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By Electronic Submission to http://www.federalreserve.gov

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

Re: **Docket No. R-1665, RIN No. 7100 AF 51** – Notice of Proposed Rulemaking - Technical updates to Federal Reserve Freedom of Information Act procedures and changes to rules governing disclosure of confidential supervisory information[1]

Ladies and Gentlemen:

The American Bankers Association (ABA)[2] appreciates the opportunity to respond to the Federal Reserve's Notice of Proposed Rulemaking (Proposal) to modify its procedures for responding to requests under the Freedom of Information Act (FOIA) and for management of confidential supervisory information (CSI) of banks and companies under its jurisdiction. Access to information via the FOIA process and transparency concerning government agency activities is vital to effective supervision of the industry and to the public interest. Accordingly, ABA appreciates the Federal Reserve's effort to update its FOIA procedures.

ABA also welcomes the Federal Reserve's decision to update its regulations on management of CSI. The appropriate management of CSI is also important to an effective supervisory process. ABA welcomes the Proposal's acknowledgment that effective institution management will often require sharing of CSI among affiliates and their officers, directors, and employees. We also welcome the recognition that a supervised financial institution's auditors and outside legal counsel should receive CSI through modern information management systems, subject to appropriate safeguards, without requiring their physical presence on the institution's premises. In addition, delegation of discretion to an institution's "central point of contact" (CPC) will streamline many routine requests for information sharing, provided the Federal Reserve can address the concerns noted below.

ABA recognizes the need for confidentiality and security of information critical to the supervisory process, but the language of the Proposal, perhaps unintentionally, would expand significantly the scope of information that would be treated as CSI and subject to restrictions on

[1] 84 *Federal Register* 27976 (June 17, 2019), https://www.govinfo.gov/content/pkg/FR-2019-06-17/pdf/2019-12524.pdf.

[2] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $14 trillion in deposits, and extend more than $10 trillion in loans.

disclosure. As a result, the Proposal would significantly impair the ability of supervised financial institutions[3] to use a wide variety of information developed in, and essential to, the routine business activities of the institution. ABA notes below several specific matters that we urge the Federal Reserve to address in a final rule, which will preserve the security of CSI while streamlining the ordinary business of supervised financial institutions.

Key Concerns

- **The Proposal would expand the scope of information that will be treated as CSI and introduce new restrictions that will interfere with routine institution management.** The Proposal would conform the basic definition of CSI to Exemption 8 in the FOIA.[4] The reference to an exemption from disclosure of records in the possession of a government agency is problematic when applied to use of the same information when in the possession of a supervised financial institution.

- **Though the Proposal would offer some improvements in sharing CSI with outside counsel, auditors, etc., the procedures would still be unnecessarily burdensome.** In addition, sharing should be broadened to include consultants, and, to the extent required for transaction-related diligence reviews and integration efforts, merger counterparties and their counsel.

- **Though it would also offer improvements for sharing CSI among supervisors and other agencies, the Proposal requires further streamlining and clarification.** The Federal Reserve should address routine sharing of information requested by multiple supervisory agencies that contains CSI, as well as outline appropriate procedures for sharing with foreign supervisory agencies.

- **The Proposal should be revised to incorporate more appropriate confidential treatment for sensitive proprietary information submitted by supervised financial institutions.** In addition, the proposed blanket expiration of confidential treatment after 10 years will likely cause unnecessary harm and should be removed.

[3] As used in the Proposal and this letter, "supervised financial institutions" includes "any institution that is supervised by the Board, including a bank; a bank holding company, intermediate holding company, or savings and loan holding company (including their non-depository subsidiaries); a U.S. branch or agency of a foreign bank; any company designated for Board supervision by the Financial Stability Oversight Council; or any other entity or service subject to examination by the Board." Proposal at 27982.

[4] 5 USC §552(b)(8), which exempts from disclosure under the FOIA any information "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."

Discussion

I. The Proposal's expanded scope of CSI will unnecessarily restrict routine institution management and business activities.

