

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 261

[Docket No. R-1665]

RIN 7100-AF 51

#### Rules Regarding Availability of Information

**AGENCY:** Board of Governors of the Federal Reserve System (Board).

**ACTION:** Notice of proposed rulemaking and request for comment.

**SUMMARY:** The Board is inviting comment on a notice of proposed rulemaking (proposal) that would amend the Board's Rules Regarding Availability of Information (Board's Rules). The amendments 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:** Comments must be received by August 16, 2019.

You may submit comments, identified by Docket No. R-1665 and RIN No. 7100 AF 51, by any of the following methods:

- *Agency Website:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Email:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.

- *Fax:* (202) 452-3819 or (202) 452-3102.

- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request.

Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

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

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The purpose of this proposed revision of the Board's Rules is to set forth more clearly the procedures for requesting access to documents that are records of the Board under the Freedom of Information Act (FOIA), as well as to update the rules governing the Board's disclosure of confidential supervisory and other nonpublic information. The revision also revises certain definitions to be consistent with language from the FOIA and to conform to recent case law and the Board's current FOIA practices. These provisions and changes are described in more detail below.

##### II. Description of the Proposal

###### A. Subpart A—General

Subpart A describes the authority, purpose, and scope of the regulation, and includes new or revised definitions for the terms used in the regulation.

###### § 261.1 Authority, Purpose, and Scope

While § 261.1 largely tracks the current § 261.1, the Board has made some minor changes to improve the language and organization of the section.

###### § 261.2 Definitions

Section 261.2 contains the definitions of key terms used throughout part 261. The Board's proposal to § 261.2 adds new terms, clarifies certain existing terms, and deletes other outdated terms. In addition, the Board proposes moving all terms related to the fees for processing a FOIA request, such as "commercial use requester," "direct costs," "duplication," "educational institution," "non-commercial scientific institution," "representative of the news

media," and "review" to the general fees section at § 261.16. The Board's proposed changes to these fees-related definitions are discussed in more depth in the Fees section below.

The Board proposes adding new definitions for three new terms ("affiliate," "nonpublic information," and "working day"). The Board also proposes modifying the definitions of "confidential supervisory information," "records of the Board," "search," and "supervised financial institution" to clarify the full scope of those terms or to conform the terms with current Board practices to facilitate the orderly processing of requests.

*§ 261.2(a) Affiliate.* The Board is incorporating the definition of "affiliate" from its Regulation Y, 12 CFR 225.2(a), as a new defined term in light of the Board's proposed revisions to subpart C providing for certain permitted disclosures of confidential supervisory information to the directors, officers, or employees of the affiliates of a supervised financial institution.

*§ 261.2(b)(1) Confidential supervisory information.* The Board proposes revising its definition of the term "confidential supervisory information" to clarify that confidential supervisory information constitutes any nonpublic information that is exempt from disclosure under Exemption 8 of the FOIA, 5 U.S.C. 552(b)(8), including any information 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. The revised definition further makes clear that confidential supervisory information includes any portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information.

*§ 261.2(c) Nonpublic information.* The Board proposes replacing the term "exempt information" with the term "nonpublic information" to emphasize that the term applies to information the Board has not made public, rather than simply to information subject to an exemption under the FOIA. This clarifies that information that could be subject to a FOIA exemption but that the Board has made public is not encompassed within the definition. At

the same time, information that has been disclosed on a discretionary basis and subject to confidentiality restrictions, such as disclosures under subpart C of the regulation, would not be considered as having been publicly disclosed, and therefore remains “nonpublic” information. The term “nonpublic information” has replaced “exempt information” throughout part 261.

*§ 261.2(d) Records of the Board.* The Board’s revised definition of this term updates the description of records in order to encompass all forms of records and eliminate outdated terminology. The proposed definition also incorporates the two-part test for determining whether a document qualifies as an agency document as set forth in *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), by covering documents that are “created or obtained” by the Board and are under the Board’s “control.” The definition encompasses all information that is created or obtained by the Board or by any Reserve Bank in the performance of functions for or on behalf of the Board 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 the records referred to in existing § 261.2(i)(1)(ii) as being maintained for administrative reasons at a Reserve Bank are all encompassed within the category of records described in new paragraph (d)(1)(i). The revision also eliminates the definition of “Board’s official files” as unnecessary and confusing. The proposal further clarifies that Board records do not include records located at Reserve Banks other than those identified in § 261.2(d)(1) and records that may be in the Board’s possession but are under the control of another entity or agency.

