

FEDERAL RESERVE SYSTEM

12 CFR PART 261

Docket No. R-1665; RIN 7100 AF-51

RULES REGARDING AVAILABILITY OF INFORMATION

AGENCIES: Board of Governors of the Federal Reserve System (“Board”).

ACTION: Final Rule.

SUMMARY: The Board is issuing a final rule revising its Rules Regarding Availability of Information. The revisions clarify and update the Board’s regulations implementing the Freedom of Information Act and the rules governing the disclosure of confidential supervisory information and other nonpublic information of the Board.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Alye S. Foster, Assistant General Counsel, (202) 452-5289; Mary Bigloo, Senior Counsel, (202) 475-6361, or Misty M. Kheterpal, Senior Counsel, (202) 452-2597, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION

I. Background

On June 17, 2019, the Board published a notice of proposed rulemaking¹ (“proposal”) in the *Federal Register* revising its Rules Regarding Availability of

¹ 84 FR 27976 (June 17, 2019).

Information (the “Board’s Rules”) found at 12 CFR Part 261, with a 60-day public comment period ending on August 16, 2019. The Board’s Rules set forth the procedures for requesting access to documents that are records of the Board under the Freedom of Information Act (“FOIA”) as well as the rules governing the disclosure of the Board’s confidential supervisory information and other nonpublic information. The Board received 15 comment letters including from supervised financial institutions, industry trade associations, bar associations, law firms, and individuals. While commenters were generally supportive of the proposed changes to improve the efficiency of the Board’s Rules, some commenters had concerns regarding particular provisions and suggested further clarifications and revisions. With the exception of a few comments that focused on the FOIA provisions, particularly, the sections referencing the “competitive harm” test under Exemption 4 and addressing confidential treatment requests, most of the comments addressed the rules governing disclosure of confidential supervisory information. Of particular concern to a number of commenters was the scope of the term “confidential supervisory information” and the provisions concerning the sharing of confidential supervisory information by supervised financial institutions with staff, outside legal counsel, auditors, service providers, the federal and state banking agencies and the Bureau of Consumer Financial Protection (“CFPB”). We have made a number of changes to the proposal to address these and other comments we received.

Harmonization with other agencies' regulations

A few commenters recommended that the federal banking agencies issue identical or harmonized rules governing confidential supervisory information and, in particular, sought harmonization in how confidential supervisory information is defined and to whom supervised financial institutions may disclose confidential supervisory information. The commenters noted that their banking organizations are regulated by multiple regulators including the Board and uniformity of the regulators' separate confidential supervisory information rules would be beneficial. In response to the comments, the Board has explored areas where it would be appropriate to harmonize the final rule with the rules of the other federal banking agencies and the CFPB. A key opportunity for harmonization we noted is the standard for sharing within and by the organization. In the final rule, we adopted the Office of the Comptroller of the Currency's ("OCC") standard to permit supervised financial institutions to disclose confidential supervisory information with their directors, officers, and employees "when necessary or appropriate for business purposes," and included a similar standard permitting disclosures to the supervised financial institution's outside legal counsel and auditors when the disclosures are "necessary or appropriate in connection with the provision of legal or auditing services." Consistent with the OCC's rules, we also removed the proposed provision that conditioned disclosures to legal counsel and auditors on their executing specific written agreements with respect to their use of confidential supervisory information. Additionally, consistent with the OCC's and the

CFPB's rules, we eliminated the requirement that supervised financial institutions obtain prior Federal Reserve approval to disclose confidential supervisory information to their other service providers, such as consultants, contractors, and contingent workers.

Opportunities to harmonize the Board's definition of confidential supervisory information with the corresponding definitions of the other agencies were more limited as those definitions did not contain sufficient particularity to meet the Board's needs.

Comments concerning additional categories of disclosure

A few commenters requested that the Board's final rule authorize additional categories of disclosure which were not addressed in the Board's proposal. A few commenters proposed that the Board establish procedures for supervised financial institutions subject to horizontal reviews to disclose confidential supervisory information amongst each other. The commenters argued that providing firms the opportunity to disclose confidential supervisory information relating to the horizontal reviews would facilitate the enhancement of firms' practices and allow them to better meet supervisory expectations. The Board did not adopt these recommendations. These recommendations pose significant concerns with respect to the protection of the confidentiality of the information, which may include market-sensitive information that could be misused by competitor firms. In addition, while the Federal Reserve looks at a similar business line or control function across firms in a horizontal examination, the supervisory assessment and feedback reflects a consideration of the firm's practices in light of the firm's risk profile and activities. Thus, supervisory feedback provided to one firm may not be

appropriate or relevant for another firm. Permitting firms to disclose this confidential supervisory information to other firms would present the risk that the feedback would be inappropriately interpreted and applied.

One commenter suggested that the Board publish general observations arising from examinations and other supervisory activities, including anonymized supervisory feedback regarding horizontal reviews. The commenter argued that publishing this information in an anonymized manner would offer institutions the opportunity to strengthen their compliance programs. Consistent with commenters' suggestions, the Federal Reserve is committed to ensuring transparency regarding its supervisory process. The Federal Reserve issues supervisory guidance to outline supervisory expectations or priorities and to articulate its general views regarding appropriate practices for a given subject area, including compliance. In addition, the Board publishes its semi-annual Supervision and Regulation Report to provide transparency regarding Federal Reserve supervisory programs and approaches. This report includes supervisory themes and findings drawn from Federal Reserve examinations, including horizontal reviews.

Other commenters recommended that the Board's Rules address the disclosure of confidential supervisory information under applicable securities laws. One commenter in particular recommended that disclosure of confidential supervisory information be permitted without the prior authorization of the Board when a supervised financial institution determines that disclosure is required under securities laws. The Board also received comments recommending that the Board's Rules address disclosure of

confidential supervisory information in the context of merger and acquisition transactions. One commenter stated that prohibiting access to confidential supervisory information in the M&A context runs counter to 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. The commenter recommended that the Board issue parameters for sharing confidential supervisory information in the M&A context in order to meet the dual objectives of safeguarding confidential supervisory information from improper disclosure and promoting thorough due diligence and thoughtful integration planning in connection with a merger or acquisition. The Board did not adopt either recommendation. The proposal did not address disclosures in the M&A context or pursuant to securities laws and guidance establishing parameters for such disclosures requires additional consideration and should be addressed on a consistent basis across the federal and state banking agencies and the CFPB.

Section-by-section analysis of comments

§ 261.1 Authority, purpose, and scope.

We received one comment on § 261.1. The commenter suggested the inclusion of a statement of the rules' objectives, the public policy goals that the rules are designed to achieve, and the potential harm, if any, they seek to prevent. We considered the request and, after reviewing the Board's Rules, including the parameters set out for the disclosure of confidential supervisory information, we determined a broad statement is not

necessary. We did, however, modify § 261.1(a) to note that the Board’s Rules establish mechanisms to carry out the Board’s responsibilities relating to the disclosure, production, or withholding of information “to facilitate the Board’s interactions with financial institutions and the public.” Additionally, in the section’s reference to the Board’s authorities, the proposal inadvertently omitted a reference to the Freedom of Information Act. Accordingly, we modified § 261.1 to include a reference to the “Freedom of Information Act, 5 U.S.C. 552.”

§ 261.2 Definitions.

The Board received one comment concerning the term “nonpublic information” and several comments concerning the definition of “confidential supervisory information.” One commenter voiced concern with the Board replacing the term “exempt information” with “nonpublic information.” The commenter argued that the change minimizes the protections given to confidential supervisory information and particularly expressed a concern that courts will not afford confidential supervisory information sufficient protection if it is deemed “confidential” rather than “exempt.”² The Board replaced the term “exempt information” with “nonpublic information” as the term is used throughout the Board’s Rules and thus applies not only to the processing of FOIA requests under subpart B but also to requests for the disclosure of confidential

² While the commenter was concerned with the level of protection that is afforded “confidential” documents, the Board’s definition replaced the term “exempt information” with “nonpublic information” We assume the commenter interprets the “nonpublic” term as synonymous with “confidential.”

supervisory information and confidential information under subpart C. The replacement of the term “exempt information” with “nonpublic information” effects no change to the confidentiality afforded to confidential supervisory information as that information remains exempt under Exemption 8 of the FOIA. Indeed, in assessing the confidentiality of a document, a court looks to the document’s contents rather than its designation as “exempt” or “nonpublic.” We note further that to the extent the commenter is concerned with the protection of confidential supervisory information that the Board authorizes for use in private litigation, the Board generally authorizes such use on the condition that the parties enter into a protective order preserving the confidentiality of the information, including by requiring any Board information filed in the case to be filed under seal. The Board’s final rule retains the term “nonpublic information.”

Several commenters also commented on the proposed revisions to the definition of “confidential supervisory information.” Commenters specifically focused on the scope of the term as it regards documents prepared by or for a financial institution for its own business purposes. Commenters were concerned that any document prepared by or for the supervised financial institution for its own business purposes and in its possession would be confidential supervisory information irrespective of its contents provided that the document is also “*created or obtained* in furtherance of the Board’s supervisory, investigatory, or enforcement activities” (emphasis added). We agree that the proposed definition of confidential supervisory information was not sufficiently clear with respect to documents prepared by or for a supervised financial institution for its own business

purposes and that are in the institution's possession. The definition is not intended to encompass internal business documents merely because in the Federal Reserve's possession such documents are confidential supervisory information. To address the concerns with the definition of confidential supervisory information, we revised the definition by reorganizing paragraph (b)(1) into three separate sentences with clarifying revisions and also by making some clarifying edits to paragraph (b)(2).

The first sentence of paragraph (b)(1) provides that: "*Confidential supervisory information* means nonpublic 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, and any information derived from or related to such information." In this first sentence, we retained the proposed language with the exception of edits to the portion of the proposal stating that confidential supervisory information includes "any information derived from, related to, or contained in such documents;" because "such" was intended to refer to confidential supervisory information generally rather than particular documents, the final rule replaces "documents" with "information" and deletes "contained in." Accordingly, the final rule provides that confidential supervisory information includes "any information derived from or related to such information."

We also received a few comments on particular phrasing contained in the first sentence of paragraph (b)(1). One commenter contended that the term “related to” is vague and potentially overly broad. We decline to delete or modify the “related to” wording as it has always been part of the Board’s definition of confidential supervisory information and, to date, we are not aware of any issues in practice with the breadth of the language. Another commenter raised concerns with the phrase “in furtherance of” in the provision stating that confidential supervisory information includes “information that is or was created or obtained in furtherance of the Board’s supervisory, investigatory, or enforcement activities.” The commenter suggested that the Board clarify the meaning of “in furtherance of” as the language may be construed to include “business as usual” documents created by a supervised financial institution in response to a supervisory finding that do not refer to Federal Reserve findings or supervisory communications. The Board declines to incorporate the requested clarification; given the variety of possible “business as usual” documents, questions about whether particular documents constitute or contain confidential supervisory information are best handled on a case-by-case basis between the institution and its Federal Reserve supervisors.

The second sentence of paragraph (b)(1) provides: “Examples of confidential supervisory information include, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports; supervisory assessments; investigative requests for documents or other information; and supervisory correspondence or other supervisory communications.” In this sentence, we clarified that

the kinds of supervisory documents referenced in the proposed language are “[e]xamples of confidential supervisory information.”

The third sentence of paragraph (b)(1) provides: “Additionally, any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution that contains or would reveal confidential supervisory information is confidential supervisory information.” In this third sentence, we modified the phrase in the proposed rule referring to “portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information,” which was too narrowly focused on documents in the possession of supervised financial institutions. Because confidential supervisory information may exist in the documents of other third parties, we modified the phrase to state that confidential supervisory information includes “any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution that contains or would reveal confidential supervisory information.”

Additionally, one commenter argued that “refer to” is vague and overly broad and that the “contains or would reveal” language is sufficiently broad. We agree that the “refer to” phrase is unnecessary and covered by the “contains or would reveal” language. Accordingly, we have deleted “refer to” in paragraph (b)(1).

We also edited paragraph (b)(2) to specify that documents prepared by or for a supervised financial institution for its own business purposes that are in its possession and do not include confidential supervisory information do not constitute confidential

supervisory information “even though copies of such documents in the Board’s or Reserve Bank’s possession constitute confidential supervisory information.”