The Proposal would redefine CSI as—

> [N]onpublic information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8) and includes information that is or was **created or obtained** in furtherance of the Board's supervisory, investigatory, or enforcement activities, including activities conducted by a Federal Reserve Bank (Reserve Bank) under delegated authority, relating to any supervised financial institution, including, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports, supervisory assessments, investigative requests for documents or other information, supervisory correspondence or other supervisory communications; **any portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information; and any information derived from, related to, or contained in such documents.**[5] [emphasis added]

Information would be outside the scope of CSI if specifically required by law to be made public, or if it consisted of "documents prepared by or for a supervised financial institution for its own business purposes and that are in its possession **except to the extent included in paragraph (b)(1) of this section** [quoted immediately above; emphasis added]."[6]

This definition would significantly expand the scope of CSI, taking it well beyond information contained in supervisory reports, correspondence, or conversations with Federal Reserve staff. It arguably would include the institution's own documents that may contain such information, including documents that were prepared for the institution's own legitimate business and operations, even if created well before a supervisory request for the information. If this was an intentional change to broaden the definition of CSI, applying CSI confidentiality restrictions to information simply because a supervisor at some point requests it critically ignores the fact that the same information is important for other management purposes, including, for example, fundamental risk management activities and normal communications with investors and analysts. Institutions must be permitted to continue to use the information for those purposes without the information becoming CSI if it is provided to the Federal Reserve. The fact of the supervisory request, the institution's specific response to the supervisor accompanying the information, and any resulting dialogue may remain subject to confidential treatment. This balance will permit routine management practices without interfering with the confidentiality of the supervisory process and communications.

[5] Proposal at 27981.
[6] *Id.*

As noted above, the Proposal would define CSI in terms of the FOIA Exemption 8, and would exclude from the scope of CSI information "prepared by or for a supervised financial institution for its own business purposes"[7] *unless* the information would be within the FOIA exemption. This language produces a circular result. The FOIA exemption defines what information *in the possession of a Federal agency* is exempt from public disclosure. It was not intended to, and should not, define what information generated in the ordinary course of an institution's business and operations should be restricted in its use in the institution's business, simply because the subject matter has attracted supervisory interest. FOIA statutory language is inappropriate for defining permitted uses of nonpublic information by an institution about itself. The final rule should eliminate this circular reference and confirm that information prepared by an institution for its own business purposes and provided to the Federal Reserve is not CSI when in the possession of the institution.

ABA believes that the Federal Reserve should also confirm that the sharing among institution personnel[8] of information that falls within a final rule's definition of CSI is appropriate. The Proposal would permit disclosure of CSI within an institution "to its directors, officers, or employees, and to the directors, officers, or employees of its affiliates, **but only to the extent those individuals have a need for the information in the performance of their official duties** [emphasis added]."[9] This language raises concerns, for example, that the scope of an individual's work may become the basis for debate about whether the institution's CSI security has been appropriate. ABA believes that a similar, but much clearer, approach would be to adopt the standard used by the Office of the Comptroller of the Currency (OCC), which permits disclosure within an institution "when necessary or appropriate for business purposes."[10] The scope of this language is broad enough to include routine management activity without sanctioning casual or reckless handling of CSI. ABA notes also that OCC's basic definition of CSI includes "created or obtained" language similar to that in the Proposal.[11] The provision for sharing that is "necessary and appropriate," with no carve-out similar to the Proposal's cross-reference to the FOIA exemption, eliminates many of the concerns with the "created or obtained" definitional scope of CSI.

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[7] Proposal at 27981.
[8] As noted below, contingent workers, independent contractors, and other parties should also have access to CSI, subject to appropriate controls.
[9] Proposal at 27988.
[10] *See* 12 CFR §4.37(b)(2). ABA notes that OCC has not defined what is "necessary or appropriate for business purposes," which permits the institution to make the appropriate judgement. A supervisory agency's challenge to those judgments should occur in only the most extenuating circumstances.
[11] *See* 12 CFR §4.32(b)(1)(i).

