the bank examination privilege is “the financial system’s sensitivity to public questioning of bank soundness.” In particular, “disclosure of confidential portions of a bank report might breed public misunderstanding and unduly undermine confidence in the bank.” As a practical matter, once a sensitive regulatory communication is released to an adversary, containing the broader dissemination of that information could be a losing battle. The danger is that “[a] public, uneducated in the intricacies of banking finance, could easily misinterpret the meaning of an examiner’s opinion.”

Driven by these twin policy considerations, the bank examination privilege has a long history in U.S. law. In 1913, U.S. Comptroller of the Currency Lawrence O. Murray testified before a subcommittee of the U.S. House of Representatives Committee on Banking and Currency, and engaged in the following colloquy with Committee counsel Samuel Untermyer, Esq.:

Untermyer: Is the information gathered by your examiners regarded as secret?
Murray: It has always been regarded by my office as confidential.
Untermyer: Well, now, confidential as against whom?
Murray: We have never even produced the reports of the examiners in court. We were subpoenaed to produce them at one time, and we asked the judge to rule whether or not we should obey under the law as it existed, and he ruled that those reports need not be produced in court under the subpoenas.

A subsequent judicial opinion, published in 1939, noted that “by unbroken custom reports of bank examiners have been regarded as privileged.”

Today, federal courts nationwide recognize the bank examination privilege. The U.S. Courts of Appeal for the District of Columbia, Third Circuit, Fifth Circuit,
Sixth Circuit,31 Eighth Circuit,32 and Tenth Circuit33 have found that certain aspects of confidential bank examination reports and related materials are privileged under federal common law. In the First Circuit, Second Circuit, Fourth Circuit, Seventh Circuit, Ninth Circuit, and Eleventh Circuit, district court opinions similarly have recognized this legal principle.34

One of the leading decisions concerning the bank examination privilege came about in the context of a shareholder class action and derivative suit against a bank holding company. The plaintiffs served subpoenas on the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System, demanding copies of bank examination reports and related documents concerning the defendant. The agencies objected to the subpoenas on the ground that such reports are privileged.

Initially, the district court disagreed with the regulators’ position. The district court held that, because the agencies’ practice was to share an examination report with the subject institution, such a report was not privileged, just as the attorney–client privilege might dissolve if a third party is privy to an attorney–client communication. As the district court summarized, “[D]on’t send [the report] to the banks, then you don’t have a problem.”35

The court of appeals vacated this aspect of the district court’s decision. The court of appeals noted that federal courts “have long recognized” a common-law bank examination privilege.36 The court elaborated, “[w]e do not think that sharing a bank examination report or other supervisory information with the subject depository institution can reasonably be thought to bear upon the continuing need for the privilege.”37

Indeed, the court of appeals found, “[t]he provision of such information to the depository institution is a fundamental part of the regulatory process.”38 Thus, “[t]o hold that the privilege is waived or even weakened merely because the regulator provides the report to the bank would quickly render the privilege a dead letter.”39

As a matter of regulatory practice, not all bank examinations are entirely confidential. For example, regulators make available to the public certain portions of examination reports regarding institutional compliance with the Community Reinvestment Act (CRA), the federal statute that requires banks to meet the credit needs of their local communities.40 Anyone can access these portions of CRA compliance reports online.41

However, regulators treat as confidential many other types of examination reports, as well as documents and communications related to such reports. Regulators take the position that such materials should not be discoverable by third parties without the agency’s consent.42 While such administrative policies are not directly binding on courts, the bank examination privilege represents the judiciary’s response to such policies.
[2] Standing

The bank examination privilege belongs exclusively to regulators. Only regulators have standing to assert or waive the privilege. If a regulator asserts the privilege and a party challenges the regulator’s position, a court will resolve the issue. But if a regulator declines to assert the privilege, the privilege is a moot point.

That is not to say that regulators are the only possible source of information regarding confidential bank examinations. At times, parties seek such information from banks. But even in that scenario, asserting or waiving the privilege is a regulatory prerogative. As a corollary to this rule, before a court decides a dispute related to the bank examination privilege, the relevant agency must be given notice and a chance to be heard.