Another commenter argued that supervised financial institutions should be able to make their own judgment about the disclosure and use of information material to the institution’s business, operations, and condition, and that the Board’s restriction on disclosure of confidential supervisory information interferes with the free flow of information upon which businesses and markets operate. The commenter offered an alternative view of what constitutes confidential supervisory information and suggested that confidential supervisory information be limited to information the Board believes would not be appropriately evaluated or understood by the public if disclosed and that the Board has clearly designated as confidential supervisory information. The commenter asserted that such a revision would appropriately put the burden on the Board to evaluate the impact of possible disclosure of the information, while permitting supervised financial institutions to meet their disclosure obligations to third parties. The Board does not agree with the proposed standard, which is inconsistent with Exemption 8 of the FOIA and the key purpose of the bank examination privilege which is to preserve candor in communications between the agency and supervised financial institutions. In addition, the proposed standard would be very difficult to implement given that there is no objective measure for determining what supervisory information would be appropriately evaluated or understood by the public.

We did not receive any other comments regarding the proposal's other revisions to § 261.2 and the final rule adopts those revisions as proposed with the exception of a change to the definition of "records of the Board." As noted in the proposal, the Board's revision to the definition of "records of the Board" was made in order to conform to Board practice and eliminate any ambiguity regarding the scope of the Board's records as they pertain to Reserve Banks. The Board has determined that further clarification of the scope of the term "records of the Board" is appropriate for these reasons. Thus, the Board's final rule revises the definition to state that Board records include records created or obtained by Reserve Bank officers, directors, employees, or contractors that either "constitute[] confidential supervisory information" or are "created or obtained in the performance of Board functions delegated to the Reserve Bank pursuant to 12 U.S.C. 248(k)."

§ 261.3 Custodian of records; certification; service; alternative authority.

We did not receive any comments on proposed § 261.3 and the final rule adopts the section as proposed.

§ 261.4 Prohibition against disclosure.

We did not receive any comments on § 261.4 and the final rule adopts the section as proposed.

§ 261.10 Published information.

The Board received no comments on § 261.10. In reviewing the section, however, we noted an outdated reference to the inspection and copying of hard copy materials in

paragraph (c)(2). Consistent with the FOIA Improvement Act of 2016, we replaced “inspection and copying at Reserve Banks” with “inspection in electronic format.”

§ 261.11 Records available to the public upon request.

The Board did not receive comments on § 261.11 and the final rule adopts the section as proposed, with one minor edit at the second sentence of paragraph (b)(3) to delete the article “the” before “fees” for readability.

§ 261.12 Processing requests.

The Board did not receive comments on § 261.12 and the final rule adopts the section as proposed.

§ 261.13 Responses to requests.

The Board received no comments on § 261.13. The Board is adopting the proposed section as final with one clarifying revision to § 261.13(a). Consistent with the Department of Justice’s *Template for Agency FOIA Regulations*, which supplements its *Guidance for Agency FOIA Regulations* (“DOJ guidance”),³ the final rule provides that when the Board receives a perfected request, it will conduct a reasonable search of Board records “in its possession” on the date the Board’s search begins.

³ U.S. Department of Justice, Office of Information Policy, *Template for Agency FOIA Regulations*, <https://www.justice.gov/oip/template-agency-foia-regulations> (last updated Feb. 22, 2017).

§ 261.14 Appeals.

The Board did not receive any comments on § 261.14. The final rule adopts the section as proposed with one minor edit to paragraph (c)(2). Current § 261.13(i)(2) and proposed § 261.14(c)(2) provide that “[a]n initial request for records may not be combined in the same letter with an appeal.” To provide further clarity and consistency, the Board’s final rule replaces “[a]n initial request for records” with “[a] request for records under § 261.11.”

§ 261.15 Exemptions from disclosure.

The Board received one comment regarding § 261.15(b)(3), which provides that “[e]xcept where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board or designated Board members, the Secretary, or the General Counsel determines that such disclosure would be in the public interest.” The commenter recommended that the Board revise § 261.15(b)(3) to provide that the Board will release records that are exempt from mandatory disclosure only where the failure to disclose such records would be manifestly contrary to the public interest. The commenter argued that the suggested added qualifier will avoid undermining the judicial integrity of the bank examination privilege by highlighting that the Federal Reserve recognizes that disclosure of confidential supervisory information is not to be taken lightly and should meet a robust public interest standard. In response to the comment, the Board added language to § 261.15(b)(3) to clarify that confidential supervisory information will only be released

as set forth in subpart C. The Board, however, does not agree with the commenter's additional suggestion that § 261.20(c) of subpart C be revised to provide that the Board will exercise its discretion to release confidential supervisory information only where the failure to do so would be manifestly contrary to the public interest. The suggestion conflicts with the Board's legal authority as the Board may disclose confidential supervisory information to "any . . . person that the Board determines to be proper." 12 U.S.C. 326. Accordingly, § 261.20(c) appropriately reflects the Board's broad statutory authority to make discretionary releases of confidential supervisory information.

In addition to the clarification stating that discretionary releases of confidential supervisory information will only be made as set forth in subpart C, the Board has made a minor addition to § 261.15(b)(3) to reiterate that the Board will "provide predisclosure notice to submitters of confidential information in accordance with § 261.18(b)(1)."

The Board did not receive any other comments on § 261.15 and the final rule adopts the remainder of the section as proposed.

§ 261.16 Fee schedules; waiver of fees.

The Board did not receive any comments on § 261.16 and the final rule adopts the section as proposed, with a few minor edits. At paragraph (g)(1), the Board has removed "federal" from the proposal's reference to "the operation or activities of the federal government" and has edited "operation" to "operations" in the plural for consistency with the FOIA and the DOJ guidance. Additionally, for clarity and consistency with the DOJ guidance, at paragraph (h)(3)(i), the Board inserted "unusual circumstances" so the

subsection now reads “[p]rovided timely notice of unusual circumstances to the requester in accordance with the FOIA.” The final rule also replaces the references to “actual costs” in the fee schedule with “direct costs.” Finally, while the proposal included the costs for “[c]omputer search, including computer search time, output, operator’s salary” for commercial requesters, it failed to specify that these costs also apply to “all other requesters.” We have corrected this minor omission and the fee schedule now states that the computer search costs apply to “all other requesters.”

§ 261.17 Request for confidential treatment.

The Board received a few comments relating to § 261.17. One commenter noted that the Board’s requirement for a submitter of confidential information “to identify the specific information for which confidential treatment is requested and include an affirmative statement that such information is not available publicly” imposes a burden in situations where confidential and non-confidential information is interwoven and there is no immediate need to make any information public. The commenter asserted that the requirement could be read to impose an obligation on a supervised financial institution to submit a public version of a document each time the institution seeks confidential treatment under FOIA, similar to the application context where banking organizations submit to the Board both public and nonpublic versions of applications. The commenter therefore recommended that the Board maintain its existing requirement that submitters of information solely “state in reasonable detail the facts supporting the request and its legal justification.” The Board does not view the requirement to include an affirmative

statement that the information is not publicly available as burdensome as the requirement is a reasonable means of ensuring that submitters of information make requests for confidential treatment only with respect to information that is truly confidential and not in the public domain. For further consistency with the DOJ guidance, however, the Board's final rule replaces the requirement to "identify the specific information" with a requirement that submitters of information "use good faith efforts to designate by appropriate markings any portion of the submission for which confidential treatment is requested." The Board believes this change will eliminate any implication that the submitter needs to do a line-by-line review for confidential information or submit a public version of a document each time the submitter seeks confidential treatment. Another commenter requested the final rule make clear that when a submission consists entirely of information that is subject to withholding under Exemption 4, the entire document is entitled to confidential treatment. The Board does not deem this change necessary as the submitter is free to request confidential treatment of the whole document.

The Board also received comments expressing concern over the 10-year expiration period for designations of confidential commercial or financial information pursuant to § 261.15(a)(4). One commenter asked that the Board instead maintain confidential treatment of supervisory documents in accordance with the Board's record retention policy. Although the commenter noted that the DOJ guidance, which also provides for a 10-year expiration period on confidential treatment requests under Exemption 4,

preceded the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the commenter did not elaborate on how that decision bears on the standard 10-year expiration period. The Board will retain the 10-year expiration period with respect to requests for confidential treatment under § 261.15(a)(4) as that is the period provided for in the DOJ guidance. Additionally, the Board does not believe its record retention policies, which govern the management, scheduling, and disposition of Board records, are an appropriate standard to address the confidentiality of information contained in those Board records.

Another commenter argued that any expiration period is inappropriate in light of the ongoing and frequent submission by supervised financial institutions of highly sensitive, nonpublic information. The commenter further argued that the provision allowing submitters of information to renew their requests for confidentiality prior to the 10-year expiration date will not mitigate the risk to financial institutions given the unlikelihood that institutions will retain personnel who are adequately familiar with the sensitive information that was the subject of a request for confidential treatment submitted years earlier. The Board notes, however, that the fact that the 10-year period has not expired is not dispositive of whether information that a submitter has designated confidential in reliance upon § 261.15(a)(4) will be withheld. Indeed, at the time of any FOIA request for the information, the Board must make a determination regarding whether the information is subject to withholding under Exemption 4 even if the 10-year period has not expired. Information that may have been confidential at the time

submitted may lose its confidentiality at a later time, whether as a result of the submitter's public release of the information or other factors. In any event, under § 261.18(b)(1), when information has been designated in good faith as protected from disclosure under either Exemption 4 or 6, the Board will provide written notice to submitters if their designated confidential information becomes the subject of a FOIA request and the Board determines that it may be required to disclose the information. In response, however, to the comments expressing concerns regarding the requirement that submitters of information who wish their information to be treated confidentially beyond the initial 10-year period renew their requests for confidential treatment, the Board's final rule removes the renewal requirement. The final rule instead incorporates language from the DOJ guidance to provide that a request for confidential treatment will expire 10 years after the date of submission unless the submitter requests and provides justification for a longer designation period. This revision will permit a submitter to request a longer designation period at the time of the initial submission.

In response to comments and for the reasons described below in connection with § 261.18, the Board's final rule removes the second sentence of proposed § 261.17(b), which referenced the "competitive harm" test under Exemption 4 of the FOIA. The Board did not receive any comments on other provisions of § 261.17.

§ 261.18 Process for addressing a submitter's request for confidential treatment.

Three commenters asked that the Board remove all references to "competitive harm" in the regulation in light of the Supreme Court's decision in *Food Marketing*

Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019), which was issued after the Board’s proposed rule. In *Argus Leader*, the Supreme Court rejected the longstanding “competitive harm” test used to determine whether information is confidential under Exemption 4. Commenters further asked that the Board provide explicit assurances of privacy with respect to commercially sensitive information provided to the Board. In light of *Argus Leader*, the Board has removed all references in the rule to the “competitive harm” test. Because, however, the Supreme Court did not reach the question of whether an assurance of confidentiality by the government is a necessary condition for information to be treated confidentially under Exemption 4, the Board is not adopting the recommendation to incorporate an explicit assurance of privacy.

Additionally, following *Argus Leader*, DOJ issued guidance on Exemption 4 (“DOJ Exemption 4 guidance”) which provides that an assurance of confidentiality by the government “can be either explicit or implicit.”⁴ DOJ also prepared a step-by-step guide for Exemption 4 analysis which provides that submitters of confidential information may rely on “express or implied” assurances of confidentiality when submitting commercial or financial information to an agency.⁵ To ensure consistent analysis with DOJ

⁴ U.S. Department of Justice, Office of Information Policy, *Exemption 4 After the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media*, <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media> (last updated Oct. 4, 2019).

⁵ U.S. Department of Justice, Office of Information Policy, *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained From a Person is Confidential Under Exemption 4 of the FOIA*, <https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential> (last updated Oct. 7, 2019).

Exemption 4 guidance, the Board plans to use the DOJ's step-by-step guide when analyzing the application of Exemption 4. The Board did not receive any other comments concerning proposed § 261.18 and the final rule otherwise adopts the section as proposed.

§ 261.20 General.