II. The Federal Reserve should broaden the Proposal's scope to permit sharing information with additional third parties.

A. Additional service providers and transaction parties need streamlined access to CSI.

As noted above, ABA appreciates the Federal Reserve's decision to permit information sharing with officers, directors, and employees of institution affiliates, and to permit institution auditors and outside counsel to review CSI off-premises under appropriate security arrangements. ABA urges the Federal Reserve to extend the same treatment to consultants under contract with the institutions, as OCC already does.[12] Given the rapid pace of innovation in financial services, use of consultants (for example, in development of new products) is critical to institutions of all sizes and business models. It is often especially important to smaller and community banks.

Similarly, some institutions and their service providers use contingent workers, independent contractors, or temporary staff. As long as there are appropriate contractual acknowledgments of and adherence to the institution's policies for safeguarding CSI, these workers should have the same access as institution employees to CSI under the business-purpose standard. Otherwise, the Proposal would further complicate routine management information dissemination and make ordinary business operations less efficient and in some respects potentially impossible.

As also noted above, CSI may be relevant in the context of merger transactions. Parties such as merger partners, as well as their legal counsel, auditors, and similar service providers perform diligence reviews of material information concerning the institution and its business. Though disclosure of the occurrence of specific supervisory communications and actions can be subject to Federal Reserve approval, the underlying data and information, if material in the context of the transaction, often must be shared for the parties to comply with applicable law. Since such transactions are typically subject to detailed confidentiality agreements, secure sharing of CSI would be comparable to sharing with the institution's outside counsel and auditors. In considering what further or broader disclosures to approve, the Federal Reserve should take appropriate account of supervised financial institutions' obligations under applicable securities laws and similar requirements.

B. The Federal Reserve should streamline the CPC approval process for sharing CSI, and it should be governed by common standards.

ABA welcomes the Federal Reserve's decision to delegate approval of CSI disclosure requests to an institution's CPC. This change will certainly facilitate making and addressing such requests and will likely reduce burdens on the Board's staff. As the Proposal notes, the decision will be in the hands of the Federal Reserve System staff most familiar with the institution in question.[13] The Federal Reserve will, however, need to establish common standards to assure consistent, non-arbitrary responses to requests addressed to a diverse group of System officials.

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[12] *See* 12 CFR §4.37(b)(2).
[13] *See* Proposal at 27979.

Furthermore, the Federal Reserve should clarify the Proposal's references to the Federal Reserve's internal procedures as they affect the CPC's approval,[14] e.g., by stating clearly the circumstances or topics that will require CPCs to consult with other System staff, and ABA believes that the circumstances requiring consultation should be significantly limited. Those internal procedures are not publicly available, and if they significantly limit CPCs' discretion (subject to common standards), the Proposal's delegation to CPCs may be of very limited practical benefit.

In addition, an institution's CPC should be able to grant a blanket approval for repeated sharing with a given third party, subject to understanding the scope of CSI involved and the contractual and other arrangements provided for its security and confidentiality. This procedure could apply, for example, to sharing of CSI with consultants discussed above. Of course, approval could be revoked for appropriate cause if circumstances change.

C. Improvements in CSI management could enhance the benefits of the horizontal review process.

Some ABA members believe that the Federal Reserve (and other supervisory agencies) should allow institutions subject to horizontal reviews to have the option (though not a requirement) to share appropriate, relevant CSI among themselves. This flexibility could facilitate the benefits of horizontal review by giving institutions more insight into supervisory expectations related to the reviews. In addition, it could be beneficial to allow institutions in horizontal reviews the option to share institution-specific findings with each other, subject to prior Federal Reserve approval. If institutions know the other subjects of a horizontal review, that knowledge could make any results more appropriately targeted and help subject institutions and supervisors identify relevant distinctions, all of which could make the horizontal reviews more effective and efficient.

III. Institutions should be free to share information on a routine basis, including CSI, with other supervisory agencies without requests for approval.

Since many supervised financial institutions are subject to examination by multiple supervisory agencies, and since all agencies have a similar interest in access to comprehensive information from the institutions they supervise, the procedures of the Federal Reserve and other agencies should recognize and adapt to meet these common needs. Supervisory information requests now routinely extend to such information as board and committee reports, briefing materials, and presentations, as well as the minutes and other follow-up materials related to those meetings. A final rule should allow such routine sharing to continue without imposing burdensome procedures.

