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March 15, 2018

The Honorable Richard G. Andrews
United States District Court
844 King Street
Wilmington, DE 19801

Re: United States v. Wilmington Trust Corp., *et al.*
Criminal Action No. 15-23-RGA

Dear Judge Andrews:

Please accept this letter in response to your request to provide the Court additional information regarding the admissibility of "pushback" evidence.

A. Procedural History

In its original Rule 404(b) motion, the government sought to admit evidence regarding the manner by which the Bank's senior management "pushed back" on specific downgrade decisions, and that Defendant Harra inserted a lending-side employee as a liaison to review proposed risk ratings changes. As a result, the government sought the admission of evidence that some members of the loan review staff (including Mr. Infanti) went directly to Federal Reserve examiners with concerns that Bank management was compromising the independence of the loan review function. The Federal Reserve referenced these concerns in its Examination Report (which is noted in the Indictment), concluding that the **"[l]ack of independence" in the Bank's loan review function gave rise "not only [for] ... the possibility of undue influence on loan review staff, but ... also the possibility for accusations of earnings manipulation.**" (D.I. 371 at 22 n.9; TSI ¶ 35) (emphasis added.)

All Defendants opposed admission of this evidence and Defendant Harra filed a specific motion *in limine* to exclude this evidence. (D.I. 424). Prior to the Court's Rule 404(b) order, the

Court granted Defendant's Harra motion to exclude this evidence "with no opposition from the government." (D.I. 571 at 14.)

B. Trial Testimony

In accordance with the Court's ruling, the government did not elicit any "pushback" evidence during its direct examination. However, Defendants North and Harra asked a series of questions that directly implicated the nature of Mr. Infanti's interactions with Defendants and federal regulators. For example, counsel for Defendant North asked a series of questions about the safety and soundness examination conducted by Federal Reserve bank examiners in 2009. In particular, after Mr. Infanti described how he negotiated risk ratings with the examiners during the examination, counsel asked him the following questions:

Q: ...you **never lied to the examiners**, did you?

A: No.

Q: ...you **never concealed anything from them**, did you?

A: No.

...

Q: Now, did you ever—**these conversations you had with the examiners, were they private, just you and an examiner or you and a group of examiners**?

A: If we were talking about an individual credit and they were challenging the rating, it would normally be me, whoever from the team had done the risk rating, and it would include the RM.

Q: Okay. **Did you ever have conversations while you worked at Wilmington Trust where it was just you and no other Wilmington Trust employees and having a conversation with one or more examiners**?

A: Not that I recall.

...

Q: Okay. **Did you always feel at ease in those conversations**?

A: With the examiners?

Q: Yes.

A: Yes.

Q: **You never felt like you had something to hide, did you**?

A: No.

(Ex. A, Mar. 15, 2018 Tr. 1674-1676.) Defendant North did not seek to limit his questions solely to his conduct, but instead asked broad based questions that implicated the actions of all defendants, as well. No defense counsel objected to these questions.

Similarly, counsel for Defendant Harra asked Mr. Infanti questions that suggested the daily contact between the witness and his client was limited and that his client never "discouraged" him from performing his job with integrity. Specifically, counsel asked the witness:

Q: Bob Harra was not in your direct chain of command?

A: That's correct.

Q: Okay. And in part because of that, you really didn't have much of a day-to-day working relationship with Mr. Harra?

A: That's correct.

Q: But you would sometimes see him in the building?

A: I would.

Q: In the halls, lunchroom, whatever it might be; is that right?

A: Yes.

Q: **And there would be times—not often, but times where you might have occasion to discuss a specific loan or specific issue**?

A: Yes.

Q: But outside of those occasional conversations, you didn't have a lot of substantial conversations, with Mr. Harra?

A: Correct.

Q: **But during those conversations that you had that we've just been talking about, Mr. Harra never discouraged you from performing your job with integrity**?

...

Q: Right?

A: That's correct.

(*Id.* 1699-1700.)

C. Argument

The Third Circuit has previously held that a defendant may "open the door" to further government inquiry through evidence he chooses to present in his defense. *See United States v. Irizarry*, 341 F.3d 273, 306 (3d Cir. 2003) ("When a defendant offers an innocent explanation [for his criminal conduct] he 'opens the door' to questioning into the truth of this testimony, and the government is entitled to attack his credibility on cross-examination.") (quoting *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998)); *see also SEC v. Johnson*, 174 F. App'x 111, 116 (3d Cir. 2006) (non-precedential opinion) (citing *Irizarry* and upholding district court's admission of SEC questioning of defendant about a prior offense).

Numerous circuit courts have likewise held that a defendant may "open the door" to government questioning in otherwise impermissible areas of inquiry. *See United States v. Osazuwa*, 564 F.3d 1169, 1175-76 (9th Cir. 2009) ("In a criminal prosecution, the government may introduce otherwise inadmissible evidence when the defendant 'opens the door' by introducing potentially misleading testimony. ... If a defendant opens the door, the prosecution may introduce evidence on the same issue to rebut any *false* impression that might have resulted from the earlier admission.") (internal citation and quotation makes omitted); *see also United States v. Desposito*, 704 F.3d 221, 234 (2d Cir. 2013) ("When a defendant offers an exculpatory explanation for the government's evidence, he 'opens the door' to impeachment of his credibility, even by previously inadmissible evidence."); and *United States v. Mitchell*, 633 F.3d 997, 1004 (10th Cir. 2011) ("[A] defendant generally opens the door when he challenges the factual basis of the government's case at trial. His prior contradictory statements become fair game—a notion supporting other provisions of the Rules of Evidence.").

Here, Defendants North and Harra opened the door to the "push back" evidence described above.[1] Defendants North and Harra have left the jury with the impression that defendants did not interfere with the integrity of the loan review function. The government now seeks to correct that misimpression by providing the jury with evidence that Defendant Harra compromised the independence of the loan review function. Based on Mr. Infanti's prior sworn testimony, the government expects that he will testify that Defendant Harra "pushed back" on risk rating and

[1] To the extent any defense counsel sat silent during these questions, they have waived any further objection. "When a lawyer, for strategic reasons, chooses to by-pass the appropriate procedures for informing the trial court of contemporaneous errors" committed by other defense counsel, "he will not be heard to complain when his strategy backfires." *United States v. Habel*, 613 F.2d 1321, 1327-28 (5th Cir. 1980). The time for counsel to object to this topic was during their colleague's cross-examination. They did not do so.

nonaccrual decisions to a level where Mr. Infanti felt compelled to inform federal regulators. For example, Mr. Infanti described the interactions at quarterly credit strategy meetings between Defendant Harra, Ted Cecala, and Karen Thuresson as "very tense, often great pushback from Ted and Bob." (Ex. B, Oct. 23, 2012, Infanti Grand Jury Tr. 52-55.) Accordingly, the jury should be permitted to hear this testimony.

Respectfully submitted,

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BY: /s/
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cc: All counsel of record (via email)