Volume 4, Number 1 January–February 2026

THE JOURNAL OF FEDERAL AGENCY ACTION

fastcase FULL COURT PRESS

The Journal of Federal Agency Action

Volume 4, No. 1 | January–February 2026

THE JOURNAL OF FEDERAL AGENCY ACTION (ISSN 2834-8818 (online)) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: David Nayer
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and anyone interested in federal agency actions.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

David Nayer, Publisher, Full Court Press at david.nayer@clio.com or at 202.999.4777

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

Federal Deposit Insurance Corporation Should Modernize Its Regulations on Confidential Supervisory Information

Dustin N. Nofziger and Pinchus D. Raice*

In this article, the authors urge the Federal Deposit Insurance Corporation (FDIC) to join its peers by clarifying that a supervised financial institution may disclose confidential supervisory information to counsel for the purpose of obtaining legal advice immediately—without the need for prior authorization from the FDIC.

Each of the federal banking agencies, as well as the New York State Department of Financial Services (DFS), permits supervised financial institutions to disclose confidential supervisory information (CSI) to their outside regulatory counsel for the purpose of obtaining legal advice. The Federal Deposit Insurance Corporation (FDIC) is the lone outlier that insists that supervised financial institutions obtain its authorization prior to disclosing CSI to counsel. This insistence materially interferes with the attorney-client relationship, prejudices intra-agency appeals (which have short deadlines) of FDIC material supervisory determinations, and delays the provision of informed legal advice. The FDIC should join its peers by clarifying that a supervised financial institution may disclose CSI to counsel for the purpose of obtaining legal advice immediately—without the need for prior authorization from the FDIC.

What Is CSI?

The banking agencies use different nomenclature for CSI—"exempt records" in the case of the FDIC and the National Credit Union Administration (NCUA), "non-public OCC information" in the case of the Office of the Comptroller of the Currency (OCC), and "confidential supervisory information" in the case of DFS, the

The Journal of Federal Agency Action / January–February 2026, Vol. 4, No. 1, pp. 9–15.

ISSN 2834-8818 (online).

Board of Governors of the Federal Reserve System (Federal Reserve Board), and the Bureau of Consumer Financial Protection (CFPB).

The concept is the same despite the differences in nomenclature. The banking agencies consider their reports of examination, supervisory letters, and other supervisory communications (as well as the contents thereof) to constitute CSI. In fact, the agencies may even consider "internal bank documents discussing or describing" CSI to constitute CSI.[1]

CSI is considered to be the agency's property, and is protected from unauthorized disclosure as such. Indeed, some federal banking agencies print on their reports of examination and supervisory correspondence that unauthorized disclosure is not only a violation of the agency's regulations governing CSI but also is subject to federal criminal prosecution for conversion of U.S. government property under 18 U.S.C. § 641.

Other Banking Agencies Do Not Interfere in the Attorney-Client Relationship by Prohibiting Supervised Institutions from Disclosing CSI to Legal Counsel

Despite the acknowledged importance of keeping CSI confidential (e.g., to prevent a run on the bank), most regulators have dealt with the issue of disclosure to a financial institution's counsel sensibly.

Since 1998, for example, the NCUA has allowed supervised credit unions to disclose CSI to their "agents properly entitled to such information for the performance of their official duties."[2] (In the authors' experience, the NCUA interprets outside counsel to constitute an "agent" of a credit union.) Since 2011, the OCC has provided that supervised financial institutions may disclose CSI to persons or organizations officially connected with the institution as attorneys "[w]hen necessary or appropriate for business purposes."[3] Since 2013, the CFPB also has provided that supervised financial institutions may disclose CSI to their counsel.[4]

Historically, while the Federal Reserve Board's regulations were on paper somewhat more restrictive, it took a liberal approach to allowing counsel to access CSI. The Federal Reserve Board permitted counsel to review CSI in person on a supervised financial institution's premises without prior authorization.[5] Moreover, in the

authors' experience, it liberally granted requests for off-premises review by providing supervised financial institutions with ongoing authorization to disclose CSI to counsel for as long as counsel represented the institution.

After advocacy by the authors,[6] in 2020 the Federal Reserve Board officially modernized its regulations, and formalized its liberal approach, by adopting the OCC standard.[7] Like the OCC, the Federal Reserve Board now allows supervised financial institutions to disclose CSI to counsel "[w]hen necessary or appropriate" in connection with the provision of legal services to the supervised financial institution.[8]

DFS, meanwhile, historically had no regulations concerning CSI. In the authors' experience, however, DFS contended behind closed doors that Section 36.10 of the New York Banking Law prohibited disclosure of CSI to counsel absent DFS's prior authorization, and, further, that DFS could ask invasive questions about which documents a supervised financial institution sought to disclose to counsel and why. The authors objected strongly to these unreasonable practices, including on the grounds that DFS had no authority under Section 36.10 to prohibit or condition the disclosure of CSI to counsel.[9]

After several years of advocacy by the authors,[10] in 2021 DFS promulgated a CSI regulation that permits supervised financial institutions to disclose CSI to their counsel without prior authorization, provided that counsel acknowledges in writing that the disclosed information is confidential and agrees not to disseminate the information.[11] While it continues to be unclear that DFS has the authority to prohibit or restrict counsel's access to CSI under Section 36.10,[12] DFS has mooted the issue by allowing counsel to access the records needed to advise their financial institution clients.

