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June 17, 2019

Federal Reserve Proposes Amendments to CSI and FOIA Regulations

Proposal Provides Greater Clarity, but Does not Address a Number of Key Issues

SUMMARY

On June 14, 2019, the Board of Governors of the Federal Reserve System (the "Federal Reserve") published proposed amendments (the "Proposal")[1] that would revise the rules governing confidential supervisory information ("CSI") and other nonpublic information of the Federal Reserve, as well as provide "technical updates" to its regulations implementing the Freedom of Information Act ("FOIA"). Comments must be received by August 16, 2019.[2]

The Federal Reserve's willingness to address its CSI rules represents a welcome development. The current rules of the banking agencies can at times be not only unduly restrictive but also a source of confusion and a potential trap for those unfamiliar with the prescriptive regime. The Proposal would create a clearer and more predictable approach. Nevertheless, the Proposal leaves open a number of questions and may create a system where a significant amount of discretion without clear standards exists, raising the potential for inconsistent application. Most disappointing, the Proposal does not address the sharing of information in the context of due diligence and planning for mergers or securities offerings.

The Proposal sets forth several notable changes to the Federal Reserve's CSI regulations. Relevant definitions would be updated, including: (i) the definition of "CSI" itself, through the incorporation by reference of FOIA's exemption 8[3] and explicitly referencing internal documents of a supervised financial institution that contain, refer to, or would reveal CSI; and (ii) the definition of "supervised financial institution," by expanding the existing definition to include institutions subject to Federal Reserve examination (*i.e.*, not just those subject to Federal Reserve supervision).

The process by which supervised financial institutions may disclose CSI would also change in several important respects. *First*, supervised financial institutions would be permitted to disclose CSI to directors, officers or employees of affiliates (as defined in Regulation Y)[4] who have a "need" for the CSI in the performance of their official duties. The Federal Reserve's current regulations contain an exception authorizing a supervised financial institution to disclose its CSI to a parent holding company's directors, officers and employees, but this exception does not apply to other affiliates held under common control with the supervised financial institution. *Second*, the Proposal revises the exception permitting a supervised financial institution to disclose CSI to its auditors and outside legal counsel by removing the anachronistic requirement that the CSI be restricted to the "premises" of the supervised financial institution, as well as the prohibition against copying the CSI; this amendment would also impose a new requirement that, for CSI to be disclosed, the auditor's and outside counsel's engagement must be pursuant to a written agreement meeting five specific criteria. *Third*, the Proposal sets forth a new process by which a supervised financial institution would submit to its central point of contact ("CPC") at the relevant Federal Reserve Bank a request for a waiver to disclose CSI to other service providers (including consultants, contingent workers, independent contractors[5] and technology providers).

In addition, the Proposal would amend the Federal Reserve's regulations implementing other aspects of FOIA and the disclosure of other nonpublic information. The Proposal would revise the definition of "records of the Board" to incorporate the two-part test for agency records set forth in the *U.S. Department of Justice* v. *Tax Analysts* decision: the agency has created or obtained the material and is in control of the material at the time a request is received.[6] Additionally, several aspects of the Federal Reserve's FOIA regulations would be updated to conform to guidance published by the Department of Justice,[7] including with respect to expedited processing, the time limits applicable to the Federal Reserve's responses to FOIA requests, descriptions of withheld information, the time to file an appeal to an adverse determination and clarifying that confidential treatment requests expire after ten years. Finally, the Proposal would revise the process for submitting confidential treatment requests by clarifying that they may be on the basis of the relevant material containing personal privacy information, and by imposing two new requirements at the time the request is submitted: the request must identify the specific information for which confidential treatment is requested and include an affirmative statement that the information is not available publicly.[8]

BACKGROUND

A. WHAT IS CSI?

CSI is defined broadly, and each Federal banking regulator (along with state banking agencies) has its own definition of CSI, and, in certain respects, they are not entirely consistent with one another.[9] The Federal Reserve's current definition of CSI includes reports of examination or inspection, confidential operating reports and information that the Federal Reserve gathers in an investigation, suspicious activity report or other orders or actions under applicable statutes.[10] CSI may also include information prepared

by the supervised financial institution for the use of a banking regulator and information arising out of, contained in, concerning, derived from, or relating to CSI.[11] As a result, CSI would include, for example, internal communications discussing examination findings or correspondence with a bank supervisor.

