TRANSPARENCY AND CONFIDENTIALITY IN THE POST FINANCIAL CRISIS WORLD—WHERE TO STRIKE THE BALANCE?

ANNETTE L. NAZARETH
MARGARET E. TAHYAR[1]

Existing supervisors, as well as the new institutions that the Dodd-Frank Act created, collect and aggregate an unprecedented amount of commercially sensitive financial information. Although financial institutions and their supervisors are increasingly transparent in the post financial crisis era, some information that financial institutions provide regulators should be protected from disclosure. Untimely public disclosure of sensitive and competitive information—through FOIA requests, third-party subpoenas, or Congress—could undermine the goals of the Dodd-Frank Act by creating upsetting markets and making financial institutions reluctant to disclose data to the government voluntarily. The Article argues that when it passed the Dodd-Frank Act, Congress, out of an understandable desire to promote transparency in the financial system, created an intolerable level of uncertainty as to whether information that regulators gather will be kept confidential. The Article argues that regulators and Congress should act to strike a proper balance between transparency and confidentiality rather than allowing courts to determine the legally required level of disclosure in an unpredictable and ad hoc fashion.

TABLE OF CONTENTS

---

[1] Annette L. Nazareth and Margaret E. Tahyar are partners of Davis Polk & Wardwell, LLP in its Financial Institutions Group. The views expressed in this Article are their own and do not reflect the views of any other partners. The authors would like to thank Davis Polk & Wardwell associates Michael Petrocelli, Brian Burnovski, Jason Sharma Manning, Tracy Ebanks, Henry Shi, and Samantha Harper Knox for their research assistance.

I. Introduction

In the post financial crisis world, the public demands greater transparency from the financial sector.[2] Americans are increasingly interested in information concerning financial activities and oversight, even though much of this information was previously considered confidential, overly technical, or inaccessible. A belief that both financial institutions and their supervisors should be more accountable to the taxpaying public fuels this move toward greater openness. Increased transparency is not unique to the financial sector or to financial supervisors. This is the era of Facebook, Twitter, and Wikileaks, and the line between the information the public demands be disclosed and the information that can remain confidential is radically shifting toward increased disclosure. There are many welcome aspects to this increased transparency. However, public discussion following WikiLeaks' publication of U.S. State Department cables illustrates that just as strong policy arguments exist for allowing diplomacy to take place both publically and confidentially, so too do strong arguments justify the fact that financial supervision requires both a public and a confidential zone.[3]

Therefore, it is unsurprising that one of the themes of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), legislation that effected the most significant revision of financial regulation since the New Deal, is increased transparency for both financial institutions

[2] Post financial crisis world refers to the period following the crisis in the financial markets that occurred in the fourth quarter of 2008 after the failure of Lehman Brothers.

[3] Indeed, even the radical transparency advocate Julian Assange, the founder of WikiLeaks, has said, "We don't say that the State Department should have no secrets." *60 Minutes* Interview by Steve Kroft with Julian Assange, Editor-in-Chief, WikiLeaks CBS News television broadcast (Jan. 30, 2011).

and financial supervisors.[4] Another theme is increased collection, aggregation, and disclosure of information between regulators and to the public.[5] Unfortunately, in the rush to complete this complex legislation, Congress neglected some policy issues, particularly those operating across titles. This Article asserts that one key underdeveloped concept concerns how preexisting confidentiality and disclosure laws, such as the Freedom of Information Act (FOIA),[6] will affect the new institutions that the Dodd-Frank Act creates and the new powers it grants to existing supervisors.

If supervisors or Congress do not establish clear disclosure policy, courts, through the random process of judicial decision-making, will determine the contours of increased transparency. It is self-evident that regulation solely by court decision, due to its random elements in both expense and areas covered, is not optimal. The increased willingness of major media outlets, responding to public interest in increased accountability of financial institutions and their supervisors during the financial crisis and beyond, to sue under FOIA to obtain information related to financial institutions and supervisory actions magnifies the risk of court-driven policy making. The recent *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*[7] is an example of the more nuanced policy choices that can be made by Congress rather than the courts. That case dealt with the release of information about the Federal Reserve's collateralized lending program during the peak of the financial crisis, including the names of the banks that received emergency lending and the amount of the loans. The *Bloomberg* case, if it stood alone, would now require the immediate release of such data. In the congressional balancing of that transparency policy, the Federal Reserve must release the data only after a one-year delay unless the Federal Reserve determines that an earlier release would be appropriate. This kind of balancing of interests by requiring a delay in release is rare and difficult in a court-driven policy arena.

This Article examines the interaction of Dodd-Frank's information collection, aggregation, and transparency provisions with preexisting law, the relevant FOIA exemptions, and certain Dodd-Frank amendments. In Part II,

---

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Among the recurrent themes are measures to promote increased transparency in over-the-counter derivatives markets, requirements (following lawsuits by Bloomberg and the enactment of provisions of the Dodd-Frank Act) that the Federal Reserve release the names of the financial institutions that received loans in the Federal Reserve's emergency lending program, increased audits of the Federal Reserve, and the on-going debate as to whether or how the names of systemically significant financial institutions will be released.

[5] There is also an increased push for more transparency and more effective disclosure with respect to consumers that is reflected in the consumer provisions of the Dodd-Frank Act and is based on behavioral economic studies and research on the inefficacy of complex technical disclosures. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., at 16–17 (Summer 2007). That theme is outside the scope of this Article.

[6] *See generally* 5 U.S.C. § 552.

[7] 601 F.3d 143 (2d Cir. 2010), *cert. denied sub nom.* Clearing House Ass'n L.L.C. v. Bloomberg L.P., __ U.S. __ (2011).

it describes the unprecedented authority of the OFR to collect systemic risk data and the confidential nature of the information they are tasked with collecting and aggregating. In Part III, the Article outlines the threats to confidentiality of this information posed by FOIA requests and third-party subpoenas and argues that the traditional legal rules are likely to be inadequate in this new context. In Part IV, it looks at the merits and flaws of congressional attempts to provide stronger confidentiality protections in certain sections of the Dodd-Frank Act. Finally, in Part V, the Article suggests various paths to achieving a balance between confidentiality and transparency in the new era of financial regulation—a path set ideally by supervisors rather than courts.

II. The New Data-Collection Regime

A. The Financial Stability Oversight Council

The Dodd-Frank Act creates a new governmental body, the Federal Systemic Oversight Council (FSOC), which is responsible for the supervision and oversight of systemic risk in the U.S. financial system.[8] In creating the FSOC and assigning it duties, Congress aimed to remedy the fact that prior to the financial crisis no regulator was responsible for the oversight of systemic risk created by large financial institutions or system-wide financial activities. To achieve this goal, Congress granted the FSOC unprecedented access to information enabling it to make informed decisions about systemic risk. The politics of the financial reform process resulted in a council of several supervisors, rather than a single supervisor, charged with the task of systemic risk oversight. The FSOC is an eclectic confederation of the heads of all of the major U.S. financial regulatory agencies, state level experts, and a presidentially appointed insurance expert for a total of fifteen members, only ten of whom are voting.[9]

---

[8] The FSOC is responsible for (1) identifying risks to the financial stability of the United States arising from the activities of bank holding companies, (2) promoting market discipline, and (3) responding to emerging threats to the stability of the U.S. financial system. *See* Dodd-Frank Act §§ 111(a), 112(a). FSOC does not have any direct supervisory or regulatory authority over bank holding companies or nonbank financial companies. Rather, it is charged with gathering information about these institutions, and sharing that information with its "member agencies" and with the "primary financial regulatory agencies," making policy recommendations to these agencies, and designating certain entities, who might pose a threat to the financial stability of the United States, for supervision by the Board of Governors of the Federal Reserve System. *See id.* § 113.

[9] *See id.* § 111(b)(1). The voting members include the nine heads of federal member agencies. FSOC's member agencies include the United States Treasury Department, the Federal Reserve, the Comptroller of the Currency, the Consumer Financial Protection Bureau (CFPB), the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC), the Commodity Futures Trading Commission (CFTC), the Federal Housing Finance Agency (FHFA), and the National Credit Union Administration Board (NCUA), along with an independent member "having insurance expertise." *Id.* § 111(b)(1). The independent member must be nominated by the President and confirmed by the United States Senate. *Id.*

The FSOC and its agent, the Office of Financial Research (OFR), more fully described below, have extensive authority to collect and analyze information from and about financial institutions and financial activities in the United States.[10] The FSOC has authority to collect information from all of its member agencies, other federal and state financial regulatory agencies, and the Federal Insurance Office.[11] The FSOC may also direct the OFR[12] to collect information from financial institutions where "necessary to assess risks to the United States financial system."[13] This information may relate to a financial institution itself or to activities conducted by a number of financial institutions. During the second half of 2011 the FSOC and the OFR will likely begin the process of gathering extensive information.[14]

Much of the FSOC's information-gathering powers relate to its duty to determine whether U.S. or foreign nonbank financial companies "could pose a threat to the financial stability of the United States," either because that financial institution is experiencing "material financial distress," or because of its "nature, scope, size, scale, concentration, interconnectedness, or mix of . . . activities."[15] As part of the information gathering process for systemic risk designation, the FSOC has proposed regulations that would allow a company to submit written materials concerning whether, "in the company's view," it could threaten the financial stability of the United States.[16] These submissions, made to rebut a finding of systemic importance, would be simi-

---

§ 111(b)(1)(J). The five nonvoting members include the directors of two federal offices created by the Dodd-Frank Act, the Office of Financial Research and the Federal Insurance Office, and three state officials: a state insurance commissioner, a state banking supervisor, and a state securities commission. *Id.* § 111(b)(2). The state representatives are chosen by selection processes developed by their state-level colleagues. *Id.*

[10] Of the fifteen FSOC positions, twelve are currently filled, of which two are acting, as opposed to permanent, directors and four are nonvoting members. Currently unrepresented on the FSOC are the presidentially appointed person with insurance expertise, the director of the CFPB, and the director of the OFR (nonvoting member).