The Board received a few comments on § 261.20. Commenters objected to the prohibition at § 261.20(a) which applies to both use and disclosure of confidential supervisory information for an unauthorized purpose. Commenters argued that the prohibition on unauthorized use introduces ambiguity and will increase the potential of inadvertent violations including violations by officers, directors, and employees who may use confidential supervisory information over a long period of time for varying business purposes. One commenter asserted that the prohibition on unauthorized disclosure sufficiently protects the Board's interests. The Board does not agree that the prohibition on use for an unauthorized purpose is ambiguous or exposes directors, officers, and employees of supervised financial institutions to the risk that they will run afoul of the prohibition. The Board's final rule allows supervised financial institutions to disclose confidential supervisory information to their directors, officers, and employees when "necessary or appropriate for business purposes." Accordingly, the use of confidential supervisory information by directors, officers, and employees for a necessary or appropriate business purpose consistent with the final rule, in the Board's view, constitutes use for an authorized purpose. Moreover, the Board believes the prohibition

against use for unauthorized purposes is necessary to proscribe impermissible uses such as use of the Board's confidential information for personal gain.

Another commenter also expressed concern that the Board should not deem conduct in violation of the rule's prohibition on unauthorized use and disclosure of confidential supervisory information as within the purview of 18 U.S.C. 641, which imposes federal criminal liability on whoever "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof." The commenter suggested that the threat of criminal sanctions for improper sharing of confidential supervisory information creates a chilling effect on employees of supervised financial institutions that inhibits beneficial information sharing internally and with third-party advisors. The Board does not believe that the prospect of criminal penalties under section 641 will inhibit disclosures authorized under the Board's Rules, which have been revised to allow internal disclosures "when necessary or appropriate for business purposes." In addition, the Board's Rules permit disclosures to outside legal counsel and auditors "when necessary or appropriate" in connection with the provision of legal or auditing services and to service providers when the "disclosure is deemed necessary" to the service providers' provision of services. Moreover, unauthorized disclosures that lack criminal intent, such as those made inadvertently, would not be subject to prosecution under section 641. Where the requisite criminal intent to steal or knowingly convert the information may be

present, criminal prosecution may be appropriate. *See, e.g., United States v. Blaszcak*, 947 F.3d 19, 39 (2d Cir. 2019); *United States v. Fowler*, 932 F.2d 306, 309-10 (4th Cir. 1991); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979). In those instances, the Board cooperates with law enforcement agencies in their investigations of potential violations of the statute. The commenter further suggested that the prospect of criminal sanctions may put supervised financial institutions in the position of having to choose between complying with congressional subpoenas and refusing to comply in order to avoid the threat of criminal sanctions for disclosing confidential supervisory information if the Board does not consent to the disclosure. The Board's Rules, however, do not sanction supervised financial institutions' non-compliance with congressional or other legally enforceable demands. Rather, the Board's Rules set forth a process for an institution to obtain permission to disclose confidential supervisory information in response to subpoenas or other legally enforceable demands including from congressional committees.

As discussed above, one commenter suggested the Board revise § 261.20(c) to provide that the Board will exercise its discretion to release confidential supervisory information only where the failure to do so would be manifestly contrary to the public interest. Because the Board has authority to disclose confidential supervisory information to "any . . . person that the Board determines to be proper," 12 U.S.C. 326, it would not be appropriate to constrain the Board's authority as proposed by the

commenter. Accordingly, the Board did not adopt the recommended change. The Board did not receive any further comments to § 261.20.

§ 261.21 Confidential supervisory information made available to supervised financial institutions.

Disclosures to directors, officers, and employees

The Board received several comments on its proposed revisions to § 261.21(b), addressing disclosures to and by supervised financial institutions. While many commenters were supportive of expanding the scope of authorized disclosures to the affiliates of supervised financial institutions under paragraph (b)(1), they disagreed with the proposal's qualification conditioning disclosure to the directors, officers, and employees of supervised financial institutions and their affiliates on their "need for the information in the performance of official duties." Commenters argued that there could be ambiguity regarding the meaning of "need" and what qualifies as an individual's "official duties," and that these ambiguities increase the risk of inconsistent application of the Board's Rules and potentially subject firms' internal disclosures to the Board's second-guessing. As an alternative, three commenters suggested that the Board adopt the OCC's language and permit disclosures that are "necessary or appropriate for business purposes." The Board agrees. Accordingly, the final rule permits supervised financial institutions to disclose confidential supervisory information to their directors, officers, and employees and to the directors, officers, and employees of their affiliates "when necessary or appropriate for business purposes." Additionally, one commenter questioned whether the limitation on sharing confidential supervisory information applies

only to disclosures made to the directors, officers, or employees of affiliates. The final rule addresses this concern and makes clear that the “necessary or appropriate for business purposes” standard applies to all directors, officers, and employees, including at the supervised financial institution and its affiliates.

A few commenters suggested that the final rule should treat contingent workers and independent contractors as employees rather than as service providers for purposes of access to confidential supervisory information in light of the “business as usual” roles these individuals fulfill. The Board declines to make this change. Instead, to address the concerns, we streamlined the process for access by all service providers including contingent workers and independent contractors. The final rule does not require the Federal Reserve’s prior approval of disclosures to contingent workers or independent contractors. Where necessary for the provision of the services, the supervised financial institution may provide the contingent worker or independent contractor access to confidential supervisory information if the individual is under a written contract with the supervised financial institution that includes the confidentiality agreements specified in the rule.

Disclosures to the FDIC, OCC, CFPB, and state financial supervisory agencies

The Board also received a number of comments on § 261.21(b)(2), which proposed to permit supervised financial institutions to disclose confidential supervisory information directly to the Federal Deposit Insurance Corporation (“FDIC”), the OCC, the CFPB, and the state financial supervisory agency that supervises the institution, so

long as the institution's central point of contact at the Reserve Bank or equivalent supervisory team leader ("CPC") concurred that the receiving agency had a legitimate supervisory or regulatory interest in the information. Commenters suggested the final rule be revised to eliminate the prior approval requirement for these disclosures arguing that the requirement is administratively burdensome. Commenters in particular noted that supervised financial institutions routinely receive requests from their banking regulators for certain internally-prepared materials, such as board and committee meeting minutes and materials, that reference the confidential supervisory information of another banking regulator. Commenters alternatively proposed that, at most, the rule should require supervised financial institutions to provide CPCs notice and an opportunity to object to the disclosure of confidential supervisory information to their other banking regulators.

The Board declines to remove the requirement that supervised financial institutions obtain Federal Reserve approval of disclosures of confidential supervisory information to the FDIC, the OCC, the CFPB, and state banking agencies. Because the regulators have different scopes of authority, Federal Reserve review of proposed disclosures is necessary to ensure that the information provided is relevant to the agency's supervisory responsibilities. The Board further notes that the banking regulators and the CFPB have no parallel provision in their respective rules that allows supervised entities to disclose nonpublic information of the agencies to the Board.

The Board, however, has decided that further revisions to paragraph (b)(2) are warranted both to limit the types of requests that may be approved under the paragraph and to clarify to whom requests should be directed. As the provision is intended to enable the expeditious sharing of supervised financial institutions' internally-prepared documents, such as board and committee meeting minutes and materials, with the FDIC, the OCC, the CFPB, and state banking agencies, the Board revised paragraph (b)(2) to apply only to requests to release "confidential supervisory information . . . contained in documents prepared by or for the institution for its own business purposes." As one commenter stated, the supervised financial institutions should not be required to play a middleperson role between the Board and the other regulators. The Board agrees and recognizes that to the extent other documents, including but not limited to, examination reports or supervisory correspondence, are provided to other agencies, it is the responsibility of the Federal Reserve, not the supervised financial institution, to provide that information. The final rule's limitation on the scope of permitted requests under paragraph (b)(2) balances the institution's need for a streamlined process to respond to supervisory requests for internally-prepared documents containing confidential supervisory information, while recognizing that the institution should not act as an intermediary between the Board and the other agencies for the provision of other confidential supervisory information. Accordingly, all other requests to disclose confidential supervisory information to the FDIC, the OCC, the CFPB, state banking agency or other agencies are to be directed to the Board's General Counsel.

In addition, the final rule clarifies to whom requests are submitted under paragraph (b)(2) in recognition that the appropriate individual to approve requests may not always be the “CPC” or “equivalent supervisory team leader.” To that end, the final rule replaces the term “CPC” with “Reserve Bank Point of Contact” or “Reserve Bank POC” and defines that term to include not only the CPC or equivalent supervisory team leader but also any “other designated Reserve Bank employee.” Additionally, the final rule omits as redundant the reference in paragraph (b)(2) of the proposal to a supervised financial institution that is “lawfully in possession of confidential supervisory information about that institution pursuant to this section.”

Some commenters were concerned that the CPCs (now Reserve Bank POCs) would not be able to grant blanket approval for recurring disclosures. Reserve Bank POCs will, when consistent with internal supervisory procedures, have latitude to approve requests to disclose confidential supervisory information contained in specified categories of internally-prepared business documents with the FDIC, the OCC, the CFPB, and state banking agencies on a recurring basis.

The Board received one comment stating that the Board should include clear procedures for supervised financial institutions to appeal a CPC’s decision denying a request to disclose confidential supervisory information. The Board does not agree that the regulation needs to incorporate such specific procedures. The Board’s Rules do not preclude a supervised financial institution that disagrees with a Reserve Bank POC’s determination from requesting reconsideration. Additionally, the supervised financial

institution whose request is denied under § 261.21(b)(2) may advise the federal or state banking agency to submit a request for the Board's information directly to the Reserve Bank POC.

Section 261.21(b)(2) also provides, consistent with proposed § 261.21(b)(5), that the Reserve Bank POC's action under § 261.21(b)(2) may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures. Commenters expressed concerns that without common standards such as what circumstances or topics will require further Federal Reserve consultation, CPCs would provide different, inconsistent, and potentially arbitrary responses, and the process would create unnecessary delays that would undermine any efficiencies that might have resulted from the CPC approval process. While the Board believes that consultation within the Federal Reserve as part of the Reserve Bank POC approval process will lead to more consistent responses and improved efficiencies over time, the likelihood of achieving these goals is further increased given that requests under paragraph (b)(2) are now limited to requests to disclose confidential supervisory information contained in documents prepared by or for the supervised financial institution for its own business purposes. The provision acknowledging that concurrence of other Federal Reserve staff may be necessary reflects that confidential supervisory information is the Board's information and that in certain circumstances it will be appropriate for Board staff to review the specific proposed disclosures, for example, to ensure consistency in approach.

Two commenters requested that the final rule clarify that supervised financial institutions are authorized to disclose confidential supervisory information to state insurance regulators in accordance with the procedures set forth at § 261.21(b)(2). Another commenter argued that state financial supervisory agencies often appoint third-party firms, experts, or consultants to conduct or assist in examinations of supervised financial institutions, and that § 261.21(b)(2) should be revised to provide for disclosures to such third parties appointed by the state financial supervisory agency. Three commenters further proposed that the Board’s final rule include procedures for supervised financial institutions to disclose confidential supervisory information to foreign bank supervisors. We decline to incorporate these changes into the final rule. Section 261.21(b)(2) is intended to facilitate the disclosure of confidential supervisory information to the primary banking agencies and the CFPB—the regulators with whom the Board interacts most closely in its day-to-day supervisory activities. All other disclosures are best handled on an individual basis under §§ 261.22(c) or 261.23(c) so that the Board may conduct an appropriate review to ensure that the information that is proposed to be shared is needed in connection with the agency’s supervisory and other statutory responsibilities.

Disclosures to legal counsel and auditors

The Board also received comments regarding the disclosure of confidential supervisory information to outside legal counsel and auditors under § 261.21(b)(3). Commenters remarked favorably on the elimination of the requirement that legal counsel

and auditors view confidential supervisory information only on the premises of the supervised financial institution. Commenters, however, raised concerns with the proposal's requirement that legal counsel and auditors enter into specific written agreements in which they agree to certain requirements concerning their handling and use of confidential supervisory information. Many commenters questioned the need for the agreements given that legal counsel and auditors are already bound by professional ethical and confidentiality obligations with one commenter suggesting that the requirement would conflict with such obligations as well as with applicable laws and regulations. The same commenter further noted that the requirement to return or destroy the confidential supervisory information or to otherwise make electronic copies inaccessible at the conclusion of the legal counsel's or auditor's engagement would be burdensome and possibly impractical. Commenters recommended that the final rule eliminate the requirement that legal counsel and auditors enter into specific written agreements and permit supervised financial institutions to disclose confidential supervisory information to these third parties "when necessary or appropriate for business purposes." We agree. Accordingly, the final rule authorizes supervised financial institutions to disclose confidential supervisory information to their legal counsel and auditors "[w]hen necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution" without the need for a written agreement addressing the use and handling of confidential supervisory information.