B. OBLIGATIONS TO SAFEGUARD CSI

Each federal banking regulator, including the Federal Reserve, considers CSI as its property, even when the CSI is lawfully in the possession of the supervised financial institution.[12] As a result, supervised financial institutions are generally prohibited from disclosing CSI without obtaining prior authorization from the relevant banking regulator.[13] The Federal Reserve's current CSI regulations contain exceptions allowing a supervised financial institution to disclose CSI to its parent bank holding company, and, subject to certain conditions, any certified public accountant or outside legal counsel employed by the supervised financial institution.[14]

C. ENFORCEMENT OF CSI REGULATIONS

The unauthorized disclosure of CSI may result in sanctions and/or other penalties (including criminal) against not only the financial institution, but also any person or third party that disclosed CSI without proper authorization.[15] Regulators have been active in pursuing enforcement actions in this area, including as recently as this month.[16] The banking regulators maintain that protecting CSI from inappropriate disclosure is essential to the bank examination process.[17]

D. CONSIDERATIONS FOR COMPLYING WITH CSI REGULATIONS

Supervised institutions today face numerous practical challenges complying with the CSI regulations, some of which have been addressed (in whole or in part) by the Federal Reserve's guidance and are discussed further in the section below.

1. **Sharing CSI with Affiliates.** Although the Federal Reserve's current CSI regulations contain an exception allowing a supervised financial institution to share CSI with its parent holding company, this exception does not apply to sharing with other affiliates within the same corporate structure.

2. **Sharing CSI with Other Supervisory Authorities.** Supervised institutions must seek Federal Reserve approval before disclosing Federal Reserve CSI to any other supervisory authority, even to another U.S. banking agency.

3. **Sharing CSI with Accountants and Legal Counsel.** Although the Federal Reserve's current CSI regulations permit supervised institutions to disclose CSI to accountants and legal counsel,[18] this exception requires that the disclosure be made on the premises of the supervised institution and prohibits the recipient from making or retaining copies of the CSI.

4. **Sharing CSI with Consultants.** Unlike certain other bank regulators,[19] the Federal Reserve's current CSI regulations require supervised institutions to seek prior authorization before disclosing CSI to a consultant, such as in the context of an engagement to resolve a matter requiring attention identified in an examination report.

5. **Sharing CSI in Specific Contexts.** Supervised institutions may need to share CSI in other contexts.

- One example is the disclosure of documents to e-discovery vendors in the litigation context, which are often engaged, in part, because they possess sophisticated screening tools and processes to prevent the inadvertent production of CSI in litigation.

- Another example, discussed in more detail below, is in the context of an M&A or securities transaction, where limitations on the sharing of CSI have the effect of preventing parties from gaining a full understanding a bank's regulatory status and remedial efforts, thus affecting the due diligence and integration processes.

E. CONFIDENTIAL TREATMENT PROCESS

The Federal Reserve's regulations also set forth the process for requesting confidential treatment of materials submitted to the Federal Reserve. This is an important process as supervised financial institutions frequently submit materials containing proprietary commercial information that, if published, could cause material harm to the institution.

DISCUSSION

A. DEFINITION, PROTECTION AND DISCLOSURE OF CSI

1. Revisions to Relevant Definitions

Among the updates outlined in the Proposal are revisions to the definition of CSI; although these proposed definitional changes would provide helpful clarification, they may have little effect in practice. The definition of CSI would be revised to be based primarily on FOIA exemption 8, which is broadly defined as 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."[20] This language is largely similar to that used in the first prong of the Federal Reserve's current definition.[21] Other revisions to the definition of CSI, such as the explicit addition of "internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information"[22] and "supervisory correspondence or other supervisory communications"[23] should function largely as clarifications of existing regulatory views.

