BANK POLICY INSTITUTE

August 16, 2019

Via Electronic Mail

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, D.C. 20551

Re: Rules Regarding Availability of Information (Docket No. R-1665, RIN 7100-AF 51)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the proposal issued by the Board of Governors of the Federal Reserve System regarding revisions to the regulations implementing the Freedom of Information Act ("FOIA") and to the rules governing the disclosure of confidential supervisory information ("CSI") and other nonpublic information of the Federal Reserve.[2]

We appreciate the Federal Reserve's willingness to take a fresh look at these regulations, particularly the rules that relate to CSI. The proposal would create a more efficient and predictable framework for the application of the Federal Reserve's CSI rules, including by alleviating certain unduly restrictive requirements in the existing rules, many of which have become anachronistic since the Federal Reserve's last comprehensive review.[3] Nevertheless, several ambiguities, uncertainties and flaws remain in the framework contemplated by the proposal.

Our recommendations in this letter are aimed at creating more easily understood standards that are consistently and rationally applied to supervised financial institutions, while also promoting the important public policies that underlie the regulatory restrictions on CSI disclosure. More specifically, these recommendations are designed to help achieve a rule that provides greater certainty and streamline decision-making processes as to what

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 84 Fed. Reg. 27976 (June 17, 2019) (the "proposal").

3 For example, we concur with the deletion of the restrictions in the Federal Reserve's existing regulations on "removing" CSI from the premises of the financial institution. This change appropriately reflects technological developments that allow for remote, electronic review of documents and files, and that have substantially increased the frequency with which people conduct business and engage with their colleagues and service providers on a long-distance basis.

constitutes CSI, how CSI should be handled by financial institutions and the circumstances under which disclosure of CSI is appropriate, either by the institution or the Federal Reserve.

The statutory and regulatory restrictions on the disclosure of CSI serve important policy interests.[4] These restrictions encourage free and open communication between the regulator and the regulated institution, creating an atmosphere that is beneficial to supervisors charged with ensuring that institutions under their supervision are operated in a safe and sound and legally compliant manner. In addition, because bank supervisors communicate with banking organizations in a candid manner that is unique among regulatory relationships, unfettered CSI disclosure could unjustifiably impair public confidence in individual institutions or in the financial system as a whole.[5] Finally, regulatory restrictions on CSI disclosure are critical to maintaining the judicial integrity of the bank examination privilege, a privilege that belongs to the supervisory agency, not the supervised institution. To promote these policy interests effectively, supervisory agencies such as the Federal Reserve limit disclosure of CSI and authorize release only in delineated situations.

Although the underlying policies for non-disclosure of CSI are both important and beneficial, actual application of the rules regarding the handling of CSI can sometimes work at cross purposes with other supervisory goals. Indeed, there are occasions—which we describe further below—where institutions require the ability to use and share CSI on a limited and controlled basis in order to promote safety and soundness and the overall stability of the financial system. For example, the absence of any guidance on—and the Federal Reserve's historical practice of not approving requests for approval for—sharing CSI in the context of mergers and acquisitions ("M&A") is at odds with promoting thorough due diligence and thoughtful integration planning prior to completing transactions, both of which the Federal Reserve has emphasized. In addition, because the unauthorized disclosure of CSI is not only a regulatory violation but also a potential criminal violation, constructing bright line boundaries between what is—and what is not—CSI is of great benefit to supervising agencies and the banking community alike. The criminal implications of violating these requirements make it imperative that the standards be as unambiguous as possible, diminishing the likelihood for inadvertent error by supervised institutions or for inconsistent or unpredictable application by agencies (and inadvertent violations should result in, at most, informal corrective action rather than formal supervisory or enforcement actions).

It is not only the consequences of potential violations that are of concern. The day-to-day functioning of supervised institutions is affected by whether or not information is considered CSI, making it all the more important that the term be defined reasonably and with precision. It is also important that the mechanisms to permit the sharing of CSI in approved circumstances operate without creating undue burden. Supervisors communicate routinely and frequently with a myriad of financial institution business line, control and executive personnel at all levels. Although institutions routinely handle confidential information and dedicate significant resources to compliance programs—including training and promoting awareness—designed to minimize the risk of improper handling of CSI, maintaining control of the dissemination of ordinary course communications between banks and regulators may be challenging, creating compliance risk. In addition, in response to supervisory requests or directives, institutions frequently mobilize substantial work projects and programs across numerous legal entities with a goal of enhancing policies and procedures or otherwise improving the institution's safety and soundness. In connection with these enterprise-wide

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4 *See generally In re Subpoena Served upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System*, 967 F.2d 630 (D.C. Cir. 1992) ("Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank."); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476–77 (6th Cir. 1983) (underscoring Congressional recognition that disclosure of CSI "might undermine public confidence and cause unwarranted runs on banks" and "the need to preserve the close relationship between banks and their supervising agencies") (citing *Consumers Union of United States, Inc.* v. *Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978)); *Ball* v. *Bd. of Governors of Fed. Reserve Sys.*, 87 F. Supp. 3d 33, 57 (D.D.C. 2015) ("If a financial institution cannot expect confidentiality, it may be less cooperative and forthright in its disclosures, even if an examination is mandatory.").

5 *See, e.g.*, *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d at 476–77, *supra* note 4.

efforts, CSI may be disseminated throughout an organization and inextricably mixed with business information that is not CSI. Although the most critical and obvious examples of CSI—examination reports and ratings—are carefully maintained and restricted from improper distribution, determining the line between other types of information that may be CSI as opposed to business information can be very difficult and subjective, especially in light of the vastly increased scope of risk, compliance and technology topics that are the subject of today's enhanced and continuously evolving supervisory expectations.

The proposal takes important steps toward clarifying the Federal Reserve's views on what constitutes CSI, and what disclosures are permitted, as well as addressing some outdated constraints on the handling of CSI by supervised financial institutions. These steps are welcome and encouraging. Further refinement, however, is needed given the potential consequences to financial institutions and their directors, officers and employees of violations of applicable requirements and given the difficulties associated with defining and controlling the dissemination of CSI. Updates to the Federal Reserve's policies regarding disclosure of CSI are also imperative in light of the significant advancements and available means of communication in the digital era since the last comprehensive review of these rules. We discuss in this letter recommendations to further clarify the scope of the definitions[6] and requirements applicable to CSI, to promote greater consistency among the federal banking regulators' requirements and practices related to CSI and to allow for certain sensible, low-risk, limited and controlled disclosures by supervised financial institutions under circumstances that promote the efficient and compliant operation of the institutions without compromising the confidentiality of the information.