For the reasons discussed above, these materials and other information prepared by the supervised financial institution as "necessary or appropriate for business purposes" should not be restricted and should be available to meet requests from other supervisory agencies. Moreover,

[14] *See* Proposal at 27989.

to the extent that multiple agencies have legitimate interests in such materials, even if they contain CSI, supervised financial institutions should not be restricted in meeting a similar routine requests from other supervisory agencies.

Notably, the Proposal does not expressly address what procedures apply to information sharing with foreign supervisory agencies.[15] For supervised financial institutions that are subject to foreign agencies' supervision, the similar considerations described above apply to information that those agencies seek from the institution. Clearly a foreign bank with approved US operations remains subject to requirements of its home jurisdiction (and often other host jurisdictions as well). Similarly, a domestic institution that has taken appropriate steps to engage in foreign operations will necessarily have those operations supervised by foreign authorities, and basic comity in all such cases should facilitate as appropriate, rather than inhibit, effective supervision.

IV. The Proposal should be revised to incorporate more appropriate confidential treatment for sensitive proprietary information submitted by supervised financial institutions.

Separate from considerations about the scope and handling of CSI, supervised financial institutions continuously submit sensitive, non-public information to the Federal Reserve for which confidential treatment is essential, both to the institution's business success and to its safety and soundness. This information is protected under FOIA Exemption 4.[16] The Federal Reserve's existing rules currently impose limitations on this protection, requiring detailed descriptions of competitive harm that would result from disclosure, and the Proposal would continue those limitations.[17] As the Supreme Court noted in a recent case, *Food Marketing Institute v. Argus Leader Media*,[18] a company need not show that "substantial competitive harm" would result from disclosure of information in order for such information to be protected by Exemption 4, as long as the submission is subject to an "assurance of privacy." ABA urges the Federal Reserve to provide an explicit assurance of privacy in a final rule to align its regulations with this recent, definitive Supreme Court decision.

The Proposal would also impose other detailed procedures and documentation requirements on requests for confidential treatment.[19] A final rule should make clear that, when a submission consists entirely of non-public sensitive information contemplated by Exemption 4, the entire document is entitled to confidential treatment.

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[15] The Proposal notes that "provision of confidential supervisory information to foreign bank regulatory or supervisory authorities is governed by 12 CFR 211.27." Proposal at 27989. That regulation addresses sharing of CSI with foreign regulatory and supervisory agencies by the Board, but not by supervised financial institutions.
[16] 5 U.S.C. § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."
[17] *See* 12 CFR §261.15(b); Proposal at 27987.
[18] Supreme Court, Slip Opinion, June 24, 2019, *available at* https://www.supremecourt.gov/opinions/18pdf/18-481_5426.pdf.
[19] Proposal at 27987.

Finally, the Proposal would provide for automatic expiration, after 10 years, of requests for confidential treatment for proprietary and other sensitive information.[20] This expiration would apparently apply regardless of the nature of the confidential information and the circumstances surrounding the submitting party. Supervised financial institutions' ongoing and frequent submission of highly sensitive, non-public information means that expiration in any particular, pre-determined timeframe will generally be inappropriate. The inclusion of a provision for renewal of confidential treatment[21] will not mitigate this risk, if only because of normal personnel turnover. Even if institutions maintain a comprehensive system to track expiration dates, the remote likelihood of personnel adequately familiar with sensitive information submitted years earlier remaining present make this approach highly impractical. A final rule should avoid imposition of an expiration for such confidential treatment.

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ABA looks forward to the Federal Reserve finalizing the Proposal, taking into account the concerns and suggestions in this letter. Should further information regarding or discussion of any of these matters be desired, please do not hesitate to contact the undersigned at hbenton@aba.com or (202) 663-5042.

Very truly yours,

Hu A. Benton
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[20] *Id.*
[21] Proposal at 27987.