[11] *See* Dodd-Frank Act § 112(a)(2)(A); *see also id.* § 112(d)(1), (2).

[12] *See infra* Section II.B for a discussion of the Office of Financial Research.

[13] Dodd-Frank Act § 112(a)(2)(A).

[14] Before requiring submission of reports directly from a bank holding company or nonbank financial company regulated by a member agency or primary financial regulatory agency, the FSOC and OFR must request and rely, whenever possible, on existing information available from these agencies or from the OFR. *See id.* § 112(d)(3)(B).

[15] *See id.* § 113(a) (U.S. nonbank financial companies); *id.* § 113(b) (foreign nonbank financial companies). Those nonbank financial companies that the FSOC determines, by a two-thirds vote, to be potential threats are to be supervised by the Board of Governors, and become subject to "prudential standards." *Id.* § 113(a), (b). The Board of Governors, on its own or pursuant to recommendations made by the FSOC, is tasked with developing these prudential standards "[i]n order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large interconnected financial institutions." *See id.* §§ 115, 165. Before a formal determination is made, the FSOC must provide the nonbank financial company with written notice of a proposed determination and provide opportunity for a written response or oral hearing to contest the proposed determination. *Id.* § 113(e).

[16] Financial Stability Oversight Council, Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 12 C.F.R. pt. 1310 (2011).

lar to a Wells notice.[17] They would likely contain extensive material that included confidential information about such companies. How and under what conditions the FSOC would collect information about foreign nonbank financial companies is an interesting issue but beyond the scope of this Article.

B. The Office of Financial Research

The Dodd-Frank Act created an independent office within the Department of the Treasury called the Office of Financial Research.[18] The OFR is the brainchild of academics and economists.[19] According to some accounts, these commentators conceived of the OFR during a February 2009 financial system workshop at which certain professors realized that "regulators had no ability, or legal framework, to collect and share data on the global financial system and therefore no way to measure system-wide risk."[20] The concept of the OFR was originally introduced in a separate bill, the National Institute of Finance Act, sponsored by Senator Jack Reed (D-RI).[21] That bill was folded into the Dodd-Frank legislation rather late in the process.

Based on these concepts, the Dodd-Frank Act vests the OFR with a wide range of duties, including: (1) collecting data on behalf of the FSOC, (2) standardizing the type and format of data reported and collected, (3) performing applied and long-term research, (4) developing tools for risk measurement and monitoring, and (5) making the results of its activities available to financial regulatory agencies and to the public.[22] The OFR is authorized to share data and information with the FSOC, the public, its member agencies, and the Bureau of Economic Analysis.[23]

The Dodd-Frank Act establishes, within the OFR, two separate units: a Data Center and a Research and Analysis Center.[24] In one of its roles, the Data Center will collect, validate, and maintain data obtained from "member agencies, commercial data providers, publicly available data sources, and financial entities" on behalf of the FSOC.[25] As one congressional supporter

---

[17] Individuals involved in a preliminary or formal SEC investigation are permitted to submit a written statement "setting forth their interests and position in regard to the subject matter of the investigation." 17 C.F.R. § 202.5 (1994). This submission is known as a "Wells statement." United States v. Grenier, 513 F.3d 632, 634 (6th Cir. 2008).

[18] Dodd-Frank Act § 152(a). The OFR will be headed by a director who is appointed by the President and confirmed by the Senate for a term of six years. *Id.* § 152(b). Two years after the establishment of the Dodd-Frank Act, the Office is authorized to fund itself by collecting a fee from large bank holding companies and nonbank financial companies which have been designated as systemically important. *Id.* § 155(d).

[19] *See* Carrick Mollenkamp, *How a Street Watchdog Got Its Bite*, WALL ST. J., Sept. 15, 2010, at C1.

[20] *Id.*

[21] National Institute of Finance Act, S. 3005, 111th Cong. § 3(7) (2010).

[22] *See* Dodd-Frank Act § 153(a).

[23] *See id.* § 153(b)(1).

[24] *Id.* § 154(a).

[25] *Id.* § 154(b)(1)(A).

described it, the OFR was designed to give regulators a "current, real-time market snapshot of all of the transactions . . . taking place on a daily basis."[26] As supporters recognized, this task poses a challenge that some have compared to the space program or hurricane-warning systems.[27] As part of this authority, the OFR may "require the submission of periodic and other reports from any financial company for the purpose of assessing the extent to which a financial activity or financial market in which the financial company participates, or the financial company itself, poses a threat to the financial stability of the United States."[28] Before requiring the submission of information directly from an entity regulated by a member agency, primary financial regulatory agency, or foreign supervisory authority, the OFR (like the FSOC) must rely whenever possible on existing information available from those agencies and authorities.[29] Under certain circumstances, the OFR may resort to the use of subpoena power to collect information from financial companies.[30]

While the full extent of the information the OFR will obtain and how it will store, aggregate, use, or publicize this information remain to be seen, the Dodd-Frank Act specifically instructs the OFR to collect "financial

---

[26] 156 Cong. Rec. S2611-01, at S2617 (daily ed. Apr. 26, 2010) (statement of Sen. Kaufman).

[27] *Supra* note 19.

[28] Dodd-Frank Act § 154(b)(1)(B). The term financial company is used as defined in Title II of Dodd-Frank, which is a broader definition than in Title I. "Financial company," in this context, means:

> "any company that—
>
> (A) is incorporated or organized under any provision of Federal law or the laws of any State;
>
> (B) is—
>
> (i) a bank holding company;
>
> (ii) a nonbank financial company supervised by the Board of Governors;
>
> (iii) any other company that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956; or
>
> (iv) any subsidiary of any company described in any of clauses (i) through (iii) other than a subsidiary that is an insured depository institution or an insurance company; and
>
> (C) is not a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. § 2001 et seq.), a governmental entity, or a regulated entity, as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. § 4502(20)) [the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and any Federal Home Loan Bank].

Used in the context of the OFR, "financial company" is expanded to include insured depository institutions and insurance companies." *Id.* § 151(2).

[29] *Id.* § 154(b)(1)(B)(ii).

[30] *See id.* § 153(f)(1). The OFR may issue such a subpoena only upon a written finding by its director that "such data is required to carry out the functions" of the OFR under the Act and that the OFR has "coordinated with the relevant primary financial regulatory agency." *Id.* "In the case of contumacy or failure to obey a subpoena," the subpoena can be enforced in "any appropriate" federal district court. *Id.* § 153(f)(3).

transaction data" and "position data."[31] "Financial transaction data" is defined as "the structure and legal description of a financial contract, with sufficient detail to describe the rights and obligations between counterparties and make possible an independent valuation."[32] "Position data" includes: (1) "data on financial assets or liabilities held on the balance sheet of a financial company, where positions are created or changed by the execution of a financial transaction"; and (2) "information that identifies counterparties, the valuation by the financial company of the position, and information that makes possible an independent valuation of the position."[33]

In addition to collecting data for the FSOC, the OFR's Data Center also will collect information for the public.[34] The Data Center is required to prepare and publish "in a manner that is easily accessible to the public" both a "financial company reference database" and a "financial instrument reference database."[35] The Dodd-Frank Act is silent as to what types of information will be published in these databases, but a sense of what may be included can be gleaned from Sen. Jack Reed's earlier proposal for a National Institute of Finance. That bill would have established a financial company database that included a comprehensive list of potential counterparties to financial transactions or entities referenced in the contractual structure of a financial instrument.[36] For each financial entity, the financial company database contemplated by the National Institute of Finance bill would have been required to "include, but not be limited to[,] a unique identifier, and sufficient information to differentiate the entity from every other entity, including an exact legal name and an address for each company."[37] Sen. Reed's bill also included a financial instrument reference database, which would have required a comprehensive list of unique financial instruments, including a comprehensive description of the contractual structure of the instrument as well as all express terms governing the interpretation and implementation of the contract.[38] By "contractual structure," the bill envisioned inclusion of the financial and economic obligations and rights, both express and implied, established among all of the counterparties having identified roles in the contract, including advisors, principals, trustees, custodians,

---

[31] *See id.* § 154(b)(1)(B)(iii).

[32] *Id.* § 151(5).

[33] *Id.* § 151(6). The OFR also has rulemaking authority with respect to the scope and standardization of data collection, making it possible that additional categories of data will be collected. *See id.* § 153(c)(1)–(2).