The FDIC Departs from the Regulatory Consensus by Materially Interfering in the Attorney-Client Relationship

As a result of the Federal Reserve Board and DFS's recent promulgation of rules to explicitly permit disclosure of CSI to counsel, the FDIC today is an outlier. It is the sole federal agency that contends that it may materially interfere in the attorney-client

relationship by requiring supervised financial institutions to obtain authorization before disclosing CSI to counsel.

Under the FDIC's regulations, a supervised depository institution must submit a request to the FDIC to disclose CSI "to *anyone* who is not a director, officer or employee of the depository institution" that "specif[ies], with reasonable particularity, the record sought, the party's interest therein, and the party's relationship to the depository institution to which the record relates."[13] As outside counsel are not "director[s], officer[s], or employee[s]" of their financial institution clients, the FDIC thus purports to prohibit financial institutions from disclosing CSI to their counsel absent ad hoc FDIC authorization.

This situation is untenable for several reasons. For one thing, the FDIC can be untimely in responding to requests to disclose CSI to counsel. At times, the FDIC also can unreasonably limit the materials that a depository institution may disclose to counsel, even to the point of requiring the financial institution to redact material from reports of examination and other documents that the FDIC does not consider relevant to counsel's remit.

But just as important, the FDIC's existing CSI rules deter financial institutions in tense regulatory situations from seeking legal advice. In such situations, many depository institutions will simply forgo legal advice rather than risk, in their perception, "raising the temperature" with the FDIC by requesting authorization to disclose CSI to counsel. Depository institutions are entitled to the advice of counsel in regulatory matters, particularly where the FDIC's actions may be unlawful or unwarranted. The FDIC should not interject itself between depository institutions and their counsel to deter, delay, or obstruct the provision of informed legal advice.

Concluding Thoughts and Recommendation

The FDIC should join its federal and state brethren in modernizing its CSI regulations to allow supervised depository institutions to immediately disclose reports of examination and other CSI to their outside regulatory counsel. In our opinion, the FDIC should join the Federal Reserve Board in adopting the OCC standard, which is both sensible and time-tested. A supervised depository institution should be permitted to disclose CSI to counsel when, in the institution's judgment, it is "necessary or appropriate for

business purposes." We hope that the FDIC will undertake the straightforward, but important, project of modernizing its CSI regulations under Acting Chairman Travis Hill's leadership.

Notes

* Dustin N. Nofziger (dnofziger@pryorcashman.com) is a counsel at Pryor Cashman LLP and a member of the firm's Financial Institutions Practice. Pinchus D. Raice (praice@pryorcashman.com), a partner at the firm, co-chairs the firm's Financial Institutions Practice.

1. See The Federal Reserve System, Confidential Supervisory Information 1, FedLinks (Aug. 2016) ("CSI includes the information requested by or provided to supervisory staff, including examination dates, and internal institution documents addressing supervisory matters.… Specific examples of CSI include, but are not limited to: supervisory communications between an institution and the Board [of Governors of the Federal Reserve System] or a [Federal] Reserve Bank, including, but not limited to, letters, emails, and oral communications [and] internal bank documents discussing or describing such communications…." (emphasis added)), https://www.communitybankingconnections.org/-/media/cbc/fedlinks/2016/Confidential-Supervisory-Information.pdf?sc_lang=en&hash=1762C32C532C626E505196D0728DE446; 12 C.F.R. § 261.2(b)(1) (CSI includes "information derived from or related to" CSI; "[A]ny portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution, that contains or would reveal confidential supervisory information is confidential supervisory information.").

2. 12 C.F.R. § 792.30 ("[N]o officer, employee, or agent of … any federally insured credit union shall disclose or permit the disclosure of any exempt records of NCUA to any person other than those … credit union officers, employees, or agents properly entitled to such information for the performance of their official duties."); The Freedom of Information Act and Privacy Act, 63 Fed. Reg. 14,336, 14,343 (Mar. 25, 1998) (final rule providing same).

3. 12 C.F.R. § 4.37(b)(2) ("When necessary or appropriate for business purposes, a national bank, Federal savings association, or holding company, or any director, officer, or employee thereof, may disclose non-public OCC information, including information contained in, or related to, OCC reports of examination, to a person or organization officially connected with the bank or Federal savings association as officer, director, employee, attorney, auditor, or independent auditor."); Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,563 (July 21, 2011) (final rule providing same). Under the regulatory principle of "national treatment," this provision also applies to federal branches and agencies of foreign banks. See 12 U.S.C. § 3102(b); 12 C.F.R. § 28.13(a)(1).