Although the bank examination privilege belongs exclusively to regulatory agencies, banks also are important players in this area of law. There are two reasons why. First, disputes related to the privilege often occur in the context of long-running, complex lawsuits. A bank and its regulator might have vastly different roles in such a case. The bank might be a plaintiff or defendant. The regulator might be a nonparty whose primary or only interest in the case is in defending the privilege. If so, the bank, based on its active participation in the case as a whole, might have a valuable perspective on the discovery dispute. As a result, regulators and courts often welcome a bank’s input. In response, a bank can ask a regulator not to assert the privilege. A bank can remain neutral. Or, if a regulator opts to defend the privilege, a bank can submit arguments in support of the regulator’s position.

The second reason is that regulators do not have the resources to pre-screen all of the documents and information that banks produce in litigation. By necessity, regulators require and depend on banks to filter their own productions for communications that might be subject to the bank examination privilege and to alert the relevant agency when an adversary’s discovery demands encompass such communications. In short, regulators expect that banks autonomously will understand and help protect the privilege.

[3] Scope

Courts use broad language to describe the scope of the bank examination privilege. One leading decision notes that the privilege covers “agency opinions and recommendations and banks’ responses thereto.” Another often-cited opinion discusses the “iterative process of comment by the regulators and response by the bank.” Yet another touchstone case describes “a privilege for materials relating to bank examination reports.”

To be sure, official reports of examination are a core concern of the privilege. An official report of examination is a written memorandum prepared by an examiner
based on the examiner’s inspection of the bank. As defined by the OCC, an examination report is “a blueprint for addressing problems and preventing them from worsening.”\textsuperscript{50} The examiner normally will share such a report with the subject bank in addition to filing the report with the agency. The bank may accept the examiner’s conclusions. Or, “if the bank and the examiners reach impasse, then their dispute may be elevated for resolution at higher levels within the bank regulatory agency.”\textsuperscript{51} However, “[i]t is the very rare dispute . . . that culminates in any formal action, such as a cease and desist order.”\textsuperscript{52}

But while the bank examination privilege can apply to official reports of examination, the privilege also can extend to other types of communications. Examiners and banks exchange sensitive, substantive information in a variety of formats. Official reports of examination are just one aspect of a “relatively informal and more or less continuous”\textsuperscript{53} supervisory relationship that may include e-mails, letters, faxes, other forms of written communications, and oral communications.

For purposes of the bank examination privilege, the threshold issue is not the mode of the communication, but rather the content. In particular, “[t]he bank examination privilege, like the deliberative process privilege, shields from discovery only agency opinions or recommendations; it does not protect purely factual material.”\textsuperscript{54} To determine whether a document contains opinions and recommendations, a court might review the document in camera.\textsuperscript{55} If a document contains facts as well as opinions and recommendations, the court might direct a party to redact those portions that contain opinions and recommendations.\textsuperscript{56}

In some cases, it is relatively easy to distinguish between opinion and fact. For example, the sample report of examination of the Federal Deposit Insurance Corporation (FDIC) contains the following statement that most courts likely would classify as factual: “The bank does not currently have an internal or external audit function in place for any areas other than Truth in Lending, but is working on a system of internal audits to be implemented soon.”\textsuperscript{57} Conversely, the sample report also contains a section entitled “Recommendations.” In this section, the examiner discusses future actions the bank should take. For instance, the examiner suggests that the bank develop “a compliance program that ensures uniform procedures and practices at all facilities.”\textsuperscript{58} This statement is the examiner’s opinion.

But in other cases, “no . . . crisp distinction can be drawn between ‘opinion’ and ‘fact,’” and certain portions of a document will fall into a grey area.\textsuperscript{59} Indeed, “[s]eparation of the important fact from the important is . . . basic to any deliberation.”\textsuperscript{60} Thus, “the manner of selecting or presenting” certain facts may “reveal the deliberative process,” or facts may in other respects be “inextricably intertwined” with opinion.\textsuperscript{61} On the other hand, “statements of conclusion often only collect and summarize statements of fact,” and thus “could, as well, be characterized as ‘shorthand’ statements of fact.”\textsuperscript{62}
For example, in one actual examination report, an examiner wrote the following under the heading “Condition of Bank”: “Extremely poor. Bank’s liquidity position is considered hazardous by this examiner. . . . The bank would be hard pressed to meet a substantial decline in deposits and its position would be even more precarious should it lose access to the Federal funds market.” A court held that this statement was primarily factual. The court concluded that, in substance, this statement “summarize[d] the examiner’s study of the financial records and discussions with bank personnel.” Therefore, the court found that this portion of the report was not privileged and that it had to be produced.