I. Executive Summary.

- The Federal Reserve should clarify and confirm that documents and information created by a supervised financial institution for its own business purposes are not CSI when in the institution's possession, and therefore may be shared by the institution without Federal Reserve approval under the CSI rules.

- The Federal Reserve should further revise the restrictions and requirements applicable to the disclosure of CSI by supervised financial institutions.

  - The Federal Reserve should address the sharing of CSI in the context of merger and acquisition transactions to facilitate both pre-announcement due diligence and post-announcement integration.

  - In order to minimize ambiguity and unintended violations of the CSI rules, the Federal Reserve should not broaden the existing prohibition on unauthorized disclosure of CSI to unauthorized "use" of CSI by persons to whom CSI is properly made available.

  - Certain qualitative restrictions on sharing CSI with the directors, officers and employees of supervised financial institutions should be modified in the final rules to avoid inadvertent breaches that could arise as a result of inconsistent interpretation or application.

  - The final rule should permit the disclosure of CSI to auditors and outside legal counsel when necessary or appropriate for business purposes, as determined by the supervised financial institution.

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[6] The Federal Reserve noted in the release accompanying the proposal that "[t]he revision to the definition of CSI is for clarification purposes and would not expand or reduce the information that falls within the definition." Federal Reserve, Press Release, *Federal Reserve Board requests public comment on technical updates to its Freedom of Information Act procedures and on changes to its rules governing the disclosure of confidential supervisory information* (June 14, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190614a.htm.

- The Federal Reserve should permit supervised financial institutions to share CSI with other consultants and other third-party service providers under circumstances in which the third party has entered into a written agreement to provide services to the institution and has agreed in writing that it is aware of restrictions on CSI disclosure and will not use CSI for any purpose other than as set forth in its agreement to provide services to the institution.

- The final rule should treat contingent workers and independent contractors fulfilling a "business-as-usual" or routine role at the supervised financial institution in the same fashion as employees of the institution are treated for purposes of permitting or not permitting disclosure of CSI to such persons.

- The final rules should (i) include an exemption to share or, at a minimum, a presumption that supervised financial institutions may share, Federal Reserve CSI with the other prudential federal banking agencies and (ii) permit supervised financial institutions to obtain general exemptions to share Federal Reserve CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x), including appropriate mechanisms for sharing CSI with foreign banking agencies and supervisors.

- The final rule should incorporate the proposal's important changes to the process by which parties to litigation can request production of documents and information containing CSI.

➢ To fully realize the potential benefits of the CPC approval framework contemplated by the proposal, the Federal Reserve should confirm that, except in exceptional circumstances, CPCs will have and exercise delegated authority to make decisions required to be made under the CSI rules without the concurrence of other Federal Reserve staff.

➢ The Federal Reserve should issue publications or otherwise make available to supervised financial institutions general observations arising from examinations and other supervisory activities, including, in particular, horizontal reviews.

➢ The final rules should incorporate certain important changes to the Federal Reserve's FOIA rules and procedures for requesting confidential treatment, including (i) incorporating the recent U.S. Supreme Court holding in *Food Marketing Institute* v. *Argus Leader Media*,[7] (ii) maintaining the confidential treatment of supervisory documents in accordance with the time limits set forth in the Federal Reserve's record retention policy, rather than pursuant to an automatic 10-year expiration period, (iii) reverting to the current standard applicable to supervised financial institution requests for confidential treatment, and (iv) making certain changes to its regulations providing for the release by the Federal Reserve of CSI and other nonpublic information provided to the Federal Reserve by supervised financial institutions.

II. The Federal Reserve should clarify and confirm that documents and information created by a supervised financial institution for its own business purposes are not CSI when in the institution's possession, and therefore may be shared by the institution without Federal Reserve approval under the CSI rules.

Under the proposal, the definition of CSI would be revised to be based primarily on FOIA exemption 8, which covers matters that are "contained in or related to examination, operating, or condition reports prepared by, on

[7] 139 S. Ct. 2356 (2019).

behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[8] In addition, the definition of CSI under the proposal would explicitly (i) include under Section 261.2(b)(1) information "created *or obtained*" by the Federal Reserve in furtherance of its supervisory, investigatory or enforcement activities and (ii) exclude under Section 261.2(b)(2) 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 Section 261.2(b)(1).

The literal language of the combination of these two provisions leaves open, presumably inadvertently,[9] the possibility that the revised articulation of the definition of CSI could be interpreted to include *any* documents prepared by or for a supervised financial institution for its own business purposes if copies of those documents, or information related to those documents, are obtained by the Federal Reserve.[10] The Federal Reserve should clarify and confirm in the final rules that the definition of CSI is not intended to include documents and information created for business purposes simply because the Federal Reserve obtains a copy. Instead, the changes to the definition are intended to clarify that non-public business purpose documents may be CSI when they are in the Federal Reserve's possession (and thus exempt from disclosure pursuant to FOIA exemption 8), as is the related supervisory correspondence, but the business documents are not otherwise CSI when in the supervised financial institution's own possession. This interpretation would comport with the distinct policy considerations of keeping confidential communications relating to the supervisory, investigatory and enforcement objectives of the Federal Reserve (which, in certain circumstances, could be inferred from the content of documents in the Federal Reserve's possession) while permitting financial institutions to share their own documents and information with their regulators without, as a result, being subject to future restrictions on the disclosure of such documents.

Further clarification of the scope of what is and is not CSI would also be helpful in situations where a financial institution is responding to a supervisory observation or directive that the institution should modify or enhance its controls or other policies and procedures to address a supervisory concern. The policies and procedures and other business documents that address these modifications and enhancements should not be considered CSI unless they disclose that the modifications or enhancements are being undertaken in response to a supervisory observation or communication and disclose the existence of such supervisory observation or communication. Similarly, even if the Federal Reserve has requested modification of a business purpose document (such as revising a policy or procedure or supplementing financial records to incorporate new metrics relating to the data presented), the resulting business purpose document is not CSI in the hands of the institution, although the Federal Reserve's request or other feedback to the institution would be treated as CSI. Expressly confirming that documents and information created for business purposes are not CSI in the institution's own possession (absent a reference to supervisory observation or communication) would assist institutions in identifying what information should be included within the CSI umbrella, without unduly infringing on ordinary business activities.

