

**Supporting Statement for the
Reporting, Recordkeeping, and Disclosure Requirements Associated with
Rules Regarding Availability of Information
(FR 4035; OMB No. 7100-NEW)**

Summary

The Board of Governors of the Federal Reserve System (Board), under authority delegated by the Office of Management and Budget (OMB), has temporarily implemented the Reporting, Recordkeeping, and Disclosure Requirements Associated with Rules Regarding Availability of Information (FR 4035; OMB No. 7100-NEW) pursuant to its authority to approve temporarily a collection of information without providing opportunity for public comment.¹

The information collection consist of reporting, recordkeeping, and disclosure requirements under subpart C (Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances) of Rules Regarding Availability of Information (12 CFR Part 261).² Subpart C contains reporting requirements that enable third parties to request the Board’s authorization to access, use, or further disclose confidential supervisory information or other nonpublic information of the Board, and that ensure that the Board is notified when any subpoena or other legally enforceable demand requires production of confidential supervisory information or other nonpublic information of the Board in the form of documents or testimony. Subpart C also contains one recordkeeping requirement related to a provision that allows supervised financial institutions³ to disclose confidential supervisory information to service providers if the disclosure is deemed necessary to the service provider’s provision of services, and two disclosure requirements that apply when individuals are 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 in the form of documents or testimony.

The estimated total annual burden for the FR 4035 is 134 hours.

Background and Justification

Section 9 of the Federal Reserve Act provides that the Board “may furnish ... confidential supervisory information ... to any ... person that the Board determines to be proper” (12 U.S.C. § 326) and 12 CFR 261.20(a) provides that “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

¹ 5 CFR Part 1320, Appendix A (1)(a)(3)(i)(A).

² There is no formal reporting form for this collection of information (the FR 4035 designation is for internal purposes only). The Board recently modified 12 CFR Part 261. See 86 FR 57616 (September 15, 2020).

³ For purposes of Part 261, a “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); an Edge Act or agreement corporation; 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. 12 CFR § 261.2(f).

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.” Given the prohibitions on the disclosure of confidential supervisory information, the Board has codified rules at subpart C to set forth permissible disclosures by supervised financial institutions, the procedures for requesting access to the Board’s confidential supervisory information and other nonpublic information, and the actions required of individuals who are served with a subpoena or legally enforceable demand for confidential supervisory information. The rules include Paperwork Reduction Act (PRA) reporting, recordkeeping, and disclosure requirements that enable the Board to respond to requests for confidential supervisory information and to ensure that confidential supervisory information is not disclosed other than as authorized by the Board.

Implementation of FR 4035 on a Temporary Basis

The delegation of authority to the Board from OMB that permits the Board to approve collections of information under the PRA includes the authority to temporarily approve a collection of information without seeking public comment. To exercise this authority, the Board must determine that a new collection of information or a change to an existing collection must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection or substantially interfere with the Board’s ability to perform its statutory obligation. Following the temporary approval of an information collection, the Board must conduct a normal delegated review of the collection within six months, including publishing in the *Federal Register* a notice seeking public comment.

The Board has temporarily approved the collections of information contained within subpart C of 12 CFR Part 261 under the title FR 4035. The Board has determined that this collection of information must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection of information and substantially interfere with the Board’s ability to perform its statutory obligations. In particular, the Board has determined that because the reporting and disclosure requirements are existing requirements that facilitate the Board’s processing of requests to access and use the Board’s confidential supervisory information, the Board’s ability to perform its statutory responsibilities relating to the disclosure, production, or withholding of the Board’s information would be diminished if the Board were unable to enforce the collections of information contained within subpart C due to possible noncompliance with the PRA.

Description of Information Collection

Reporting Requirements

Section 261.22(c). Pursuant to section 261.22(c), state, local, and foreign agencies, including law enforcement agencies, and other entities exercising governmental authority,⁴ may file written requests with the Board for access to confidential supervisory information and other

⁴ Such a request may also be made by a federal agency. However, a federal agency is not considered a “person” under the PRA. Therefore, the FR 4035 information clearance for section 261.22(c) encompasses only requests by persons other than federal agencies.

nonpublic information, including information in the form of testimony and interviews from current or former Federal Reserve System staff. Under section 261.22(c)(1), requesters must submit a letter request to the General Counsel specifying (1) the particular information, kinds of information, and where possible, the particular documents to which access is sought, (2) the reasons why such information cannot be obtained from the supervised financial institution in question or another source rather than from the Board, (3) a statement of the law enforcement purpose or other statutory purpose for which the information shall be used, (4) 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 (5) if the document or information requested includes customer account information subject to the Right to Financial Privacy Act (the 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.