In a different case, a court analyzed an examination report that contained a somewhat similar section. As described by the court, this section discussed the bank’s “financial condition,” “the degree of adherence by bank officials to proper policies and procedures,” and “internal control deficiencies.” Despite the similarities to the report described earlier, the court found that this section was the examiner’s opinion.

One important distinction between these two cases was that, in the first case, the bank was no longer operating. Consequently, disclosing the examiner’s characterizations of the bank’s financial condition was less likely to impact the public’s confidence in the bank or the candor of future communications between the bank and its regulators. In the second case, however, the bank was still operating, and as a result these concerns carried greater weight. As these cases illustrate, the scope of the bank examination privilege can appear to expand or contract as a function of the policy goals underlying the privilege.

[4] Regulators

A wide variety of federal and state regulators engage in supervisory oversight of financial institutions. In some instances, the entities supervised by these regulators technically are not “banks,” and the agencies are not traditional “bank regulators.” For example, the jurisdiction of the Consumer Financial Protection Bureau (CFPB), the federal regulator responsible for implementing various federal consumer financial protection laws, encompasses some nonbank providers of consumer financial services. Given this complex regulatory architecture, questions arise from time to time as to which specific regulators are entitled to assert the bank examination privilege.

Courts have not set rigid boundaries regarding this matter. At a minimum, the privilege extends to the following federal regulators:

- The OCC, which supervises national banks;
- The Federal Reserve Board and the Federal Reserve Banks, which oversee the member banks of the Federal Reserve System; and
- The FDIC, which examines insured depository institutions.
These agencies, among others, are referred to as prudential regulators because they concern themselves with the safety and soundness of financial institutions. It stands to reason that examinations conducted by such agencies would come within the fold of the privilege. If examination reports raising questions about the safety and soundness of specific banks were in the daily news, public confidence in the financial sector could erode. Much of the case law in this area concerns the work of these agencies.

However, certain other federal financial regulators also have invoked the privilege. One such agency is the CFPB. Another is the Securities and Exchange Commission (SEC). In a recent decision, the United States District Court for the Southern District of New York held that the Federal Housing Finance Agency (FHFA), which supervises Federal Home Loan Banks, can claim the privilege. The court noted that the privilege was based on “the distinctive necessity for candid and informal regulation of the banking sector—stemming from both practical necessity of day-to-day bank regulation, as well as from necessity to maintain public confidence in the financial system.” The court held that these concerns apply to the supervisory work of the FHFA.

[5] Limitations

The bank examination privilege is not an absolute privilege. It is a qualified privilege. That is, at times, the privilege yields to competing considerations.

Specifically, the privilege is governed by a burden-shifting framework. Initially, a regulator bears the burden of proving that the privilege applies. Once the agency meets that burden, the burden shifts to the proponent of the discovery request. That party then can attempt to show good cause to override the privilege. “Even when asserted to protect deliberative material, the privilege may be overridden where necessary to promote ‘the paramount interest of the Government in having justice done between litigants,’ . . . ; or to ‘shed light on alleged government malfeasance,’ . . . or in other circumstances ‘when the public’s interest in effective government would be furthered by disclosure.’”

Courts have distilled the broadly worded good-cause standard into a five-factor balancing test. To determine whether the proponent of a discovery request has shown good cause to override the bank examination privilege, a court must weigh “(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.” Often, when a court finds good cause to override the privilege, the court will impose a protective order that prevents the proponent of the discovery request from releasing the documents to the general public.
For example, in one case, a securities fraud class action involving allegations of false and misleading financial statements, the plaintiffs demanded that the defendant produce documents regarding confidential communications with the OCC. Plaintiffs served a similar demand on the OCC itself, which was not a party to the lawsuit. As a threshold matter, the court found that “the documents in question predominantly contain opinions and or recommendations as opposed to facts.” Thus, the documents were subject to the bank examination privilege, and the court turned its attention to the good-cause test.