III. The Federal Reserve should further revise the restrictions and requirements applicable to the disclosure of CSI by supervised financial institutions.

The proposal would revise the existing restrictions and requirements applicable to the disclosure of CSI by supervised financial institutions in important respects. Many of these changes are welcome, as they will simplify the CSI compliance process and modernize the rules governing CSI disclosure. Further revisions, however, are needed

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8 5 U.S.C. § 552(b)(8).

9 There is no suggestion in the proposal that the change in the language was intended to expand the scope of the definition of CSI. Indeed, the Federal Reserve stated when announcing the proposal that the opposite is true. *See supra*, note 6.

10 As just one of many examples, board minutes are typically requested and "obtained" by the Federal Reserve in the course of its supervision of financial institutions. Under Delaware law, which is applicable to many bank holding companies, shareholders have certain rights to inspect and copy corporate records, including board minutes. In addition, institutions routinely both vet with a supervisory agency and post on internal and external websites some of their policies and procedures (such as their codes of conduct).

to account for existing compliance challenges (particularly in light of the potential for criminal investigation or liability following a breach of the restrictions on CSI disclosure), to encourage thorough due diligence and allow for informed integration planning in the transaction context, and to facilitate the design of robust plans and programs to comply with applicable regulatory requirements and required remedial actions. We discuss recommendations that would address these concerns below.

A. The Federal Reserve should address the sharing of CSI in the context of merger and acquisition transactions to facilitate both pre-announcement due diligence and post-announcement integration.

The proposal does not address the sharing of CSI between parties to merger and acquisition transactions, which would facilitate more thorough due diligence and more informed integration planning. Prohibiting access to CSI under such circumstances runs counter to other bank regulatory policies and objectives and frustrates the ability of acquiring institutions to understand and make plans to address potential compliance, operational or other weaknesses of target institutions. Indeed, although the Federal Reserve has stressed the importance of thorough due diligence and successful integration planning in connection with bank acquisitions,[11] it has generally been unwilling to grant requests for permission for potential merger parties to share examination reports and related documents (such as remediation programs). Indeed, it is the Federal Reserve's stated policy to deny requests to share CSI in the M&A context "absent very unusual circumstances."[12]

Consistent with past advocacy, we strongly recommend that the Federal Reserve set forth the principles involved and reasonable parameters for sharing CSI in the M&A context in order to meet the dual objectives of safeguarding CSI from improper disclosure and promoting thorough due diligence and thoughtful integration planning in connection with a merger or acquisition.[13] The current approach to sharing CSI in the M&A context has complicated and limited the scope of pre-announcement due diligence and has hampered the efficient remediation of supervisory issues when transactions do proceed. Providing avenues and parameters for sharing CSI in the M&A context would, therefore, enable more informed decision-making (*i.e.*, more comprehensive due diligence) prior to execution of transaction agreements and facilitate more efficient remediation efforts (*i.e.*, more appropriately tailored integration planning) after institutions agree to proceed with a transaction.[14]

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11 In recent years, the Federal Reserve has continued to emphasize the due diligence and integration processes of a proposed acquirer institution in considering new bank holding company formations and bank holding company merger proposals. *See, e.g.*, Federal Reserve Board Order Approving the Acquisition of TCF Financial Corporation by Chemical Financial Corporation (July 16, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/orders20190716a1.pdf ("The Board has also considered Chemical's plans for implementing the proposal. Chemical and TCF **have conducted comprehensive due diligence** and **are devoting significant financial and other resources to address all aspects of the post-acquisition integration process for this proposal**." (emphasis added)); Federal Reserve Board Order Approving the Acquisition of MB Financial, Inc. by Fifth Third Bancorp (Mar. 6, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/orders20190306a1.pdf (same); Federal Reserve Board Order Approving the Acquisition of State Bank Financial Corporation by Cadence Bancorporation (Dec. 7, 2018), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/orders20181207a1.pdf (same).

12 *See* "FedLinks: Confidential Supervisory Information" (August 2016) ("Institutions may not share CSI with acquirers or targets in merger or acquisition transactions without prior approval of the [Federal Reserve's] general counsel, and it is the [Federal Reserve's] policy that disclosure requests in these contexts are denied absent very unusual circumstances."), *available at* https://www.kansascityfed.org/~/media/files/publicat/banking/guidance/fedlinks_bulletin_confidential_supervisory_information.pdf.

13 Ideally, the Federal Reserve would coordinate this change in policy together with the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, but the Federal Reserve should not delay finalizing the proposal to achieve such a consensus.

14 The considerations that support sharing CSI in the M&A context apply to acquiring institutions, both parties to a merger of equals and, in some cases, target institutions.

The parameters on sharing of CSI that would accommodate thoughtful due diligence and thorough integration planning include: (i) limiting the sharing to certain identified individuals at the subject institutions, their respective outside counsel and advisors who sign confidentiality agreements; (ii) restricting the sharing to the due diligence phase occurring after substantial terms of the transaction have been agreed, any application preparation process in order to develop a more refined business plan and facilitate completion of other key aspects of an application and integration planning; (iii) restricting permissible disclosure to information that would have a substantial impact on the anticipated combined organization such as outstanding Matters Requiring Immediate Attention, Matters Requiring Attention, supervisory ratings (*e.g.*, CAMELS ratings), other outstanding or contemplated supervisory actions such as Memoranda of Understanding or Board Resolutions, other restrictions imposed on the target institution, or potential enforcement actions and investigations in process; and (iv) requiring that the receiving parties be contractually bound to preclude any further disclosure or use of CSI other than in connection with the contemplated transaction (which may include specific firewall arrangements to be consistent with the handling of sensitive information generally), and then be required to return or destroy CSI (or terminate virtual access to the CSI) if the transaction is called off, or, in the case of a completed transaction, the party having possession of the CSI no longer has a separate basis for retaining the information.[15] Providing access to CSI in this limited manner would help ensure that both parties are able to make informed decisions about a potential acquisition and better consider the safety and soundness of a proposed transaction. At the same time, the restrictions suggested above would substantially mitigate any risk that the information might be used for purposes outside of furthering legitimate supervisory objectives. Procedurally, the regulation should set forth that a disclosure under the limitations outlined above is an authorized disclosure of CSI.[16]

We would welcome the opportunity to work with the Federal Reserve, and potentially the other federal banking agencies, in further developing the appropriate principles and parameters for sharing CSI in this context.