The Proposal would also update the definition of "supervised financial institution" to include institutions subject to examination by the Federal Reserve, which is a change from the current definition that includes only institutions subject to Federal Reserve supervision.

The Proposal also updates the broader defined term "exempt information" by changing it to "nonpublic information,"[24] which the Proposal indicates is intended to clarify that: (i) information that could be subject to a FOIA exemption but which the Federal Reserve has decided to make public is not covered, whereas (ii) information disclosed by the Federal Reserve on a discretionary basis and subject to confidentiality restrictions (*e.g.*, CSI disclosures) is covered by the definition. This clarification bolsters the argument that CSI, even if the subject of a limited disclosure, remains the property of the Federal Reserve and does

not result in the waiver of any applicable privilege. Additionally, this change moves the Federal Reserve's definition closer to that used by the OCC.[25]

2. Changes to the Rules Regarding the Protection and Disclosure of CSI

The Proposal would revise the existing procedures for supervised financial institutions to disclose CSI in four important respects, which are described below. The revisions to the exception for sharing CSI with auditors and outside legal counsel, as well as the Proposal's new exception for affiliate sharing, are important because they should simplify the CSI compliance process for supervised financial institutions. Nevertheless, as a practical matter, many of these institutions will still face compliance challenges due to the lack of uniformity on these points by various federal and state banking regulators.

- **Sharing with Affiliates.** The Proposal would permit a supervised financial institution to disclose CSI to the directors, officers or employees of its affiliates (as that term is defined in Regulation Y)[26] to the extent that the recipients have a "need" for the information in the performance of their official duties.[27] This provision is similar to an equivalent provision in the Consumer Financial Protection Bureau ("CFPB")'s Part 1070 Rules on the disclosure of records and information, which authorizes disclosure of CSI to affiliates where the CSI is "relevant to the performance of the [recipient's] assigned duties."[28]

- **Sharing with Other Supervisory Authorities.** Under the Proposal, a supervised financial institution would be permitted to share CSI with other Federal banking regulators (*i.e.*, the Federal Deposit Insurance Corporation ("FDIC"), Office of the Comptroller of the Currency ("OCC"), and the CFPB) and its state supervisors provided that the supervised financial institution receives the concurrence of its CPC that the receiving agency has a legitimate supervisory or regulatory interest in the information.[29] This differs from the current requirement that supervised financial institutions make these requests to the Director of Banking Supervision and Regulation or the appropriate Federal Reserve Bank, which "may make available" the CSI to the designated recipient(s).[30] There is no apparent guidance as to the standards that should be applied by the CPC, and, notably, the Proposal does not contemplate applying this new approach to disclosures of CSI to a supervised financial institution's foreign regulatory authorities.

- **Sharing with Auditors and Outside Legal Counsel.** The Proposal would eliminate the outdated restrictions currently in 12 CFR 261.20(b)(2), which authorizes a supervised financial institution to disclose CSI to its auditors and outside legal counsel provided that: (i) the CSI is reviewed on the premises of the supervised financial institution, and (ii) the auditors and outside legal counsel are prohibited from making or retaining copies of the CSI.[31] However, the Proposal imposes new restrictions, to be set forth in a written agreement, that would require the auditor or outside legal counsel, to, among other things—

- Not use the CSI for any purpose other than in connection "with the ***particular*** engagement" with the supervised financial institution;[32]
- At the conclusion of the engagement, return or certify the destruction of the CSI, or, in the case of electronic files, "render the files effectively inaccessible through access control measures or other means;" and
- Strictly limit access to the CSI within its staff to those who have a need to know and who are bound by written agreement to keep the information confidential in accordance with the Federal Reserve's regulations.[33]