[34] In addition to monitoring, investigating, and reporting on changes and patterns in systemic risk levels, maintaining expertise necessary to assist financial regulators, investigating disruptions and failures in the financial markets, and making recommendations to the FSOC based on those investigations, *see id.* § 154(c)(1)(B) & (D)–(F), the Research and Analysis Center has a duty to "conduct, coordinate, and sponsor research to support and improve regulation of financial entities and markets." *Id.* § 154(c)(1)(C).

[35] *Id.* § 154(b)(2)(A)(i)–(ii).

[36] *See supra* note 12, at § 3(7).

[37] *Id.* § 3(8).

[38] *Id.*

guarantors, prime brokers, executing brokers, clearing brokers, and issuers of securities.[39]

The full scope of the information that the OFR will collect, analyze, and publish will be known only over time as the OFR and the FSOC develop their data systems, data protection protocols, and processes, but it is already clear that the OFR and the FSOC will be the repository of enormous amounts of data that were never previously collected and aggregated for use by supervisors or, potentially, the public. Once the systems are in place, they may assist financial institutions and supervisors in a myriad of now unknown ways. The OFR's initiatives concerning databases are widely expected to benefit private firms and investors, particularly to the extent that they standardize the manner in which entities are identified and financial instruments and transactions are reported. By creating a "uniform government data platform,"[40] the database could eliminate the need for private firms to independently "track[ ] counterparties and calculat[e] exposures across multiple datasystems."[41] Some estimate that by virtue of this standardization, private firms could save between twenty and thirty percent of their operating costs.[42] Deputy Secretary of the Treasury Neil S. Wolin testified before Congress that this standardization "will also improve market discipline as individual firms will be better able to assess their own risks."[43] On November 30, 2010, the OFR took the first step toward standardization by releasing a statement of policy and request for public comment on the adoption of a "universal standard for identifying parties to financial contracts."[44] This Legal Entity Identifier (LEI) will be "a fundamental ingredient in creating a reference database of financial companies."[45] The SEC and CFTC also expect to employ it in their regulations covering swaps and security-based swaps reporting.[46] An LEI would among other things, (1) "be unique for each legally distinct entity," (2) "include minimal information about the entity,"[47] and (3) "persist over the life of an entity, regardless of . . . structural

[39] *Id.*

[40] Jim Harper, Editorial, *Planned Economy, Privacy Problems*, WALL ST. J., May 1, 2010, *available at*: http://online.wsj.com/article/SB10001424052748703871904575216404010055506.html.

[41] Statement on Legal Entity Identification for Financial Contracts, 75 Fed. Reg. 74,146, 74,147 (Nov. 30, 2010).

[42] *See* Harper, *supra* note 40; *see also* Deputy Secretary of the Treasury Neal S. Wolin, Written Testimony before the Senate Banking Committee, "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act," at 4 (Sept. 30, 2010) ("[S]tandardization may lower firms' costs over the long run.").

[43] Written Testimony of Deputy Treasury Secretary Wolin, *supra* note 42, at 4.

[44] *See supra* note 41, at 74,146.

[45] *Id.* at 74,147.

[46] *Id.*

[47] *Id*. Some have urged the OFR to adopt a "neutral" LEI—i.e., an identifier that "do[es] not attempt to embed meaning or information." Letter from Thomas Price, Managing Dir., SIFMA, to Lewis Alexander, Counselor to the Sec., Office of Fin. Research, 7 (Jan. 31, 2011), *available at*: http://www.regulations.gov/#!documentDetail;D=TREAS-DO-2010-0008-0026.

changes."[48] The OFR envisions that LEIs would be assigned to entities by a nonprofit entity "with expertise in implementing standards for the financial sector."[49] The OFR has asked the financial industry to participate in the development of the LEI standard, which it hopes will become "the single international standard for unique identification of legal entities in the financial sector."[50]

C. The Public and Confidential Nature of the Information to be Collected

Although a core purpose of the OFR is to create a public database of aggregated information in standardized formats about the financial system, a good deal of the specific information to be collected by the FSOC and the OFR will be of a confidential nature. The two types of data that the OFR is authorized to collect from financial institutions—"position data" and "financial transaction data"—almost by definition encompass highly sensitive material. These data include: positions an institution holds, the identity of its counterparties, the manner in which new transactions alter those positions, an institution's trading strategy, the institution's valuation of its positions, and information that would allow supervisors to conduct their own valuation of the institution's positions.[51] This information is at the core of a financial institution's business. Details revealed publicly, either by regulatory policy or action, pursuant to FOIA requests, or via inadvertent disclosure such as hacking or leaks, could have an adverse impact on the institution's competitive position, and, potentially, on the stability of the financial system.[52]

Additionally, the FSOC and OFR have the authority to request virtually any information from the Federal Insurance Office and the FSOC member agencies, or in the case of the OFR, directly from a financial institution.[53] Additional types of confidential information collected pursuant to OFR's role in assisting the FSOC in assessing systemic threats could include:

- All federal and state examination reports and any backup or working papers associated with them;

---

[48] *Id.*

[49] *Id.*

[50] *Id.* at 74,148. The public comment period on the Department's Statement on Legal Entity Identification for Financial Contracts closed on February 1, 2011. Comments are available for viewing online at the Federal eRulemaking Portal at www.regulations.gov.

[51] Dodd-Frank Act § 151(5), (6).

[52] Neither the Dodd-Frank Act nor its legislative history makes clear the extent to which some of this information will end up in the public databases, in at least some aggregate form. A high-ranking Treasury official told Congress that regulators and supervisors, as well as private firms and investors will have access to "key reference data that identify and describe financial contracts and institutions." Written Testimony of Deputy Treasury Secretary Wolin, *supra* note 42, at 4.

[53] Dodd-Frank Act §112(d)(1).

- Information from any financial institution about any activity that might be deemed to be of systemic significance;
- Information about any financial institution that might be part of the analysis and process of determining whether it is of systemic significance;
- Resolution and recovery plans, also known as living wills, of systemically important financial institutions;
- Information contained in annual or quarterly stress tests;
- Information about on-going investigations and enforcement proceedings;
- Information about trading strategies related to position data;
- Detailed inputs to and results of horizontal regulatory reviews; and
- High-level strategic information shared with regulators.

This list is only a fragment of the types of information currently closely held among a small group of examiners or within one or two regulatory agencies, that could make their way to the FSOC and OFR and then become accessible to a wide group of supervisors or entered into databases in both disaggregated and aggregated forms.[54] Certainly, there will be legitimate policy reasons for making public certain types of information collected by the OFR that financial institutions may wish to keep confidential. Because the purpose of the data collection is to assist supervisors, academics, and others in conducting analysis with a view toward anticipating systemic risk issues, the dissemination of aggregated trade or position data of financial institutions—so long as it does not disclose the identity of the data source—would further the policy goals of the Dodd-Frank Act. Conversely, there will be compelling policy reasons that the confidentiality of such information must be jealously guarded. Public disclosure of highly sensitive data, as opposed to disclosure only to supervisors, will potentially cause competitive harm to financial institutions since others may seek to mimic successful business strategies. Public disclosure may also exacerbate financial instability as the public seeks to interpret such information.[55]

---

[54] The OFR is, of course, required to ensure that data collected and maintained by it are kept secure and protected against unauthorized disclosure. *See id.* § 112(d)(5). Although beyond the scope of this article, it bears noting in this era of WikiLeaks, attempts by foreign governments to hack into U.S. government computers and the use of worms for geopolitical strategic purposes, *see, e.g.*, William J. Broad et al., *Israel Tests on Worm Called Crucial In Iran Nuclear Setback*, N.Y. TIMES, Jan. 16, 2011, at A1, that keeping such data confidential as a practical matter is no small task. WikiLeaks itself has reportedly obtained high-level confidential information from the digital files of a large U.S. bank, as well as financial details related to more than 2,000 prominent clients of Bank Julius Baer who may have used offshore tax shelters, *see* Ravi Somaiya & Julia Werdigier, *Ex-Banker Gives Data On Taxes to WikiLeaks*, N.Y. TIMES, Jan. 18, 2011, at B1.

[55] *See* Financial Stability Oversight Council, Transparency Policy for the Financial Stability Oversight Council, *available at* http://www.treasury.gov/initiatives/Documents/FSOCtransparencypolicy.pdf.

For present purposes, this Article does not attempt to define with precision what is or should be confidential information. Rather, since the OFR is in its earliest stages of formation and the full scope of what should be public or confidential has not yet been determined, the Article assumes that there remains, within the context of the appropriate increased transparency under the Dodd-Frank Act and the OFR's mission, a zone of data that the supervisors, financial institutions, and key policymakers will agree should be kept confidential. The Article then asks how solid the protections are within that zone under existing law and regulatory practice.

