Federal Reserve Board Proposes Revisions to Clarify and Modernize the Rules Governing Confidential Supervisory Information and FOIA Requests

June 25, 2019

On June 14, 2019, the Federal Reserve Board ("FRB") invited public comment on proposed amendments to its Rules Regarding Availability of Information (the "Proposed Rule")[1]—the first time in 30 years the agency has meaningfully revisited its framework for the treatment, use and disclosure of confidential supervisory information ("CSI"). The Proposed Rule also makes technical adjustments to the FRB's procedures for handling Freedom of Information Act ("FOIA") requests.

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If adopted, the Proposed Rule would provide helpful clarity to FRB-supervised institutions on what qualifies as CSI and how CSI may be shared within an organization, with third-party service providers, and with other regulatory agencies. Because it would impose new compliance requirements, however, the Proposed Rule calls for careful consideration of existing policies, procedures and training programs—as well as vendor agreements and engagement letters—to ensure compliance with the new regime.

Noncompliance with these rules carries significant risks, both for institutions and individuals alike, and the stakes appear to be growing. Recently, including earlier this month, the FRB has taken enforcement actions against institutions and individuals for unauthorized disclosure of CSI; in one case the Justice Department also pursued related criminal charges.[2]

KEY FEATURES

A Revised Definition of CSI Makes Clear Its Broad Scope

Although the current rules contain an expansive definition of CSI, the Proposed Rule removes any uncertainty about its scope. Specifically, CSI would be defined as:

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1 *See* 84 Fed. Reg. 27976 (June 17, 2019); comments are due August 16, 2019.

2 *In the Matter of Youlei Tang A.K.A. Alex Tang*, "Order to Cease and Desist Issued Upon Consent Pursuant to Section 8(b) of the Federal Deposit Insurance Act, as Amended," Docket No. 19-010-B-I (Jun. 4, 2019); *In the Matter of Rohit Bansal,* Docket No. 15-033-G-I (Nov. 5, 2015); *U.S. v. Gross*, Case number 1:15 cr 766-01 (Nov. 4, 2016).

> [N]on-public information . . . created or obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities. . . relating to ***any supervised financial institution***, including, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports, supervisory assessments, investigative requests for documents or other information, supervisory correspondence or other supervisory communications; ***any portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information; and any information derived from, related to, or contained in such documents***.[3]

This definition departs from the current standard in at least two important ways. *First*, it makes clear that records relating to any "supervised financial institution," which term would be defined to include not only banks, bank holding companies and other entities supervised by the FRB but also non-bank subsidiaries and "any other entity or service subject to examination by the Board" qualify as CSI inasmuch as such records relate to the FRB's supervisory activities.[4] If adopted, this definition would clarify that, in the FRB's view, records of functionally regulated non-bank subsidiaries (*e.g.*, broker-dealers, insurance companies, etc.) can fall within the ambit of its CSI regulations.

Second, the revised definition makes clear that an institution's internal documents, including ***portions of such documents***, constitute CSI to the extent they refer to or describe the FRB's supervisory activities. In our experience, such references frequently occur in board reporting and other types of MIS; if adopted, institutions will need to take even greater care to ensure that these documents are treated in accordance with the CSI restrictions.

New (and Clearer) Rules and Procedures for Interaffiliate, Interagency and Other CSI Disclosures

In a helpful development for financial institutions, the Proposed Rule would loosen current restrictions on sharing CSI both within an organization and with other agencies that have supervisory authority. Specifically, whereas the current provisions permit an institution to share CSI only with its directors, officers and employees—or directors, officers and employees of its holding company—the proposed rule would permit sharing with affiliates and their personnel, limited only insofar as the recipient must have a "need for the information in the performance of their official duties."[5]

In the same spirit, the Proposed Rule would grant broader authority to institutions to share FRB CSI with other federal and state regulatory agencies, provided its

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[3] 84 Fed. Reg. 27976, 27981 (emphasis added).