The information provided in written requests made by state, local, and foreign agencies and other entities exercising governmental authority pursuant to section 261.22(c) enables the General Counsel to determine, pursuant to section 261.22(c)(2), whether the information is needed in connection with a formal investigation or other official duties of the requesting agency or entity, whether satisfactory assurances of confidentiality have been given, and whether disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.

Section 261.23(b). Section 261.23(b)(1) provides that in connection with any proposed use of confidential supervisory information in litigation before a court, board, commission, agency, or arbitration, any person who (A) 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), (B) seeks to use confidential supervisory information in its possession or to disclose such information to another party, or (C) seeks to require a person to disclose confidential supervisory information to a party, shall file a written request with the General Counsel.

Section 263.23(b)(2) provides that the request shall include (1) 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, (2) 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, (3) 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, (4) the relevance of the confidential supervisory information to the issues or matters raised by the litigation, (5) the reason why the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source, and (6) 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. Additionally, section

261.23(b)(3) provides that 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.

The information provided in written requests pursuant to section 261.23(b) allows the Board to determine, pursuant to section 261.23(d), whether 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 whether approval is consistent with the supervisory and regulatory responsibilities and policies of the Board.

Section 261.23(c). Under section 261.23(c), 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 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. The information provided in written requests pursuant to section 261.23(c) allows the Board to determine, pursuant to section 261.23(d), whether 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 whether approval is consistent with the supervisory and regulatory responsibilities and policies of the Board.

Section 261.24(a)(1). Under section 261.24(a)(1), 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 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. The information provided pursuant to section 261.24(a) allows the Board to determine whether the Board's confidential supervisory information or other nonpublic information should be disclosed in response to a subpoena or other legally enforceable demand.

Recordkeeping Requirements

Section 262.21(b)(4). Under section 261.21(b)(4), a supervised financial institution shall maintain a written account of the disclosures of confidential supervisory information that the supervised financial institution makes to service providers under this section and provide the Board or Reserve Bank with a copy of such a written account upon the Board's or Reserve Bank's request. This requirement is necessary to maintain accountability and supervisory oversight with respect to disclosures of the Board's privileged information to a wide array of third-party service providers.

Disclosure Requirements

Section 261.24(a). In addition to the reporting requirements described above pursuant to section 261.24(a)(1), section 261.24 imposes two related disclosure requirements on persons who

are 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 in the form of documents or testimony. Under section 261.24(a)(2) and (a)(3), the person is required to inform the entity issuing the process of the substance of these rules and, in particular, of the obligation to follow the request procedures in section 261.23(b) and at the appropriate time inform the court or tribunal that issued the process of the substance of these rules. These disclosure requirements help to ensure that the Board's confidential supervisory information is not disclosed in response to a subpoena or other legally enforceable demand except as authorized by the Board's General Counsel.

Respondent Panel

The FR 4035 respondent panel comprises supervised financial institutions (12 CFR 261.21(b)(4)), state, local, and foreign agencies and entities exercising governmental authority (12 CFR 261.22(c)), and any person, entity, agency or authority (12 CFR 261.23(b), 261.23(c), 261.24(a)).

Time Schedule for Information Collection

While all the reporting, recordkeeping, and disclosure requirements in the FR 4035 are event-generated, the reporting required under section 261.24(a)(1) must occur "promptly," and the disclosure required under section 261.24(a)(3) must occur "at the appropriate time."

Public Availability of Data

There is no data related to this information collection available to the public.

Legal Status

The FR 4035 is authorized pursuant to section 9 of the Federal Reserve Act (12 U.S.C. § 326), which provides that the Board "may furnish ... confidential supervisory information ... to any other person that the Board determines to be proper." Persons seeking to obtain, use, or disclose confidential supervisory information must comply with the reporting requirements of the Rules Regarding Availability of Information. Additionally, persons 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 information in any proceeding must comply with the disclosure requirements of FR 4035. Thus, the FR 4035 is required to obtain a benefit, in part, and mandatory, in part.