Both Congress and the nascent FSOC have recognized these issues, but their attempts to address them reveal that, as a policy matter, key decisions determining what should be public and what should be kept confidential have not yet been made. The Dodd-Frank Act requires that the FSOC, the OFR, and the member agencies "maintain the confidentiality of any data, information, and reports submitted" to them.[56] In the same section, however, Congress explicitly provided that FOIA guidelines will apply to the information that the FSOC and the OFR amass, making it far from certain which data courts ultimately may determine should be public and which will remain confidential.[57] Tension exists between the OFR's mission to collect what will surely include confidential information and its duty to create public databases of information about the financial system. This tension offers another example of the Dodd-Frank Act's troubling lack of clarity. The Dodd-Frank Act explicitly provides that the public databases will not publish any confidential data, but it fails to indicate where the line between confidential and nonconfidential data will be drawn other than by referencing FOIA which itself has a number of exceptions.[58]

The FSOC, in its brief period of existence, has explicitly contemplated the balance between transparency and confidentiality. One of the FSOC's first acts was the adoption of a transparency policy expressing commitment to "conducting its business in an open and transparent manner" including by making its meetings open to the press and to the public via a live web stream "whenever possible."[59] In this respect, the FSOC has appropriately followed the lead of many other U.S. agencies, including the SEC, the FDIC, and the CFTC, among others, who make their open meetings accessible via the web.[60] At the same time, the FSOC transparency policy acknowledges that FSOC's mandate will require discussion of "supervisory and other market-

---

[56] Dodd-Frank Act § 112(d)(5)(A).

[57] *See id.* § 112(d)(5)(C); *see generally* 5 U.S.C. § 552 (1996). The practical and legal obligations on the OFR to maintain a secure computer and other environment for its realm of confidential data, which will presumably be shared among a number of U.S. agencies, is a major undertaking.

[58] *See* Dodd-Frank Act § 154(b)(2)(B).

[59] *See* Transparency Policy for the Financial Stability Oversight Council, *supra* note 55.

[60] *See, e.g.*, Press Release U.S. Treasury Department, Financial Stability Oversight Council Meeting, (Jan. 18, 2011) *available at* http://www.treasury.gov/press-center/news/Pages/FSOC-meeting-Jan18.aspx. In this respect, the U.S. government is far in advance of the prac-

sensitive data, including information about individual firms, transactions, and markets that may only be obtained if maintained on a confidential basis."[61] Protection of this information, the policy goes on to explain, "will be necessary in order to prevent destabilizing market speculation that could occur if that information were to be disclosed."[62] To address these concerns, the transparency policy allows the chairperson or a majority of voting members to close a meeting which, if open to the public, could "result in the disclosure of information which would lead to significant financial speculation, significantly endanger the stability of any financial market or financial institution, or significantly frustrate implementation of a proposed agency action."[63] In its first three meetings, the FSOC held both closed and open sessions.

Additionally, the FSOC's bylaws provide that the FSOC, the OFR, and the member agencies "shall maintain the confidentiality of any data, information, and reports submitted or available to them in accordance with the [Dodd-Frank] Act, other applicable law, and any memorandum of understanding," and that the "submission of any non-public data or information under the [Dodd-Frank] Act and other applicable law shall be protected and maintained in a confidential manner."[64] In further recognition of the need for confidentiality, the member agencies are empowered to exclude the nonvoting members of the FSOC, which include state and other nonfederal officials, from any proceedings "when necessary to safeguard and promote the free exchange of confidential supervisory information."[65] Where necessary, the FSOC chairperson is permitted to enter into memoranda of understanding with nonvoting members regarding the specific treatment and protection of "confidential supervisory information."[66]

That the FSOC has simultaneously pronounced its commitment to transparency and taken steps to make its proceedings private when necessary should not be surprising. It is not in the interest, nor consistent with the

---

tices of many other governments and multinational organizations that do not provide web access to public meetings, thus rendering the meetings inaccessible to many.

[61] Transparency Policy for the Financial Stability Oversight Council, *supra* note 55.

[62] *Id.*

[63] *Id.*

[64] Financial Stability Oversight Council, Rules of Organization of the Financial Stability Oversight Council, § XXX.10(a), (b), *available at* http://www.treasury.gov/initiatives/Documents/FSOCbylaws.pdf.

[65] *Id.* § XXX.10(c)(1); Dodd-Frank Act § 111(b)(3).

[66] Rules of Organization of the Financial Stability Oversight Council, *supra* note 64, at § XXX.10(c)(2). These memoranda of understanding are necessary because confidentiality rules applicable to staff at member agencies do not apply to those members of the FSOC who are not federal employees. The Consumer Financial Protection Bureau, created in Title X of Dodd-Frank, has entered into similar memoranda of understanding with state regulators in order to facilitate the sharing of information. *See* Press Release, Conference of State Bank Supervisors, CFPB Implementation Team and CSBS Sign Information Sharing Memorandum of Understanding (Jan. 4, 2011), *available at* http://www.csbs.org/news/press-releases/pr2010/Pages/pr-010411.aspx. Although the information-collecting role of the Consumer Financial Protection Bureau as well as its ability to access confidential examination information is beyond the scope of this Article, many of the same concerns relate to it as well.

mandate, of either the FSOC or the OFR for confidential information to become public. If financial market participants rightly fear that confidential information will become public, such participants may be reluctant to provide the information, even where it can be helpful to monitoring systemic risk. Moreover, if such confidential information becomes public, depending on the sensitivity of the information and the market environment, disclosure could exacerbate systemic risk, making runs on financial institutions and market panics more, rather than less, prevalent. As this Article will show, however, under the current legal framework there is a risk that the FSOC and the OFR could be forced to disclose such information whether they wish to or not.

III. Risks to the Confidentiality of Information Collected by the FSOC and the OFR

In this section, the Article addresses three distinct threats to the confidentiality of information obtained by the FSOC and the OFR. First, it discusses the potential applicability of FOIA and the viability of FOIA exemptions that could arguably apply. Next, it discusses the risk posed by subpoenas issued by third-party private litigants. Finally, it touches on the possibility that confidential information could be made public via disclosure to Congress.

A. *The Freedom of Information Act*

Despite congressional recognition of the confidentiality of some of the information to be collected and analyzed by FSOC and OFR, the Dodd-Frank Act explicitly provides that such information, like most information in the possession of a government agency, is subject to FOIA.[67] FOIA places an affirmative obligation on federal agencies to make agency records available to the public unless one of nine enumerated exemptions applies.[68] Several of

[67] *See* Dodd-Frank Act § 112(d)(5)(C); *see generally* 5 U.S.C. § 552 (1996).

[68] *See* 5 U.S.C. § 552(b)(1)–(9) (1996). Even if an exemption applies to an information request, the agency from which the information is sought has discretion under FOIA to disclose it unless prohibited from doing so by another statute. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) ("We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure."); *id.* at 318 (holding that agency disclosure of information was barred by the Trade Secrets Act). Here, however, given the FSOC's recognition of the importance of confidentiality to the work it performs, and the presumption of confidentiality applied to information collected by the FSOC and the OFR by the Dodd-Frank Act itself, it is likely that in the usual course both the FSOC and the OFR would decline to disclose information that is otherwise subject to one of the enumerated exemptions. Arguably, the Dodd-Frank Act's statement that the FSOC, the OFR, and the member agencies "shall" maintain the confidentiality of information collected, Section 112(d)(5)(A), is an express bar on the FSOC and the OFR's discretion to disclose information sought under FOIA. However, given that the Dodd-Frank Act expressly subjects such information to FOIA generally, § 112(d)(5)(C), it is not clear how a court would view it.

these exemptions are of at least some interest in preventing FOIA requests for confidential information held by the OFR and the FSOC. These include the "trade secret exemption" (Exemption 4), the "examination exemption" (Exemption 8), the "express exemption" (Exemption 3), and the "agency deliberation exemption" (Exemption 5). As this Article argues, however, all of the exemptions are subject to the ambiguities typical of judicial precedent, making their application to this new collection of information, at best, uncertain. As a general rule, courts give the FOIA exemptions a "narrow compass," because they "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[69] Moreover, the fact that challenges to federal agencies' application of FOIA exemptions are ultimately reviewed by courts under judicial standards that do not include *Chevron* deference means that absent clear regulatory or legislative guidance, the implementation and efficacy of these important provisions of the Dodd-Frank Act could be determined largely without the input of expert agencies.

1. The Trade Secret Exemption—Exemption 4

The trade secret exemption to FOIA's disclosure obligation applies to matters that are "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[70] As interpreted by the courts, the trade secret exemption applies to information that is *either* (1) a trade secret, *or* (2) commercial or financial information obtained from a person that is privileged or confidential.[71] While it appears amenable on its face to an interpretation that would cover the competitively sensitive information collected or obtained under the Dodd-Frank Act, the trade secret exemption's narrow judicial interpretation makes application uncertain. For example, the trade secret exemption's application to position limits and transaction data is unclear.

The trade secret exemption is widely asserted before supervisory agencies, for commercial and competitive information. But, in the courts its fact-intensive nature can lead to expensive and time-consuming litigation. Courts have interpreted "trade secrets" using its common law meaning, the basic elements of which are: (1) secrecy, (2) use or the opportunity for use in one's business, and (3) lack of general knowledge about the secret information within the trade, profession, or community, though others may have independently derived the same information.[72] Information already in public circulation can be compiled into a trade secret, unless this compilation itself is

---

[69] Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7–8 (2001).

[70] *See* 5 U.S.C. § 552(b)(4) (1996).

[71] *See* Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983) ("[T]his exemption applies to . . . data submitted . . . if those data satisfy one of two statutory criteria.").