*§ 261.2(e) Search.* The proposed changes simplify the definition of “search” by moving the part of the definition relating to computing fees to § 261.16, which discusses the fee schedule.

*§ 261.2(f) Supervised financial institution.* The Board is proposing to modify the definition of “supervised financial institution” to clarify that, for the purposes of this part, the term includes not only institutions supervised by the Board but also any entity or service subject to examination by the Board.

*§ 261.2(g) Working day.* The Board proposes adding a definition of “working day” to clarify time limits in accordance with the FOIA, 5 U.S.C. 552(a)(6)(A)(i).

The Board proposes deleting the definitions of “report of examination” and “report of inspection” as no longer necessary in light of the other revisions made in this section.

#### § 261.3 Custodian of Records; Certification; Service; Alternative Authority

The Board proposes minor changes to this section. Section 261.3(a) deletes reference to records held at Reserve Banks, since these are covered by the definition of “records of the Board.” Section 261.3(c) will add language clarifying that the Secretary will not accept service of process on behalf of employees in connection with private legal disputes. Section 261.3(d) will add language clarifying that Board officers authorized under the rule to take actions may delegate that authority to others.

#### § 261.4 Prohibition Against Disclosure

A new § 261.4 will be added to subpart A to emphasize the general prohibition on disclosure of the Board’s nonpublic information by Board or Reserve Bank staff. This provision is currently included in § 261.14. A companion prohibition relating to third parties in possession of nonpublic Board information is found at § 261.20(a).

#### B. Subpart B—Published Information and Records Available to Public; Procedures for Requests

##### § 261.10 Published Information

Section 261.10 lists and explains the various types of information that are readily available to the public in the **Federal Register**, Board Printing & Fulfillment, or in the Board’s electronic reading room. The proposed regulations revise the regulations in three ways. First, the Board proposes shortening the list of items published in the **Federal Register** by replacing the items listed in original paragraphs (a)(6) through (10) with *Other notices as required by law* in order to add flexibility in the event of new required reports. Second, the Board proposes removing the paragraphs regarding the Board’s reports to Congress, the Federal Reserve Bulletin, and “Other published information” because of the ready availability and frequently changing nature of information made available on the Board’s website. As proposed, § 261.10(b) will address the current procedures for obtaining Board publications. Finally, the Board will consolidate duplicative material in current § 261.11 into § 261.10(c). In particular, § 261.10(c)(1) will explain what information is available in the

Board’s electronic reading room, § 261.10(c)(2) will explain which publicly available filings may be made available at Reserve Banks, and § 261.10(c)(3) will retain the existing provision authorizing the Board to delete personal privacy details prior to disclosure.

##### § 261.11 Records Available to the Public Upon Request

This revised section (currently § 261.12) is modified to separate the mechanics of making a request (new § 261.11(a)) from the contents of the request (new § 261.11(b)). In addition, the Board proposes clarifying that its time period for responding to a request begins when it receives a request that includes all required information. Finally, the Board proposes removing the paragraph regarding oral requests given that the FOIA does not reference oral requests. As a practical matter, the Board may decide to honor oral requests on a case-by-case basis.

##### § 261.12 Processing Requests

The substance of current § 261.13 relating to processing requests is substantially unchanged, although some clarifying language has been added. This section contains information on tracking, time limits, and responses to requests. Matters related to appeals, currently included in § 261.13, will be moved to a later section. Further changes to the section include incorporating language from the Department of Justice’s guidance (DOJ guidance)<sup>1</sup> into § 261.12(c) (“Expedited Processing”) and § 261.12(e) (“Time Limits”).

##### § 261.13 Responses to Requests

While the majority of the language in the proposal reflects the current regulation, § 261.13 is reorganized and includes a few substantive edits. Section 261.13(a) will clarify that the search for responsive records, and therefore the start of the response time clock, will begin once the Board has received a perfected request. The language will also be revised to explain that the search for responsive records will be of records of the Board as of the date of the search. The foreseeable harm standard language currently in § 261.14(a) will be moved to § 261.13(c) and the discussion of segregability, now in § 261.14(b), will be moved to § 261.13(d) to reflect the sequential process that the Board takes when it receives a FOIA request. The Board proposes editing § 261.13(e)(3) to conform to the DOJ guidance, mainly to

<sup>1</sup> <https://www.justice.gov/oip/template-agency-foia-regulations>.

specify that the Board will provide the requester with an estimate of the amount of information withheld unless the amount of information withheld is indicated by deletions marked on the documents that are produced in part or if providing an estimate would harm an interest protected by an exemption. Section 261.13(f) will set out with additional specificity what determinations are considered “adverse determinations” that can be appealed. Finally, the Board proposes editing § 261.13(g) to indicate that the Board will typically send responsive records via email unless otherwise agreed upon by the Board and the requester.