The court concluded that while certain factors favored the plaintiffs, on balance the plaintiffs had not shown good cause. The first factor, relevance, supported the plaintiffs’ position. The court found that the requested OCC documents were relevant because they “address[ed] potential regulatory infractions by [the defendant].” However, regarding the second factor, the availability of other evidence, the court determined that “much of the requested materials consist of expert opinions based upon factual data,” and that “[p]laintiffs have been provided with the raw factual materials underlying these opinions and can use their own expertise to render opinions on these facts.”

The third factor, the seriousness of the litigation, favored the plaintiffs, “[g]iven the current climate of the economy and the heightened need to promote sound, reliable financial data in order to permit the public to make educated investing decisions.” But the fourth factor, the government’s role, weighed against the plaintiffs, as the OCC was not a party and lacked “a direct interest in the outcome of the litigation.” Likewise, the fifth factor, the possibility of future timidity by government employees, was an obstacle to plaintiffs’ demand. The documents at issue contained “the thoughts and recommendations of the government.” Allowing the plaintiffs to obtain such documents could make bank examiners “reluctant to capture the full breadth of their opinions and thoughts in written form for fear of future disclosure.” Thus, the court denied plaintiffs’ motion to compel.


The bank examination privilege is closely related to the deliberative process privilege. The deliberative process privilege “protects the deliberative and decisionmaking processes of the executive branch.” Like the bank examination privilege, the deliberative process privilege “rests most fundamentally on the belief that agencies forced to ‘operate in a fishbowl,’ . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.” Both are qualified privileges that can be overcome based on a showing of good cause, and, in both contexts, courts use the same five-factor balancing test to determine whether good cause has been shown.

However, for two reasons, there is room for disagreement as to whether the traditional deliberative process privilege applies to communications between agencies and
banks. First, the deliberative process privilege usually contemplates internal agency deliberations. As held by one court, “[i]f a document is neither inter- nor intra-agency, then an agency may not withhold it, regardless of whether or not it reflects the deliberative process of the agency, attorney work product, or is an attorney-client communication.”90 Bank examinations involve external agency communications sent to or received from banks.

Second, the deliberative process privilege generally is oriented around “pre-decisional” materials, defined as “documents that anticipate and address the possible adoption of some decision or policy.”91 The bank examination process, however, attempts to secure the voluntary cooperation of a bank to rectify a problem, eliminating the need for the agency to decide on an order or penalty. Thus, in one dispute involving a request for the disclosure of bank examination materials, the party opposing the request invoked the deliberative process privilege, but did not cite the bank examination privilege. The court held that the deliberative process privilege was inapplicable to an examination report because “a final report of examination is not a decision,” and “[i]t does not announce any action or policy.”92

In substance, the bank examination privilege clears away these obstacles, allowing the deliberative process privilege to encompass bank examinations. As one court put it, “[u]nder the penumbra of government deliberations, courts have recognized a privilege for materials relating to bank examination reports.”93 As another court has noted, “the bank examiner’s privilege falls within the ambit of the deliberative process privilege.”94

§ 1.02 STATUTES AND REGULATIONS

[1] Federal

The common-law bank examination privilege has a complex relationship with federal statutory and regulatory law. As a statutory matter, the privilege is not a legislative mandate. The privilege helps federal banking regulators fulfill their statutory responsibilities in the area of bank supervision.95 However, no federal statute expressly requires courts to recognize such a privilege. The privilege is a court-created doctrine.

