

Overview

Financial institutions (institutions) supervised by the Board of Governors of the Federal Reserve System (Board) have access to and possession of confidential supervisory information (CSI), which is subject to the Board's regulations governing availability and disclosure of such information. Institutions may receive requests or subpoenas for information that includes CSI in their possession. This article discusses scenarios in which requests for CSI might occur and the responsibilities of institutions under the Board's regulations at [12 CFR Part 261](#) (CSI Regulations). This article also presents questions for institution staff to consider as they assess their internal processes and practices for handling CSI in different scenarios.

What Is CSI?

The definition of CSI¹ is broad and includes *any information that is prepared by, on behalf of, or for the use of the Federal Reserve Board, a Reserve Bank, or a state or federal banking supervisor, including information "related to" an examination, inspection, or visitation of an institution.* CSI includes the information requested by or provided to supervisory staff, including examination dates, and internal institution documents addressing supervisory matters. Information prepared by an institution for its own business purposes and in its possession is not CSI.

Specific examples of CSI include, but are not limited to:

- supervisory communications between an institution and the Board or a Reserve Bank, including, but not limited to, letters, emails, and oral communications;
- internal bank documents discussing or describing such communications;

- examination and inspection reports, including target or other limited purpose examinations, and including reports jointly issued with state supervisors;
- supervisory ratings;
- nonpublic enforcement actions and commitment letters such as a memorandum of understanding; and,
- progress reports and other information required by an enforcement action.

Except as specifically permitted by the CSI Regulations, CSI may be disclosed only upon the prior written approval of the Board's general counsel.^{2,3}

Disclosure Scenarios

A request for, or the disclosure of, CSI can arise in a number of different scenarios as described in the following sections.

Directors, Officers, Employees, and Investors. Institutions may share CSI with the directors, officers, and employees of the institution and its parent holding company.⁴ However, these individuals are not permitted to retain CSI once employment with the institution is terminated, remove CSI from the premises of the institution, or make a personal copy.⁵

Under certain circumstances, institutional or private equity investors have entered into investment agreements with institutions to be guests or observers during an institution's board meeting. However, institutions may not discuss or share CSI with nondirector observers or guests without the prior approval of the Board's general counsel, regardless of the terms of the investment agreements.

FedLinks is intended to highlight the purpose of supervisory policy and guidance for community banking organizations. FedLinks does not replace, modify, or establish new supervisory policy or guidance.

¹ 12 CFR 261.2(c).

² 12 CFR 261.20-23.

³ 12 CFR 261.22.

⁴ 12 CFR 261.20(b)(1).

⁵ 12 CFR 261.20(g).

Questions to Consider

- How will board packages be provided to the board of directors (email or hard copy)?
- Are board packages provided to nondirector or employee observers who will attend board meetings?
- Who at the institution determines the distribution list and handles distribution of board packages?
- What happens to the paper copies of the board package that are provided to the directors (are they returned or destroyed)?
- Are there adequate and appropriate encryption or other protections to safeguard confidential information and prevent interception or access of confidential information by unauthorized individuals?
- Do authorized recipients of CSI know what information is CSI and have knowledge of the Board's CSI Regulations, and are they aware of their responsibilities to protect any CSI that they receive?
- Is there an off-boarding process or procedure in place to mitigate the risk that a departing employee could remove CSI from the institution?
- What is the institution's process for handling investor requests for information, including the process for determining whether the request includes CSI?
- Are the staff members responsible for responding to investor information requests trained on CSI and not just the institution's confidential or privileged information?

Auditors, Accountants, Legal Counsel, and Other Third-Party Service Providers. Institutions may share examination reports or other information containing CSI with their auditors, certified public accountants, or legal counsel provided they review the information at the institution and refrain from making or retaining copies for their files.^{6,7,8} However, accountants, auditors, or legal counsel may not disclose CSI without prior written approval of the Board's general counsel. Institutions should consider addressing the handling of CSI in their agreements with accountants, auditors, and legal counsel.

