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August 14, 2019

SENT VIA FIRST CLASS MAIL AND E-MAIL

Federal Reserve System
Attn: Ms. Ann E. Misback, Secretary
20th Street and Constitution Avenue NW
Washington, D.C. 20551
Email: regs.comments@federalreserve.gov

Re: Notice of Proposed Rulemaking: Rules Regarding Availability of Information, Docket No. R-1665, RIN 7100AF15.[1]

Dear Board of Governors of the Federal Reserve,

The Kentucky Bankers Association (KBA) is pleased to submit this response to the Notice of Proposed Rulemaking (Proposal) from the Board of Governors of the Federal Reserve System (Fed or Board), which proposes to revise 12 CFR Part 261 to "clarify and update the Board's regulations implementing the Freedom of Information Act and the rules governing the disclosure of supervisory information and other nonpublic information of the Board" (Purpose).[2] We support the intent of the Proposal in providing regulatory clarity.

After consulting with representatives from the Kentucky Bankers Association's one hundred and sixty-one (161) member institutions ranging in asset size from twenty-one million dollars ($21,000,000) to over three hundred and seventy billion dollars ($70,000,000,000.00), the Kentucky Bankers Association supports the majority of the proposed amendments. However, some changes and additions to these amendments would better align with the Purpose. We recommend the following amendments to Part 261:

- That financial institutions have the opportunity to respond to the board regarding a request for confidential information in connection with litigation, subpoenas, order compelling production, and other process;[3]
- That the board reconsider its position in replacing the term "exempt information" with the term "nonpublic information";[4]
- Adopt the other proposed clarifications and instructions for handing information.

[1] Board of Governors of the Federal Reserve System, Notice of Proposed Rulemaking: Rules Regarding Availability of Information (12 CFR Part 261), 84 Federal Register 27976, June 17, 2019 (https://www.govinfo.gov/content/pkg/FR-2019-06-17/pdf/2019-12524.pdf).
[2] Proposal, page 27976.
[3] Proposal, pages 27989-27990; 12 CFR § 261.23- §261.24.
[4] Proposal, page 27976.

These recommendations and analysis of the Proposal follow.

1.Banks Should Have the Opportunity to Respond to a Request

The Proposal generally addresses the intersection of the bank examiner privilege and the Freedom of Information Act (FOIA) and how financial institutions should respond to a request for such privileged documents in light of FOIA.

As the Fed is aware, the common-law bank examination privilege is justified by the distinctively continuous and informal process of bank regulation, which especially requires candor from regulated entities.[5] An important justification for the common-law bank examination privilege is the financial system's sensitivity to public questioning of bank soundness, since open, adversarial litigation between banks and their regulators would be destabilizing and regulators seek to avoid it. The D.C. Court of Appeals has described the bank examination privilege at length stating that it is:

> Firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal...in these net that it calls for adjustment, not adjudication...These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.[6]

This privilege strengthens when applied to Suspicious Activity Reports [SARS] because the privilege cannot be waived. SARS are confidential and subject to an unqualified discovery and evidentiary privilege.[7]

Third parties are consistently seeking the production of confidential information with FOIA as their basis for production.[8] This rule goes a long way in clarifying how financial institutions should handle such requests.

The KBA supports the amendments to 16 CFR Part 261 requiring those requesting confidential information "to provide a narrow and specific description of the supervisory information" and "to state the reason why the information sought, or equivalent information adequate to the needs of the case, cannot by obtained from any other source."[9]

While the Proposal sets forth a substantial process for obtaining confidential information, the process is missing one key item; financial institution input. In litigation, financial institutions are often best suited to address the intent of the requester and assert malfeasance by the requester. With the common low standard of discovery being, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense

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[5] *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, 978 F.Supp.2d 267 (S.D. NY. 2013).
[6] *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992).
[7] *See Wiand v. Wells Fargo Bank, N.A.*, 2013 WL 5925545 (M.D.Fla. 2031; *See also U.S. v. Holihan*, 248 F. Supp.2d 179, 186 (W.D.N.Y. 2003).
[8] *See S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152 (S.D.N.Y. 2014); *See also Federal Housing Finance Agency v. JPMorgan Chase & Co.*, 978 F.Supp.2d 267 (S.D. NY. 2013).
[9] Proposal, page 27980.

of any other party, including the existence, description, nature, custody, condition and location of any books.."[10]

Courts are generally inclined to grant requestors the opportunity to seek information, essentially leaving solely the governing entity, in this case, the Fed, as the lone roadblock to production. While confidential information is important to regulators and financial institutions, the relationship between regulators and financial institutions "in preserving and promoting candor in communication between banks and their regulators" rests on the Fed's and other regulators ability to protect that information.[11] If financial institutions are not provided the opportunity to input their position on the disclosure of confidential information, there is potential for the development of mistrust between financial institutions and regulators. The policy principles in promoting candor in exams with open and honest dialect could disappear. Input from financial institutions is a necessary and important step in preserving that trust.

For these reasons, the KBA requests that the FED add provisions for financial institution input regarding a request for confidential information.

2. The Board Should Reconsider its Position Replacing the term "Exempt Information" with the term "Nonpublic Information"

In the Proposal, "[t]he Board proposed replacing the term "exempt information" with the term "nonpublic information" to emphasize that the term applies to information the Board has not made public, rather than simply to information subject to an exemption under the FOIA."

While the KBA understands the intent in replacing the terms in attempting to align with FOIA, the change minimizes the protections afforded to information contained in bank examinations.

From a practical perspective, the judiciary often views the term "confidential" as a relative term. Millions of documents are stamped "confidential" within various forms of business and the term itself no longer encapsulates privacy. As a result, the judiciary often views the term "confidential" as a misnomer and orders that documents be produced. By changing "exempt information" to "confidential information", bank examinations and other protected material would fall within the plethora of documents traditionally marked "confidential".

This change fails to delineate the differentiation between these documents and other "confidential" documents. As a result, there is a risk of the judiciary viewing these documents in the same manner and ordering their production despite the other limitations set forth in the Proposal.

While the KBA understands the Proposal's position that exempt is too strong because there are a few, rare instances where the documents may be produced, the documents are exempt absent a showing a last resort. Very few documents meet the standard of "substantial need to access confidential supervisory information that outweighs the need to maintain confidentiality." The term "exempt" supports this position. As such, the term exempt should remain and be replaced with the term "confidential information."[12]

For these reasons, the KBA requests that the term "exempt" not be replaced with "confidential information".

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[10] *See* Fed. R. Civ. P. 26.01.

[11] *See S.E. Pa.. Trans. Auth. v. Orrstown Fin. Serv., Inc.*, 367 F. Supp.3d 267 (M.D.PA. 2019).

[12] Proposal, page 27990.

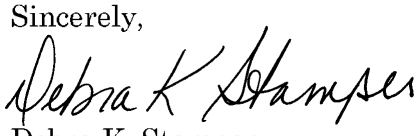
3. Adopt the Remaining Portions of the Proposal

The purpose of the Proposal "is to set forth more clearly the procedures for requesting access to documents that are records of the Board under the Freedom of Information Act, as well as to update the rules governing the Board's disclosure of confidential supervisory information."[13]

The KBA supports the incorporation of these clarifications in resolving questions that are otherwise uncodified.

Thank you for considering our suggestions. If there are any questions, please do not hesitate to contact the undersigned.

Sincerely,



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[13] Proposal, page 27976.