At the same time, a federal statute, the Freedom of Information Act (FOIA), includes a provision that in some respects is analogous to the bank examination privilege. FOIA does not govern discovery in civil lawsuits. Instead, FOIA allows members of the public to request documents from federal agencies. FOIA contains certain exemptions that allow agencies to withhold specified categories of information. One such exemption, Exemption 8, permits agencies to withhold materials 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.”96

The policy considerations that animated the passage of this FOIA exemption are similar to those that underlie the bank examination privilege. In particular, Congress
was concerned “that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks.”97 In addition, Congress concluded that “[i]f details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less than fully with federal authorities.”98

While driven by similar purposes, Exemption 8 and the bank examination privilege are not necessarily equivalent in scope. For example, the United States District Court for the District of Columbia has held that, while purely factual materials are not subject to the privilege, Exemption 8 does not contain any such limitation.99 Nevertheless, in order to resolve disputes concerning the bank examination privilege, courts on occasion look to Exemption 8 for guidance. For instance, as mentioned previously,100 the United States District Court for the Southern District of New York addressed the question of whether the FHFA is a type of regulator that can assert the bank examination privilege. The court answered this question in the affirmative. In the course of that opinion, the court noted that Exemption 8 applies to the FHFA. Accordingly, the court held, “Congress intended for the [FHFA] regulatory regime to run parallel to the bank regulatory regime.”101 Thus, the court concluded, just as the FHFA can invoke Exemption 8, so should the FHFA be allowed to invoke the common-law bank examination privilege.

As a matter of administrative law, each federal financial regulator has promulgated rules regarding the secrecy of examination materials.102 Such regulations tend to be broader than the common-law bank examination privilege. For example, the OCC categorically deems examination reports to be privileged and confidential.103 In the normal course of business, such regulations are binding on agency personnel and financial institutions. However, a lawsuit is a different matter. In the context of a lawsuit, a federal court generally will not allow “a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery.”104 As a result, for judicial purposes, regulatory policy regarding the secrecy of examination materials does not have the force of an evidentiary privilege.105 Federal courts nonetheless recognize that such rules are grounded in legitimate policy concerns. The common-law bank examination privilege is the compromise that federal courts have fashioned between such concerns and other principles of pretrial discovery.

[2] State

[a] Summary

At the state level, unlike at the federal level, statutes generally displace the common-law bank examination privilege. Most state legislatures have promulgated laws that expressly indicate whether and under what circumstances a litigant can compel documents or testimony related to confidential bank examinations. Thus,
under state law, when a dispute arises regarding the discoverability of such materials, a court initially will focus on the applicable statute in that jurisdiction. Such laws do not use the terminology “bank examination privilege.” As a result, this phrase rarely appears in state-court jurisprudence.

To interpret such statutes, courts tend to lean on certain maxims of statutory construction. First, “[i]t is well recognized that a privilege may be created by statute.” If a statute creates an evidentiary privilege, “information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff’s claim.” At the same time, however, statutory privileges “impede the search for truth,” and therefore should be construed narrowly. Accordingly, a court will “avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result.”

As detailed in the following section, there are three key categories of state statutes regarding the discoverability of bank examination materials. First, in some states, the relevant statute, read literally, exempts bank examination materials in absolute terms from litigants’ discovery requests. Second, in other states, the applicable law only provides that bank examinations are confidential and should not be released to the public, and does not create an evidentiary privilege. In these states, parties potentially can obtain such materials for purposes of a civil lawsuit, subject to a protective order. Third, in several states, a qualified statutory privilege shields bank examination materials to an extent. Such statutes bear the closest resemblance to the federal common-law bank examination privilege.

[b] Three Approaches

[i] Absolute Privilege

In the State of New York, the State Banking Law provides that “reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations . . . shall not be subject to subpoena,” unless the Superintendent of the Banking Department (the Superintendent) voluntarily releases such materials to serve “the ends of justice and the public advantage.” In a civil lawsuit in a New York state court, when the Superintendent, pursuant to this statute, objects to a subpoena, and the proponent of the subpoena moves to compel, the court will review the requested documents in camera. The court will confirm whether the materials are in fact, in the words of the statute, “reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations.” If they are, then the court likely will sustain the Superintendent’s assertion of the privilege.

On its face, this statute shields bank examinations to a far greater degree than the common-law bank examination privilege recognized by federal courts. The statute contains no express exceptions for factual information, nor does it state that the proponent of a discovery request can overcome the privilege for good cause.
Many other states take a similar approach. For example, in Nevada, as described by the Nevada Supreme Court, “the legislature has determined that the superintendent of banks making a report required by law has an absolute privilege to refuse to disclose the contents of that report and a duty to prevent others from disclosing the report.”

