

Federal Reserve Board Updates and Improves the Rules Governing Confidential Supervisory Information and FOIA Requests

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On July 24, 2020, the Federal Reserve Board (“FRB”) finalized amendments to its Rules Regarding Availability of Information (“Final Rule”), just over one year after inviting public comment on an earlier draft and more than three decades since they were last substantially revised. The Final Rule makes various clarifying revisions, including to the definition and scope of confidential supervisory information (“CSI”) and the restrictions on sharing CSI within an organization, with third-party service providers and with other regulatory agencies.¹ It also amends the FRB’s procedures for handling Freedom of Information Act (“FOIA”) requests. The Final Rule will take effect thirty days from the date of its publication in the Federal Register.

Although the Final Rule stops short of fully harmonizing the FRB’s CSI regime with those of other federal banking agencies, it takes steps in that direction and, more generally, updates and modernizes the CSI framework in ways that are helpful to supervised financial institutions with at least one important exception, which we note below. Below we highlight several of its more salient features. In the Appendix, we also include a table comparing the new CSI rules to those they supersede.

KEY FEATURES

Scope of CSI

The Final Rule clarifies and codifies the scope of CSI protections.

- Records of Functionally-Regulated Non-Bank Subsidiaries. The Final Rule makes clear that CSI includes not only the records of a bank, bank holding company (“BHC”) and others entities supervised by the FRB but also those of a BHC’s non-bank subsidiaries (e.g., broker-dealers, insurance companies, etc.) to the extent that such records relate to, or derive from, the FRB’s supervisory activities. Under an expanded definition of the term “supervised financial institution,” moreover,

¹ Our analysis of the proposed rule is available [here](#) and a redline comparing the final rule to the proposal is available [here](#).

FRB-related information contained in records of a company designated for Board supervision by the FSOC or “any other entity or service subject to examination by the Board” also qualifies as CSI.² In this respect, the Final Rule arguably places a new burden on diversified financial institutions—ensuring that documents relating to nonbank subsidiaries are handled in accordance with the FRB’s CSI framework to the extent they relate to supervisory, investigatory or enforcement activities of the FRB.

- Documents Created for Internal Business Purposes. Under the existing regime, vexing questions often arise in connection with documents that a financial institution creates in the normal course and subsequently provides to the FRB because, in plain terms, the current regulation suggests that a document becomes CSI if it is “obtained by” the FRB—irrespective of its origins or content.³ The Final Rule offers welcomed clarity on this point. It provides that a document created by a financial institution for its own purposes (and that does not otherwise contain CSI) does not become CSI simply because “copies of such [a] document[.]” are in the FRB’s possession (although, the specific copies in the FRB’s physical possession are themselves CSI).⁴

Put differently, under the new regime, whether CSI protections attach to a document created for internal business purposes appears to depend on the custodian—copies are not CSI if they are in the hands of the supervised financial institution; however, copies of the same document are CSI if they are in the hands of the FRB. By limiting the scope of CSI in this way, the Final Rule helps to address concerns raised during the comment period that internal documents “obtained by” the FRB could become CSI for all purposes under the new definition.

- CSI Contained in Internal Documents. At the same time, the Final Rule also makes clear that *portions* of documents that “contain[] or would reveal” CSI must be treated as such.⁵ For example, in our experience reports to the Board and other MIS often contain references to examination findings or supervisory observations or ratings, even if the document itself does not exclusively concern supervisory matters. The Final Rule provides that these references to CSI in otherwise non-privileged documents must be treated as CSI and subject to the associated restrictions and protections. Accordingly, FRB-regulated institutions should take even greater care to ensure that internal documents that commonly include information relating to FRB supervisory activities are treated in accordance with

² FRB, *Federal Register Notice: Rules Regarding Availability of Information*, 57 (July 24, 2020) <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200724a1.pdf>.

³ Federal Register Notice at 8.

⁴ *Id.* at 12.

⁵ *Id.* at 11.

the new CSI regime, for example, through restrictions on internal access and redaction protocols.

Clearer Rules and Procedures for CSI Disclosure

Among the more helpful features of the Final Rule is its removal of longstanding—and, in many cases, long outdated—restrictions on sharing CSI with affiliates, service providers and other agencies with supervisory authority. In an effort to reduce ambiguities in the rules and make the procedures for disclosure more efficient, the Final Rule also introduces new standards and processes for disclosure to certain parties.

- Disclosures to Directors, Officers, Employees and Affiliates. Previously, an institution could share CSI only with its directors, officers and employees—and those of its holding company—whereas the Final Rule permits sharing with personnel, including directors officers and employees of *all* affiliates, so long as disclosure is “necessary or appropriate for business purposes,” the same standard employed by the Office of the Comptroller of the Currency (“OCC”).⁶ In adopting this approach, the FRB adopted a standard significantly more lenient than what had been proposed—disclosure based on a “need for the information in the performance of . . . official duties.”⁷
- Disclosures to Legal Counsel and Auditors. Notably, an outdated and onerous prohibition on legal counsel and auditors reviewing or receiving CSI except “on the premises” has been removed from the Final Rule. Under the new framework, a supervised financial institution may disclose CSI to its outside counsel and auditors when the disclosures are “necessary or appropriate in connection with the provision of legal or auditing services.”⁸ Consistent with the OCC’s rules, and in response to industry comments, the FRB also removed a proposed provision that conditioned disclosures to legal counsel and auditors on their executing specific written agreements with respect to their use of CSI. As we discussed in our previous analysis, that provision would have required institutions to repaper their arrangements with lawyers and auditors; therefore, its removal avoids what could have been a substantial compliance burden.
- Disclosures to Other Service Providers. Here, too, the FRB adopted a procedure similar to the OCC’s. Service providers, other than lawyers and auditors, may receive CSI from a supervised institution provided the relevant engagement letter or agreement contains appropriate confidentiality provisions *and* the institution maintains a written log of such disclosures, which must be made available to the

⁶ *Id.* at 22.