#### § 261.14 Appeals

The Board proposes adding a new section, § 261.14, for Appeals, which was previously included in the section about “Processing Requests.” Section 261.14(a)(1) will now specifically include information about how to appeal the denial of expedited treatment. The time period for filing an appeal is amended to conform to the statute and DOJ guidance. Finally, the Board proposes adding clarifying language to § 261.14(c) which describes the circumstances for when the Board may reconsider an adverse determination.

#### § 261.15 Exemptions From Disclosure

Section 261.15 lists the exemptions available under the FOIA, currently located in § 261.14. The Board proposes simplifying the language related to exemptions (b)(3) and (b)(7) of the FOIA, 5 U.S.C. 552(b)(3) and (7), to incorporate rather than repeat the statutory language. The Board also proposes adding clarifying information to § 261.15(b) which discusses the circumstances under which the Board may make a discretionary release of nonpublic information. For example, the Board proposes adding paragraph (b)(2) that explains that the Board’s prior release of particular nonpublic information does not waive the Board’s ability to withhold similar nonpublic information in response to the same or a different request. The Board also proposes moving language currently in § 261.14(c)(1), which permits the Board, designated Board members, the General Counsel, and the Secretary to make discretionary disclosures of any material that is exempt under FOIA, into § 261.15(b)(3). Section 261.15(c) is unchanged from the current provision (§ 261.14(c)).

#### § 261.16 Fee Schedules; Waiver of Fees

Proposed § 261.16 sets forth various provisions relating to the fees applicable to requests for records and also provides in Table 1 to § 261.16 the proposed fee schedule. The Board proposes several changes to the current fee provisions at § 261.17. First, the Board proposes adding language to § 261.16(a) to emphasize that the fee schedules will be applied in a manner consistent with the limitations set forth in 5 U.S.C. 552(a)(4)(A)(viii), which reference the Board’s compliance with the response time limit and also address unusual circumstances. Second, the Board proposes adding § 261.16(b) to address the definitions for search time, direct costs, duplication costs, and review time which have been modified to provide greater clarity. Section 261.16(c) addresses the payment procedures for requesters. Third, the Board proposes removing from § 261.16(c) any reference to a dollar threshold for when the Board will give advance notification of fees. In practice, a requester is only notified if staff have determined that the processing charges will exceed the amount the requester agreed to in his original perfected request; the language will now reflect that. Fourth, proposed § 261.16(d) will define the different categories of requesters, which are currently found in § 261.2 (“Definitions”). The Board believes that these definitions are better grouped in the fees section so that users only have to reference a single section in order to determine the fee category for which they qualify. The proposal updates the definitions for “representative of the news media,” “educational institution,” and “noncommercial scientific institution” to be consistent with the FOIA and DOJ guidance. The Board will also set out a fee schedule in chart form in place of the current regulatory language so that users can more easily determine which fees apply. Finally, the Board proposes adding § 261.16(g) to detail the conditions for a waiver or reduction of fees.

#### § 261.17 Request for Confidential Treatment

Section 261.17 addresses the procedures to be used by any submitter of information to the Board who seeks confidential treatment of the information. The language of § 261.17(a) is revised to permit confidential treatment requests to be made for personal privacy information as well as proprietary commercial information. The Board also proposes replacing “a reasonable time after submission” with

“within 10 working days thereafter” in order to provide the submitters with a specific time frame for Board review of confidential treatment requests. The Board proposes language to § 261.17(b) that requires submitters to include detailed information to support confidential treatment requests. In addition, the Board proposes including language from the DOJ guidance stating that confidential treatment requests expire after 10 years. In the provision regarding confidential information contained in forms approved pursuant to the Paperwork Reduction Act in § 261.17(d), the Board proposes replacing “data” with “data items” to emphasize that even if the entire form is not deemed confidential, certain portions of the form may be confidential.