In Delaware, a statute entitled “Financial Institution Supervisory Privilege” provides that “[a]ll confidential supervisory information shall be the property of the [State Bank] Commissioner and shall be privileged and protected from disclosure to any other person and shall not be discoverable or admissible into evidence in any civil action; . . .” For purposes of this statute, “confidential supervisory information” has a broad definition that encompasses virtually all aspects of the examination process. The definition includes

- “[a]ny report of examination and any information prepared or collected by the Commissioner or the Commissioner’s designee in connection with the supervisory process, including any computer file, work paper or similar document”;
- “[a]ny correspondence or communication from the Commissioner or the Commissioner’s designee to a financial institution as part of an examination or otherwise in connection with the supervisory process”;
- “[a]ny correspondence, communication or document, including any compliance and other reports, created by a financial institution in response to any request, inquiry or directive from the Commissioner or the Commissioner’s designee in connection with any examination or other supervisory process and provided to the Commissioner or the Commissioner’s designee”; and
- any record of the Commissioner containing data “derived” from the above.

In Idaho, the applicable statute goes a step further. Not only does the statute strictly protect bank examination materials, but the statute allows the bank to assert the privilege independently of the regulator: “The privilege may be claimed by the financial institution or by the department of finance or the federal bank or other financial institution regulatory or supervisory agency, or by the lawyer for either.” Under the common-law bank examination privilege, only the regulator can invoke the privilege.

**[iii] Confidential but Not Privileged**

In some states, bank examination reports are confidential, but are not privileged for purposes of discovery in civil litigation matters. For example, in Kentucky, state law provides that “[r]eports of examination, and correspondence that relates to the report of examination, of a bank or trust company shall be considered confidential information.” However, this statute also notes that such documents may be released when “[r]equired in a proper legal proceeding in which a subpoena and protective order
insuring confidentiality has been issued by a court of competent jurisdiction.”

As held by the United States District Court for the Western District of Kentucky:
“Although the statute specifies that bank examination materials are confidential, it
does not render them privileged. So long as an adequate protective order has been
issued, the materials may be lawfully disclosed pursuant to court order.”

[iii] Privileged Subject to Exceptions

In Louisiana, a state statute expressly permits courts, in certain circumstances, to
order the State Office of Financial Institutions to disclose bank examination materials
“which are relevant to claims or disputes at issue in a lawsuit.” Among other things,
the court must find that “no other source [of the relevant information] is available.”
In addition, the proponent of the discovery request must show “good cause and sub-
stantial need.” Furthermore, if the court compels the production of examination
materials, the court must enter a protective order placing appropriate limits on the
dissemination of such materials.

In effect, this statute incorporates several core tenets of the federal common-law
bank examination privilege. Under the statute, as under the common-law doctrine, a
party potentially can overcome the privilege. In addition, the statute specifically refer-
ences one prong of the five-prong good-cause test used by federal courts: the question
of whether the sought-after information is available from an alternative source.

In several other states, the statutory code contains a similar provision. In the State
of Washington, for instance, examination reports are “confidential and privileged.”
But “[t]he court may permit discovery and introduction” of portions of such a report
“which are relevant and otherwise unobtainable by the requesting party.”

§ 1.03 CHOICE OF LAW

In federal court, when a party seeks to compel the production of confidential mater-
ials related to a bank examination, an important threshold question is whether state
or federal law should govern the resolution of the dispute. This choice of law deter-
nmination can be consequential because, as discussed earlier, state law often diverges
significantly from federal law regarding the discoverability of such documents.

Federal Rule of Evidence (FRE) 501 controls this vertical choice of law analysis.
FRE 501 provides that “[t]he common law—as interpreted by United States courts in
the light of reason and experience—governs a claim of privilege unless any of the fol-
lowing provides otherwise: the United States Constitution; a federal statute; or rules
prescribed by the Supreme Court.” However, “in a civil case, state law governs privi-
lege regarding a claim or defense for which state law supplies the rule of decision.”