Other third-party service providers may request information that includes CSI to establish risk, insurability, and pricing. Examples of such parties include insurers, technology service providers, and other government agencies. Institutions may not disclose CSI to any other third-party service providers without prior written approval of the Board's general counsel.

⁶ 12 CFR 261.20(b)(2).
⁷ 12 U.S.C. 1831(m)(h)(1)(A).
⁸ 12 CFR 261.20(b)(2)(i). The Board routinely waives the requirement for onsite review on request.

Questions to Consider

- Is there a contract or agreement that outlines the terms of the engagement between the institution and the auditing, accounting, or law firm?
- Does the contract discuss the definition and handling of CSI, and is the discussion consistent with the Board's CSI Regulations?
- Are the accountants certified public accountants?
- Does the auditing, accounting, or law firm need access to CSI to perform the contracted work?
- How do the board and management make the determination to provide an auditing, accounting, or law firm access to CSI?
- Will a third party have access to the institution's systems, records, and databases that contain or may contain CSI?
- How will access be managed to ensure that a third party does not inappropriately access CSI?
- Does the institution's outside legal counsel understand the Board's rules with respect to disclosing CSI (see below)?
- Are institution staff members who interact with a third party aware of the CSI requirements and the process they should follow in the event a CSI access question arises?

Direct and Third-Party Litigation. Institutions may not share CSI with litigants without prior written approval from the Board's general counsel. This issue can come up in a variety of situations, including cases in which the institution is a plaintiff, a defendant, or even a nonparty. For example, suppose an institution directly sues its insurance provider for failure to pay insurance claims related to losses involving alleged wrongful acts that are, or relate to, activities that resulted in a public enforcement action with the Board. The insurance provider might issue a discovery request seeking the underlying examination or inspection report, certain correspondence with the Federal Reserve, or the institution's progress reports on corrective actions that were provided to the Federal Reserve pursuant to the enforcement action.

Institutions and directors may also be defendants in individual, shareholder derivative, or class action lawsuits by customers. In attempting to prove their case, the plaintiffs in these cases may seek information in discovery that includes CSI. An example could be a securities class action lawsuit in which shareholders seek discovery of regulatory reviews and findings.

Attempts to access CSI through discovery also exist in third-party litigation (litigation in which the institution is not a party). For example, suppose the purchaser of a mortgage loan sues the borrower in a foreclosure action and the borrower raises affirmative defenses concerning alleged actions or con-

duct by the institution at origination or sale of the loans. The borrower's counsel may seek to obtain examination reports to support the contention that the institution's actions or conduct were illegal and caused harm.

Once it is determined that a subpoena or discovery request calls for an institution to produce CSI, the Board's CSI Regulations require the institution to file a written request with the Board's general counsel. The request must include the information specified in 12 CFR 261.22(b)(1). Action on the request, including imposition of any conditions or limitations, will be taken pursuant to the Board's CSI Regulations (refer to 12 CFR 261.22(c)). Subpoena and discovery response time frames are typically short, so timeliness is important. Delay can limit the amount of time needed by various parties to appropriately review and address CSI, and requests for time extensions are not always granted.

Questions to Consider

Has a determination been made by the institution or its counsel that information responsive to the subpoena is or may be CSI?

Has the opposing counsel been notified that the information being subpoenaed or being requested is considered CSI, and that opposing counsel is required to file a written request with the Board's general counsel to access CSI in the possession of the institution?

Does the institution have a process for notifying the Board's general counsel that a request has been received for the release of CSI?

Has the institution's legal counsel prepared, or is the counsel planning to prepare, a privilege log to identify the information as privileged CSI?

Is the description in the privilege log covered by the Board's CSI Regulations (see the discussion above regarding the definition of CSI)?

Merger and Acquisitions. Institutions may not share CSI with acquirers or targets in merger or acquisition transactions without prior approval of the Board's general counsel, and it is the Board's policy that disclosure requests in these contexts are denied absent very unusual circumstances.