Some commenters also requested that the Board clarify that litigation vendors and similar service providers providing services to legal counsel are authorized to access confidential supervisory information to the extent necessary in their performance of services for the financial institution. We agree with this addition. The final rule provides that the supervised financial institution may also disclose confidential supervisory information to service providers of its legal counsel or auditors if the service provider is under a written agreement with the legal counsel or auditor in which the service provider agrees to treat the Board’s information in accordance with § 261.20(a) and that it will not use the information for any purpose other than as necessary to provide services to the supervised financial institution. The final rule also clarifies that the reference to service providers—both under paragraphs (b)(3) and (b)(4)—includes independent contractors, in addition to consultants, contingent workers, and technology providers. One commenter additionally suggested that the final rule be revised to permit legal counsel and auditors to disclose confidential supervisory information to their affiliates in the performance of legal and auditing services for the financial institution. We view adoption of this suggestion as unnecessary given that the need for these types of disclosures do not appear to be common and thus can be handled on a case-by-case basis.

Disclosures to other service providers

The Board also received a number of comments on § 261.21(b)(4) regarding the disclosure of confidential supervisory information by supervised financial institutions to their other service providers, including consultants and independent contractors. While

commenters appreciated that the proposal would improve efficiency by allowing firms to submit their requests to their Reserve Bank CPCs rather than the General Counsel, commenters urged the Board to eliminate any prior approval requirement and to adopt a rule similar to the OCC's which permits national banks to disclose nonpublic OCC information to their consultants subject to certain written confidentiality agreements. Commenters cited the inefficiencies and burdens associated with a prior approval requirement and the critical role consultants play in assisting firms in meeting supervisory and regulatory requirements. One commenter suggested that the Board require supervised financial institutions to maintain a log of confidential supervisory information disclosures to service providers that may be subject to examiner review in lieu of prior approval. The Board agrees with the comments and has removed the requirement to obtain CPC approval to disclose confidential supervisory information to service providers. Under the final rule, a supervised financial institution is authorized to disclose confidential supervisory information to a service provider if the service provider is under a written contract to provide services to the institution, the disclosure of confidential supervisory information is deemed necessary to the provision of the services, and the service provider has a written agreement with the institution that includes the written agreements set forth at § 261.21(b)(4)(i)-(ii).

The Board is also adopting the suggestion that it require supervised financial institutions to maintain a log of confidential supervisory information disclosures to service providers that is subject to examiner review. The final rule requires supervised

financial institutions to maintain a written account of their disclosures to service providers under § 261.21(b)(4) and to provide the Board or Reserve Bank a copy of the written account upon request. The written account should allow the supervised financial institution to identify the actual confidential supervisory information that was disclosed to the service provider. The written account is intended to protect the confidentiality of the Board's privileged information in the hands of a wide array of service providers and also to ensure accountability and compliance with the rule and the parameters for appropriately disclosing confidential supervisory information under § 261.21(b)(4). The firm is expected to have reasonable assurance of such accountability and compliance through maintenance of the written account and more broadly through the policies, procedures, and controls that apply to the disclosure of confidential supervisory information.

§ 261.22 Nonpublic information made available by the Board to governmental agencies and entities exercising governmental authority.

The Board received three comments regarding § 261.22. One commenter recommended that the Board revise § 261.22(a), which addresses disclosures by the Federal Reserve to federal and state financial supervisory agencies, and § 261.22(b), which addresses disclosures to certain governmental officials in furtherance of specific statutory responsibilities, to provide that the Federal Reserve will disclose confidential supervisory information and other nonpublic information under those sections only when disclosure would be appropriate in light of the general factors that govern the General Counsel's decision to disclose confidential supervisory information to other

governmental agencies under § 261.22(c). Under § 261.22(c), other federal, state, and local agencies and other entities exercising governmental authority may file written requests with the Board for access to confidential supervisory information and other nonpublic information. Section 261.22(c)(2) provides that the General Counsel may approve such requests if “[t]he information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;” “[s]atisfactory assurances of confidentiality have been given;” and “[d]isclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.” The Board does not agree that the rule should be revised to provide that the Federal Reserve will disclose confidential supervisory information and other nonpublic information under paragraphs (a) and (b) only when disclosure would be appropriate under the factors set forth under paragraph (c)(2). The specific delegations authorizing the disclosure of confidential supervisory information to the FDIC, the OCC, the CFPB, and state financial supervisory agencies and the disclosure of confidential supervisory information to particular governmental officials in furtherance of specific statutory responsibilities are codified at § 261.22(a) and (b) based on the Board’s determination that the authorized disclosures satisfy the considerations set forth at § 261.22(c)(2)(ii)-(iv). Indeed, the delegations at paragraphs (a) and (b) were established because the Board determined that the named agencies and officials in those sections require confidential supervisory information in connection with their official duties on a recurring basis and that given the close coordination between the agencies authorizing disclosures on a case-by-case basis does

not further the Board's supervisory and regulatory responsibilities. Furthermore, all disclosures under § 261.22, including those made under paragraphs (a) and (b), are subject to the confidentiality restrictions set forth in the Board's Rules.

Another commenter recommended that the Board add state insurance regulatory authorities to the regulators included at § 261.22(a). The Board declines to make this change. Section 261.22(a) is intended to delegate information sharing at the staff level in order to facilitate the disclosure of confidential supervisory information to the primary banking regulators and the CFPB—the regulators with whom the Board interacts most closely in its day-to-day supervisory activities. Disclosures to the other functional regulators, including state insurance supervisors, are better addressed by the General Counsel on a case-by-case basis under § 261.22(c) or in accordance with written memoranda of understanding between the agencies.

The same commenter stated that the Board should 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 that the Federal Reserve will notify supervised financial institutions of any such subpoena or court order to the extent legally permissible. The commenter also suggested that the final rule should provide a mechanism for an institution to challenge the Federal Reserve's transfer of such material. The Board, however, only transfers attorney-client, work product, or other privileged materials in accordance with applicable law including 12 U.S.C. 1821(t) and 1828(x). The law does not require prior notice to the supervised

financial institution of a request including an enforceable subpoena or court order for privileged materials. Additionally, such notice would not be appropriate as it may reveal confidential information about an agency's pending actions involving the supervised financial institution and, in some cases, such as grand jury subpoenas, would also not be permitted. The Board is cognizant of the privilege concerns and thus encourages institutions to clearly mark their attorney-client, work product, or other materials as privileged. Accordingly, the Board declines to make the proposed changes.

§ 261.23 Other disclosure of confidential supervisory information.

The Board received three comments on § 261.23. One commenter supported the Board's revisions to § 261.23(b)(2)(iii) requiring requesters "to provide a narrow and specific description of the confidential supervisory information the requester seeks to access or to disclose in the litigation" and to provide "the reason why the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source," but argued that supervised financial institutions should have the opportunity to provide input on third-party requests to use confidential supervisory information in litigation. The commenter asserted that the Board should grant supervised financial institutions the opportunity to provide input on such requests because financial institutions are best suited to address the intent of the requester. The commenter also contended that there is a potential for the development of mistrust between financial institutions and the Board if institutions are not afforded an opportunity to provide input on the disclosure of confidential supervisory information. The Board does not agree that

any change to the final rule is warranted. The Board's Rules set forth stringent standards for the disclosure of confidential supervisory information that recognize the sensitivity of the information and disfavor the granting of a request absent substantial need. Moreover, the Board may, on a case-by-case basis, seek the input of supervised financial institutions if it would be of assistance in resolving specific requests for access to confidential supervisory information. In many cases, the institution is a party to the litigation and may provide input.

Another commenter requested that the Board clarify that third parties who are authorized to access confidential supervisory information for litigation purposes are prohibited from further disclosing the information. The Board does not believe this clarification is necessary as the Board's Rules state that confidential supervisory information remains the property of the Board and that no person to whom the information is made available may use the information for an unauthorized purpose or disclose the information without the prior written permission of the General Counsel. In addition, the Board's authorization letters approving the use of confidential supervisory information for litigation purposes also emphasize the restriction on further disclosures and generally require that the parties obtain a protective order acceptable to the Board.

Lastly, one commenter stated that the Board should affirm that it will not produce to litigants materials that are covered by 12 U.S.C. 1828(x) and that the Board should otherwise notify supervised financial institutions so that they may assert privilege or other grounds for withholding the information if the Board believes that there is a

question as to whether § 1828(x) applies. The Board does not believe such a clarification to § 261.23 is warranted because these requests are rare and, when they arise, the Board's Rules provide sufficient flexibility to address them. Under the Board's Rules, the litigant must show that "the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source." Because the litigant can seek the firm's privileged material directly from the firm through existing discovery processes, the Board would not have reason to grant the litigant's request. In the rare instance that the disclosure of privileged materials were necessary, those requests would generally be handled in consultation with the firm as the Board would ask the firm to confirm that a court has ordered or the firm has authorized production of the firm's privileged information. The Board did not receive any other comments regarding § 261.23 and the final rule adopts the section as proposed.

§ 261.24 Subpoenas, orders compelling production, and other process.

The Board did not receive any comments on proposed § 261.24 and the final rule adopts the section as proposed.

III. Administrative Law Matters

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, the Board published an initial regulatory flexibility analysis with the proposal. The Board did not receive any comments on its initial regulatory flexibility analysis. The RFA requires a federal agency to prepare a final regulatory flexibility analysis unless the

agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Based on its analysis, and for the reasons stated below, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.⁶

Under regulations issued by the Small Business Administration, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of \$600 million or less and trust companies with annual receipts of \$41.5 million or less.⁷ As of March 2020, there were approximately 2,925 small bank holding companies, 132 small savings and loan holding companies, and 472 small state member banks. As of March 2020, the Board does not supervise any small trust companies.

As stated in the initial regulatory flexibility analysis, the requirements set forth in the rule with respect to requests for Board records under the FOIA and requests to access and disclose confidential supervisory information apply equally to all persons and to all entities regardless of their size. The rule, which in part introduces organizational changes to clarify the Board's FOIA regulation, does not impose economic effects on FOIA requesters, including any FOIA requesters that would be small entities. Notably, consistent with the FOIA, the Board's fees for processing FOIA requests are limited to reasonable standard charges, and the processing fees have not been increased by the final rule. Similarly, far from imposing any economic costs on supervised financial

⁶ 5 U.S.C. 605(b).

⁷ See 13 CFR 121.201; 84 FR 34261 (July 18, 2019).

institutions, the Board’s clarifications to the rules governing access to and disclosure of the Board’s confidential supervisory information ease certain outdated restrictions that hamper supervised financial institutions in their ability to further disclose confidential supervisory information of the Board within their organizations as well as with their outside legal counsel, auditors, and other service providers. The final rule imposes minimal reporting, recordkeeping, or other compliance requirements, including the reporting requirements under §§ 261.22(c), 261.23(b) and (c), and 261.24(a)(1); the recordkeeping requirement under § 261.21(b)(4); and the disclosure requirements under § 261.24(a)(2) and (a)(3). As noted in the discussion of the Paperwork Reduction Act below, the Board has estimated the reporting, recordkeeping, and disclosure requirements would impose an annual burden of approximately 134 hours on all respondents. For these reasons, the Board certifies that the final rule will not have a significant economic impact on a substantial of number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) (“PRA”) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board, as well as the authority to temporarily approve a new collection of information without providing opportunity for public

comment if the Board determines that a change in an existing collection must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection or substantially interfere with the Board's ability to perform its statutory obligation.

This final rule contains collections of information subject to the PRA, including certain reporting and disclosure requirements in subpart C that have not previously been cleared by the Board under the PRA. In order to accurately account for these requirements pursuant to the PRA, the Board has temporarily approved new collections of information titled Information Collections Associated with the Rules Regarding Availability of Information (FR 4035; OMB No. 7100-NEW).

The Board's delegated authority requires that the Board, after temporarily approving a collection, solicit public comment to extend the information collection for a period not to exceed three years. Therefore, the Board is inviting comment to extend the FR 4035 information collections for three years.

The Board invites public comment on the FR 4035 information collections, which are being reviewed under authority delegated by the OMB under the PRA. Comments must be submitted on or before **[insert date 60 days after date of publication in the Federal Register]**. Comments are invited on the following:

- a. Whether the collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

- b. The accuracy of the Board’s estimate of the burden of the information collections, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected;
- d. Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and
- e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the collections.