Based on FRE 501, when a court conducts a vertical choice of law analysis with
respect to the bank examination privilege, the nature of the parties’ claims and
defenses can be a key factor. When the parties’ claims and defenses are grounded
§ 1.03 Choice of Law

Exclusively in state substantive law—that is, when the parties are in federal court based solely on diversity jurisdiction—courts usually defer to state privilege law in order to resolve disputes regarding the discoverability of bank examination materials. When all of the parties’ claims and defenses spring from federal substantive law, courts ordinarily apply the federal common-law bank examination privilege. 127

This framework can frustrate the expectations of bank regulators at the federal and state levels. From a federal regulatory perspective, the problem occurs when courts subject federal agencies to state laws that lower the bar for compelling the production of examination records. For example, in one federal action, the parties’ claims and defenses were framed in terms of Vermont state law. A party to the case sought confidential bank examination materials from the FDIC and the Vermont Department of Banking and Insurance (the VDBI). The FDIC and the VDBI objected to this request based on the federal common-law bank examination privilege, and based on state statutory law. 128

The court held that, under FRE 501, because the case did not involve federal claims or defenses, Vermont law governed questions of privilege. As a result, notwithstanding that the FDIC is a federal regulator, the court resolved the discovery dispute by looking to Vermont law, holding, “we are obliged to apply the state law of privileges in this case.” Under Vermont law, the court found, bank examination reports, while confidential, are not privileged. The court instructed the agencies to produce the documents. 129

Similarly, in another diversity-jurisdiction case, the FDIC and Federal Reserve asserted the federal common-law bank examination privilege. The parties’ claims and defenses were stated in terms of Kentucky law. As in the earlier-referenced case, the court held that Kentucky law governed privilege assertions, and, furthermore, found that Kentucky law did not shield bank examination reports from discovery requests. The FDIC and Federal Reserve contended that, because they owned the sought-after documents, “federal law must apply.” 130 However, the court rejected this argument as inconsistent with FRE 501. Thus, the court mandated the wholesale production of the requested materials. 131

Such outcomes are controversial. The view reflected in the decisions just described is that, in pure diversity-jurisdiction cases, FRE 501 strictly requires the application of state privilege law. 132 But another reading of FRE 501 is that, in such cases, while courts cannot apply traditional common-law federal privileges, courts should consider federal privileges that are provided for in the Constitution, federal statutory law, or Supreme Court rules. 133 Under this reading of the rule, it is unclear how a court would treat the bank examination privilege in a pure diversity-jurisdiction case. The privilege is a common-law doctrine. However, the privilege also is integral to the federal system of bank supervision, which is statute-driven. 134

FRE 501 also can destabilize relationships between state regulators and financial institutions. Here, the problem is turned on its head: in a federal-question case, the
qualified federal privilege might displace a state statute that strictly protects bank examination reports.

For instance, in a federal case involving a Racketeer Influenced and Corrupt Organizations Act (RICO) claim, the New York State Department of Financial Services (NYDFS) objected to a request for bank examination records, and cited New York law as the basis for the objection. As previously discussed, New York statutory law strictly protects bank examination materials. However, the court held that “this action is in federal court on the basis of federal question jurisdiction,” and that “[a]ssertions of privilege in federal question cases, even those involving pendant state law claims, are governed by federal common law, rather than state law.” The court therefore applied federal law to resolve the discovery dispute. The court required the NYDFS to produce a number of categories of documents that a New York state court likely would not have compelled.

In a recent False Claims Act (FCA) case in the United States District Court for the Eastern District of Texas, a party once again moved to compel the NYDFS to produce bank examination materials that were categorically privileged under New York law. The NYDFS asked the court to apply New York law and deny the motion. In this case, the NYDFS based its position on a line of authority regarding the role of state statutory privileges in cases involving federal-law claims and defenses. According to this line of authority, when “a state official asserts a privilege not existent in the common law but enacted by the [state] legislature based on unique considerations of government policy,” a federal court must “make an independent examination of the appropriateness of the privilege by balancing the policies behind the privilege against the policies favoring disclosure.”

The court conducted such an analysis, but held that applying the statutory privilege was unwarranted. The court reached this result for three reasons. First, “[t]here is a strong federal interest in FCA cases for seeking the truth, and in this case, federal law plays a predominant role in the litigation.” Second, “there [was] no reason for the NYDFS to assume that these documents would be protected in a FCA action based on [a] federal question, especially given the broad range of permissible discovery.” Third, “the NYDFS has broad power to require cooperation from the entities that it is regulating, and does not need to rely on the confidentiality of these documents alone to obtain cooperation.”

