August 16, 2019

Via email

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
regs.comments@federalreserve.gov

Re: Potential Modifications to Rules Regarding Availability of Information, Request for Comments (Docket No. R-1665; RIN 7100-AF 51)

Dear Ms. Misback:

CLS Bank International ("CLS") welcomes the opportunity to comment on the advance notice of proposed rulemaking, entitled Rules Regarding Availability of Information ("ANPR"), issued by the Board of Governors of the Federal Reserve System ("Board") and published in the Federal Register on June 17, 2019.[1]

CLS was established by the private sector, in cooperation with a number of central banks, to mitigate settlement risk (loss of principal) associated with the settlement of payments relating to foreign exchange transactions. CLS operates the world's largest multicurrency cash settlement system (the "CLS system") and provides payment-versus-payment settlement in 18 currencies directly to 71 settlement members, some of which provide access to the CLS system for over 25,000 third-party institutions.

As an Edge Act corporation under section 25A of the United States Federal Reserve Act, CLS is regulated and supervised by the Board and the Federal Reserve Bank of New York (together, the "Federal Reserve"). Additionally, the 23 central banks whose currencies are settled in the CLS system have established the CLS Oversight Committee, organized and administered by the Federal Reserve pursuant to the *Protocol for the Cooperative Oversight Arrangement of CLS*,[2] as a mechanism to carry out the central banks' individual responsibilities to promote safety, efficiency and stability in the multiple local markets and payments systems in which CLS participates.

[1] 84 FR 27976 (June 17, 2019).

[2] https://www.federalreserve.gov/paymentsystems/cls_protocol.htm.

In July 2012, CLS was designated a systemically important financial market utility by the Financial Stability Oversight Council under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Board is CLS's "Supervisory Agency" (as defined by the Dodd-Frank Act), and CLS is subject to the risk management standards set forth in Regulation HH. As a systemically important financial market infrastructure, CLS is also subject to the *Principles for financial market infrastructures*, as applicable to payment systems.[3]

CLS is a "supervised financial institution"[4] ("SFI") as defined in the ANPR and subject to the proposed rules regarding the availability of information. CLS's comments are directed to specific areas where CLS believes it can provide useful input.

I. General Comments on the Proposal

CLS applauds the Board's initiative to revise its regulations relating to confidential supervisory information ("CSI"), which over time, and particularly given the developments in technology and electronic communications, have become increasingly cumbersome and unworkable.

CLS supports the majority of the proposed changes to the Board's rules and welcomes the opportunity to comment on areas that CLS believes require greater clarity or further consideration. In particular, CLS seeks to ensure that the changes to the rules continue to promote the protection of CSI and enhance operational efficiency.

II. Specific Comments on the Proposal

A. Section 261.1(a) – Authority and Purpose

CLS proposes that the Board include a statement of the proposed rules' objectives, the public policy goals they are designed to achieve and the potential harm, if any, they seek to prevent. An explanation along these lines would provide helpful context and insight to those persons and entities responsible for the practical application of the proposed rules and increase the likelihood that they are implemented in a manner consistent with the Board's intention.

B. Section 261.2(b)(1) – Definition of Confidential Supervisory Information

CLS recommends modifying the proposed definition of CSI to provide more specificity as to what comes within the scope of the CSI categories currently proposed, which are (a) all exempt, non-public information that was "created or obtained in furtherance of"[5] the Board's supervisory, investigatory or enforcement activities relating to an SFI; (b) any portion of an SFI's documents that "contain, refer to, or would reveal confidential supervisory information;"[6] and (c) any information "derived from, related to, or contained in such documents."[7]

CLS suggests clarifying the meaning of "created or obtained in furtherance of" – in particular the intention behind the words "in furtherance of" – as the current wording could be construed to include "business as usual" documents created by an SFI in response to a supervisory finding (such as a new procedure manual) that do not refer to the Federal Reserve's findings or its communications

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[3] Committee on Payment and Settlement Systems ("CPSS") and Technical Committee of the International Organization of Securities Commissions, Principles for financial market infrastructures (Apr. 2012). Effective September 1, 2014, CPSS changed its name to the Committee on Payments and Market Infrastructures.