#### § 261.18 Process for Addressing a Submitter’s Request for Confidential Treatment

Section 261.18 addresses how the Board processes confidential treatment requests and incorporates the provisions of current § 261.16. In § 261.18(a), the Board proposes removing language that specifically references that Board or Reserve Bank staff may also act on confidential treatment requests as unnecessary in light of revisions to the “*Alternative authority*” section in § 261.3. While the substance of current § 261.16(b), regarding notice to the submitter, will not be altered, the proposal incorporates DOJ guidance language into this section to help clarify the process. Proposed revisions to § 261.18(c), (d), (e), and (g) also incorporate DOJ guidance language without changing the substance of the Board’s current language.

#### *C. Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances*

#### § 261.20 General

The Board is proposing to add a new “*General*” section at the beginning of subpart C to set forth certain generally applicable provisions. Section 261.20(a) is largely based on current §§ 261.20(g), 261.21(g) and 261.22(e) and provides that all confidential supervisory information and other nonpublic information of the Board made available under subpart C remains the property of the Board and can neither be used for an unauthorized purpose nor further disclosed without the written permission of the General Counsel. Section 261.20(b) adds new language stating that any disclosure of confidential supervisory information or

nonpublic information under subpart C does not constitute a waiver by the Board of any applicable privileges. This new language would make explicit the Board's authority to make disclosures of confidential supervisory information and other nonpublic information on a confidential and limited basis without forfeiting any applicable privileges such as the bank examination privilege. Section 261.20(c) provides that subpart C does not limit or restrict the Board's authority to impose additional conditions or limitations on the use and disclosure of confidential supervisory information or other nonpublic information or to make discretionary disclosures of confidential supervisory information or other nonpublic information in addition to the specific disclosures provided for in subpart C.

#### § 261.21 Confidential Supervisory Information Made Available to Supervised Financial Institutions

Current § 261.20 addresses confidential supervisory information that is made available to both supervised financial institutions and financial institution supervisory agencies in one section. Under the Board's proposal, these provisions will be covered by separate regulatory sections. Section 261.21 will address disclosures to and by supervised financial institutions and § 261.22 will address disclosures by the Board to governmental agencies, including financial institution supervisory agencies.

The Board is proposing a number of changes in § 261.21. Under current § 261.20(b), a supervised financial institution may disclose confidential supervisory information only to its parent holding company. The Board recognizes that supervised financial institutions may have legitimate business needs to disclose information to a variety of affiliates, including subsidiary banks, nonbank subsidiaries, and other entities within a holding company structure that provide centralized services to the company. Accordingly, under § 261.21(b), supervised financial institutions would be authorized to disclose confidential supervisory information to the directors, officers, or employees of their affiliates, as defined in the Board's Regulation Y, 12 CFR 225.2(a), to the extent such individuals have a need for the information in the performance of their official duties.

Additionally, under § 261.21(b)(2) the Board is proposing to permit supervised financial institutions to disclose confidential supervisory information directly to the Federal Deposit

Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (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) concurs that the receiving agency has a legitimate supervisory or regulatory interest in the information.

Sections 261.21(b)(3) and (b)(4) further modify the requirements governing supervised financial institutions' disclosures of confidential supervisory information to their auditors, outside legal counsel, and other service providers. Section 261.21(b)(3) eliminates the requirement that auditors and legal counsel view confidential supervisory information only on the premises of the supervised financial institution. Accordingly, the Board's amendment would allow supervised financial institutions to provide their auditors and outside legal counsel off-premises access to confidential supervisory information, subject to the written agreements set forth in § 261.21(b)(3)(i) through (iv), which include the requirement to render electronic files effectively inaccessible through access control measures or other means at the conclusion of the engagement.

Sections 261.21(b)(4) and (5) would modify the current process under which firms seek approval to disclose confidential supervisory information to their other service providers, including consultants and independent contractors. Instead of institutions submitting their disclosure requests to the General Counsel as required under the current regulation, the proposal would have institutions direct requests to their CPCs, who will, if required by internal procedures, consult with other Federal Reserve staff before rendering a decision on the request. This change will efficiently locate the Federal Reserve decision-making on such requests within the area most knowledgeable about a particular institution's supervisory information and need to share that information. The Board particularly invites public comment on this provision, given the change in existing procedure and the amendments proposed in § 261.21(b)(3).