- **Sharing with Other Service Providers.** The Proposal would update the manner in which supervised financial institutions obtain permission to disclose CSI to its "other service providers"—including consultants, contingent workers, independent contractors and technology providers—that may require access to CSI; it does not, however, contemplate providing a blanket authorization for disclosures to these recipients. Under the current regime, requests for other service providers are directed to the Federal Reserve's General Counsel,[34] but the Proposal would provide for a supervised financial institution instead to direct these requests to its CPC, who may consult with other Federal Reserve staff as part of the decision-making process.[35] Additionally, the Proposal would require a supervised financial institution to identify in its request the "specific documents or materials" it seeks to disclose to the service provider. If the request is granted, the service providers would be subject to the same written agreement requirements applicable to auditors and legal counsel.[36] The Federal Reserve particularly invites public comment on this provision, given the shift from current practice.[37]

The Proposal also imposes heightened requirements for requests to disclose CSI in connection with litigation.[38] The party making the request would be required to provide a "narrow and specific"[39] description of the CSI and its relevance to the litigation, and an explanation of why the information sought, or "equivalent information adequate to the needs of the case,"[40] cannot be obtained from any other source.

The Federal Reserve's current CSI regulations require persons served by subpoenas or other legal processes to appear as required and decline to disclose or give testimony with respect to information of the Federal Reserve that may not be disclosed in accordance with the applicable regulation. The Proposal clarifies that the person served would not be expected to defy an order to produce the CSI, provided that the Federal Reserve has had an opportunity to appear and to oppose the disclosure of the CSI; otherwise, the person served must continue to decline to disclose the information and promptly report to the Federal Reserve.[41] However, as currently drafted, the Proposal would apply this relief only to federal (and not state) court proceedings in which the Federal Reserve has had an opportunity to appear and oppose discovery.[42]

Finally, the Proposal also updates the regulations governing CSI made available by the Federal Reserve to other governmental agencies and entities exercising governmental authority. The Proposal revises the list of agencies with which the Federal Reserve may share information (*e.g.*, adding the CFPB) and clarifies that, with respect to both federal and state supervisory authorities, disclosures of CSI would be based on the same standard: "legitimate supervisory or regulatory purposes."[43] These disclosures could be made by the Federal Reserve with or without a request for the CSI from the receiving federal or state authority. The Proposal would continue to permit U.S. and "properly accredited" foreign law enforcement agencies to file written requests with the Federal Reserve to obtain CSI, with the required contents of that disclosure identical to the current requirements except for the removal of a requirement for the requestor to indicate whether the requested disclosure is permitted or restricted in any way by applicable law or regulation.[44] However, the Proposal clarifies that disclosures of CSI to foreign *supervisory* authorities are governed by 12 C.F.R. § 211.27, which authorizes the Federal Reserve to approve the request if disclosure is appropriate for bank supervisory or regulatory purposes and will not prejudice the interests of the United States.[45]

3. Mergers and Acquisitions; Securities Transactions

The Proposal does not address the sharing of CSI in the context of mergers and acquisitions, including for both pre-merger announcement due diligence and post-merger announcement integration. Limiting the access to this information, as a policy matter, would seemingly run counter to other bank regulatory policies and objectives. Indeed, the bank regulatory agencies, as well as investors, have stressed the importance of thorough due diligence in connection with bank acquisitions. Yet, the banking agencies have rejected requests for permission for potential merger parties to gain access to examination reports and related documents (such as remediation programs). Likewise, the bank regulatory agencies, as well as investors, have stressed the importance of successful integration planning and implementation, yet the Proposal provides no guidance regarding the disclosure of CSI during this critical phase of the transaction. Moreover, the Proposal also does not address the sharing of CSI with a supervised financial institution's underwriters in connection with a securities offering, another area in which CSI restrictions can pose issues for supervised financial institutions that the Federal Reserve (and other bank supervisors) could address.