[4] *See* 84 Fed. Reg. 27982 (to be codified at 12 C.F.R. § 261.2(f)).

[5] *See* 84 Fed. Reg. 27981 (to be codified at 12 C.F.R. § 261.2(b)(1)).

[6] *Id.*

[7] *Id.*

with the SFI or documents that the SFI previously created in the usual course of business but later provided to the Federal Reserve in response to a request for information (such as testing results). Of course, non-public information provided to the Board or a Federal Reserve Bank that is not CSI would still be protected against disclosure by Board and Federal Reserve Bank personnel as non-public information unless released by the Board pursuant to the Freedom of Information Act or otherwise in accordance with the Board's regulations.

Finally, the Board should clarify to what the term "documents" in (c) above is intended to refer. Does it refer to portions of internal documents that "contain, refer to, or would reveal confidential supervisory information" or to the specific types of documents listed in the first clause of the subsection (e.g., reports of examination, inspection, and visitation, etc.)? Also, the import of the term "related to" seems vague and perhaps overly broad.

C. Section 261.21 – Disclosure of CSI by SFIs

1. Section 261.21(b)(2) – Federal and State Financial Supervisory Agencies

CLS endorses proposed rule 261.21(b)(2), which permits SFIs to disclose CSI to various agencies when the central point of contact ("CPC") determines that the receiving agency has "a legitimate supervisory or regulatory interest in the information."[8] This will create efficiencies for SFIs and facilitate the regulatory and enforcement mission of other supervisory agencies. CLS particularly supports transferring this decision-making authority from the Board's General Counsel to the SFI's CPC, which CLS believes will expedite the resolution of requests and lessen the administrative burden on the Board's General Counsel. CLS, however, proposes that the Board modify the proposed rule to allow for disclosure to foreign regulators and authorities.

Foreign regulators regularly interact with SFIs, including CLS, in connection with their supervisory or oversight responsibilities. In addition to foreign regulators, CLS is expected to provide information (potentially including information which could be considered CSI) to numerous other foreign authorities. These information requests primarily arise as a result of the fact that CLS is "designated" under legislation in numerous foreign jurisdictions so that the CLS system may benefit from special legal protections in those jurisdictions; consequently the relevant designating authority in the jurisdiction may have statutory authority to request information from CLS. In cases where CLS has a legal obligation to provide information as a result of such designation, or for other reasons (e.g., license or registration), it is important to ensure that there will be a clear and efficient process for CLS to obtain any necessary approvals to respond in a timely manner.

2. Section 261.21(b)(3) – Legal Counsel and Auditors

CLS supports the proposed elimination of the requirement that outside counsel and auditors view CSI only on the premises of their SFI client, but recommends the conditions contained in subsections 261.21(b)(3)(iii) and (v)[9] be modified, and that the Board rely on the ethical obligations of lawyers to maintain confidentiality and extend the exception for lawyers to anyone operating under their supervision that is covered by their duties of confidentiality irrespective of whether they are law firm personnel.

[8] *See* 84 Fed. Reg. 27988 (to be codified at 12 C.F.R. § 261.21(b)(2)).

[9] *See* 84 Fed. Reg. 27988 (to be codified at 12 C.F.R. § 261.21(b)(3)(iii) and (v)).

CLS recommends removing subsection 261.21(b)(3)(v)[10] based on feedback received from many of its legal counsel from various jurisdictions, who have informed CLS that they would not be able to enter into written agreements that include this subsection because doing so would conflict with applicable laws, regulations, professional responsibility rules and insurance requirements. Moreover, because CSI may not be contained just in isolated documents but may be included in ordinary course email and other correspondence with counsel, it is at least burdensome and perhaps impractical to meet the destruction or inaccessibility requirement.