[72] *See* James T. O'Reilly, Federal Information Disclosure § 14:5, at 638 (3d ed. 2000).

available in a public source.[73] In practice, relatively few litigated FOIA cases involve pure trade secrets; the majority turn on the broader category of protected information, namely commercial or financial information that is privileged or confidential.[74]

As it is virtually certain that data obtained by the FSOC and the OFR will be "commercial and financial,"[75] whether the exemption can be invoked is likely to turn on whether the information sought to be disclosed is confidential.[76] Under the widely followed test announced by the D.C. Circuit Court of Appeals in *National Parks & Conservation Association v. Morton*, information submitted to a government agency is "confidential" if disclosure of that information pursuant to FOIA would either (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.[77]

Much of the information that the OFR is asked to collect is unlikely to satisfy the first prong of *National Parks*. Courts have generally held that disclosure will not impair the government's ability to obtain necessary information "when the government can compel disclosure of the information."[78] The OFR has the authority to subpoena information that is not given volun-

---

[73] *See id.* at 642.

[74] *Id.* § 14:4, at 638.

[75] Any information that relates to a business or trade is generally considered "commercial or financial." *See, e.g.*, Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (such information includes "identities of businesses having unclaimed deposits"). Examples of information that are considered "commercial or financial" include business-sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition. *See* Landfair v. U.S. Dep't of Army, 645 F. Supp. 325, 327–28 (D.D.C. 1986).

[76] *See* Dep't of Justice, Freedom of Information Act Guide (May 2004), *available at* http://www.justice.gov/oip/exemption4.htm. ("[b]y far, most Exemption 4 litigation has focused on whether or not requested information is 'confidential' for purposes of Exemption 4."). Information that is not confidential, but is privileged, could theoretically fall within the protection of Exemption 4. However, as one commentator has observed: "So few discussions of privilege, apart from confidentiality, have arisen that it is difficult to predict how a nonconfidential but privileged document should be protected under" Exemption 4. JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 14:22, at 653. Some courts have indicated that this term is not to be considered synonymous with "confidential," while others have refused to extend protection from disclosure based on privilege for types of information that "would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'" *Compare* McDonnell Douglas Corp. v. U.S. EEOC, 922 F. Supp. 235, 243 (E.D. Mo. 1996) (attorney-client privilege provides a separate basis for Exemption 4 as disclosure to agency constituted only a limited waiver) *with* Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 945 (10th Cir. 1990).

[77] Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Notably, an agency's policy of keeping submitted information confidential does not necessarily bring the information within Exemption 4. *See Pub. Citizen Health Research Group*, 704 F.2d at 1287 ("Congress has made clear . . . that agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality."); Teich v. FDA, 751 F. Supp. 243, 249 (D.D.C. 1990).

[78] Aguirre v. SEC, 551 F. Supp. 2d 33, 52 (D.D.C. 2008).

tarily.[79] Thus, it is unlikely that the OFR could successfully argue that disclosure would impair its ability to obtain necessary information in the future. If disclosure could impact the reliability of the information collected, the court must conduct "a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."[80] However, courts have declined to consider a disclosure's impact on future involuntary submissions in this balancing and have rejected, as speculative, agency arguments that disclosure would reduce the quality and reliability of information already required to be submitted.[81] As a result, the OFR most likely could invoke the trade secret exemption only by satisfying the "substantial harm" prong of *National Parks*.[82]

Under the second prong of the *National Parks* test, "substantial harm" must be demonstrated "to the competitive position of the person from whom the information was obtained."[83] The D.C. Circuit has emphasized that consideration must "be limited to harm flowing from the affirmative use of proprietary information by competitors" and that harm "should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement."[84] Whether particular information produced in response to an OFR subpoena would meet this standard would require a case-by-case analysis.[85]

Were the issue properly presented to a court, many financial institutions would *eventually* be able to demonstrate that much of the information submitted to the OFR was, at the time of its submission, a trade secret or confidential information. Confidential information submitted by a nonbank financial company to the FSOC in order for the FSOC to evaluate whether to

---

[79] *See* Dodd-Frank Act § 153(f)(1).

[80] *Aguirre*, 551 F. Supp. 2d at 52. (quoting Washington Post Co. v. U.S. Dep't of Health & Human Services, 690 F.2d 252, 269 (D.C. Cir. 1982)).

[81] *See Aguirre*, 551 F. Supp. 2d at 53; *Legislative Proposal to Address Concerns Over SEC's New Confidentiality Provision: Testimony Before the H. Comm. on Financial Services*, 111th Cong. (2010) (statement of Mary L. Schapiro, Chairman U.S. Securities and Exchange Commission), *available at* http://www.sec.gov/news/testimony/2010/ts091610mls.htm.

[82] *See Teich*, 751 F. Supp. at 251 ("[W]here compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.").

[83] *Nat'l Parks*, 498 F.2d at 770.

[84] *Pub. Citizen Health Research Group*, 704 F.2d at 1291 n.30. The idea that competitors would seek to use FOIA as a means of accessing sensitive information is hardly speculative. A study focusing on the SEC recently found that more than 70 percent of FOIA requests are made by commercial organizations that use the data as part of their business operations. *See* Boston Consulting Group, U.S. Securities and Exchange Commission Organizational Study and Reform (2011), *available at* www.sec.gov/news/studies/2011/967study.pdf.

[85] Evidence of competitive harm can be established through affidavits from the submitter. The Department of Treasury and all other federal member agencies of the FSOC have procedures in place to notify "business submitters" when it receives a request for those submitters' information and to provide them with an opportunity to object and provide the grounds for withholding from disclosure. *See* 12 C.F.R. § 4.16 (2011) (OCC); 12 C.F.R. § 261.16 (2011) (Federal Reserve); 12 C.F.R. § 309.6 (2011) (FDIC); 12 C.F.R. § 792.29 (2010) (NCUA); 12 C.F.R. § 1202.8 (2011) (FHFA); 17 C.F.R. § 145.9 (2011) (CFTC); 17 C.F.R. § 200.83 (2011) (SEC); 31 C.F.R. § 1.6 (2011) (Treasury).

designate the company as systemic should also satisfy the "substantial harm" prong of the *National Parks* test.[86] Moreover, nonaggregated position limits and transaction data should also satisfy this prong of the test. The difficulty, of course, lies in the fact that application of FOIA exemptions is often determined by the courts without the benefit of *Chevron* deference to an expert agency determination, and demonstrating substantial harm to a company's competitive position will be fact-intensive, expensive, and time-consuming. At present, there is no consistent way to predict which issues will come before a court, whether they will be properly presented, and whether a court will find the financial institution's or agency's analysis persuasive.[87]

Additionally, with the passage of time, disclosure of certain data possessed by the FSOC and the OFR could be deemed to no longer pose a substantial competitive harm if disclosed because of the constantly changing nature of the data. For example, a court might conclude that disclosure of a fund's current trading position would cause substantial harm, while disclosure of positions held six months or two years earlier may not. While understandable, this conclusion may be incorrect and potentially quite harmful. It may be true that a single data point of historical position data would not cause substantial harm, but a collection of such data points over the course of several months or years could reveal a financial institution's or fund's trading strategies or methodologies. Courts may take such considerations into account, but the proposition is untested.

Equally problematic, the exemption may protect only the raw data financial institutions provide, and not documents compiled, aggregated, or generated by the OFR and the FSOC based on that data. The reason for this is that the trade secrets exemption, by its own terms, exempts from FOIA only "trade secrets and commercial and financial information *obtained from a person*."[88] Courts have seized on this requirement to read the exemption as applying only to "data which have not been generated within the government."[89] In the recent *Bloomberg* case involving discount window lending

---

[86] While, as we have discussed, it has been suggested that these submissions will bear some similarity to the familiar Wells notice procedure, *see supra* page 4 & note 16, the FOIA analysis will presumably be different. Wells submissions are made in the course of SEC enforcement investigations, and as such they are exempt from FOIA disclosure under the law enforcement exemption. *See* 5 U.S.C. § 552(b)(7)(A). Materials submitted as part of an inquiry into "systemic" status fall outside the law enforcement context, and thus, are likely to be protected only to the extent they contain trade secrets and/or confidential commercial or financial information.

[87] *See, e.g.*, Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting competitive harm argument when submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury").

[88] *See* 5 U.S.C. § 552(b)(4) (1996) (emphasis added).

[89] Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403–04 (D.C. Cir. 1980). It should be noted that some agency-created documents could be protected under FOIA Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which

during the financial crisis (also discussed in Part III below), the Second Circuit held that the trade secrets exemption could not apply to Federal Reserve loan documents that revealed "the identity of the borrowing bank, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loan" because this information was not "obtained from" the borrowing banks.[90] Writing for the court, Chief Judge Dennis Jacobs acknowledged that disclosure of the bank documents "allows one to back into information about the borrower."[91] He concluded, however, that the "fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA."[92] A court following this analysis could find that documents generated by the OFR and the FSOC that would reveal confidential information provided by financial institutions were not "obtained from a person," and thus not covered by the trade secret exemption. Exactly where information crosses the line between "obtained from a person" and compiled by an agency is unclear, and some courts have taken a more lenient view. The Third Circuit, for example, found that a ratio that the U.S. Department of Labor calculated using information obtained from employers was "obtained from a person" and thus eligible for Exemption 4 protection.[93] At best, it is uncertain whether particular documents that OFR and FSOC create will be considered to have been "obtained from a person."