B. FOIA REGULATIONS AND CONFIDENTIAL TREATMENT REQUESTS

1. Updated Procedure to Obtain Records of the Federal Reserve

The Proposal would make several changes to the Federal Reserve's FOIA regulations regarding the process through which records of the Federal Reserve may be obtained, including:

- **Definition of "Records of the Board."** The Proposal would conform the definition of "records of the Board" to apply the two-part test set forth in *U.S. Department of Justice* v. *Tax Analysts*: (i) information created or obtained by the Federal Reserve and (ii) under the Federal Reserve's

control.[46] In explaining the significance of including "obtain" in the definition, the Court in *Tax Analysts* observed that agencies routinely use information produced by other government and private organizations, and that restricting the definition to internally generated material would frustrate the intent of Congress to put within the public's reach the information made available to the agency in the decision-making process.[47] The Court further elaborated that the "control" element covers materials that came into the agency's possession "in the legitimate conduct of its official duties," and would not, for example, include the personal materials in the possession of an employee physically located in the agency.[48]

- The Proposal would also eliminate the current definition's inclusion of information "maintained for administrative reasons" in official files in any office of the Federal Reserve or Reserve Bank in connection with the transaction of official business; the Proposal explains that the Federal Reserve has determined that the records covered by this part of the current definition would be encompassed within the two-part *Tax Analysts* test.[49] This change is notable as this aspect of the definition of "records of the Board" was at issue in both *Bloomberg L.P.* v. *Board of Governors of the Federal Reserve System*[50] and *Fox News Network, LLC* v. *Board of Governors of the Federal Reserve System* .[51] In *Fox News*, the Federal Reserve had argued that this aspect of the definition covered only records created under the Federal Reserve's delegated authority, but the Second Circuit rejected this view because there was no support for it in the context or phrasing of the regulation, and also noted that the district court in *Bloomberg* had previously required certain Reserve Bank records to be searched in response to a FOIA request in accordance with this aspect of the definition.[52]

- **Incorporation of DOJ Guidance.** The Proposal would make various other changes to the Federal Reserve's FOIA regulations by incorporating guidance from the Department of Justice ("DOJ Guidance") that addresses the key elements to be addressed in each section of an agency's FOIA regulations.[53] Areas in which the DOJ Guidance has been incorporated in the Proposal include:

  - *Expedited Processing* – Among other changes, the conforming revisions would broaden the public dissemination basis for requesting expedited processing to include situations where there is an urgent need to inform the public of actual or alleged *federal government activity*, and is no longer limited to *Federal Reserve activity* covered by the existing Federal Reserve regulation.[54]

  - *Time Limits* – The Proposal's changes would, in accordance with the DOJ Guidance, provide a more detailed description of the Federal Reserve's obligations in responding to requests subject to expedited treatment.[55] An additional change in the Proposal related

to time limits (but not made to conform to DOJ Guidance), would clarify that the usual 20-day time limit runs from the date on which a request is perfected.[56]

- *Estimate of Amount of Information Withheld* – The Proposal would require the Federal Reserve to provide an estimate of the amount of information withheld in a response to a FOIA request unless: (i) the estimate is not needed because the amount of information withheld is indicated by deletions marked on disclosed records, or (ii) providing the estimate would harm an interest protected by an applicable exemption.[57] The Proposal does not explain what the estimate should contain, though based on the DOJ's Guidance, it appears to be referencing the volume of information withheld.[58]

- *Time to File an Appeal* – The Proposal would make a conforming change to clarify that, to be considered timely, an appeal must be postmarked, or, in the case of electronic submissions, transmitted, within 90 calendar days after the date of the adverse determination.[59]

- *Categories of Requestors* – The Proposal would conform the Federal Reserve's definitions of "representative of the news media," "educational institution," and "noncommercial scientific institution" to be consistent with the DOJ Guidance.[60]

- **Clarification of Individual Nature of FOIA Determinations.** The Proposal would add new language to clarify that a decision by the Federal Reserve to release particular nonpublic information does not waive the Federal Reserve's ability to withhold similar nonpublic information in response to the same or a different request.[61]