[4] Id. at 27982.

[5] Id. at 27988.

examiner-in-charge "concurs" that the receiving agency has a legitimate supervisory interest in the material. Institutions currently are required to seek permission from the FRB's Washington-based staff for interagency CSI disclosures, and to do so for each proposed disclosure. By decentralizing the process and empowering local examiners to approve interagency disclosure, and establishing an apparently lenient "concurrence" standard, the Proposed Rule promises to make the process significantly more efficient.

Modernized, and More Permissive, Guidelines for Disclosure of CSI to Outside Counsel, Auditors and Other Service Providers

Perhaps the most vexing feature of the FRB's current CSI rules is their prohibition against outside counsel and independent auditors receiving or reviewing CSI except "on the premises" of the FRB-supervised institution.[6] The relic of a bygone era, this provision created significant compliance challenges given modern communications and data storage practices. Its removal from the regulation is long overdue.

The Proposed Rule may, however, create new challenges, at least initially, in respect of CSI disclosure to counsel, auditors or other service providers. It would require engagement letters for outside counsel and auditors to meet enumerated criteria to qualify for the exemption. Thus, to the extent institutions have long-standing relationships with these service providers, it may be necessary to repaper these arrangements with agreements that satisfy the new rules.

Further, the Proposed Rule permits disclosure to "other service providers" (*i.e.*, besides lawyers and auditors) only after a request to the local examiner-in-charge.[7] Although, as above, decentralizing the request process would likely result in certain efficiencies, the Proposed Rule does not suggest a standard under which these disclosures to other service providers should be evaluated. If adopted in its current form, it may be difficult, both for examiners and institutions, to know how to implement the process. The Proposed Rule also is silent on how disputes between examiners and institutions regarding any particular disclosure should be resolved.

Streamlined FOIA Procedures

The Proposed Rule also would make a series of mostly technical changes to the procedures through which confidential treatment can be requested and records are made available through FOIA. Although these may be of less relevance to FRB-supervised institutions in their day-to-day operations, they nonetheless help to harmonize the CSI and FOIA standards as well as to streamline and clarify the FRB's processes.

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[6] 12 C.F.R. § 261.20(b)(2)(i).

[7] 84 Fed. Reg. 27976, 27988-89.

Proposed FOIA-related revisions include:

- Redefining the term "Records of the Board" to conform with the standard derived from the Supreme Court's decision in *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), which is the majority standard among federal agencies;[8]

- Clarifying the time period in which the FRB will respond to FOIA requests and that the FRB will provide in its responses an estimate of the "amount of information withheld;"[9]

- Revising FOIA appeal procedures and timelines; and

- Expanding the grounds for confidential treatment requests to include "personal privacy information" as well as proprietary commercial information.[10]

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In summary, the Proposed Rule would update and clarify the FRB's CSI framework in ways that appear to be broadly helpful for financial institutions despite some interpretive difficulties and near-term compliance challenges that may result. The Proposed Rule would not, however, harmonize the disparate regimes each of the federal banking agencies applies to its CSI. Absent an interagency effort to propound consistent standards on the use and disclosure of CSI, institutions will continue to face challenges navigating these rules.

Please do not hesitate to contact us with any questions.

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8 Id. at 27981.

9 Id. at 27984.

10 Id. at 27978.

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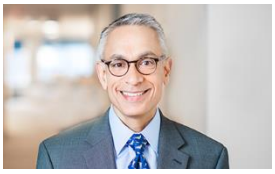

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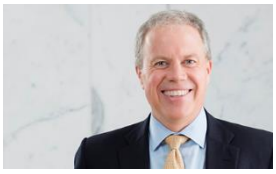

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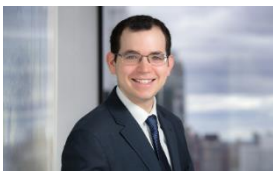

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