B. In order to minimize ambiguity and unintended violations of the CSI rules, the Federal Reserve should not broaden the existing prohibition on unauthorized disclosure of CSI to unauthorized "use" of CSI by persons to whom CSI is properly made available.

The proposal revises the Federal Reserve's current CSI rules by prohibiting—in addition to unauthorized "disclosure" of CSI—any "use" of CSI "for an unauthorized purpose… without the prior written permission of the General Counsel."[17] This change would introduce significant ambiguity into the Federal Reserve's CSI rules. The prohibition on "use… for an unauthorized purpose" is not qualified in the proposed rule by any definition or cross-reference, leaving open the risk of inadvertent violations or inconsistent interpretation of what is and what is not "authorized use."[18]

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15 In this context, it may also be appropriate to permit restricted "view only" access through a virtual data room or similar arrangement.

16 Alternatively, the regulation could set forth the outlined parameters as the criteria the Federal Reserve will apply to approve such disclosures, provided that the approval process is expedited in light of the time sensitive nature of M&A transactions.

17 Proposal, 84 Fed. Reg. at 27988.

18 The preamble to the proposal indicates that new Section 261.20(a) is "largely based on" current Sections 261.20(g), 261.21(g) and 261.22(e). Proposal, 84 Fed. Reg. at 27978. Only current Section 261.22(e), however, includes a prohibition on unauthorized "use." Current Section 261.22(e) is distinguishable from current Sections 261.20(g) and 261.21(g) and from proposed Section 261.20(a) in that current Section 261.22 addresses written requests for disclosure of CSI by litigants and other parties. In particular, current Section 261.22 contemplates that, in approving a request for disclosure of CSI, the Federal Reserve may "impose *such conditions or limitations on use of any information disclosed* as is deemed necessary to protect the confidentiality of the Board's information." 12 C.F.R. § 261.22(c)(2). Accordingly, the prohibition on unauthorized use in current Section 261.22(e) is limited by reference to express authorization of the Federal Reserve, making it clear in any given case what use is authorized and what use is unauthorized.

Accordingly, we recommend that the final rules eliminate the reference to unauthorized use, while retaining the explicit prohibition on unauthorized disclosure (that is, disclosure not expressly authorized by exceptions in the final rules or by the written permission of the Federal Reserve). Prohibiting all unauthorized disclosures sufficiently protects the Federal Reserve's and the financial institution's mutual interest in maintaining the confidentiality of CSI.[19] To the extent the change set forth in the proposal was intended to prevent activities that are adverse to the institution, the financial system or the public interest, the prohibition on unauthorized use of CSI should expressly describe the activities the Federal Reserve is seeking to prevent. Likewise, to the extent the prohibition on unauthorized use is intended to apply in those circumstances where CSI has been made available to litigants or other parties upon request and subject to limitations set by the Federal Reserve, that limited application should be made explicit in the language of the final rules.

C. Certain qualitative restrictions on sharing CSI with the directors, officers and employees of supervised financial institutions should be modified in the final rules to avoid inadvertent breaches that could arise as a result of inconsistent interpretation or application.

The proposal would revise the existing rules by permitting a supervised financial institution to disclose CSI to the directors, officers and employees of its affiliates (as that term is defined in the Federal Reserve's Regulation Y) to the extent that the recipients have a "*need* for the information in the performance of their *official duties*."[20] Consistent with past advocacy, we support the additional flexibility to share CSI with affiliates in addition to parent holding companies.

We are concerned, however, that the phrasing of these restrictions, as a general matter, will lead to unpredictable and inconsistent results in practice. The qualitative and subjective standards set forth in the proposal—that CSI may only be shared with certain individuals to the extent they have a "need" to know the information in the "performance of their official duties"—appear overly stringent and raise a number of interpretive issues. Does "need" mean "necessary" or "useful and appropriate"? What is an "official" duty, as opposed to some other duty?[21] For example, is the employee of an affiliate who has been tasked with assisting in remediation efforts responsive to a specific, nonrecurring supervisory issue acting in the context of his or her "official duties"? Or what about CSI that is shared with a senior manager in anticipation of the manager rotating to a new division or being elevated to the C-suite? The proposed standard also raises the question whether it would become necessary, as a practical matter, for institutions to engage in a burdensome, documented analysis of whether the official duties of the directors, officers and employees of affiliates appropriately encompassed each receipt of CSI. Such an analytical exercise could prove especially difficult with respect to members of boards of directors and top-level management teams, all of whom have fiduciary duties and may require access to a wide range of CSI across the entire corporate group.

In addition, it is not clear whether the proposal, as written, would apply this limitation to the directors, officers and employees of the supervised financial institution itself, or only those of the financial institution's affiliates.

We recommend that the Federal Reserve revise the final rules to provide that supervised financial institutions may disclose CSI to directors, officers and employees of the institution and its affiliates "when necessary

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19 As discussed in Section III.C below, we recommend that the disclosure of CSI within the organization be restricted to disclosures to employees, officers and directors "when necessary or appropriate for business purposes," preventing disclosures within organizations that are not for the benefit of the organization.

20 Proposal, 84 Fed. Reg. at 27988 (emphasis added).

21 The "performance of their official duties" standard previously has been used only in connection with disclosure of CSI within the Federal Reserve or with other U.S. or foreign governmental agencies. *See* 12 C.F.R. §§ 261.14(e), 261.20(h)(1)–(2), 261.21(a), 261.21(d)(1)(ii). This standard is not transferable to the private sector.

or appropriate for business purposes," with financial institutions having the discretion to determine when such disclosures are "necessary or appropriate." Such a standard would have the dual benefits of significantly (i) reducing the risk of unpredictable or inconsistent application of the requirement in practice without expanding the universe of individuals who would be entitled to access CSI unduly, and (ii) promoting uniformity by being more consistent with the OCC's rules.[22] This is particularly important given the various forms CSI may take, including information required to be prepared by large teams in response to requests for information from examiners, as well as substantial, enterprise-wide projects designed to modify or develop business processes.