#### § 261.22 Nonpublic Information Made Available by the Board to Governmental Agencies and Entities Exercising Governmental Authority

Section 261.22(a) revises the Board's current rules governing disclosures by the Board and Reserve Banks to

financial institution supervisory agencies. It updates the agencies with which information may be shared to eliminate agencies that no longer exist and include new ones, such as the CFPB. It also permits sharing with state financial supervisory agencies on the same basis as the federal agencies—that is, “for legitimate supervisory or regulatory purposes and with or without a request.” The revisions also slightly alter the authorities of various Board staff to make disclosures in particular circumstances. Section 261.22(b) permits disclosure of information to particular governmental units in furtherance of specific statutory responsibilities, such as the Fair Housing Act, the Equal Credit Opportunity Act, and the Employee Retirement Income Security Act of 1974.

Section 261.22(c), which largely tracks current § 261.21(a) through (c), addresses non-subpoena requests for confidential supervisory information or other nonpublic information from other governmental agencies or entities exercising governmental authority, such as self-regulatory organizations. Section 261.22(c) additionally clarifies that properly accredited foreign law enforcement agencies and other foreign government agencies may submit requests for confidential supervisory information and other nonpublic information, with the exception that the provision of confidential supervisory information to foreign bank regulatory or supervisory authorities is governed by 12 CFR 211.27.

Section 261.22(d) addresses federal and state grand jury, criminal trial, and government administrative subpoenas, and largely tracks existing § 261.21(e). Section 261.22(e) permits the Board's General Counsel to impose conditions on disclosure and recognizes that the Board also enters into formal information-sharing agreements with other agencies and entities.

#### § 261.23 Other Disclosure of Confidential Supervisory Information

Section 261.23 addresses requests that do not fall under § 261.21 or 261.22, including requests to access, use, or disclose confidential supervisory information in litigation. Section 261.23 largely adopts current § 261.22 with some clarifying revisions. For example, amended § 261.23(a)(2) will clarify that the Board will not authorize access to or disclosure of suspicious activity reports except as necessary to fulfill official duties under the Bank Secrecy Act and therefore will not authorize disclosure of such reports for use in private legal proceedings. This provision implements the Bank Secrecy Act regulations

promulgated by the Financial Crimes Enforcement Network (FinCEN) within the Department of the Treasury. *See* 31 U.S.C. 5318(g)(2)(ii); 31 CFR 1020.320(e)(2). Amended § 261.23(a) will also specify that the section covers not only requests for disclosure from the Board but also requests to access confidential supervisory information in the possession of third parties.

Section 261.23(b)(1)(i) clarifies which requests may be made in connection with litigation, recognizing that the Board receives various types of such requests. Accordingly, the revised section identifies the following categories of requests for the proposed use of confidential supervisory information in litigation: (1) Requests to obtain confidential supervisory information from the Board or Reserve Banks; (2) requests to disclose confidential supervisory information already in the possession of the requester; and (3) requests to access confidential supervisory information in the possession of a third party. Section 261.23(b)(2) sets forth the requirements for any request made under § 261.23(b)(1), which are largely based on the Board's requirements at current § 261.22(b)(1) with some proposed modifications to ensure requests contain the information required by the General Counsel. First, the Board is proposing that in addition to the requester identifying the "judicial or administrative action" to which the request relates, the requester also provide a copy of the complaint or other pleading setting forth the assertions in the case. Importantly, the proposed rule would have requesters directly speak to "the relevance of the confidential supervisory information to the issues or matters raised by the litigation," which allows the General Counsel to make an informed judgment as to the party's need for the information. The proposed rule further requires requesters to provide a "narrow and specific description of the confidential supervisory information," emphasizing the importance of precisely identifying the confidential supervisory information that is deemed relevant to the litigation.

The Board is also clarifying current § 261.22(b)(1)(iv) to require the requester to state "[t]he reason why the information sought, or *equivalent information adequate to the needs of the case*, cannot be obtained from any other source" (emphasis added). This recognizes that frequently, business information obtainable directly from litigants may provide material sufficient for a party's purposes without invading the bank examination privilege. Lastly, the Board's amended rule would clarify

that in cases in which a requester seeks to disclose confidential supervisory information to a litigant, the Board, prior to acting on the request, may require the litigant to whom disclosure would be made to substantiate its needs for the information.

