

## Davis Polk Comments on Federal Reserve's Proposed Rule on Confidential Supervisory Information

By [Randall D. Guynn](#), [Margaret E. Tahyar](#) & [Eric McLaughlin](#) on August 19, 2019

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Navigating the outdated rules on confidential supervisory information has become increasingly difficult in the digital world because the rules have their origin in the paper-based world of 1967, when they were first enacted. In the meantime, the amount and type of information made available by the banking agencies to banking organizations, and vice versa, has increased by several orders of magnitude. We estimate that banking organizations send the Federal Reserve, just one of the banking agencies, approximately 2.5 million documents a year. Against this backdrop, the Federal Reserve has taken a welcome step in [proposing an update](#) to its availability of information rules. We hope that the OCC and the FDIC follow suit.

In light of the explosion in information shared in the supervisory context, Davis Polk & Wardwell LLP submitted a [comment letter](#) which made two key points. Relying on a recent Supreme Court case decided in June 2019,<sup>1</sup> we argue that the Proposal is an opportunity to restore the regulations and supervisory practices concerning confidential supervisory information to their original roots in FOIA by striking a more appropriate balance between the important policy goals reflected by Exemption 4 (competitively sensitive information) and those reflected by Exemption 8 (confidential supervisory information). We believe that banking organizations should have more discretion over what is made public.

We also argue the threat of criminal sanctions against supervised financial institutions and their directors, officers, employees and agents for the unauthorized disclosure of confidential supervisory information should cease, because

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<sup>1</sup> *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

criminalization of a vague standard related to information sharing raises a serious constitutional question. We point the Federal Reserve to another recent Supreme Court case decided in June 2019 for the void-for-vagueness issue.<sup>2</sup> We believe that the Federal Reserve has all of the power it needs to punish unauthorized disclosures by the private sector through civil means.

[Read the full comment letter](#)

*Associates Alba Baze, Eric B. Lewin and Drew Ruben contributed to the comment letter.*

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<sup>2</sup> *United States v. Davis*, 139 S. Ct. 2319 (2019)