We also recommend that the Federal Reserve specifically state in the preamble of the final rule that a supervised financial institution's determination that disclosure of CSI within the organization is "necessary or appropriate for business purposes" will not be challenged by Federal Reserve staff as long as there are reasonable protocols in place for safeguarding the information and those protocols are followed. The supervised financial institution is best placed to determine who needs access to CSI in order to discharge his or her duties or perform his or her job effectively. There should not be reluctance in determining the appropriateness of disclosure within the organization because of a perceived risk that Federal Reserve supervisory staff might question who received CSI within a corporate group or threaten sanctions should there be a difference in views regarding whether CSI was "necessary or appropriate for business purposes" of a recipient.

D. The final rule should permit the disclosure of CSI to auditors and outside legal counsel when necessary or appropriate for business purposes, as determined by the supervised financial institution.

The proposal would eliminate the restrictions in the Federal Reserve's current rules that authorize a supervised financial institution to disclose CSI to its outside legal counsel and auditors only if the CSI is reviewed on the institution's premises and the auditors and outside counsel are prohibited from making or retaining copies of the CSI. Consistent with past advocacy, we support these changes, which properly account for technological developments that allow for remote, electronic review of documents and files.

The proposal would, however, also impose new restrictions, required to be set forth in a written agreement, on sharing CSI with auditors and outside counsel. Specifically, auditors and outside counsel would (i) not be permitted to use CSI for any purpose other than in connection with the "particular engagement" with the supervised financial institution; (ii) be required, at the conclusion of the engagement, to return or certify the destruction of the CSI, or render electronic files "effectively inaccessible through access control measures or other means"; and (iii) be required to strictly limit access within their staffs to those who have a need to know and who are bound by written agreement to keep the information confidential in accordance with Federal Reserve rules. These additional restrictions are unnecessary in the context of auditors and outside legal counsel—who are bound by professional ethical and confidentiality obligations—and would therefore impose an unnecessary compliance burden if adopted as proposed.

Consistent with Section III.C above, we recommend that the Federal Reserve revise the final rules to provide that a supervised financial institution has the discretion to disclose CSI to persons at such institution's auditor and/or outside counsel when "necessary or appropriate for business purposes," with the financial institution having the discretion to determine when such disclosure satisfies the "necessary or appropriate" test. The "necessary or appropriate for business purposes" standard would be consistent with the OCC's rules[23] and would avoid the imposition of a regulatory requirement that is superfluous given the professional obligations of the parties entitled to receive CSI under this provision. To the extent that the Federal Reserve believes there should be a regulatory

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22 *See* 12 C.F.R. § 4.37(b)(2).

23 *See* 12 C.F.R. § 4.37(b)(2).

requirement that supervisory information be returned or destroyed, it should be keyed to termination of the client relationship pursuant to the terms of the particular service or retention agreement, rather than to the "particular engagement."[24] In addition, consistent with prior advocacy, the Federal Reserve should confirm that litigation vendors and similar service providers providing services to internal and outside counsel may review CSI consistent with, and to the extent necessary for, their roles (*i.e.*, on a "necessary or appropriate" basis), provided that a confidentiality agreement is in place requiring such service providers to keep CSI confidential consistent with the Federal Reserve's rules. This is a particularly important and recurring issue, because one of the functions of litigation vendors is to identify CSI so that it will *not* be inadvertently produced in discovery.

We also recommend that the Federal Reserve expressly extend this exception to the prohibition on CSI disclosure to outside counsel retained to represent individual directors, officers or employees in the context of a government investigation where the investigating body has access to CSI and plans to use CSI in connection with interviewing such individuals or otherwise interacting with counsel.[25] Extending the exception to outside counsel for individual directors, officers or employees in this limited circumstance would facilitate a fairer and more efficient process in the context of government investigations without inappropriately sharing CSI with a wider audience without Federal Reserve approval.

E. The Federal Reserve should permit supervised financial institutions to share CSI with other consultants and other third-party service providers under circumstances in which the third party has entered into a written agreement to provide services to the institution and has agreed in writing that it is aware of restrictions on CSI disclosure and will not use CSI for any purpose other than as set forth in its agreement to provide services to the institution.

The proposal would update the manner in which supervised financial institutions obtain permission to disclose CSI to its "other service providers" that may require access to CSI, including consultants, contingent workers, independent contractors and technology providers. In particular, rather than seeking the approval of the Federal Reserve's General Counsel as currently required, supervised financial institutions would instead direct requests to disclose CSI to other service providers to their central points of contact ("CPC") at the relevant Reserve Bank.[26] The request submitted to the CPC would need to identify the "specific documents or materials" to be disclosed and, if the request is granted, service providers would be subject to the same written agreement requirements applicable to auditors and outside legal counsel under the proposal.[27] The proposal does not contemplate a blanket exception or set of circumstances under which disclosures to these recipients would automatically be permitted.

Consistent with our recommendations in Sections III.C and III.D above, we suggest that the Federal Reserve adopt requirements for these third-party service providers similar to those of the OCC, which permits the disclosure of CSI to a consultant—without prior OCC approval—if the consultant is under written contract to provide

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[24] Because attorneys and auditors often have continuing relationships with financial institutions regarding advice on supervisory matters, it is often not possible to tie the receipt of CSI to a narrow "particular engagement" that has a determinable beginning or end. The use of the term "particular engagement," then, is likely to lead to confusion and uncertain application.

[25] Currently, because outside counsel in this context is counsel for the individual and not the supervised financial institution, parties have to seek the Federal Reserve's prior approval for counsel to review CSI, a complicated hurdle that needs to be faced under already fraught circumstances.

[26] Proposal, 84 Fed. Reg. at 27979, 27988-89.