4. 12 C.F.R. § 1070.42(b)(2)(i) ("Any supervised financial institution or affiliate thereof that is lawfully in possession of confidential supervisory information of the CFPB provided directly to it by the CFPB pursuant to paragraph (a) of this section may disclose such information, or portions thereof, to: (i) Its certified public accountant, legal counsel, contractor, consultant, or service provider. . . ."); Disclosure of Records and Information, 78 Fed. Reg. 11,484, 11,515-16 (Feb. 15, 2013) ("Any supervised financial institution or affiliate thereof that is lawfully in possession of confidential supervisory information of the CFPB pursuant to this section may disclose such information, or portions thereof, to: (i) Its certified public accountant, legal counsel, contractor, consultant, or service provider. . . .").

5. Until October 14, 2020, 12 C.F.R. § 261.20(b)(2) provided: "Any supervised financial institution lawfully in possession of confidential supervisory information of the Board pursuant to this section may disclose such information, or portions thereof, to any certified public accountant or legal counsel employed by the supervised financial institution, subject to the following conditions: (i) Certified public accountants or legal counsel shall review the confidential supervisory information only on the premises of the supervised financial institution, and shall not make or retain any copies of such information; (ii) The certified public accountants or legal counsel shall not disclose the confidential supervisory information for any purpose without the prior written approval of the Board's General Counsel except as necessary to provide advice to the supervised financial institution, its parent bank holding company, or the officers, directors, and employees of such supervised financial institution and parent bank holding company.").

6. Letter from Pinchus D. Raice, chair, Banking Committee, Brooklyn Bar Association, to Anne E. Misback, Secretary, Board of Governors of the Federal Reserve System (Aug. 13, 2019), https://www.pryorcashman.com/dustin-n-nofziger/news/raice-letter-leads-to-changes-to-federal-reserve-boards-regulations-on-confidential-supervisory-information.

7. See 12 C.F.R. § 261.21(b)(3) ("When necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution, the supervised financial institution may disclose confidential supervisory information to its legal counsel or auditors."); Rules Regarding the Availability of Information, 85 Fed. Reg. 57,616, 57,616 (Sept. 15, 2020) ("[T]he [Federal Reserve] Board has explored areas where it would be appropriate to harmonize the final rule with the rules of the other Federal banking agencies and the CFPB. A key opportunity for harmonization we noted is the standard for sharing within and by the organization. In the final rule, we adopted the Office of the Comptroller of the Currency's ('OCC') standard to permit supervised financial institutions to disclose confidential supervisory information with their directors, officers, and employees 'when necessary or appropriate for business purposes,' and included a similar standard permitting disclosures to the supervised financial institution's outside

legal counsel and auditors when the disclosures are 'necessary or appropriate in connection with the provision of legal or auditing services.' Consistent with the OCC's rules, we also removed the proposed provision that conditioned disclosures to legal counsel and auditors on their executing specific written agreements with respect to their use of confidential supervisory information.").

8. 12 C.F.R. § 261.21(b)(3).

9. Pinchus Raice and Dustin Nofziger, NY Regulator's Untenable Authority Over Confidential Info, Law360 (Nov. 3, 2017) ("The language and history of Section 36.10 suggest that it was never meant to prevent financial institutions from confidentially disclosing CSI to their outside counsel."), https://www.law360.com/articles/980300/ny-regulator-s-untenable-authority-over-confidential-info.

10. See, e.g., id.; Letter from Dustin N. Nofziger, chair, New York County Lawyers Association, to Linda A. Lacewell, Superintendent, DFS (Sept. 4, 2019) (noting that Section 36.10 did not appear to prohibit financial institutions from disclosing CSI to counsel and requesting a formal written response from Superintendent Lacewell, on whether, inter alia, "the Superintendent interpret[s] Section 36.10 to prohibit a financial institution from disclosing 'reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations' … in a financial institution's lawful possession to its outside legal counsel, on a confidential basis, for the purpose of obtaining legal advice and/or representation before DFS"), https://www.pryorcashman.com/dustin-n-nofziger/news/dfs-proposes-new-regulation-after-receipt-of-nycla-letter. On November 14, 2019, just over two months after receipt of Mr. Nofziger's letter, DFS proposed a regulation allowing financial institutions to disclose CSI to counsel; the regulation was promulgated with minor changes in 2021.

11. N.Y. Comp. Codes R. & Regs. tit. 3, § 7.2(b).

12. See supra notes 9 and 10.

13. 12 C.F.R. § 309.6(b)(7)(i) (emphasis added); see also id. at § 309.6(a) ("Except as provided in paragraph (b) of this section or by 12 CFR part 310, no person shall disclose or permit the disclosure of any exempt records, or information contained therein, to any persons other than those officers, directors, employees, or agents of the [Federal Deposit Insurance] Corporation who have a need for such records in the performance of their official duties.") & § 309.6(b) ("Exempt records or information of the Corporation may be disclosed only in accordance with the conditions and requirements set forth in this paragraph (b).").