Final Approval under OMB Delegated Authority of the Temporary Implementation of, and Solicitation of Comment to Extend for Three Years, the Following Information Collection:

Collection title: Information Collections Associated with the Rules Regarding Availability of Information.

Agency form number: FR 4035.

OMB control number: 7100-NEW.

Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

Frequency: Event generated.

Respondents:

§ 261.21(b)(4)	Supervised financial institutions
§ 261.22(c)	State, local, and foreign agencies and entities exercising governmental authority
§ 261.23(b)	Any person
§ 261.23(c)	Any person
§ 261.24(a)	Any person

Estimated number of respondents:

§ 261.21(b)(4)	60
§ 261.22(c)	20
§ 261.23(b)	15
§ 261.23(c)	30
§ 261.24(a)	3

Estimated average hours per response:

§ 261.21(b)(4)	0.25
§ 261.22(c)	0.5
§ 261.23(b)	1
§ 261.23(c)	1
§ 261.24(a)(1)	1
§ 261.24(a)(2)	1
§ 261.24(a)(3)	1

Estimated annual burden hours:

§ 261.21(b)(4)	60
§ 261.22(c)	20
§ 261.23(b)	15
§ 261.23(c)	30
§ 261.24(a)(1)	3
§ 261.24(a)(2)	3
§ 261.24(a)(3)	3

General description of information collection:

Subpart C provides for certain reporting, recordkeeping, and disclosure requirements under the PRA. As discussed in further detail below, the subpart contains reporting requirements to enable third parties to request the Board's authorization to access, use, or further disclose confidential supervisory information or other nonpublic information of the Board, and to ensure that the Board is informed when any subpoena or other legally enforceable demand requires production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony. Additionally, the subpart contains one recordkeeping requirement related to the provision that allows supervised financial institutions to disclose the Board's confidential supervisory information to service providers if the disclosure is deemed necessary to the service provider's provision of services. It also contains two disclosure requirements when individuals are served with a subpoena, order, or other judicial or administrative process requiring the production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony.⁸

Reporting: Pursuant to § 261.22(c), state, local, and foreign agencies and other entities exercising governmental authority may file written requests to the General

⁸ Subpart C of the final rule generally prohibits supervised financial institutions from disclosing the Board's confidential supervisory information without prior approval. However, § 261.21(b) of the final rule provides that such institutions may "disclose" confidential supervisory information, under certain circumstances, to various persons, without prior approval. This provision does not grant positive authority to disclose the Board's information or impose a separate "requirement" under the PRA to disclose such information. Instead, it defines the scope

Counsel for access to the Board’s confidential supervisory information and other nonpublic information.⁹ Such written requests must include the information specified at § 261.22(c)(1)(i)-(v). Pursuant to § 261.23(b), any person that seeks to access, use or disclose, or require another person to disclose the Board’s confidential supervisory information in connection with litigation before a court, board, commission, agency, or arbitration must file a written request with the General Counsel. Such a request must include the information specified in § 261.23(b)(2). Additionally, pursuant to § 261.23(c), any other person seeking to access, use, or disclose the Board’s confidential supervisory information for any other purpose shall file a written request with the General Counsel. Such a request must describe the purpose for which access, use, or disclosure is sought and the requester must provide other information as requested by the General Counsel. Finally, pursuant to § 261.24(a)(1), any person who is served with a subpoena, order, or other judicial or administrative process requiring the production of the Board’s confidential supervisory information or other nonpublic information or requiring the person’s testimony regarding such Board information in any proceeding is required to promptly inform the General Counsel of the service and all relevant facts, including the documents, information or testimony demanded, and any facts relevant to the Board in determining whether the Board material requested should be made available.

of the general prohibition against disclosing confidential supervisory information without prior approval.

⁹ Such a request may also be made by a federal agency. However, a federal agency is not considered a “person” under the PRA. Therefore, the FR 4035 information clearance for § 261.22(c) encompasses only requests by persons other than federal agencies.

The information provided in written requests made pursuant to the § 261.22(c) enables the General Counsel to determine, pursuant to § 261.22(c)(2), whether “[t]he information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;” whether “[s]atisfactory assurances of confidentiality have been given;” and whether “[d]isclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.” The information provided in written requests pursuant to § 261.23(b) and (c) allows the Board to determine, pursuant to § 261.23(d), whether the “[t]he person seeking access, or the person to whom access would be provided, has shown a substantial need to access [the Board’s] confidential supervisory information that outweighs the need to maintain confidentiality” and whether “[a]pproval is consistent with the supervisory and regulatory responsibilities and policies of the Board.” Finally, the information provided pursuant to § 261.24(a) allows the Board to determine whether the Board’s confidential supervisory information or other nonpublic information should be disclosed in response to a subpoena or other legally enforceable demand.

Recordkeeping: Pursuant to § 261.21(b)(4), a Board-supervised financial institution must maintain a written account of the disclosures of the Board’s confidential supervisory information that the supervised financial institution makes to service providers under that section and provide the Board or Reserve Bank with a copy of the written account upon request. The Board has decided to implement this recordkeeping requirement in light of its decision to eliminate the longstanding requirement that

supervised financial institutions request the Board's authorization to disclose the Board's confidential supervisory information to service providers. As explained above, the Board received public comments requesting that the Board eliminate the prior approval requirement for service providers, citing the inefficiencies and burdens associated with requesting and waiting for Federal Reserve approval before being able to disclose the Board's confidential supervisory information to service providers, such as consultants and contingent workers. While supervised financial institutions will no longer be required to request approval from the Board to disclose the Board's confidential supervisory information to their service providers, the new recordkeeping requirement is necessary to maintain accountability and supervisory oversight with respect to disclosures of the Board's privileged information to a wide array of third-party service providers.

Disclosure: In addition to the reporting requirement described under § 261.24(a)(1), § 261.24 also imposes two related disclosure requirements on persons who are served with a subpoena, order, or other judicial or administrative process requiring the production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony. Under § 261.24(a)(2) and (a)(3), the person is required to inform the entity that issued the process and, at the appropriate time, the relevant court or tribunal of the substance of the Board's Rules and, in particular, of the obligation to follow the request procedures in § 261.23(b). These disclosure requirements help to ensure that the Board's confidential information is not disclosed in proceedings other than as authorized by the General Counsel.

Current actions:

The Board has temporarily implemented the collections of information contained within subpart C pursuant to its authority to approve temporarily a collection of information without providing opportunity for public comment. The Board has determined that these collections of information must be instituted quickly and that public participation in the approval process would defeat the purpose of the collections and substantially interfere with the Board's ability to carry out its statutory obligations. In particular, the Board has determined that because the reporting and disclosure requirements are existing requirements that facilitate the Board's processing of requests to access and use the Board's confidential supervisory information, the Board's ability to perform its statutory responsibilities relating to the disclosure, production, or withholding of the Board's information would be diminished if the Board were unable to enforce the collections of information contained within subpart C due to possible noncompliance with the PRA. The Board also invites comment to extend the FR 4035 information collections for three years.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires each federal banking agency to use plain language in all rules published after January 1, 2000. In light of this requirement, the Board believes this final rule is presented in a simple and straightforward manner and is consistent with this "plain language" directive.

List of Subjects

12 CFR Part 261

Administrative practice and procedure, Confidential business information, Freedom of information, Reporting and recordkeeping requirements

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System revises 12 CFR Part 261 to read as follows:

PART 261 — RULES REGARDING AVAILABILITY OF INFORMATION

1. The authority citation of part 261 continues to read as follows:

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 248(i) and (k), 321 et seq., 611 et seq., 1442, 1467a, 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o), 1821(t), 1830, 1844, 1951 et seq., 2601, 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq.; 15 U.S.C. 77uuu(b), 78q(c)(3); 29 U.S.C. 1204; 31 U.S.C. 5301 et seq.; 42 U.S.C. 3601; 44 U.S.C. 3510.

2. Revise part 261 to read as follows:

Subpart A – General

Sec.

§ 261.1 Authority, purpose, and scope.

§ 261.2 Definitions.

§ 261.3 Custodian of records; certification; service; alternative authority.

§ 261.4 Prohibition against disclosure.

Subpart B – Published Information and Records Available to Public; Procedures for Requests

Sec.

- § 261.10 Published information.
- § 261.11 Records available to the public upon request.
- § 261.12 Processing requests.
- § 261.13 Responses to requests.
- § 261.14 Appeals.
- § 261.15 Exemptions from disclosure.
- § 261.16 Fee schedules, waiver of fees.
- § 261.17 Request for confidential treatment.
- § 261.18 Process for addressing a submitter’s request for confidential treatment.

Subpart C – Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances

Sec.

- § 261.20 General.
- § 261.21 Confidential supervisory information made available to supervised financial institutions.
- § 261.22 Nonpublic information made available by the Board to governmental agencies and entities exercising governmental authority.
- § 261.23 Other disclosure of confidential supervisory information.
- § 261.24 Subpoenas, orders compelling production, and other process.

Authority: 5 U.S.C. 552; 12 U.S.C. 248(i) and (k), 321 *et seq.*, 611 *et seq.*, 1442, 1467a, 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o), 1821(t), 1830, 1844, 1951 *et seq.*, 2601, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*; 15 U.S.C. 77uuu(b), 78q(c)(3); 29 U.S.C. 1204; 31 U.S.C. 5301 *et seq.*; 42 U.S.C. 3601; 44 U.S.C. 3510.

SUBPART A—GENERAL

§ 261.1 Authority, purpose, and scope.

(a) *Authority and purpose.* This part establishes mechanisms for carrying out the Board's statutory responsibilities relating to the disclosure, production, or withholding of information to facilitate the Board's interaction with financial institutions and the public. In this regard, the Board has determined that the Board or its delegees may disclose nonpublic information of the Board, in accordance with the procedures set forth in this part, whenever it is necessary or appropriate to do so in the exercise of any of the Board's authorities, including but not limited to authority granted to the Board in the Freedom of Information Act, 5 U.S.C. 552, Federal Reserve Act, 12 U.S.C. 221 *et seq.*, the Bank Holding Company Act, 12 U.S.C. 1841 *et seq.*, the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.*, and the International Banking Act, 12 U.S.C. 3101 *et seq.* The Board has determined that all such disclosures made in accordance with the rules and procedures specified in this part are authorized by law, and are, as applicable, disclosures to proper persons pursuant to 12 U.S.C. 326. This part also sets forth the categories of information made available to the public, the procedures for obtaining information and records, the procedures for limited release of nonpublic information, and the procedures for protecting confidential business information.

(b) *Scope.*

(1) This subpart A contains general provisions and definitions of terms used in this part.

(2) Subpart B implements the Freedom of Information Act (FOIA) (5 U.S.C. 552).

(3) Subpart C sets forth:

(i) The kinds of nonpublic information made available to supervised financial institutions, governmental agencies, and others in certain circumstances;

(ii) The procedures for disclosure; and

(iii) The procedures with respect to subpoenas, orders compelling production, and other process.

§ 261.2 Definitions.

For purposes of this part:

(a) *Affiliate* has the meaning given it in 12 CFR 225.2(a).

(b) (1) *Confidential supervisory information* means nonpublic 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, and any information derived from or related to such information. Examples of confidential supervisory information include, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports; supervisory assessments; investigative requests for documents or other information; and supervisory correspondence or other supervisory communications. Additionally, any portion of a document in the possession of any person, entity, agency or authority, including a

supervised financial institution, that contains or would reveal confidential supervisory information is confidential supervisory information.

(2) *Confidential supervisory information* does not include:

(i) Documents prepared by or for a supervised financial institution for its own business purposes that are in its own possession and that do not include confidential supervisory information as defined in paragraph (b)(1) of this section, even though copies of such documents in the Board's or Reserve Bank's possession constitute confidential supervisory information; or

(ii) Final orders, amendments, or modifications of final orders, or other actions or documents that are specifically required to be published or made available to the public pursuant to 12 U.S.C. 1818(u), the Community Reinvestment Act, or other applicable law.

(c) *Nonpublic information* means information that has not been publicly disclosed by the Board and that is:

(1) Confidential supervisory information, or

(2) Exempt from disclosure under § 261.15(a).