[27] Seeking approval from a CPC, rather than the Federal Reserve General Counsel, is a helpful development from the perspective of reducing inefficiency in regulatory requirements. If the Federal Reserve ultimately adopts this approach, however, it is essential that there be structures in place to promote consistency, predictability and rapidity in the CPC decision-making process (*e.g.*, by providing standard forms for disclosure requests by institutions, as well as criteria to the CPCs for deciding whether to object).

services to the institution and the consultant has a written agreement in which it states its awareness of the prohibitions on disclosing CSI and agrees not to use the CSI for any purpose other than as provided in its contract to provide services to the institution.[28] The additional burden on both Federal Reserve staff and supervised financial institutions associated with the prior approval requirement in this context is especially acute in light of the critical role that consultants play in assisting financial institutions in meeting a broad range of regulatory requirements.[29] There may also be time-sensitive situations in which it would be harmful to the institution to wait for a request for prior approval to be granted (*e.g.*, instances in which experts must be brought in quickly to help contain a data breach or cyber event where immediate action is imperative). Accordingly, aligning the Federal Reserve's rules with the OCC's in this regard should not materially increase the risk that sensitive information would be inappropriately disclosed. One additional safeguard could be a requirement that an organization maintain a log of third-party CSI disclosure for subsequent examiner review.

F. The final rule should treat contingent workers and independent contractors fulfilling a "business-as-usual" or routine role at the supervised financial institution in the same fashion as employees of the institution are treated for purposes of permitting or not permitting disclosure of CSI to such persons.

The proposal treats "contingent workers" as "service providers" and requires that any disclosure of CSI to such persons be approved by the institution's CPC.[30] Many financial institutions utilize contingent workers and independent contractors for various purposes and under different employment structures. In some cases, these workers—although they are technically employed by a third party with whom the financial institution has entered into a contractual arrangement—function at the financial institution as "business-as-usual" employees, fulfilling administrative or other roles that exist at the institution as a matter of course.

Rather than require CPC approval of a written request meeting the requirements of proposed Section 261.21(b)(4), financial institutions should be permitted to treat all workers fulfilling "business-as-usual" employee functions of the institution the same as regular employees under proposed Section 261.21(b)(1). Such an approach would mitigate the burden associated with seeking written CPC approval for "business-as-usual" activities without unduly expanding the universe of individuals to whom CSI is disclosed.

G. The final rules should (i) include an exemption to share or, at a minimum, a presumption that supervised financial institutions may share, Federal Reserve CSI with the other prudential federal banking agencies and (ii) permit supervised financial institutions to obtain general exemptions to share Federal Reserve CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x), including appropriate mechanisms for sharing CSI with foreign banking agencies and supervisors.

The proposal would permit institutions supervised by the Federal Reserve to disclose CSI to other federal bank regulators (*i.e.*, the FDIC, the OCC and the Consumer Financial Protection Bureau) and to its state supervisors provided that the institution receives the concurrence of its CPC that the receiving agency has a legitimate supervisory or regulatory interest in the CSI.[31] The proposal changes the current regulatory requirements by directing supervised financial institutions to make these requests of their CPCs, rather than through the Federal

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28 *See* 12 C.F.R. § 4.37(b)(2).

29 Under the post-crisis regulatory framework, financial institutions routinely engage consultants to assist with various aspects of their CCAR programs, the development of their resolution plans, required remedial actions and a variety of other safety-and-soundness-enhancing measures.

30 Proposal, 84 Fed. Reg. at 27988–89.

31 Proposal, 84 Fed. Reg. at 27979, 27988.

Reserve's Director of Banking Supervision and Regulation or the appropriate Federal Reserve Bank. The proposal does not, however, eliminate the underlying requirement that there be prior Federal Reserve approval before CSI can be shared with other supervisors and does not contemplate applying the new approach to disclosures of CSI to a supervised financial institution's foreign regulatory authorities.

The prior approval requirement of both the Federal Reserve's current rules and the proposal is administratively burdensome, and creates unnecessary friction with other domestic agencies and foreign supervisors, with little measurable benefit where the other supervisor has a legitimate interest in the information and has adequate controls in place to ensure that Federal Reserve CSI is not further disseminated. Moreover, with respect to the federal bank regulators and certain foreign regulatory authorities, the agencies already have in place with one another memoranda of understanding regarding CSI, providing added assurance that Federal Reserve CSI will not be disclosed to third parties unduly and without the Federal Reserve's knowledge.

Rather than require prior approval to share Federal Reserve CSI in all cases, the Federal Reserve should include in the final rules an exemption to share or, at a minimum, a presumption that it is appropriate for supervised financial institutions to share, Federal Reserve CSI with the prudential federal banking regulators of the institutions' insured depository institution subsidiaries. To implement such a presumption, the final rules could include a prior notice requirement pursuant to which a supervised financial institution would be required to provide its CPC with five business days' prior notice and an opportunity to object to the sharing of CSI with these other governmental agencies. Absent an objection by the CPC, the information could be shared with the other regulators. In addition, the Federal Reserve should revise the final rules to permit the financial institution to obtain general exemptions for sharing CSI with the banking agencies and supervisors referenced in 12 U.S.C. § 1828(x)—specifically, any other federal banking agency, the Consumer Financial Protection Bureau and any state bank supervisor, as well as any foreign banking authority[32]—to the extent that those agencies have supervisory jurisdiction over the entity involved. Such exemption requests, and the Federal Reserve's consideration and approval of them, could be tailored to the institution and its particular supervisory circumstances.[33]

Bank regulators routinely request to review certain documents that may contain CSI of another regulator, including board materials, management committee packages, management information system reports and risk reports, and idiosyncratic approaches to considering requests to share such information may lead to inconsistent or unpredictable results. Moreover, seeking authorization to share this information with other regulators each time the financial institution receives a request requires time and resources from both the agencies and the financial institutions they supervise. The procedures we have recommended, providing for presumptions and exemptions for sharing Federal Reserve CSI with other banking agencies and supervisors, would therefore create a consistent and streamlined approach beneficial to both supervised financial institutions and their respective regulators.[34]

H. The final rule should incorporate the proposal's important changes to the process by which parties to litigation can request production of documents and information containing CSI.

The proposal would impose more detailed requirements for requests to disclose CSI in connection with litigation. Specifically, the party making the request would be required to provide a "narrow and specific" description of the CSI and its relevance to the litigation, as well as an explanation of why the information sought, or "equivalent

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32 We recognize that any authorization to share Federal Reserve CSI with a foreign banking authority would need to be in accordance with the statutory requirements of 12 U.S.C. § 3109 and with Section 211.27 of the Federal Reserve's Regulation K.