Therefore, the court declined to apply New York law. The court also determined that the requested materials were not subject to the federal common-law bank examination privilege. Consequently, the court granted the motion to compel.

ENDNOTES
2. Id.
5. Id.
8. In re Subpoena, 967 F.2d at 633–34.
12. Id. at 710.
13. Id. at 710 n.18 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).
16. In re Subpoena, 967 F.2d at 634.
18. Id.
21. Id.
22. In re Subpoena, 967 F.2d at 633 (quoting Wolfe v. Dep’t of Health and Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988)).
33. Martinez v. Rocky Mountain Bank, 540 F. App’x 846, 854 (10th Cir. 2013).
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35. In re Subpoena, 967 F.2d at 635.
36. Id. at 633.
37. Id.
38. Id.
39. Id. at 635.
44. Id.
46. In re Bankers Trust Co., 61 F.3d at 471.
47. In re Subpoena, 967 F.2d at 633.
49. In re Subpoena, 967 F.2d at 633.
51. In re Subpoena, 967 F.2d at 634.
52. Id.
53. Id.
54. Id.
56. Id.
58. Id.
60. Id. at 588.
63. Id. at 585.
64. Id.
66. Id.
67. 12 U.S.C.S. § 481 (LexisNexis, current through PL 114-243); In re Subpoena, 967 F.2d at 630.
73. David H. Herrington & Kathleya Choironos, The Developing Privilege for Regulatory Communications with the SEC, 124 Banking L.J. 704 (Sept. 2007).
75. Id.
76. In re Subpoena, 967 F.2d at 634.
78. In re Subpoena, 967 F.2d at 634.
79. Id.
80. Id.
82. Id.
83. Id.
84. Id. at 428.
85. Id.
86. Id.
88. Id.
90. Ctr. for Biological Diversity v. Office of U.S. Trade Representative, 450 F. App’x 605, 608 (9th Cir. 2011).
92. Id.
98. Id.
100. See § 1.01[3], supra.
104. In re Bankers Trust Co., 61 F.3d at 470. See also 5 U.S.C. § 301 (LexisNexis, current through PL 114-243) (although the head of each agency may “prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property,” this authority “does not authorize withholding information from the public or limiting the availability of records to the public.”).
107. Id.
110. N.Y. Banking Law § 36.10 (LexisNexis, current through 2016 released chapters 1-395).
113. 5 Del. C. § 145 (LexisNexis, current through 80 Del. Laws, ch. 430).
114. Id.
115. IDAHO CODE ANN. § 26-1111(3)(c) (LexisNexis, current through the 2016 regular session) (emphasis added).
116. See § 1.02[1], supra.
117. KY. REV. STAT. ANN. § 286.3-470(1) (LexisNexis, current through the 2016 Legislative Session).
118. Id. § 286.3-470(1)(a).
120. LA. REV. STAT. ANN. § 6:103(H) (LexisNexis, current through 2016 Regular Session legislation).
121. Id.
122. WASH. REV. CODE ANN. § 32.04.220 (LexisNexis, current through 2016 1st Special Session).
123. Id.
124. See § 1.02[2], supra.
125. See FED. R. EVID. 501.
126. Id.
129. Id.
130. SBAV LP, 2015 WL 1471020, at *7.
131. Id.
132. See THE NEW WIGMORE: EVIDENTIARY PRIVILEGES, § 4.2.4, n.389 (“In short, the argument can be made that the sequence of the two sentences in the statute should be reversed. The second sentence addresses a question that analytically precedes the issue governed by the first sentence.”).
133. See 23 FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5436 (the first sentence of FED. R. EVID. 501 “obviously applies to both the general rule and the state law proviso.”).
134. See, e.g., 12 U.S.C.S. § 1(A) (LexisNexis, current through PL 114-243) (“There is established in the Department of the Treasury a bureau to be known as the ‘Office of the Comptroller of the Currency’ which is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”).
139. Id.
140. Id.
141. Id.