(d)(1) *Records of the Board* or *Board records* means all recorded information, regardless of form or characteristics, that is created or obtained by the Board and is under the Board's control. A record is created or obtained by the Board if it is created or obtained by:

(i) Any Board member or any officer, employee, or contractor of the Board in the conduct of the Board's official duties, or

(ii) Any officer, director, employee, or contractor of any Reserve Bank and either constitutes confidential supervisory information as defined in paragraph (b)(1) of this section or is created or obtained in the performance of Board functions delegated to the Reserve Bank pursuant to 12 U.S.C. 248(k).

(2) *Records of the Board* do not include:

(i) Personal files or notes of Board members, employees, or contractors; extra copies of documents and library and museum materials kept solely for reference or exhibition purposes; or unaltered publications otherwise available to the public in Board publications, libraries, or established distribution systems;

(ii) Records located at Reserve Banks other than those records identified in paragraph (d)(1) of this section; or

(iii) Records that belong to or are otherwise under the control of another entity or agency despite the Board's possession.

(e)(1) *Search* means a reasonable search of such records of the Board as seem likely in the particular circumstances to contain information of the kind requested.

(2) As part of the Board's search for responsive records, the Board is not obligated to conduct any research, create any document, or modify an electronic program or automated information system.

(f) *Supervised financial institution* 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); an Edge

Act or agreement corporation; 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.

(g) *Working day* means any day except Saturday, Sunday, or a legal Federal holiday.

§ 261.3 Custodian of records; certification; service; alternative authority.

(a) *Custodian of records.* The Secretary of the Board (Secretary) is the official custodian of all records of the Board.

(b) *Certification of record.* The Secretary may certify the authenticity of any Board record, or any copy of such record, for any purpose, and for or before any duly constituted federal or state court, tribunal, or agency.

(c) *Service of subpoenas or other process.* Subpoenas or other judicial or administrative process demanding access to any Board records or making any claim against the Board or against Board members or staff in their official capacity shall be addressed to and served upon the Secretary of the Board at the Board's office at 20th Street and Constitution Avenue NW, Washington, DC 20551. The Board does not accept service of process on behalf of any employee in respect of purely private legal disputes.

(d) *Alternative authority.* Any action or determination required or permitted by this part to be done by the Board, the Secretary, the General Counsel, the Director of any Division, or any Reserve Bank, may be done by any employee who has been duly authorized or designated for this purpose by the Board, the Secretary, the General

Counsel, the appropriate Director, or the appropriate Reserve Bank, respectively.

§ 261.4 Prohibition against disclosure.

Except as provided in this part or as otherwise authorized, no officer, employee, or agent of the Board or any Reserve Bank shall disclose or permit the disclosure of any nonpublic information of the Board to any person other than Board or Reserve Bank officers, employees, or agents properly entitled to such information for the performance of official duties.

SUBPART B—PUBLISHED INFORMATION AND RECORDS AVAILABLE TO PUBLIC; PROCEDURES FOR REQUESTS

§ 261.10 Published information.

(a) *Federal Register*. The Board publishes in the *Federal Register* for the guidance of the public:

- (1) Descriptions of the Board's central and field organization;
- (2) Statements of the general course and method by which the Board's functions are channeled and determined, including the nature and requirements of procedures;
- (3) Rules of procedure, descriptions of forms available and the place where they may be obtained, and instructions on the scope and contents of all papers, reports, and examinations;
- (4) Substantive rules, interpretations of general applicability, and statements of general policy;

(5) Every amendment, revision, or repeal of the foregoing in paragraphs (a)(1) through (a)(4) of this section; and

(6) Other notices as required by law.

(b) *Publications.* The Board maintains a list of publications on its website (at www.federalreserve.gov/publications). Most publications issued by the Board, including available back issues, may be downloaded from the website; some may be obtained through an order form located on the website (at www.federalreserve.gov/files/orderform.pdf) or by contacting Board Printing & Fulfillment, Federal Reserve Board, Washington, DC 20551. Subscription or other charges may apply for some publications.

(c) *Publicly available information.*

(1) *Electronic reading room.* The Board makes the following records available in its electronic reading room, <http://www.federalreserve.gov/foia/readingrooms.htm#rr1>.

(i) Final opinions, including concurring and dissenting opinions, as well as final orders and written agreements, made in the adjudication of cases;

(ii) Statements of policy and interpretations adopted by the Board that are not published in the *Federal Register*;

(iii) Administrative staff manuals and instructions to staff that affect the public;

(iv) Copies of all records, regardless of form or format –

(A) That have been released to any person under § 261.11; and

(B) (1) That because of the nature of their subject matter, the Board has determined have become or are likely to become the subject of subsequent requests for

substantially the same records; or

(2) That have been requested three or more times;

(v) A general index of the records referred to in paragraph (c)(1)(iv) of this section; and

(vi) The public section of Community Reinvestment Act examination reports.

(2) *Inspection in electronic format at Reserve Banks.* The Board may determine that certain classes of publicly available filings shall be made available for inspection in electronic format only at the Reserve Bank where those records are filed.

(3) *Privacy protection.* The Board may delete identifying details from any public record to prevent a clearly unwarranted invasion of personal privacy.

§ 261.11 Records available to the public upon request.

(a) *Procedures for requesting records.*

(1) Requesters are encouraged to submit requests electronically by filling out the required information at <https://www.federalreserve.gov/secure/forms/efoiaform.aspx>.

Alternatively, requests may be submitted in writing to the Office of the Secretary, Board of Governors of the Federal Reserve System, Attn: FOIA Requests, 20th Street and Constitution Avenue NW, Washington, DC 20551; or sent by facsimile to the Office of the Secretary, (202) 872–7565. Clearly mark the request FREEDOM OF INFORMATION ACT REQUEST.

(2) A request may not be combined with any other request or with any matter presented to the Board such as a protest on a pending application or a comment on a

public rulemaking. It may, however, be combined with a request for records under the Privacy Act pursuant to 12 CFR 261a.5(a) or a request for discretionary release of confidential supervisory information pursuant to § 261.23.

(b) *Contents of request.* A request must include:

(1) The requester's name, address, daytime telephone number, and an email address if available.

(2) A description of the records that enables the Board's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board's operations. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(3) A statement agreeing to pay the applicable fees. If the information requested is not intended for a commercial use (as defined in § 261.16(d)(1)) and the requester seeks a reduction or waiver of fees because he or she is either a representative of the news media, an educational institution, or a noncommercial scientific institution, the requester should include the information called for in § 261.16(g)(2).

(c) *Perfecting and defective requests.*

(1) The Board will consider the request to be perfected on the date the Office of the Secretary receives a request that contains all of the information required by paragraphs (b)(1)-(3) of this section.

(2) The Board need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this section.

(3) The Board may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

§ 261.12 Processing requests.

(a) *Receipt of requests.* Upon receipt of any request that satisfies the requirements set forth in § 261.11, the Office of the Secretary shall assign the request to the appropriate processing schedule, pursuant to paragraph (b) of this section. The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency or by a Reserve Bank, is the date the Office of the Secretary actually receives the request.

(b) *Multitrack processing.*

(1) The Board provides different levels of processing for categories of requests under this section.

(i) Requests for records that are readily identifiable by the Office of the Secretary and that have already been cleared for public release or can easily be cleared for public release may qualify for simple processing.

(ii) All other requests shall be handled under normal processing procedures, unless expedited processing has been granted pursuant to paragraph (c) of this section.

(2) The Office of the Secretary will make the determination whether a request qualifies for simple processing. A requester may contact the Office of the Secretary to learn whether a particular request has been assigned to simple processing. If the request has not qualified for simple processing, the requester may limit the scope of the request in order to qualify for simple processing by contacting the Office of the Secretary in writing, by letter or email, or by telephone.

(c) *Expedited processing.*

(1) A request for expedited processing may be made at any time. A request for expedited processing must be clearly labeled “Expedited Processing Requested.” The Board will process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information.

(2) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester’s sole occupation. Such a requester also must establish a particular

urgency to inform the public about the government activity involved in the request—one that extends beyond the public’s right to know about federal government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the Board may waive the formal certification requirement.

(3) Within 10 calendar days of receipt of a request for expedited processing, the Board will notify the requester of its decision on the request. A denial of expedited processing may be appealed to the Board in accordance with § 261.14. The Board will respond to the appeal within 10 working days of receipt of the appeal.

(d) *Priority of responses.* The Office of the Secretary will normally process requests in the order they are received in the separate processing tracks, except when expedited processing is granted in which case the request will be processed as soon as practicable.

(e) *Time limits.* The time for response to requests shall be 20 working days from when a request is perfected. Exceptions to the 20-day time limit are only as follows:

(1) In the case of expedited treatment under paragraph (c) of this section, the Board shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable.

(2) Where the running of such time is suspended for a requester to address fee requirements pursuant to § 261.16(c)(1) or (2).

(3) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), the Board may –

(i) Extend the 20-day time limit for a period of time not to exceed 10 working days, where the Board has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; and

(ii) Extend the 20-day time limit for a period of more than 10 working days where the Board has provided the requester with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or with an opportunity to arrange an alternative time frame for processing the original request or a modified request, and has notified the requester that the Board’s FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Board and of the requester’s right to seek dispute resolution services from the Office of Government Information Services.

§ 261.13 Responses to requests.

(a) When the Board receives a perfected request, it will conduct a reasonable search of Board records in its possession on the date the Board’s search begins and will review any responsive information it locates.

(b) If a request covers documents that were created by, obtained from, or classified by another agency, the Board may refer the request for such documents to that agency for a response and inform the requester promptly of the referral.

(c) In responding to a request, the Board will withhold information under this section only if –

(1) The Board reasonably foresees that disclosure would harm an interest protected by an exemption described in § 261.15(a); or

(2) Disclosure is prohibited by law.

(d) The Board will take reasonable steps necessary to segregate and release nonexempt information.

(e) The Board will notify the requester of:

(1) The Board’s determination of the request;

(2) The reasons for the determination;

(3) An estimate of the amount of information withheld, if any. An estimate is not required if the amount of information is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) The right of the requester to seek assistance from the Board’s FOIA Public Liaison; and

(5) When an adverse determination is made, the Board will advise the requester in writing of that determination and will further advise the requester of:

(i) The right of the requester to appeal any adverse determination within 90 calendar days after the date of the determination as specified in § 261.14;

(ii) The right of the requester to seek dispute resolution services from the Board's FOIA Public Liaison or the Office of Government Information Services; and

(iii) The name and title or position of the person responsible for the adverse determination.

(f) *Adverse determinations.* Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited treatment.

(g) *Providing responsive records.* The Board will normally send responsive, nonexempt documents to the requester by email but may use other means as arranged between the Board and the requester or as determined by the Board. The Board will attempt to provide records in the format requested by the requester.

§ 261.14 Appeals.

(a) *Appeal of adverse determination.* If the Board makes an adverse determination as defined in § 261.13(f), the requester may file a written appeal with the Board, as follows:

(1) The appeal should prominently display the phrase FREEDOM OF INFORMATION ACT APPEAL on the first page, and should be sent directly to FOIA-

Appeals@frb.gov or, if sent by mail, addressed to the Office of the Secretary, Board of Governors of the Federal Reserve System, Attn: FOIA Appeals, 20th Street & Constitution Avenue NW, Washington, DC 20551; or sent by facsimile to the Office of the Secretary, (202) 872-7565. If the requester is appealing the denial of expedited treatment, the appeal should clearly be labeled “Appeal for Expedited Processing.”

(2) A request for records under § 261.11 may not be combined in the same letter with an appeal.

(3) To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the adverse determination.

(b) Except as provided in § 261.12(c)(3), the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal by the Office of the Secretary. If an adverse determination is upheld on appeal, in whole or in part, the determination letter shall notify the appealing party of the right to seek judicial review and of the availability of dispute resolution services from the Office of Government Information Services as a nonexclusive alternative to litigation.

(c) The Board may reconsider an adverse determination, including one on appeal, if intervening circumstances or additional facts not known at the time of the adverse determination come to the attention of the Board.

§ 261.15 Exemptions from disclosure.

(a) *Types of records exempt from disclosure.* Pursuant to 5 U.S.C. 552(b), the following records of the Board are exempt from disclosure under this part:

(1) Any information that is specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to the executive order.

(2) Any information related solely to the internal personnel rules and practices of the Board.

(3) Any information specifically exempted from disclosure by statute to the extent required by 5 U.S.C. 552(b)(3).