Any confidential supervisory information that is submitted in connection with the FR 4035 would be considered confidential pursuant to exemption 8 of the Freedom of Information Act (FOIA), which protects information contained in "examination, operating, or condition reports" obtained in the bank supervisory process (5 U.S.C. § 552(b)(8)). Individual respondents may request that other information submitted to the Board through the FR 4035 be kept confidential. If a respondent requests confidential treatment, the Board will determine

whether the information is entitled to confidential treatment on a case-by-case basis. To the extent a respondent submits nonpublic commercial or financial information in connection with the FR 4035, which is both customarily and actually treated as private by the respondent, the respondent may request confidential treatment pursuant to exemption 4 of the FOIA (5 U.S.C. § 552(b)(4)).

Consultation Outside the Agency

There has been no consultation outside the Federal Reserve System.

Estimate of Respondent Burden

As shown in the table below, the estimated total annual burden for the FR 4035 is 134 hours. The estimated total annual burden is based on the average number of requests the Board received in connection with the types of requests covered by sections 261.22(c), 261.23(b), and 261.23(c) in 2017, 2018, 2019, and the average number of notices the Board received pursuant to the notice requirement covered by section 261.24(a)(1) in 2017, 2018, and 2019. Although these provisions were recently modified by the Board, the Board does not believe that the number of requests and notices made pursuant to those sections will materially change due to those modifications. Furthermore, the estimated annual burden hours with respect to the new recordkeeping requirement under section 261.21(b)(4) is based on the average number of requests the Board received in 2017, 2018, 2019 from supervised financial institutions to disclose confidential supervisory information to their service providers. These reporting, recordkeeping, and disclosure requirements represent less than 1 percent of the Board's total paperwork burden.

FR 4035	<i>Estimated number of respondents⁵</i>	<i>Annual frequency</i>	<i>Estimated average hours per response</i>	<i>Estimated annual burden hours</i>
Reporting				
Section 261.22(c)	20	2	0.5	20
Section 261.23(b)	15	1	1	15
Section 261.23(c)	30	1	1	30
Section 261.24(a)(1)	3	1	1	3
Recordkeeping				
Section 262.21(b)(4)	60	4 ⁶	0.25	60
Disclosure				
Section 261.24(a)(2)	3	1	1	3
Section 261.24(a)(3)	3	1	1	<u>3</u>
<i>Total</i>				134

The estimated total annual cost to individuals is \$1,458,⁷ while the estimated total annual cost to institutions and governments is \$4,620.⁸ Accordingly, the estimated total annual cost to the public for the FR 4035 is \$6,078.

Sensitive Questions

These collections of information contain no questions of a sensitive nature, as defined by OMB guidelines.

Estimate of Cost to the Federal Reserve System

The estimated cost to the Federal Reserve System for collecting and processing the FR 4035 is negligible.

⁵ Of these respondents, 2 for section 261.22(c), 2 for section 261.23(b), 2 for section 261.23(c), and 2 for section 262.21(b)(4) are considered small entities as defined by the Small Business Administration (i.e., entities with less than \$600 million in total assets), <https://www.sba.gov/document/support--table-size-standards>. There are no special accommodations given to mitigate the burden on small institutions.

⁶ The Board determined that supervised financial institutions would record an average of four disclosures to service providers a year. The Board reached this determination by utilizing its records of requests from supervised financial institutions to disclose confidential supervisory information to their service providers. Specifically, the Board determined that approximately 60 supervised financial institutions submitted an average of four requests a year to disclose confidential supervisory information to service providers. Accordingly, the Board estimated that supervised financial institutions would need to account for disclosures of confidential supervisory information to their service providers on approximately 240 occasions annually.

⁷ The average consumer cost of \$27 is estimated using data from the BLS Economic News Release (USDLE-20-0300) https://www.bls.gov/news.release/archives/cewqtr_02202020.htm.

⁸ Total cost to the public was estimated using the following formula: percent of staff time, multiplied by annual burden hours, multiplied by hourly rates (30% Office & Administrative Support at \$20, 45% Financial Managers at \$71, 15% Lawyers at \$70, and 10% Chief Executives at \$93). Hourly rates for each occupational group are the (rounded) mean hourly wages from the Bureau of Labor and Statistics (BLS), *Occupational Employment and Wages May 2019*, published March 31, 2020, <http://www.bls.gov/news.release/ocwage.t01.htm>. Occupations are defined using the BLS Standard Occupational Classification System, <http://www.bls.gov/soc/>.