2. *The Examination Exemption—Exemption 8*

The examination exemption contained in Exemption 8 of FOIA likely affords the broadest protection for information the FSOC and OFR will collect. However, like the trade secrets exemption, the examination exemption is subject to ambiguity that makes its application uncertain. The examination exemption provides that "matters that are . . . 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,"[94] are protected from disclosure under FOIA. Thus, to invoke the examination exemption, the FSOC and the OFR must demonstrate that the information sought to be withheld is (a) "contained in or related to"

---

would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1996).

[90] Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143, 147 (2d Cir. 2010), *cert. denied sub nom.* Clearing House Ass'n L.L.C. v. Bloomberg L.P., __ U.S. __ (2011).

[91] *Id.* at 148.

[92] *Id.*

[93] OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 162 n.23 (3d Cir. 2000); *see also* Gulf & West. Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. 1979) (redaction of information in agency report from which information supplied by a person could be extrapolated proper under Exemption 4).

[94] 5 U.S.C. § 552(b)(8) (1996).

(b) "examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision" (c) "of financial institutions."[95] In contrast to the trade secrets exemption, courts have generally read the examination exemption broadly. For example, in one of the early Court of Appeals cases on the examination exemption, the D.C. Circuit rejected a narrow interpretation that would limit the exemption to reports on the solvency or security of banks, noting that Congress has "intentionally and unambiguously crafted a particularly broad, all-inclusive definition."[96] The court held that documents submitted by a financial institution to the Office of the Comptroller of Currency (OCC) relating to the agency's examination of the institution's compliance with the Truth in Lending Act was covered by the examination exemption.[97]

Additionally, applying the examination exemption to information collected or obtained by the FSOC and the OFR would be consistent with the exemption's legislative purposes: (1) to address "concern that the disclosure of examination, operation and condition reports containing frank evaluations of investigated banks might undermine public confidence and cause unwarranted runs on banks"; and (2) to ensure "frank cooperation between bank officials and regulated entities."[98] First, as discussed *supra*, the information that these new entities will collect is very likely to be sensitive, as those entities are charged with researching and addressing both systemic risks and risks posed by individual financial companies that threaten the nation's financial stability.[99] If this information were subject to the risk of widespread public disclosure, then the financial companies under examination could be put at risk and the public's confidence in the financial system could be shaken. Second, the public disclosure of the information would discourage banks and nonbank financial companies from cooperating with regulatory agencies in the future; an outcome that would thwart the goals of both FOIA and the Dodd-Frank Act. With these legislative purposes in mind, the following is an analysis of each of the requirements of the examination exemption as they would apply to information collected by the FSOC and the OFR—to the extent such requirements can be parsed and analyzed separately.

a. "Contained in or related to"

To fit within the examination exemption, the information collected by or transferred to the OFR or the FSOC must be "contained in or related to" examination, operating, or condition reports.[100] Courts have broadly inter-

---

[95] *Id.*
[96] Consumers Union of the U.S., Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978).
[97] *See id.* at 535.
[98] *Consumers Union*, 589 F.2d at 534; *see also* Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980).
[99] *See, e.g.*, Dodd-Frank Act § 112(a)(1)(A).
[100] 5 U.S.C. § 552(b)(8) (1996).

preted the phrase "contained in or related to."[101] For example, in *Abrams v. Department of Treasury*, the Fifth Circuit rejected the argument that "a direct connection must be shown between" the materials sought to be withheld and an agency report, noting that "[i]f Congress meant to require a direct connection between the matter exempted and the [r]eport, it could have easily accomplished that by specifying as much."[102]

More recently, the Federal Reserve successfully relied on the examination exemption to withhold a variety of information furnished by financial institutions regarding their exposure to the contemplated Bear Stearns bankruptcy filing. That information included the amount of exposure, the "activities these institutions had taken to limit their exposure to Bear Stearns," and the identities of the institutions.[103] The court agreed that this information was properly withheld, especially in light of the breadth of the examination exemption.[104] The court explicitly rejected plaintiff's argument that the Board of Governors should be required to identify the specific report pursuant to which the information was withheld, observing that the "withheld materials 'constituted part of a fast moving, real-time effort by the Board to monitor the possible impact of a Bear Stearns bankruptcy filing on financial institutions regulated by the Board.'"[105]

At the same time, several district courts have imposed boundaries on the breadth of the examination exemption's "related to" requirement. For example, the district court in *Forest Guardians v. United States Forest Service* held that the examination exemption did not extend to "everything banking institutions accumulate if any possibility existed the information might be reviewed in the process of examination," and rejected the agency's argument to withhold copies of "escrow waivers" for federal grazing permits used as loan collateral.[106] Likewise, two other district courts have held

---

[101] *See, e.g.*, *Gregory*, 631 F.3d at 898 (Exemption 8 "provide[s] absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating, or condition reports."); *Consumers Union of the United States*, 589 F.2d at 534 (withholding documents "submitted to the Comptroller's Office by national banks which concern the extent of their compliance with the Truth-in-Lending Act."); McKinley v. FDIC, 2010 U.S. Dist. LEXIS 103045, at *34–35 (D.D.C. Sept. 29, 2010) (rejecting plaintiff's attempt to limit the term "report," and holding "Exemption 8 is to be broadly construed"); Atkinson v. FDIC, 1980 U.S. LEXIS 17793, at *3 (D.D.C. Feb. 13, 1981) (withholding documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up" as "related to" the report); *see also* Parsons v. FOIA Officers, 1997 U.S. App. LEXIS 21621 (6th Cir. Aug. 12, 1997) (unpublished) (holding that "all communication[s]" between the SEC and National Association of Securities Dealers, including SEC audits, "were exempt from disclosure").

[102] 243 Fed. App'x 4, 6 (5th Cir. 2007).

[103] *McKinley*, 2010 U.S. Dist. LEXIS 103045, at *34–35.

[104] *Id.* at *38.

[105] *Id.* at *37, *40.

[106] 2001 U.S. Dist. LEXIS 26121 (D.N.M. Jan. 29, 2001) at *85.

more generally that "purely factual material" is not protected under the examination exemption.[107]

In sum, the weight of authority supports a broad interpretation of the "related to" requirement. Ultimately, however, whether any given type of information is sufficiently "related to" reports to be included within the examination exemption inevitably depends to some extent on the facts of the particular situation, regardless of how broadly interpreted the requirement.

b. "Examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision"

In order to fall within the protection of the examination exemption, information must relate 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.[108] As discussed above,[109] the FSOC is charged with "facilitat[ing] information sharing and coordination among the member agencies," making recommendations to its member agencies and to the primary financial regulatory agencies, and designating financial companies for supervision by the Board.[110] Thus, it appears this requirement should be satisfied so long as the information collected by the FSOC and the OFR is contained in or relates to reports "prepared by, on behalf of, or for the use of" a member agency or primary regulatory agency,

[107] *See, e.g.*, Pentagon Fed. v. Nat'l Credit Union Admin., 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996) (refusing, on a motion for summary judgment, to hold that factual information such as the solvency calculation and borrowing ratio of the company was protected under Exemption 8); Lee v. FDIC, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (denying Exemption 8 protection to "Comptroller of the Currency Supervisory Monetary System Ratings and Examination Data Profile"). Notably, however, both courts incorrectly based their holdings on the D.C. Circuit's decision in *In re Subpoena*, 967 F.2d 630 (D.C. Cir. 1992), a case that does not interpret FOIA. *In re Subpoena* addresses the related but distinct common law "bank examination privilege," which protects agency analysis and opinions, not factual material. *Id.* at 634. In light of the courts' mistaken reliance on authority addressing the common law bank examination privilege, and the fact that nothing in the text of FOIA supports a distinction between factual and analytical material, the reasoning in these opinions is not persuasive. *See, e.g.*, Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 136 n.5 (D.D.C. 2003) (refusing to apply bank examination privilege case law in interpreting Exemption 8); *see also* Bloomberg v. SEC, 357 F. Supp. 2d 156 (D.D.C. 2004) (citing *Nat'l Cmty. Reinvestment Coalition* for proposition that bank examination privilege is "inapposite" to FOIA actions involving Exemption 8). Indeed, two other district courts have cited the same language in *In re Subpoena* in the FOIA context but limited the application of the carve-out, stating that "facts cannot be considered in isolation. . . . Otherwise, the 'purely factual information' exception would swallow the entire exemption in piecemeal fashion." Gavin v. SEC, 2007 U.S. Dist. LEXIS 62252, at *37 (D. Minn. Aug. 23, 2007) (quoting Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 U.S. Dist. LEXIS 22842, at *15 (E.D. Va. Dec. 24, 1996)) (internal quotation marks omitted).

[108] 5 U.S.C. § 552(b)(8) (1996).

[109] *Supra* page 2.

[110] *See* Dodd-Frank Act §§ 112(a)(2)(E)–(F), (K); 113.

whether or not the FSOC or the OFR authored the report.[111] Much of the information collected by the FSOC and the OFR would likely fall into this category. This proposition is, however, untested in the courts and unsupported by any formal written regulations.