While § 261.23(c), governing all other requests seeking to access or to disclose confidential supervisory information, is largely unchanged from the current § 261.22(b)(2), the Board has added some minor clarifications, including requiring the requester to provide "other information as requested by the General Counsel."

#### § 261.24 Subpoenas, Orders Compelling Production, and Other Process

The Board is proposing minor clarifying revisions to current § 261.23(a) and (b) addressing the actions required of any individual who is served with a subpoena, order, or other judicial or administrative process requiring the person's production of confidential supervisory information or other nonpublic information of the Board in the form of documents or testimony. Specifically, the revisions make clear that the Board does not expect parties to defy court orders where the Board has had an opportunity to appear and oppose disclosure of its information. The Board is also proposing to add a new provision at § 261.24(c) to clarify that § 261.24 governs the procedure with respect to subpoenas and other legally-enforceable demands only, while any civil request for production of documents containing confidential supervisory information must proceed under § 261.23.

### III. Administrative Law Matters

#### *Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, the Board is publishing an initial regulatory flexibility analysis of the proposal. The RFA requires each federal agency to prepare an initial regulatory flexibility analysis in connection with the promulgation of a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with average total assets of \$550 million or less and trust companies with average total assets of \$38.5 million or less. As of December 2018, there were approximately 3,191 small bank holding companies, 204

small savings and loan holding companies, 549 small state member banks, and one small trust company directly supervised by the Federal Reserve. Based on the Board's analysis, and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Board will, if necessary, conduct a final regulatory flexibility analysis after consideration of comments received during the public comment period.

1. *Statement of the need for, and objectives of, the proposed rule.* The proposed rule updates the procedures for requesting access to documents that are records of the Board under the FOIA and the rules governing the disclosure of confidential supervisory and other nonpublic information.

2. *Small entities affected by the proposed rule.* Like the Board's current part 261 regulation, the requirements set forth in the proposed 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 proposal, 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, under the FOIA, fees for processing FOIA requests must be limited to reasonable standard charges. Similarly, far from imposing any economic costs on supervised financial institutions, the Board's clarifications to the rules governing access to and disclosure of confidential supervisory information would ease certain outdated restrictions that hamper supervised financial institutions in their ability to further disclose confidential supervisory information within their organizations as well as with their auditors and legal counsel.

3. *Recordkeeping, reporting, and compliance requirements.* Beyond the restrictions on the unauthorized use and disclosure of confidential supervisory information and other nonpublic information of the Board, the proposal does not impose any reporting, recordkeeping, or other compliance requirements on persons or entities, including small entities.

4. *Other Federal rules.* The Board does not believe that the proposal duplicates, overlaps, or conflicts with any other federal rules.

5. *Significant alternatives to the proposed revisions.* The Board does not believe that there are other significant

alternatives to the proposed rule which accomplish its stated objectives.

#### *Paperwork Reduction Act*

There is no collection of information required by this proposal that would be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

#### *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 proposal is presented in a simple and straightforward manner and is consistent with this “plain language” directive.

#### **List of Subjects in 12 CFR Part 261**

Administrative practice and procedure, Confidential business information, Freedom of information.

#### **Authority and Issuance**

For the reasons set forth in the preamble, the Board of Governors of the Federal Reserve System proposes to amend 12 CFR part 261 as follows:

- 1. Revise part 261 to read as follows:

### **PART 261—RULES REGARDING AVAILABILITY OF INFORMATION**

#### **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**

- 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**

- 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. 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 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 of this part implements the Freedom of Information Act (FOIA) (5 U.S.C. 552).

(3) Subpart C of this part 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, 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.

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

(i) Documents prepared by or for a supervised financial institution for its own business purposes and that are in its possession except to the extent included in paragraph (b)(1) of this section; 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 in the performance of functions for or on behalf of the Board.

(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); 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 (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](http://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](http://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 3 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 and copying at Reserve Banks.* The Board may determine that certain classes of publicly available filings shall be made available for inspection and copying 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 the 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) *Perfected 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) through (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 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, 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) 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) 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) An initial request for records 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.

(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 Table 1 to § 261.16 Fees 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) *Computing Fees.* 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 Table 1 to § 261.16 Fees of this section.

(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 Table 1 to § 261.16 Fees 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) 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 operation or activities of the federal 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) 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 in this section. 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) through (4) of this section, may not charge duplication fees, except as permitted under paragraphs (h)(2) through (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 paragraphs (d)(2) through (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 paragraphs (d)(2) through (4) of this section, may charge duplication fees, if the Board has:

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

(ii) Discussed with the requester via written mail, email, 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.