⁷ *Id.* at 25.

⁸ *Id.* at 88.

FRB on request. In the preamble accompanying the Final Rule, the FRB indicated its expectation that institutions have “reasonable assurance” of accountability and compliance with the rules for such disclosures, including through maintenance of the log as well as appropriate “policies, procedures, and controls that apply to the disclosure of confidential supervisory information.”⁹ Supervised institutions should, accordingly, revisit and adjust their compliance program to account for this new requirement.

- Disclosures to Federal and State Regulatory Agencies. The Final Rule broadens institutions’ authority to share FRB CSI with other federal and state regulatory agencies, provided its principal point of contact (e.g., examiner-in-charge or senior supervisory officer) “concur[s]” that the receiving agency has a legitimate supervisory interest in the material.¹⁰ Institutions previously were required to seek permission from the FRB’s Washington-based staff for interagency-CSI disclosures, and to do so for each proposed disclosure. The Final Rule likely will make the process significantly more efficient.

Streamlined FOIA Procedures

The Final Rule also makes a series of mostly technical changes to the procedures through which confidential treatment can be requested and records are made available through FOIA. While 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.

FOIA-related provisions in the Final Rule include:

- Revising the term “records of the Board” to 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)”;¹¹
- 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”;
- Revising FOIA appeal procedures and timelines;

⁹ *Id.* at 35.

¹⁰ *Id.* at 87.

¹¹ *Id.* at 13.

- Expanding the grounds for confidential treatment requests to include “personal privacy information” as well as proprietary commercial information; and
- Removing all references in the Final Rule to the “competitive harm” test that previously had been used to determine whether information could be considered “confidential” for purposes of FOIA Exemption 4. This revision reflects a new standard articulated in the Supreme Court’s opinion in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), which came down just after the FRB’s proposal.

Prior to *Argus Leader*, FOIA Exemption 4 required a showing that release of purportedly confidential information would cause “substantial competitive harm” to the person claiming the exemption. In *Argus Leader*, the Court adopted a more favorable interpretation, holding that Exemption 4 protects commercial or financial information that is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy. Many commentators understand this to be a more lenient and protective standard than the prior “competitive harm” test; the FRB’s apparent adoption of it is likely welcomed news to supervised financial institutions.¹²

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In summary, the Final Rule updates and clarifies the FRB’s CSI framework in ways that are broadly helpful for financial institutions and further harmonizes the FRB’s regime with the OCC’s.

¹² *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

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Appendix A

Summary of Key Changes to the FRB’s CSI Requirements

| | Current Regulation | Final Rule |
|---|--|---|
| Scope of CSI | <p>FRB CSI includes the following:</p> <ul style="list-style-type: none"> • FRB reports of examination, inspection and visitation, confidential operating and condition reports (including any information derived from those reports); • Information gathered by the FRB in the course of any investigation, suspicious activity report, cease-and-desist orders, civil money penalty enforcement orders, suspension, removal or prohibition orders, or other orders or actions (subject to some exceptions); and • Any documents prepared by, on behalf of, or for the use of the FRB, a Federal Reserve Bank, a federal or state supervisory agency or a bank, bank holding company or other regulated entity. | <p>FRB CSI includes the following:</p> <ul style="list-style-type: none"> • FRB 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; • Any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution, which contains or would reveal confidential supervisory information; and • Any information created or obtained in furtherance of the FRB’s supervisory, investigatory or enforcement activities, including activities conducted by a Federal Reserve Bank under delegated authority, relating to any supervised financial institution. |
| Parties Authorized to Review or Receive CSI Without a Specific Request | <p>FRB CSI may be disclosed to the following entities:</p> <ul style="list-style-type: none"> • Directors, officers and employees of the regulated entity; • A parent bank holding company or parent savings and loan holding company and its directors, officers and employees; • Certified public accountants and legal counsel on the premises of the regulated entity. | <p>FRB CSI may be disclosed to the following entities:</p> <ul style="list-style-type: none"> • Directors, officers and employees of the supervised financial institution and of its affiliates when necessary or appropriate for business purposes; • Federal Deposit Insurance Corporation, the OCC, the Bureau of Consumer Financial Protection and state financial supervisory agency (i) if the CSI is contained in documents prepared by or for the supervised financial institution and (ii) the applicable Reserve Bank point of contact concurs; • Legal counsel and auditors—and their service providers if they are under written confidentiality agreements—when necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution; and • Other service providers engaged by the supervised financial institution if deemed necessary for the provision of services and |

| | Current Regulation | Final Rule |
|---|--|--|
| | | under written confidentiality agreements. A written account of such disclosures must be maintained by the institution and provided to the FRB or applicable Federal Reserve Bank upon request. |
| Process for Specific Disclosure Requests | Entities seeking approval for CSI disclosures that are not specifically authorized by FRB regulation must submit a written request to the FRB's General Counsel. Requests are approved on a discretionary basis. | (Not affected by the new rule.) |