Internal reports prepared by the FSOC or the OFR would arguably be prepared, at least in part, by these entities "on behalf of" or "for the use of" the FSOC member agencies. The FSOC and the OFR are responsible for the coordination and support of the member agencies, and thus information in their possession could be considered related to reports prepared "for the use of . . . agenc[ies] responsible for the regulation or supervision of financial institutions." Courts have held that the author of a report need not be a relevant agency within the meaning of the examination exemption. For example, in *McCullough v. Federal Deposit Insurance Corp.*, the court held that reports prepared by state banking commissions were protected under the examination exemption because the state reports were prepared "for the use of" the FDIC.[112] It did not matter that the state commissions were not themselves "agencies" within the meaning of the examination exemption because the reports were for the use of the FDIC, which is such an agency.

Courts have also held that the agency from which disclosure is sought need not be "responsible for the regulation or supervision of" the financial institution that is the subject of the information request. In *Public Citizen v. Farm Credit Administration*, the Court of Appeals for the D.C. Circuit held that an examination report of a financial institution by the Farm Credit Administration was protected by the examination exemption even though the Farm Credit Administration itself "does not supervise or regulate" that institution.[113] The court relied on both the plain meaning of the statutory text and the legislative purpose, reasoning that disclosure "may undermine public confidence and investment in the [financial institution] despite the absence

---

[111] Exemption 8 would also be satisfied to the extent either the FSOC or the OFR were itself an "agency responsible for the regulation or supervision" of financial institutions. If they could be construed as such, any information sought from the FSOC or the OFR would be protected if it is related to a report prepared by, on behalf of, or for the use of the FSOC or the OFR (i.e., even if the report is not prepared for the use of a member agency, or the information is not otherwise related to a report of any member agency). The FSOC's designation authority under Section 113 of the Act arguably makes the FSOC "responsible for the regulation" of financial companies because it is the FSOC's determination that triggers additional regulation by the Board of Governors on those companies. On the other hand, as discussed above, the FSOC has no direct regulatory or supervisory power over financial institutions. *See supra* page 2; s*ee generally* Dodd-Frank Act § 112. Likewise, the OFR has limited rulemaking and subpoena powers related to the collection of data from financial companies, and the OFR has the authority to require periodic reports from financial companies and to set standards for required financial reporting. *See supra* page 3–4. That said, it is far from certain that this limited rulemaking and subpoena authority with respect to data collection and reporting would qualify as "regulation" of financial institutions, especially given that the FSOC, not the OFR, makes the policy recommendations based on the collected and reported data. *See id.*

[112] 1980 U.S. Dist. LEXIS 17685, at *6–7 (D.D.C. July 28, 1980).

[113] 938 F.2d 290, 293–94 (D.C. Cir. 1991) (holding that a report prepared by an agency qualified for Exemption 8, even though the agency did not supervise or regulate the financial institution in question).

of a regulatory or supervisory relationship between the Farm Credit Administration and the [institution]."[114] Such conclusions are not surprising, given that the text of the examination focuses on the agency that is ultimately responsible for the regulation or supervision of the financial institution, not the agency to which the FOIA request is directed. Indeed, the inclusion of the "on behalf of, or for the use of" language indicates that Congress contemplated that reports and related information would be shared among different agencies with overlapping or related regulatory purposes without losing the protection of the examination exemption.[115]

Information related to reports not prepared by the FSOC or the OFR should also be protected if they are prepared by, on behalf of, or for the use of member agencies and the primary financial regulatory agencies and would otherwise fall within the examination exemption. Nothing in the text of the examination exemption requires that the agency from which disclosure is sought under FOIA be the same agency that actually prepared the "examination, operating or condition reports" to which the information relates. The transfer of otherwise protected information among agencies likely does not vitiate the protection of the examination exemption. Much of the information collected by the FSOC and the OFR will be from other agencies. The mitigation of burdens provisions of the Dodd-Frank Act[116] provide that the FSOC and the OFR should, where possible, gather the information required to fulfill the FSOC's purpose from the FSOC's member agencies and the primary financial regulatory agencies, rather than from the financial companies directly. Most of the FSOC's member agencies—including the Treasury Department, the Board of Governors, the SEC, the FDIC, and the National Credit Union Administration Board—are "agenc[ies] responsible for the regulation or supervision of financial institutions" within the meaning of the examination exemption.[117] Thus, information the FSOC and the OFR gather from these other agencies would be exempt if the information is related to "examination, operating or condition reports" that are "prepared

---

[114] *Id.*

[115] *Cf. McCullough*, 1980 U.S. Dist. LEXIS 17685, at *4 (noting that "the duties and powers of the FDIC and state banking authorities are interconnected").

[116] *See* Dodd-Frank Act § 112(d)(3)(B) (FSOC "shall coordinate with such agencies and shall, whenever possible, rely on information available from the Office of Financial Research or such agencies."); *id.* § 154(b)(1)(B)(ii) (OFR "shall coordinate with such agencies or authority, and shall, whenever possible, rely on information available from such agencies or authority.").

[117] *See, e.g.*, Gregory v. FDIC, 631 F.2d 896, 898 (noting that the FDIC is an agency responsible for the regulation and supervision of the state and national banks it insures); Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135 (noting that the NCUA is the agency responsible for the regulation of credit unions which are "financial institutions"); Abrams v. U.S. Dep't of Treasury, 243 Fed. App'x 4 (5th Cir. 2007); Teichgraeber v. Board of Governors, 1988 U.S. Dist. LEXIS 12166, at *1–4 (D. Kan. Oct. 14, 1988) (finding that the Board of Governors properly withheld certain documents under Exemption 8 of FOIA); Mermelstein v. SEC, 629 F. Supp. 672, 673 (D.D.C. 1986) (stating that "it is undisputed that the SEC is an agency responsible for the supervision of the [Boston Stock Exchange]").

by or on behalf of or for the use of" *any* member agency. For example, information provided to the FSOC or the OFR by the SEC could be protected by the examination exemption if such information were related to the SEC's own "examination, operating or condition reports."[118] The same analysis should apply to information collected directly by the OFR from financial institutions and subsequently is contained in or relates to an "examination, operating, or condition report prepared by, on behalf of, or for the use of" a member agency or primary financial regulatory agency.

In sum, there are strong arguments that information collected by the FSOC and the OFR, either from other agencies or directly from financial institutions themselves, should be protected either as information related to the reports of those agencies themselves, or as information related to reports prepared by the FSOC and the OFR for those agencies' use. Nonetheless, the application of the examination exemption to data collection of the type envisioned by the Dodd-Frank Act remains untested and, in the absence of regulatory or congressional policy, could require costly litigation to resolve.

c. "Of financial institutions"

Finally, the examination exemption requires that the relevant agencies regulate or supervise "financial institutions."[119] The term is not defined in FOIA itself, nor in the Dodd-Frank Act in connection with the roles of the FSOC and the OFR in collecting information that would be subject to FOIA.[120] As discussed above, the FSOC is charged with collecting information about both "bank holding companies" and "nonbank financial companies."[121] Separately, the OFR has the authority to collect information directly from "financial companies," a term that is defined in Title II of the Dodd-Frank Act to include both bank holding companies and nonbank financial companies supervised by the Board of Governors, as well as any company "predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto" and any subsidiary of

---

[118] *See, e.g.*, Gavin v. SEC, 2007 U.S. Dist. LEXIS 62252, at *37–39, (D. Minn. Aug. 23, 2007) (holding that Exemption 8 applies to documents in the possession of the SEC that originated from other federal and state regulators).

[119] 5 U.S.C. § 552(b)(8) (1996). The D.C. Circuit, which has decided many leading FOIA cases, has observed that the text of Exemption 8 does not require that the report itself actually concern a financial institution. *See* Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 291 n.1 (D.C. Cir. 1991). Thus, it is arguable that Exemption 8 covers information related to an examination report of *any* entity prepared by, on behalf of or for the use of an agency that regulated or supervised financial institutions.

[120] The only instances in the Dodd-Frank Act where "financial institution" is defined have no application to the FSOC or the OFR. *See* § 210(c)(9)(D)(i) (defining "financial institution" in connection with the FDIC's liquidation authority "for [the] purposes of this paragraph" only); § 803(5)(A) (providing a different definition of "financial institution" applicable only to Title VIII); § 956(e)(2) (defining "covered financial institutions" for the purposes of that section only); § 1071 (defining "financial institution" for the purposes of Section 704B of the Equal Credit Opportunity Act).

[121] *See supra* page 2.

such companies.[122] The definition of "financial companies" in the Dodd-Frank Act should heavily influence a court's interpretation of "financial institutions" for FOIA purposes, particularly in light of the broad interpretation generally accorded to the term "financial institutions" over the last several decades. It would be nonsensical for a court to parse the wording differences between FOIA and the Dodd-Frank Act in order to evidence a policy difference as to which should be covered.

Like the other aspects of the examination exemption under FOIA, the term "financial institutions" is construed broadly and not limited to "depository institutions."[123] In interpreting the term, courts have generally looked to the definition of "financial institutions" contained in the legislative history of the related but distinct Sunshine Act:[124] "the term 'financial institutions' is intended to include banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, such as the New York Stock Exchange, investment companies, investment advisors, self-regulatory organizations subject to 15 U.S.C. § 78(s), and institutional managers as defined in 15 U.S.C. § 78m(f)."[125] In addition, entities the SEC is responsible for "regulating, supervising, or examining" are now defined as "financial institutions" for FOIA purposes, including credit rating agencies, transfer agents, and municipal advisors.[126] Information related to reports on these entities should thus be covered by the examination exemption.