(4) Any matter that is a trade secret or that constitutes commercial or financial information obtained from a person and that is privileged or confidential.

(5) Inter- or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the Board, provided that the deliberative process privilege shall not apply to records that were created 25 years or more before the date on which the records were requested.

(6) Any information contained in personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Any records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7).

(8) Any matter that is 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, including a state financial institution supervisory agency.

(b) Release of nonpublic information.

(1) The Board may make any nonpublic information furnished in connection with an application for Board approval of a transaction available to the public in response to a request in accordance with § 261.11, and may, without prior notice and to the extent it deems necessary, comment on such information in any opinion or statement issued to the public in connection with a Board action to which such information pertains.

(2) The fact that the Board has determined to release particular nonpublic information does not waive the Board's ability to withhold similar nonpublic information in response to the same or a different request.

(3) Except where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board or designated Board members, the Secretary, or the General Counsel determines that such disclosure would be in the public interest. The Board will provide predisclosure notice to submitters of confidential information in accordance with § 261.18(b)(1). Confidential supervisory information may only be released as set forth in subpart C.

(c) *Delayed release.* Except as required by law, publication in the *Federal Register* or availability to the public of certain information may be delayed if immediate disclosure would likely:

(1) Interfere with accomplishing the objectives of the Board in the discharge of its statutory functions;

(2) Interfere with the orderly conduct of the foreign affairs of the United States;

(3) Permit speculators or others to gain unfair profits or other unfair advantages by speculative trading in securities or otherwise;

(4) Result in unnecessary or unwarranted disturbances in the securities markets;

(5) Interfere with the orderly execution of the objectives or policies of other government agencies; or

(6) Impair the ability to negotiate any contract or otherwise harm the commercial or financial interest of the United States, the Board, any Reserve Bank, or any department or agency of the United States.

§ 261.16 Fee schedules; waiver of fees.

(a) *Fee schedules.* Consistent with the limitations set forth in 5 U.S.C. 552(a)(4)(A)(viii), the fees applicable to a request for records pursuant to § 261.11 are set forth in Appendix A of this section. These fees cover only the full allowable direct costs of search, duplication, and review. No fees will be charged where the average cost of collecting the fee (calculated at \$5.00) exceeds the amount of the fee.

(b) For purposes of computing fees:

(1) Search time includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Such activity is distinct from “review” of material to determine whether the material is exempt from disclosure.

(2) Direct costs mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating records in response to a request made under § 261.11, as shown in Appendix A below.

(3) Duplication refers to the process of making a copy, in any format, of a document.

(4) Review refers to the process of examining documents that have been located as being potentially responsive to a request for records to determine whether any portion of a document is exempt from disclosure. It includes doing all that is necessary to prepare the documents for release, including the redaction of exempt information. It does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(c) *Payment procedures.* The Board may assume that a person requesting records pursuant to § 261.11 will pay the applicable fees, unless the request includes a limitation on fees to be paid or seeks a waiver or reduction of fees pursuant to paragraph (g) of this section.

(1) *Advance notification of fees.* If the estimated charges are likely to exceed the amount authorized by the requester, the Office of the Secretary shall notify the requester of the estimated amount. Upon receipt of such notice, the requester may confer with the

Office of the Secretary to reformulate the request to lower the costs or may authorize a higher amount. The time period for responding to requests under § 261.12(e) and the processing of the request will be suspended until the requester agrees in writing to pay the applicable fees.

(2) *Advance payment.* The Board may require advance payment of any fee estimated to exceed \$250. The Board may also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. The time period for responding to a request under § 261.12(e) and the processing of the request will be suspended until the Office of the Secretary receives the required payment.

(3) *Late charges.* The Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717 and accrues from the date of the billing.

(d) *Categories of uses.* The fees assessed depend upon the intended use for the records requested. In determining which category is appropriate, the Board will look to the intended use set forth in the request for records. Where a requester's description of the use is insufficient to make a determination, the Board may seek additional clarification before categorizing the request.

(1) A *commercial use requester* is one who requests records for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(2) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience, including organizations that disseminate solely on the Internet. The term “news” means information that is about current events or that would be of current interest to the public. A non-affiliated journalist who demonstrates a solid basis for expecting publication through a news media entity, such as a publishing contract or past publication record, will be considered as a representative of the news media.

(3) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The Board may seek verification from the requester that the request is in furtherance of scholarly research.

(4) *Noncommercial scientific institution* is an institution that is not operated on a “commercial” basis, as defined in paragraph (d)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

Please refer to Appendix A to determine what fees apply for different categories of users.

(e) *Nonproductive search.* Fees for search and review may be charged even if no responsive documents are located or if the request is denied.

(f) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Board reasonably believes that a requester is separating a single request into a series of requests for the purpose of evading the assessment of fees, the Board may aggregate any such requests and charge accordingly. It is considered reasonable for the Board to presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(g) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in § 261.12(e), shall not begin until either a waiver has been granted or, if the waiver is denied, until the requester has agreed to pay the applicable fees.

(1) *Standards for determining waiver or reduction.* The Board will grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the Board will consider the following factors:

(i) Whether the subject of the records would shed light on identifiable operations or activities of the government with a connection that is direct and clear, not remote or attenuated; and

(ii) Whether disclosure of the information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The Board will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. A commercial interest includes any commercial, trade, profit, or litigation interest.

(2) *Contents of request for waiver.* A request for a waiver or reduction of fees must include:

- (i) A clear statement of the requester's interest in the documents;
 - (ii) The use proposed for the documents and whether the requester will derive income or other benefit for such use;
 - (iii) A statement of how the public will benefit from such use and from the Board's release of the documents;
 - (iv) A description of the method by which the information will be disseminated to the public; and
 - (v) If specialized use of the information is contemplated, a statement of the requester's qualifications that are relevant to that use.
- (3) The requester has the burden to present evidence or information in support of a request for a waiver or reduction of fees.
- (4) The Board will notify the requester of its determination on the request for a waiver or reduction of fees. The requester may appeal a denial in accordance with § 261.14(a).
- (5) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.
- (6) A request for a waiver or reduction of fees should be made when the request for records is first submitted to the Board and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is

denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

(h) *Restrictions on charging fees.*

(1) If the Board fails to comply with the FOIA's time limits in which to respond to a request, the Board may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(2)-(4) of this section, may not charge duplication fees, except as permitted under paragraphs (h)(2)-(4) of this section.

(2) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. 552(a)(6)(B), and has provided timely written notice to the requester and subsequently responds within the additional 10 working days as provided in § 261.12(e)(3), the Board may charge search fees, or, in the case of requests from requesters described in paragraph (d)(2)-(4) of this section, may charge duplication fees.

(3) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. 552(a)(6)(B), and more than 5,000 pages are necessary to respond to the request, then the Board may charge search fees, or, in the case of requesters described in paragraph (d)(2)-(4) of this section, may charge duplication fees, if the Board has:

(i) Provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

(ii) Discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(4) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(i) *Employee requests.* In connection with any request by an employee, former employee, or applicant for employment, for records for use in prosecuting a grievance or complaint of discrimination against the Board, fees shall be waived where the total charges (including charges for information provided under the Privacy Act of 1974 (5 U.S.C. 552a)) are \$50 or less; but the Board may waive fees in excess of that amount.

(j) *Special services.* The Board may agree to provide, and set fees to recover the costs of, special services not covered by the FOIA, such as certifying records or information and sending records by special methods such as express mail or overnight delivery.

Appendix A to § 261.16 Fees.

Type of requester	Search costs per hour	Review costs per hour	Duplication costs
Commercial	Clerical/Technical staff \$20	Clerical/Technical staff \$20	Photocopy per standard page10
	Professional/Supervisory staff \$40	Professional/Supervisory staff \$40	Other types of duplication Direct Costs
	Manager/Senior professional staff \$65	Manager/Senior professional staff\$65	
	Computer search, including computer search time, output, operator's salary Direct Costs		
Educational; or Non-commercial scientific; or News media	Costs waived	Costs waived	First 100 pages <i>free</i> , then: Photocopy per standard page10 Other types of duplication Direct Costs
All other requesters	First 2 hours <i>free</i> , then: Clerical/Technical staff \$20	Costs waived	First 100 pages <i>free</i> , then: Photocopy per standard page10
	Professional/Supervisory staff \$40		Other types of duplication Direct Costs
	Manager/ Senior professional staff \$65		
	Computer search, including computer search time, output, operator's salary Direct Costs		

§ 261.17 Request for confidential treatment.

(a) *Submission of request.* Any submitter of information to the Board who desires that such information be withheld pursuant to § 261.15(a)(4) or (a)(6) shall file a request for confidential treatment with the Board (or in the case of documents filed with a Reserve Bank, with that Reserve Bank) at the time the information is submitted or within 10 working days thereafter.

(b) *Form of request.* Each request for confidential treatment shall state in reasonable detail the facts supporting the request, provide the legal justification, use good faith efforts to designate by appropriate markings any portion of the submission for which confidential treatment is requested, and include an affirmative statement that such information is not available publicly. A submitter's request for confidentiality in reliance upon § 261.15(a)(4) generally expires 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *Designation and separation of confidential material.* All information considered confidential by a submitter shall be clearly designated *CONFIDENTIAL* in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential information from other material may result in release of the unsegregated material to the public without notice to the submitter.

(d) *Exceptions.* This section does not apply to:

(1) Data items collected on forms that are approved pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and deemed confidential by the Board. Any such

data items deemed confidential by the Board shall so indicate on the face of the form or in its instructions. The data may, however, be disclosed in aggregate form in such a manner that individual company data is not disclosed or derivable.

(2) Any comments submitted by a member of the public on applications and regulatory proposals being considered by the Board, unless the Board determines that confidential treatment is warranted.

(3) A determination by the Board to comment upon information submitted to the Board in any opinion or statement issued to the public as described in § 261.15(b)(1).

(e) *Special procedures.* The Board may establish special procedures for particular documents, filings, or types of information by express provisions in this part or by instructions on particular forms that are approved by the Board. These special procedures shall take precedence over this section.

§261.18 Process for addressing a submitter's request for confidential treatment.

(a) *Resolving requests for confidential treatment.* In general, a request by a submitter for confidential treatment of any information shall be considered in connection with a request for access to that information. At its discretion, the Board may act on a request for confidentiality prior to any request for access to the documents.

(b) *Notice to the submitter.*

(1) When the Board receives a FOIA request for information for which a submitter has requested confidential treatment, the Board shall promptly provide written notice of

the request to the submitter if the Board determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4) or (b)(6); and

(ii) The Board has reason to believe that the requested information may be protected from disclosure, but has not yet determined whether the information may be protected from disclosure.

(2) Where a submitter has not requested confidential treatment but the Board reasonably believes the requested information may be protected from disclosure under 5 U.S.C. 552(b)(4) or (b)(6), the Board may notify a submitter of the receipt of a request for access to that information and provide the submitter an opportunity to respond.

(3) The notice given to the submitter shall:

(i) Describe the information that has been requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Board may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications; and

(ii) Give the submitter a reasonable opportunity, not to exceed 10 working days from the date of notice, to submit written objections to disclosure of the information.

(c) *Exceptions to notice to submitter.* Notice to the submitter need not be given if:

(1) The Board determines that the information is exempt under the FOIA and, therefore, will not be disclosed;

(2) The requested information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute (other than 5 U.S.C. 552) or by a regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The submitter's claim of confidentiality appears obviously frivolous or has already been denied by the Board. In such case, the Board shall give the submitter written notice of the determination to disclose the information at least five working days prior to disclosure.

(d) *Notice to requester.* The requester shall be notified whenever:

(1) The submitter is provided with notice and an opportunity to object to disclosure under paragraph (b) of this section;

(2) The submitter is notified of the Board's intention to disclose the requested information; or

(3) The submitter files a lawsuit to prevent the disclosure of information.

(e) *Written objections by submitter.*

(1) Upon receipt of the notice referenced in paragraph (b) of this section, a submitter that has any objections to disclosure should provide a detailed written statement that specifies all grounds for withholding the particular information under any exemption

identified in § 261.15(a). A submitter relying on § 261.15(a)(4) as the basis for nondisclosure must explain why the information constitutes a trade secret or commercial or financial information that is confidential and must explain the consequences of disclosure of the information.