TABLE 1 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 page—.10.
	Professional/Supervisory staff—\$40.	Professional/Supervisory staff—\$40.	Other types of duplication—Actual Cost.
	Manager/Senior professional staff—\$65.	Manager/Senior professional staff—\$65.	
	Computer search, including computer search time, output, operator's salary—Direct Costs.		

TABLE 1 TO § 261.16 FEES—Continued

Type of requester	Search costs per hour	Review costs per hour	Duplication costs
Educational; or Non-commercial scientific; or News Media.	Costs waived .....	Costs waived .....	First 100 pages <i>free</i> , then: Photocopy per standard page—.10. Other types of duplication—Actual Cost.
All other requesters .....	First 2 hours free, then: ..... Clerical/Technical staff—\$20. Professional/Supervisory staff—\$40. Manager/Senior professional staf—\$65.	Costs waived .....	First 100 pages <i>free</i> , then: Photocopy, per standard page—.10. Other types of duplication—Actual Cost.

### § 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 (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, identify the specific information for which confidential treatment is requested, and include an affirmative statement that such information is not available publicly. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment for purposes of § 261.15(a)(4). A submitter's request for confidentiality in reliance upon § 261.15(a)(4) generally expires 10 years after the date of submission unless a renewal request is submitted in writing to the Board before the confidentiality designation expires. The renewal request will likewise expire 10 years after the date of submission, unless the Board receives another timely renewal request.

(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 (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 that disclosure of information may cause substantial competitive harm to the submitter or would result in an unwarranted invasion of personal privacy, 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 disclose such information to its directors, officers, or employees, and to the directors, officers, or employees of its affiliates, but only to the extent those individuals have a need for the information in the performance of their official duties.

(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 lawfully in possession of confidential supervisory information about that institution pursuant to this section may, with the concurrence of the institution's central point of contact at the Reserve Bank or equivalent supervisory team leader (CPC), disclose such information 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 CPC determines that the receiving agency has a legitimate supervisory or regulatory interest in the information.

(3) *Legal counsel and auditors.* 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 so long as the disclosure is necessary to the legal counsel's or auditor's engagement and the legal counsel or auditor is engaged by the supervised financial institution pursuant to a written agreement under which the legal counsel or auditor agrees that:

(i) It will treat the confidential supervisory information in accordance with this subpart;

(ii) It will not use the confidential supervisory information for any purpose other than in connection with the particular engagement with the supervised financial institution;

(iii) It will strictly limit disclosure of the confidential supervisory information to those of its staff who have a need to know the information for the purposes of the engagement and who are bound by written agreement to keep the information confidential in accordance with this subpart;

(iv) It will not disclose the confidential supervisory information to any third party for any purpose without the prior written approval of the General Counsel; and

(v) It will return or certify the destruction of the confidential supervisory information or, in the case of electronic files, render the files effectively inaccessible through access control measures or other means, at the conclusion of the engagement.

(4) *Other service providers.* (i) A supervised financial institution that seeks to disclose confidential supervisory information to other service providers (such as consultants,

contingent workers, and technology providers) (hereinafter, "service provider") engaged by the supervised financial institution must submit a written request to the financial institution's CPC that identifies:

(A) The purpose and scope of the service provider's engagement;

(B) The specific business need to disclose confidential supervisory information to the service provider; and

(C) The specific documents or materials the supervised financial institution seeks permission to disclose to the service provider.

(i) The CPC may authorize, in whole or in part, or deny the request. If the CPC authorizes a supervised financial institution to disclose confidential supervisory information to a service provider under this section, the supervised financial institution may not disclose confidential supervisory information to the service provider unless the service provider has agreed to the terms set out in paragraphs (b)(3)(i) through (v) of this section.

(5) *Other applicable internal procedures.* A CPC's action under this section may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures.

**§ 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 of 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 261.22,

(1) In connection with any proposed use of confidential supervisory information in litigation before a court, board, commission, agency, or arbitration, any person who:

(i) 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);

(ii) Seeks to use confidential supervisory information in its possession or to disclose such information to another party; or

(iii) 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)(ii) 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) 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) 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 non-public 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, June 10, 2019.

**Ann Misback,**  
*Secretary of the Board.*

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