  - Similarly, in a change apparently undertaken to protect the bank examination privilege, the Proposal would also add new language indicating that any disclosure under Subpart C of the Federal Reserve's regulations (including CSI) does not constitute a waiver by the Federal Reserve of any applicable privileges. The Proposal explains that this addition "makes explicit" the authority of the Federal Reserve to disclose CSI and other nonpublic information on a confidential and limited basis without forfeiting applicable privileges.[62]

2. Updated Procedure to Request Confidential Treatment of Submitted Materials

The Proposal's changes affect requests to obtain confidential treatment for materials submitted to the Federal Reserve in several respects:

- **Importance of Specificity in Requests for Confidential Treatment.** Although submitters are already required to provide certain information to the Federal Reserve when requesting confidential treatment or objecting to the release of information in response to a FOIA request, the Proposal would impose additional requirements at both stages of the process.

- *Initial Request for Confidential Treatment*. Under the Federal Reserve's current FOIA regulations, at the time of submission (or within ten working days thereafter), the submitter must state in reasonable detail the facts supporting the request and its legal justification. The Proposal would retain both of the current requirements and also add two new requirements: the submitter must identify the specific information for which confidential treatment is requested and include an affirmative statement that the information is not available publicly.

- *Objection to Release of Information*. Under the Federal Reserve's current FOIA regulations, a submitter that objects to the release of material that is the subject of a FOIA request must provide detailed facts showing that: (i) with respect to information that had been voluntarily disclosed to the Federal Reserve, the information is customarily withheld from the public, and (ii) with respect to any information that had not been voluntarily disclosed to the Federal Reserve, detailed facts showing the likelihood of substantial harm that would be caused to the submitter's competitive position, or, alternatively, that the release of the information would impair the Federal Reserve's ability to obtain necessary information in the future. The Proposal would change this approach and instead require a detailed written statement specifying all grounds for withholding the information under any exemption. If relying on the exemption for proprietary commercial information, the Proposal would require the submitter to also explain why the information constitutes a trade secret or commercial or financial information that is confidential and the consequences of disclosing the information.[63]

- **Additional Basis for Personal Privacy Information.** The Proposal would authorize submitters to make confidential treatment requests for "personal privacy information," in addition to proprietary commercial information. This change would be implemented through incorporation by reference of the Federal Reserve's regulation implementing FOIA exemption 6, which covers "information contained in personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[64]

- **Ten-year Period of Confidential Treatment.** The Proposal would also make a conforming change to reflect the DOJ Guidance that requests for confidential treatment generally expire ten years after the date of submission, unless a renewal request is submitted to the Federal Reserve before the confidentiality designation expires.[65]

IMPLICATIONS

If adopted, the Proposal would have several important consequences for supervised financial institutions and their external advisors and service providers, including:

- **Review of Agreements with Auditors and External Legal Counsel.** The Proposal's elimination of the premises requirement and prohibition on making or retaining copies would potentially be beneficial to supervised financial institutions and these advisors. However, the Proposal's new requirement for a written agreement meeting specific criteria warrants a review of existing agreements and will likely require either entering into new agreements or modifying existing agreements. As part of this review process, supervised financial institutions may wish to also consider any waivers already obtained from the Federal Reserve.

    - Additionally, certain aspects of the proposed requirements, in particular the requirement to destroy CSI (or, if stored electronically, to render it effectively inaccessible) at the conclusion of the engagement may present implementation challenges for the supervised financial institutions' advisors.

- **Treatment of "Other Service Providers."** Because the Proposal would not provide a general authorization to disclose CSI to other service providers, it may be beneficial for supervised financial institutions to consider how they plan to formulate such requests, and, to the extent their CPCs are willing to engage on this topic in advance of specific requests, discuss the details of how this would work in practice.

    - In particular, the Proposal seems to indicate that requests to disclose CSI to these other service providers cannot be general in nature as it would require the supervised financial institution to include in the request the "specific documents or materials that the supervised financial institution seeks permission to disclose."[66] Accordingly, a supervised financial institution may wish to consider, and potentially discuss with its CPC, the expected level of detail and specificity to be included in these requests. This is particularly true for contingent workers and temporary employees who are at times utilized for general assistance that does not lend itself to listing of specific documents.