33 For example, a domestic top-tier bank holding company with a national bank subsidiary may have different needs in respect of sharing Federal Reserve CSI than the intermediate holding company of an FBO with a state nonmember bank subsidiary that is subject to joint examination by the FDIC and its state regulator.

34 See also note 36, *infra*.

information adequate to the needs of the case," cannot be obtained from any other source. We are supportive of this approach, which appropriately balances the relevant considerations and interests of parties involved.

Even if the Federal Reserve ultimately determines to grant a request to disclose CSI in the context of litigation, it is critical to note that the documents or information in question may otherwise be protected from production to litigants on the basis of the institution's attorney-client privilege, work product protection or other grounds.[35] Accordingly, the Federal Reserve CSI regulation should affirm that the Federal Reserve will not produce materials to litigants that are covered by the non-waiver provisions of 12 U.S.C. § 1828(x), and otherwise notify and provide subject financial institutions with an opportunity to assert privilege or other grounds for withholding such documents or information if the Federal Reserve believes that there is a question as to whether Section 1828(x) applies.[36]

IV. To fully realize the potential benefits of the CPC approval framework contemplated by the proposal, the Federal Reserve should confirm that, except in exceptional circumstances, CPCs will have and exercise delegated authority to make decisions required to be made under the CSI rules without the concurrence of other Federal Reserve staff.

Proposed Section 261.21(b)(5) states that "[a] CPC's action…may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures."[37] Although the CPC process could create a more streamlined and efficient approval mechanism for both the Federal Reserve and the supervised financial institution, the potential two-step approval requirement would undermine the potential benefits of the proposed CPC process. In addition, the statement that a CPC's action "may" require concurrence without specifying the circumstances in which concurrence with Federal Reserve staff would be required leaves open the possibility that CPCs must regularly obtain Federal Reserve staff approval and makes the timeline and procedures for obtaining CPC approval opaque and uncertain. Requiring staff concurrence for any significant number of approval requests will eviscerate any efficiency that might have resulted from the revision of the rules.

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35 As we have previously maintained, the attorney-client privilege protects privileged documents and information from required production to the federal banking agencies, including in connection with their examination authority and prudential duties. *See* Memorandum, *Bank Regulators' Legal Authority to Compel the Production of Material That Is Protected by Attorney-Client Privilege: Banking Regulators' Examination Authority Does Not Override Attorney-Client Privilege* (May 16, 2018), *available at* https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Banking_Regulators_Examination_Authority_Does_Not_Override_Attorney_Client_Privilege.pdf (concluding that neither the examination and visitorial powers of the federal bank regulators nor any other asserted rationale overrides and supersedes the attorney-client privilege).

36 The regulation should also confirm that the Federal Reserve will not, absent an enforceable subpoena or court order, transfer materials covered by 12 U.S.C. § 1828(x) to other government agencies or third parties, and the Federal Reserve will notify supervised financial institutions of any such subpoena or court order to the extent legally permissible. In addition, the regulation should provide a mechanism for an institution to challenge the transfer by the Federal Reserve of materials that the submitting institution has indicated are covered by Section 1828(x), but the Federal Reserve disagrees. Otherwise, the Federal Reserve could be breaching an institution's statutorily preserved privileges, providing a strong disincentive for institutions to share privileged materials with their supervisors.

We note that the framework we recommend in Section III.G above—which would promote streamlined mechanisms to share Federal Reserve CSI with other banking agencies and supervisors that have a legitimate interest in such information—should not be viewed as requiring supervised institutions to provide privileged information to these other supervisors, including privileged information previously provided to the Federal Reserve that may also be CSI. Nor should the streamlined mechanisms for sharing Federal Reserve CSI with these other supervisors be viewed as providing a basis for a supervisor who receives privileged material voluntarily submitted under 12 U.S.C. § 1828(x) to share those privileged materials with any other agency.

37 Proposal, 84 Fed. Reg. at 27989.

Under the current process, approval requests to the Federal Reserve often are referred from the Board's Legal Division to the local examination team for its views.[38] This routine consultation of CPCs under the current framework makes them well acquainted with the relevant considerations for a CSI approval request. The new proposed framework should not only grant CPCs delegated authority to make decisions on CSI, but should also clarify that only in limited, specified circumstances would the CPC be required to obtain Federal Reserve Board Legal Division or Supervision staff concurrence.

V. The Federal Reserve should issue publications or otherwise make available to supervised financial institutions general observations arising from examinations and other supervisory activities, including, in particular, horizontal reviews.

In June 2019, the FDIC issued a Financial Institution Letter with the purpose of enhancing transparency regarding the FDIC's consumer compliance supervisory activities and providing a high-level overview of consumer compliance issues identified during 2018 through the FDIC's supervision of state non-member banks and thrifts.[39] A similar publication or issuance by the Federal Reserve with respect to the Federal Reserve's observations on compliance and other matters during the most recent supervisory cycle would be highly beneficial to Federal Reserve-supervised financial institutions. Releasing this information in an anonymized manner would offer institutions meaningful opportunities to strengthen their own compliance programs, reduce the potential for compliance violations and enhance risk management practices based on information that would otherwise be inaccessible based on its characterization as CSI. We note the Federal Reserve's very helpful publication of aggregate and anonymized data about ratings and supervisory findings in the November 2018 inaugural Report on Supervision.[40]

In addition, the Federal Reserve should periodically publish or issue to participating institutions generalized supervisor feedback from horizontal reviews (but not institution-specific findings) that have industry-wide implications. Such feedback is more analogous to industry guidance, rather than communications particular to an individual institution. Similar to the benefits that could result from the Federal Reserve releasing anonymized information regarding compliance issues observed in recent supervisory cycles, explicitly permitting the sharing of this more general feedback at the time that it is given would facilitate enhancement of industry-wide and institution-specific practices. It is critical, however, that the practices of a small number of institutions that may be highlighted in any such Federal Reserve issuance not be conflated with safety and soundness requirements to which all institutions must adhere.

VI. The final rules should incorporate certain important changes to the Federal Reserve's FOIA rules and procedures for requesting confidential treatment.