Issues typically arise in this scenario based upon provisions within the plan of merger or merger agreement (collectively, Merger Agreements). For example, Merger Agreements may permit acquirers to have observers present during the target institution's board and committee meetings. CSI may not be

disclosed to these observers without prior written approval of the Board's general counsel.

Merger Agreements may also provide for information access rights by an acquirer, which can include CSI. Information access rights provided by Merger Agreements are not superior to the Board's CSI Regulations.

Questions to Consider

Does the Merger Agreement provide for observers from the acquiring institution to attend board or committee meetings at the target institution?

Does the Merger Agreement require the target institution to provide information to the acquiring institution? If the answer is yes, what information must be provided and how is it to be provided?

Does the Merger Agreement provide an exemption for CSI?

How do parties to the agreement decide what constitutes CSI?

Disclosure Risks

Failure to handle CSI in compliance with the CSI Regulations is a violation of those regulations and could subject a person or entity to supervisory action, including the imposition of civil money penalties. In some instances, disclosure of CSI could expose a person to criminal penalties under 18 U.S.C. 641. Disclosure can also have other unintended consequences, such as negatively impacting an institution's reputation with investors, customers, and other third parties.

Final Thoughts

Institutions have access to and possession of CSI, which is subject to requirements of the Board's CSI Regulations. Unauthorized or improper disclosure of CSI exposes an institution and its staff to a number of risks, some more severe than others. Given these requirements and risks, an institution should be aware of the various scenarios in which a request for CSI may arise and should have appropriate policies, procedures, and processes in place governing CSI. CSI handling policies and procedures may be included as part of other policies addressing an institution's proprietary and confidential information or a standalone policy.

In establishing appropriate policies, procedures, and processes, consider the questions posed in this article. Consider training relevant staff, including directors, to enhance awareness and

ensure adherence to the Board's CSI Regulations. Evaluate communication processes to ensure that outside legal counsel, directors, external accountants, and other service providers, and consultants are aware of requirements for handling CSI and are familiar with the Board's CSI Regulations. Establish a process or protocols for notifying appropriate Reserve Bank staff of any CSI issues or situations, including those in which employees have left the organization with CSI. Finally, Reserve Bank staff members are available to assist with CSI questions or issues, including coordinating with Board staff, so when in doubt, reach out to your Reserve Bank supervisory contact or member of your Reserve Bank's legal staff.⁹

Resources

Supervisory guidance is available in the Supervision and Regulation (SR) letters and other resources listed below.

- Code of Federal Regulations, Title 12, Chapter II, Subchapter A, Part 261, "Rules Regarding Availability of Information" (see Subpart C), available at www.ecfr.gov.
- Federal Reserve Board Supervisory and Confidential Information webpage, available at www.federalreserve.gov/bankinfo/reg/topics/supervisory_n_confidential_info.htm.
- SR Letter 07-19, "Confidentiality Provisions in Third-Party Agreements," available at www.federalreserve.gov/boarddocs/srletters/2007/SR0719.htm.
- SR Letter 05-04, "Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Non-public Supervisory Information," available at www.federalreserve.gov/boarddocs/srletters/2005/SR0504.htm.
- *Commercial Bank Examination Manual*, available at www.federalreserve.gov/boarddocs/supmanual/cbem/cbem.pdf.
 - Section 5020.1, "Overall Conclusions Regarding Condition of the Bank."

- Section A.5020.1, "Overall Conclusions Regarding Condition of the Bank: Uniform Financial Institutions Rating System and the Federal Reserve's Risk Management Rating."
- Section 6000.1, "Commercial Bank Report of Examination" (see the subsection: Communication of Examination Findings).
- *Bank Holding Company Supervision Manual*, available at www.federalreserve.gov/boarddocs/supmanual/bhc/bhc.pdf.
 - Section 1050.2.4.1, "Coordination and Information Sharing Among Domestic Primary Bank Supervisors and Functional Regulators."
 - Section 4070.5, "Nondisclosure of Supervisory Ratings"

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⁹ A list of Federal Reserve Bank contacts may be found at www.communitybankingconnections.org/connect.