- **Review of Policies, Procedures and Training Materials.** Given the importance of robust policies, procedures and training materials related to CSI, supervised financial institutions should consider reviewing these existing documents to identify revisions that may be required if the Proposal is enacted. In particular, supervised financial institutions may wish to review the scope of these documents to see if they would apply to (and contemplate sharing of CSI with) affiliates under common control.

    - Critically, as part of this review, institutions must bear in mind that the approach to CSI safeguards remains differentiated at both the federal and state levels. As a result, even if the modernizations set forth in the Federal Reserve's Proposal are adopted, supervised financial institutions may not be able to fully realize the resulting benefits if they are subject to the CSI regulations of other federal or state banking regulators that may

contain conflicting requirements. For example, the Proposal would remove the anachronistic "premises" requirement for CSI disclosures to auditors and outside legal counsel from the Federal Reserve's regulation, but before a state member bank could avail itself of this revised exception, it would need to consider whether the information it wishes to disclose is joint CSI of both the Federal Reserve and its state supervisor; if it is, the state member bank would need to determine whether an analogous exception exists under the applicable state CSI regime and disclose the joint CSI in accordance with the parameters of both the Federal Reserve's regulation and state law.

- **Confidential Treatment Requests.** Institutions and their advisors should consider whether new formulations would be required for confidential treatment requests, particularly in light of the proposed requirement to specifically identify at the time of submission of the request which information it covers and affirmatively state that the information is not available publicly. In addition, institutions should review existing confidential treatment requests to see if any warrant the submission of a renewal request (*e.g.*, covers personal information that should not be subject to a FOIA request).

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ENDNOTES

[1] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Rules Regarding Availability of Information*, 84 Fed. Reg. 27,976 (June 17, 2019) (the "Proposal").

[2] Proposal at 27.976.

[3] 12 U.S.C. § 552(b)(8).

[4] 12 C.F.R. § 225.2(a).

[5] This term is used only in the Proposal's preamble, though the proposed rule text would adopt a "such as" formulation and therefore would likely encompass this category of individuals.

[6] 492 U.S. 136 (1989).

[7] U.S. Dep't of Justice, *Template for Agency FOIA Regulations*, https://www.justice.gov/oip/template-agency-foia-regulations (updated Feb. 22, 2017) ("DOJ Guidance").

[8] Proposed Rules at 12 C.F.R. § 261.17(a)–(b).

[9] *C.f.* 12 C.F.R. § 1070.2(i) ("[CSI] means: (i) reports of examination, inspection and visitation, non-public operating, condition, and compliance reports, and any information contained in, derived from, or related to such reports; (ii) any documents, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Federal, State, or foreign government agency in the exercise of supervisory authority over a financial institution, and any information derived from such documents; (iii) any communications between the CFPB and a supervised financial institution or a Federal, State, or foreign government agency related to the CFPB's supervision of the institution; (iv) any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services, or to assess whether an institution should be considered a covered person, as that term is defined by 12 U.S.C. 5481, or is subject to the CFPB's supervisory authority; and/or (v) information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8). [CSI] does not include documents prepared by a financial institution for its own business purposes and that the CFPB does not possess."),

N.Y. Banking Law § 36 ("All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any banking organization. . .shall be confidential communications. . . [f]or the purposes of this subdivision, 'reports of examinations and investigations, and any correspondence and memoranda concerning or arising out of such examinations and investigations,' includes any such materials of a bank, insurance or securities regulatory agency or any unit of the federal government or that of this state[,] any other state or that of any foreign government which are considered confidential by such agency or unit and which are in the possession of the department or which are otherwise confidential materials that have been shared by the department with any such agency or unit and are in the possession of such agency or unit.").

[10] 12 C.F.R. § 261.2(c).

[11] *See, e.g.,* 12 C.F.R. § 261.2(c)(1)(i); § 1070.4(i)(1)(ii); N.Y. Banking Law § 36(10).