The proposal would make several changes to the Federal Reserve's FOIA rules and procedures to request confidential treatment for materials submitted to the Federal Reserve. We support the objective of setting forth more clearly the Federal Reserve's rules applying FOIA.[41] We make the following recommendations in furtherance of that objective:

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38 This significantly delays the approval process, and helps explain our concern about any "in-practice" dual review.

39 FDIC, FIL-31-2019, *Consumer Compliance Supervisory Highlights* (June 13, 2019), *available at* https://www.fdic.gov/news/news/financial/2019/fil19031.html.

40 Federal Reserve, Report on Supervision (Nov. 9, 2018), *available at* https://www.federalreserve.gov/publications/files/201811-supervision-and-regulation-report.pdf.

41 Proposal, 84 Fed. Reg. at 27976.

- With respect to those records that implicate exemption 4 under FOIA, the Federal Reserve should explicitly incorporate the recent U.S. Supreme Court holding in *Food Marketing Institute* v. *Argus Leader Media*[42] into its final rules implementing FOIA.

  - Specifically, the Court held that where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of FOIA's exemption 4, which shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[43] The Court expressly declined to find that FOIA's exemption 4 requires a showing that disclosure of the confidential information would cause "substantial competitive harm."[44]

  - Accordingly, the Federal Reserve should (i) revise Section 261.17(b) and Section 261.18(b)(2) in the final rules to remove the existing references to the "competitive harm" standard that the Supreme Court declined to adopt, and (ii) expressly confirm in its final rules that the Federal Reserve will treat as exempt from disclosure under FOIA, at a minimum, all information submitted to the Federal Reserve by a supervised financial institution that is both customarily and actually treated as private by the institution and which is provided to the Federal Reserve under an assurance of privacy. In light of the Supreme Court's focus on agency assurances of privacy and the special nature of the bank-supervisor relationship, the regulation should also include an explicit statement that all information tagged as commercially sensitive submitted by institutions to the Federal Reserve in reliance on FOIA exemption 4 is received under an assurance of privacy.

  - In the context of both ordinary course supervision and examination and the consideration of regulatory applications and other circumstances requiring regulatory approval, supervised financial institutions routinely provide supervising agencies with confidential information that the institutions are not required to disclose to the public. Because institutions also submit confidential information to the Federal Reserve outside the supervisory process, such as for economic research, the statement should also note that the assurance of privacy includes non-public information that is not otherwise considered CSI. Express incorporation of the Supreme Court's holding in *Food Marketing Institute* v. *Argus Leader Media* would provide supervised financial institutions with greater certainty regarding the scope of FOIA's exemption 4 and would further encourage frank and open communication between institutions and the Federal Reserve.

- The proposal would make various changes to the Federal Reserve's current FOIA rules to reflect the U.S. Department of Justice ("DOJ") guidance that addresses key elements to be addressed in each section of an agency's FOIA rules.[45] One such change incorporates the DOJ guidance, which precedes the *Food Marketing Institute* v. *Argus Leader Media* decision. Under that guidance, requests for confidential treatment generally expire 10 years after the date of submission, unless a renewal request is submitted to the agency before the confidentiality designation expires. Rather than provide for the automatic expiration of confidential treatment requests after a 10-year period, which would create an undue burden on supervised financial institutions to track each and every confidential treatment request and would leave open the risk that confidential information would be inappropriately

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42 139 S. Ct. 2356 (2019).

43 *Id*. at 2366.

44 *Id*. at 2363–64.

45 Proposal, 84 Fed. Reg. at 27978, 27984-85.

shared with third parties, the Federal Reserve should maintain the confidential treatment of supervisory documents in accordance with the time limits set forth in the Federal Reserve's record retention policy, as it may be amended from time to time.[46] This approach would be fully consistent with the general policy underlying the bank supervisory relationship that institutions be comfortable routinely providing their most sensitive information to the Federal Reserve.

- The proposal would require that requests for confidential treatment "provide the legal justification, identify the specific information for which confidential treatment is requested, and include an affirmative statement that such information is not available publicly."[47] Although such a requirement is broadly consistent with the current practice in the application context where applicants must submit both a public and non-public version, the requirement to identify the specific information for which confidential treatment is requested in other contexts, in particular, could be unduly burdensome where confidential and nonconfidential information is interwoven throughout and there is no immediate need to make any of the information public. This requirement could also be read to impose an obligation on financial institutions to prepare multiple versions of the same document, submitting a potentially "public" version to the Federal Reserve each time the institutions seek confidential treatment under FOIA. We recommend maintaining the existing standard requiring that a supervised financial institution "state in reasonable detail the facts supporting the request and its legal justification."[48]

- In furtherance of the broad policy interests that favor limiting the disclosure of supervised financial institutions' confidential information, the Federal Reserve should make certain changes to its regulations limiting the release by the Federal Reserve of CSI and other nonpublic information provided to the Federal Reserve by supervised financial institutions.

  - The Federal Reserve should revise Section 261.15(b)(3) to provide that the Federal Reserve will only release records that are exempt from mandatory disclosure under FOIA where the failure to disclose such records would be manifestly contrary to the public interest, rather than provide that such records may be released by the Federal Reserve if it determines such disclosure would be in the public interest. A similar reference should be included in Section 261.20(c). In both cases, the added qualifier will avoid undermining the judicial integrity of the bank examination privilege by highlighting that the Federal Reserve recognizes that disclosure of CSI is not to be undertaken lightly and should meet a robust public interest standard.

  - The Federal Reserve should revise Sections 261.22(a) and 261.22(b) to provide that the Federal Reserve will only disclose CSI and other nonpublic information to the agencies and governmental authorities named in those sections when such disclosure would be appropriate in light of the considerations set forth in Sections 261.22(c)(2)(ii)-(iv).

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46 *See* Records Retention Program, Supervision & Regulation Function, N1-82-00-02 Supervision and Regulation Function Approved by NARA: 07-05-2001, *available at* https://www.federalreserve.gov/foia/rr_supervision.htm.

47 Proposal, 84 Fed. Reg. at 27987.

48 12 C.F.R. § 261.15(b).

The Bank Policy Institute appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (646) 736-3960 or by email at *Gregg.Rozansky@bpi.com*.

Respectfully submitted,

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