Further, CLS respectfully requests that the Board clarify the meaning of "staff" in section 261.21(b)(3)(iii),[11] so as to recognize that information may need to be shared with relevant attorneys, law firm employees and/or law firm non-employees, such as consultants and contractors. The need to employ outside services to sift through documents in litigation discovery is an obvious example of the need to involve such third parties routinely.

3. Section 261.21(b)(4) – Other Service Providers

As with outside counsel and auditors, SFIs have a legitimate business need to disclose CSI to other service providers, including the myriad individual contractors, consultants, vendors and others who are involved in the operation of the SFIs' business on a regular basis. Under the Board's proposed rule, both CLS and the Board would be required to devote substantial resources to obtaining approval for, and agreement from, such service providers. CLS urges that the Board adopt the approach taken by the Office of the Comptroller of the Currency and permit sharing of CSI with service providers without prior approval but subject to appropriate confidentiality arrangements.[12]

CLS further recommends that, consistent with CLS's recommendation for legal counsel and auditors, CSI disclosure be subject only to the conditions set forth in subsections 261.21(b)(3)(i)-(iv).[13] Application of this standard for the disclosure of CSI to service providers would facilitate efficient business operations by creating a more consistent approach to the flow of information among the different categories of entities engaged in the operation of an SFI's business.

CLS, however, respectfully recognizes that the Board may have policy objectives that require written requests for the disclosure of CSI to service providers. Therefore, if the Board retains this provision, CLS suggests that it delete subsection 261.21(b)(4)(i)(C)'s requirement that an SFI identify the "specific documents or materials"[14] that it seeks permission to disclose, on the basis that it may be impossible in some cases and difficult in others to identify specific documents in advance. For example, in a litigation scenario, vendors retained to review documents (which in a large case could be a substantial number), receive all of the emails of a given document custodian and those emails may well contain CSI. One of the vendor's functions is to screen for CSI and legally privileged material, and until the vendor does so the SFI does not know what CSI it may be giving to the vendor. In the case of consultants, it may be difficult or impossible to identify beforehand which specific CSI materials will need to be shared with the consultant to complete a given task or which materials might need to be shared as the task evolves. In addition, the documents that SFIs routinely need to share or discuss with service providers in the course of their business generally, and in the fulfillment of their regulatory compliance responsibilities in particular, is highly varied and may encompass CSI materials. The compilation of a list of these documents and subsequent review by the Board may be extremely resource intensive for both the Board and the SFI. At a minimum, the Board should limit the required identification of CSI in an SFI's request for Board approval to

[10] *See* 84 Fed. Reg. 27988 (to be codified at 12 C.F.R. § 261.21(b)(3)(v)).

[11] *See* 84 Fed. Reg. 27988 (to be codified at 12 C.F.R. § 261.21(b)(3)(iii)).

[12] *See* 12 C.F.R. § 4.37(b)(2) (2012).

[13] *See* 84 Fed. Reg. 27988 (to be codified at 12 C.F.R. § 261.21(b)(3)(i)-(iv)).

[14] *See* 84 Fed. Reg. 27989 (to be codified at 12 C.F.R. § 261.21(b)(4)(i)(C)).

"categories" or "types" of documents and materials. Moreover, one recognized category should be documents being provided to a vendor for the purpose of screening them for, among other things, CSI.

Finally, in the event the Board decides to proceed with the proposed rule without the above modifications, CLS strongly recommends that the Board make the proposed rule applicable only to new engagements entered into with service providers after the proposed rule's effective date while allowing existing service providers to be "grandfathered" in under the old rule and Board approvals granted prior to the adoption of any new rule. This would significantly reduce the burden on SFIs – especially those with a large contractor and vendor workforce.

We appreciate the Board's consideration of the views set forth in this letter and would welcome the opportunity to discuss any of these comments in further detail.

Sincerely,

Gaynor Wood, General Counsel

cc: Michele Fleming, Chief Compliance Officer
Dino Kos, Chief Regulatory Officer
Janice Payne, Head of Supervisory Affairs
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