[12] *See, e.g.,* 12 C.F.R. § 261.20(g) ("All confidential supervisory information or other information made available under this section shall remain the property of the Board."); 12 C.F.R. § 309.6(a) ("all copies of such records shall remain the property of the [FDIC].").

[13] *Id.*

[14] 12 C.F.R. § 261.20(b).

[15] *See, e.g.,* 12 U.S.C. § 1818(b); 18 U.S.C. § 641.

[16] *In the Matter of Youlei Tang A.K.A. Alex Tang*, Order to Cease and Desist Issued Upon Consent Pursuant to Section 8(b) of the Federal Deposit Insurance Act, Docket No. 19-010-B-I (June 4, 2019).

ENDNOTES (CONTINUED)

[17] *See, e.g. In re Subpoena Served Upon Comptroller of Currency* (*In re Subpoena*), 967 F.2d 630, 633 – 34 (D.C. Cir. 1992), *citing Franklin Nat'l Bank*, 478 F. Supp. 577, 586 (E.D.N.Y. 1979); *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988).

[18] 12 C.F.R. § 261.20(b).

[19] 12 C.F.R. §§ 1070.42(b)(2), 4.37(b)(2).

[20] 12 U.S.C. § 552(b)(8).

[21] 12 C.F.R. § 261.2(c)(1)(i).

[22] Proposed Rules at 12 C.F.R. § 261.2(b)(1).

[23] *Id*.

[24] Proposed Rules at § 261.1.

[25] 12 C.F.R. § 4.32(b)(1).

[26] Proposed Rules at § 261.2(a).

[27] Proposed Rules at § 261.21(b)(1).

[28] 12 C.F.R. § 1070.42.

[29] Proposed Rules at § 261.21(b)(2).

[30] 12 C.F.R. § 261.21(a).

[31] 12 C.F.R. § 261.20(b)(2).

[32] Proposed Rules at § 261.21(b)(3)(ii) (emphasis added).

[33] Proposed Rules at § 261.21(b)(3).

[34] 12 C.F.R. § 261.22(b)(2).

[35] Proposed Rules at § 261.21(b)(4).

[36] *Id*.

[37] Proposal at 27,979.

[38] Proposed Rules at § 261.23(b).

[39] Proposed Rules at § 261.23(b)(2)(iii).

[40] Proposed Rules at § 261.23(b)(2)(v).

[41] Proposed Rules at § 261.24.

[42] "Unless authorized by the Board or as ordered by a ***federal*** court in a judicial proceeding in which the Board has had the opportunity to appear and oppose discovery . . ." *Id.* (emphasis added).

[43] Proposed Rules at § 261.22(a).

[44] Proposed Rules at § 261.22(d).

[45] Proposed Rules at § 261.22(c).

[46] 492 U.S. 136 (1989); Proposal at 5.

[47] 492 U.S. 144–45 (1989).

[48] *Id*. at 145.

[49] Proposal at 27,977.

ENDNOTES (CONTINUED)

[50] 649 F. Supp. 2d 262 (S.D.N.Y., Aug. 2012).

[51] 601 F.3d 158 (2d Cir. 2010).

[52] *Id*. at 162.

[53] DOJ Guidance, *supra* note 7.

[54] Proposed Rules at § 261.12(c) (emphasis added).

[55] Proposed Rules at § 261.12(e)(1).

[56] Proposed Rules at § 261.12(e).

[57] Proposed Rules at § 261.13(e)(3).

[58] DOJ Guidance, *supra* note 7.

[59] Proposed Rules at § 261.12(a)(3).

[60] Proposed Rules at § 261.16(d)(2)–(4).

[61] Proposed Rules at § 261.15(b)(2).

[62] Proposal at 27,979.

[63] Proposed Rules at § 261.18(e)(1).

[64] Proposed Rules at § 261.17(a).

[65] Proposed Rules at § 261.17(b).

[66] Proposed Rules at § 261.21(b)(4)(C).

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