(2) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The Board is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart, including a written request for confidential treatment, may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Board's determination to disclose any information for which confidential treatment has been requested shall be communicated to the submitter immediately. If the Board determines to disclose the information and the submitter has objected to such disclosure pursuant to paragraph (e) of this section, the Board shall provide the submitter with the reasons for disclosure and shall delay disclosure for 10 working days from the date of the determination.

(g) *Notice of lawsuit.* The Board shall promptly notify any submitter of information covered by this section of the filing of any legal action against the Board to compel disclosure of such information.

Subpart C – Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances

§ 261.20 General.

(a) All confidential supervisory information and other nonpublic information,

including but not limited to information made available under this subpart, remains the property of the Board, and except as otherwise provided in this regulation, no person, entity, agency, or authority to whom the information is made available or who otherwise possesses the information, including any officer, director, employee, or agent thereof, may use any such information for an unauthorized purpose or disclose any such information without the prior written permission of the General Counsel.

(b) The disclosure of confidential supervisory information or other nonpublic information in accordance with this subpart shall not constitute a waiver by the Board of any applicable privileges.

(c) Nothing in this subpart shall be construed to limit or restrict the authority of the Board to impose any additional conditions or limitations on the use and disclosure of confidential supervisory information or other nonpublic information. Further, nothing in this subpart shall be construed to limit or restrict the authority of the Board to make discretionary disclosures of confidential supervisory information or other nonpublic information in addition to the disclosures expressly provided for in this subpart.

§ 261.21 Confidential supervisory information made available to supervised financial institutions.

(a) *Disclosure of confidential supervisory information to supervised financial institutions.* The Board or the appropriate Reserve Bank may disclose confidential supervisory information concerning a supervised financial institution to that supervised financial institution.

(b) *Disclosure of confidential supervisory information by supervised*

financial institutions.

(1) *General.* Any supervised financial institution lawfully in possession of confidential supervisory information pursuant to this section may when necessary or appropriate for business purposes disclose such information to its directors, officers, or employees, and to the directors, officers, or employees of its affiliates.

(2) *Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Bureau of Consumer Financial Protection, and state financial supervisory agencies.* Any supervised financial institution may, with the concurrence of the institution's central point of contact at the Reserve Bank, equivalent supervisory team leader, or other designated Reserve Bank employee (hereinafter, "Reserve Bank Point of Contact" or "Reserve Bank POC"), disclose confidential supervisory information about the institution that is contained in documents prepared by or for the institution for its own business purposes to the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Bureau of Consumer Financial Protection, and the state financial supervisory agency that supervises that institution when the Reserve Bank POC determines that the receiving agency has a legitimate supervisory or regulatory interest in the information. A Reserve Bank POC's action under this paragraph may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures. Requests to disclose any other confidential supervisory information to these or other agencies should be directed to the General Counsel under §§ 261.22(c) or 261.23(c).

(3) *Legal counsel and auditors.* When necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution, the supervised financial institution may disclose confidential supervisory information to its legal counsel or auditors. The supervised financial institution may also disclose confidential supervisory information to service providers (such as consultants, contractors, contingent workers, and technology providers) of its legal counsel or auditors if the service provider is under a written agreement with the legal counsel or auditor in which the service provider agrees that:

(i) It will treat the confidential supervisory information in accordance with § 261.20(a); and

(ii) It will not use the confidential supervisory information for any purpose other than as necessary to provide the services to the supervised financial institution.

(4) *Other service providers.* A supervised financial institution may disclose confidential supervisory information to other service providers engaged by the supervised financial institution if the service provider is under a written contract to provide services to the institution, the disclosure of the confidential supervisory information is deemed necessary to the service provider's provision of services, and the service provider has a written agreement with the institution in which the service provider has agreed that:

(i) It will treat the confidential supervisory information in accordance with § 261.20(a); and

(ii) It will not use the confidential supervisory information for any purpose other than as provided under its contract to provide services to the supervised financial institution.

A supervised financial institution shall maintain a written account of the disclosures of confidential supervisory information that the supervised financial institution makes to service providers under this section and provide the Board or Reserve Bank with a copy of such written account upon the Board's or Reserve Bank's request.

§ 261.22 Nonpublic information made available by the Board to governmental agencies and entities exercising governmental authority.

(a) *Disclosure to federal and state financial institution supervisory agencies.* The Director of the Division of Supervision and Regulation, the Director of the Division of Consumer and Community Affairs, the General Counsel, or the appropriate Reserve Bank may, for legitimate supervisory or regulatory purposes and with or without a request, disclose confidential supervisory information and other nonpublic information to the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Bureau of Consumer Financial Protection, and a state financial institution supervisory agency.

(b) *Disclosures pursuant to the Equal Credit Opportunity Act, the Fair Housing Act, and the Employee Retirement Income Security Act.* The Director of the Division of Supervision and Regulation, the Director of the Division of Consumer and Community

Affairs, or the General Counsel may disclose confidential supervisory information and other nonpublic information concerning a supervised financial institution to:

(1) The Attorney General or to the Secretary of the Department of Housing and Urban Development related to the enforcement of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) or the Fair Housing Act (42 U.S.C. 3601 *et seq.*); and

(2) The Secretary of the Department of Labor and the Secretary of the Department the Treasury in accordance with section 3004(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1204(b)).

(c) *Disclosure to other governmental agencies and entities exercising governmental authority.* Except as provided in paragraph (d) or (e) of this section, other federal, state, and local agencies, including law enforcement agencies, and other entities exercising governmental authority, may file written requests with the Board for access to confidential supervisory information and other nonpublic information under this section, including information in the form of testimony and interviews from current or former Federal Reserve System staff. Properly accredited foreign law enforcement agencies and other foreign government agencies may also file written requests with the Board in accordance with this paragraph, except that provision of confidential supervisory information to foreign bank regulatory or supervisory authorities is governed by 12 CFR 211.27.

(1) *Contents of request.* To obtain access to confidential supervisory information or other nonpublic information under this section, including information in the possession of a person other than the Board, the requester shall address a letter request to the Board's

General Counsel, specifying:

- (i) The particular information, kinds of information, and where possible, the particular documents to which access is sought;
- (ii) The reasons why such information cannot be obtained from the supervised financial institution in question or another source rather than from the Board;
- (iii) A statement of the law enforcement purpose or other statutory purpose for which the information shall be used;
- (iv) A commitment that the information requested shall not be disclosed to any person outside the requesting agency or entity without the written permission of the General Counsel; and
- (v) If the document or information requested includes customer account information subject to the Right to Financial Privacy Act, as amended (12 U.S.C. 3401 *et seq.*), any federal agency request must include a statement that such customer account information need not be provided, or a statement as to why the Act does not apply to the request, or a certification that the requesting federal agency has complied with the requirements of the Act.

(2) *Action on request.* The General Counsel may approve the request upon determining that:

- (i) The request complies with this section;
- (ii) The information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;

(iii) Satisfactory assurances of confidentiality have been given; and

(iv) Disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.

(d) *Federal and state grand jury, criminal trial, and government administrative subpoenas.* The General Counsel shall review and may approve the disclosure of nonpublic information pursuant to federal and state grand jury, criminal trial, and government administrative subpoenas.

(e) *Conditions or limitations; written agreements.* The General Counsel may impose any conditions or limitations on disclosure that the General Counsel determines to be necessary to effect the purposes of this regulation, including the protection of the confidentiality of the Board's information, or to ensure compliance with applicable laws or regulations. In addition, Board or Reserve Bank staff may make disclosures pursuant to any written agreement entered into by the Board when authorized by the express terms of such agreement or by the General Counsel.

§ 261.23 Other disclosure of confidential supervisory information.

(a) *Board policy.*

(1) It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged. Accordingly, the Board does not normally disclose confidential supervisory information to the public or authorize third parties in possession of confidential supervisory information to further use or disclose the information. When considering a request to access, use, or to disclose confidential

supervisory information under this section, the Board will not authorize access, use, or disclosure unless the requesting person is able to show a substantial need to access, use, or disclose such information that outweighs the need to maintain confidentiality.

(2) Notwithstanding any other provision of this part, the Board will not authorize access to or disclosure of any suspicious activity report (SAR), or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this part, “official duties” shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of nonpublic information or a request for use in a private legal proceeding, including a request pursuant to this section.

(b) *Requests in connection with litigation.* Except as provided in §§ 261.21 and .22,

(1) In connection with any proposed use of confidential supervisory information in litigation before a court, board, commission, agency, or arbitration, any person who (A) seeks access to confidential supervisory information from the Board or a Reserve Bank (including the testimony of present or former Board or Reserve Bank employees on matters involving confidential supervisory information, whether by deposition or otherwise), (B) seeks to use confidential supervisory information in its possession or to disclose such information to another party, or (C) seeks to require a person to disclose confidential supervisory information to a party, shall file a written request with the General Counsel.

(2) The request shall include:

(i) The judicial or administrative action, including the case number and court or adjudicative body and a copy of the complaint or other pleading setting forth the assertions in the case;

(ii) A description of any prior judicial or other decisions or pending motions in the case that may bear on the asserted relevance of the requested information;

(iii) A narrow and specific description of the confidential supervisory information the requester seeks to access or to disclose for use in the litigation including, whenever possible, the specific documents the requester seeks to access or disclose;

(iv) The relevance of the confidential supervisory information to the issues or matters raised by the litigation;

(v) The reason why the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source; and

(vi) A commitment to obtain a protective order acceptable to the Board from the judicial or administrative tribunal hearing the action preserving the confidentiality of any information that is provided.

(3) In the case of requests covered by paragraph (b)(1)(B) of this section, the Board may require the party to whom disclosure would ultimately be made to substantiate its need for the information prior to acting on any request.

(c) *All other requests.* Any other person seeking to access, use, or disclose confidential supervisory information for any other purpose shall file a written request

with the General Counsel. A request under this paragraph (c) shall describe the purpose for which access, use, or disclosure is sought and the requester shall provide other information as requested by the General Counsel.

(d) *Action on request*—

(1) *Determination of approval.* The General Counsel may approve a request made under this section provided that he or she determines that:

(i) The person seeking access, or the person to whom access would be provided, has shown a substantial need to access confidential supervisory information that outweighs the need to maintain confidentiality; and

(ii) Approval is consistent with the supervisory and regulatory responsibilities and policies of the Board.

(2) *Conditions or limitations.* The General Counsel may, in approving a request, impose such conditions or limitations on use of any information disclosed as is deemed necessary to protect the confidentiality of the Board's information.

(e) *Exhaustion of administrative remedies for discovery purposes in civil, criminal, or administrative action.* Action on a request under this section by the General Counsel is necessary in order to exhaust administrative remedies for discovery purposes in any civil, criminal, or administrative proceeding. A request made pursuant to § 261.11 of this regulation does not exhaust administrative remedies for discovery purposes. Therefore, it is not necessary to file a request pursuant to § 261.11 to exhaust administrative remedies under this section.

§ 261.24 Subpoenas, orders compelling production, and other process.

(a) *Advice by person served.* Any person (including any officer, employee, or agent of the Board or any Reserve Bank) who is served with a subpoena, order, or other judicial or administrative process requiring the production of confidential supervisory information or other nonpublic information of the Board or requiring the person's testimony regarding such Board information in any proceeding, shall:

(1) Promptly inform the Board's General Counsel of the service and all relevant facts, including the documents, information or testimony demanded, and any facts relevant to the Board in determining whether the material requested should be made available;

(2) Inform the entity issuing the process of the substance of these rules and, in particular, of the obligation to follow the request procedures in § 261.23(b); and

(3) At the appropriate time inform the court or tribunal that issued the process of the substance of these rules.

(b) *Appearance by person served.* Unless authorized by the Board or as ordered by a federal court in a judicial proceeding in which the Board has had the opportunity to appear and oppose discovery, any person who is required to respond to a subpoena or other legal process concerning Board confidential supervisory information or other nonpublic Board information shall attend at the time and place required and respectfully decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this regulation. If the court or other body orders the

disclosure of the information or the giving of testimony, the person having the information shall continue to decline to disclose the information and shall promptly report the facts to the Board for such action as the Board may deem appropriate.

(c) A litigant or non-party who is served with a civil request for production of documents calling for production of confidential supervisory information should proceed under § 261.23 rather than this section.

By order of the Board of Governors of the Federal Reserve System, July 20, 2020.

Ann E. Misback,
Secretary of the Board.