To the extent that other types of "financial companies" from which FSOC and OFR would collect information are neither found in the Sunshine Act, nor regulated by the SEC, it is worth noting that courts have never held the list of "financial institutions" prescribed in the Sunshine Act to be exclusive. Moreover, in discerning the breadth of the term "financial institutions," courts have consistently applied the examination exemption to protect examination reports that, if disclosed, "could threaten the solvency of the type of institution examined."[127] The FSOC and the OFR are charged with collecting precisely this type of information from both bank holding companies and nonbank financial companies.[128] Thus, information collected from hedge funds or other "nonbank financial companies" should be protected under the examination exemption, even though they may not be ex-

---

[122] *See* Dodd-Frank Act §§ 151(2); 201(a)(11).

[123] *Pub. Citizen*, 938 F.2d at 293–94.

[124] 5 U.S.C. § 552(b) (1996). Congress' intent in enacting the Sunshine Act is relevant to interpreting FOIA because the two statutes are *in pari materia*. *See* Feshbach v. SEC, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997).

[125] *Feshbach*, 5 F. Supp. 2d at 781 (citing S. Rep. No. 354, at 24 (1975)); *see also* Berliner v. SEC, 962 F. Supp. 1348, 1352 (D. Colo. 1997).

[126] Pub. L. 111-257, 124 Stat. 2646 (2010); Securities Exchange Act of 1934 § 17.

[127] *Pub. Citizen*, 938 F.2d at 292.

[128] *See, e.g.*, Dodd-Frank Act § 112(a)(1)(A) (charging FSOC with identifying "risks to the financial stability of the United States" arising from "the material financial distress or failure . . . of large, interconnected bank holding companies or nonbank financial companies").

pressly identified in the Sunshine Act's legislative history or otherwise regulated by the SEC. Nonetheless, there is no guarantee that, without further regulatory or congressional guidance, a court would reach the same conclusion.

3. The Express Exemption—Exemption 3

The express exemption allows the withholding of information expressly prohibited from disclosure by another federal statute, provided that the statute either (1) "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or [(2)] establishes particular criteria for withholding or refers to particular types of matters to be withheld."[129] The exemption only encompasses materials specifically protected by Congress: agency proclamations, on their own, are not sufficient to bring materials within the exemption's protection.[130] The Circuit Court of Appeals for the District of Columbia has explained that:

> [A] statute that is claimed to qualify as an Exemption 3 withholding statute must, *on its face*, exempt matters from disclosure. [The court] must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA) – not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.[131]

Accordingly, agencies are not afforded deference in determining whether a particular statute expressly exempts information from FOIA disclosure. But, once a court determines that a statute has expressly exempted information from FOIA, agencies may be afforded deference as to what type of information is protected by the statute.[132]

Litigation has often been required to resolve whether a particular statute qualifies as a withholding statute under the express exemption, and courts have held some statutes to be express exemption statutes while rejecting others.[133] To eliminate future ambiguity over which statutes qualify, Congress passed the Open FOIA Act of 2009; the act amended the express exemption to require that for any new statute—including the Dodd-Frank

---

[129] 5 U.S.C. § 552(b)(3) (2006).

[130] James T. O'Reilly, Federal Information Disclosure, § 13:1 (3d ed. 2000).

[131] Reporters Comm. for Freedom of the Press v. DOJ, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) (emphasis added) (citations omitted).

[132] *Id.* at 735 n.5; *see also* Tax Analysts v. IRS, 117 F.3d 607, 613 (D.C. Cir. 1997) (finding that the Internal Revenue Code is a withholding statute for purposes of Exemption 3 and noting that the IRS is entitled to *Chevron* deference for its interpretation of a provision of the Internal Revenue Code in that Exemption 3 context).

[133] *See* James T. O'Reilly, *supra* note 70; U.S. Department of Justice, Guide to the Freedom of Information Act (ed. 2009).

Act—to provide protection under the express exemption, that statute must do so expressly.[134]

Many statutes enacted before the recent passage of the Open FOIA Act have already been the subject of litigation and have been held to protect certain forms of financial information from disclosure under the express exemption. For example, the Internal Revenue Code shields from disclosure confidential tax returns and tax return information.[135] The Bank Secrecy Act prohibits the disclosure of Suspicious Activity Reports, Currency Transaction Reports, and other information pertaining to monetary instruments transactions filed under Subchapter II of Title 31.[136] The Commodity Exchange Act prohibits the CFTC from publishing "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."[137] The confidentiality provisions of the Graham-Leach-Bliley Act prohibit the disclosure of nonpublic personal information provided by consumers to financial institutions and subsequently obtained by government agencies.[138] A multitude of other pre-Open FOIA Act statutes in the financial regulatory arena likely protect information provided by financial institutions about themselves, their transactions, their customers, and their clients under the express exemption as well. But, as they have not been the subject of litigation, their inclusion as express exemption statutes has not been established through court precedent. One fruitful area for further research would be an analysis of additional pre-Open FOIA Act express exemption statutes.[139] To the authors' knowledge, a comprehensive catalog of such statutes has not been created either by the agencies or the financial institutions.

Following the mandates of the Open FOIA Act, the Dodd-Frank Act expressly cites the express exemption in two provisions protecting whistleblowers[140] and in a provision protecting information and documents obtained or created by government agencies in the Payment, Clearing and

---

[134] Pub. L. 111-83, 123 Stat. 2142, 2184 (2009).

[135] 26 U.S.C. § 6103; *see, e.g.*, Church of Scientology v. IRS, 484 U.S. 9, 10–11 (1987).

[136] 31 U.S.C. § 5319; *see* Whitney Nat'l Bank v. Karam, 306 F. Supp. 2d 678 (S.D. Tex. 2004) Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992).

[137] 7 U.S.C. § 12(a)(1).

[138] *See* Hodes v. HUD, 532 F. Supp. 2d 108, 114 (D.D.C. 2008) (applying 15 U.S.C. 6801 et seq., determining that the confidentiality provisions of the Graham-Leach-Bliley Act are subject to the express exemption, and holding that these privacy protections only extend to the records of persons, not entities).

[139] Title 12 of the United States Code, the banking title, includes several provisions that could arguably be construed as exempting information from FOIA. *See* 12 U.S.C. 1831m (FDIC "may designate certain information as privileged and confidential and not available to the public."); 12 U.S.C. 4201 ("the Attorney General may take all steps necessary to guard against the disclosure of any information that could in any way prejudice a current criminal or civil investigation or proceeding."); 12 U.S.C. 1828b (information banking agencies are required to provide to antitrust authorities "shall be treated as confidential.").

[140] Dodd-Frank Act § 748(h)(2) (amending the Commodity Exchange Act); *id.* § 922(h)(2) (amending the Securities Exchange Act of 1934).

Settlement Supervision Act of 2010 (Dodd-Frank Title VIII).[141] Additionally, Section 1103 of the Act amends the Federal Reserve Act to require disclosure—after certain prescribed intervals of time—of "information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank," including the identity of the borrower, participant, or counterparty; the amount involved in the transaction; the interest rate, or discount paid; and any collateral pledged.[142] Depending on the type of transaction, the information must be disclosed within one or two years of its execution or completion.[143] Section 1103 expressly cites the express exemption to allow disclosure to be withheld before the mandatory release date.[144] The policy choice to permit certain data to be made public after a time delay is an important one that Congress and supervisors should consider in the context of the OFR's data collection efforts.

Section 404 of the Dodd-Frank Act also amends the Investment Advisors Act to protect various information collected by the SEC pursuant to the Act.[145] Thus, for whistleblowers, counterparties to transactions with the Federal Reserve, and entities covered by the Investment Advisors Act, Dodd-Frank follows the dictates of the Open FOIA Act and specifically uses the express exemption to provide a degree of protection from disclosure. However, as discussed above, a much wider range of financial actors has legitimate concerns regarding disclosure of sensitive financial information than what is covered by these specific provisions. While the express exemption could thus provide some protection to information collected and obtained by the OFR and the FSOC, it will not provide protection without a pre-2009 statute that expressly exempts the data.

4. *The Agency Deliberation Exemption—Exemption 5*

Certain materials produced by agencies based on systemic risk or other supervisory data could find some protection from the FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[146] This exemption "is intended to preserve the process of agency

---

[141] *Id.* § 809(g).

[142] *Id.* § 1103(b).

[143] *Id.* § 1103(b).

[144] *Id.* § 1103(b). Information about such lending during the financial crisis was recently released by the Federal Reserve, Credit and Liquidity Programs and the Balance Sheet, *available at* http://www.federalreserve.gov/monetarypolicy/bst.htm. As noted in the press commentary, that information revealed a great deal about who borrowed from the Federal Reserve and when. It is an interesting thought experiment to ask whether it would have been helpful or hurtful to release such information during the financial crisis. As a policy matter, the authors believe that the delayed release was appropriate in the current post financial crisis context but have serious doubts about whether it would have been helpful during the financial panic.

[145] *Id.* § 404; 15 U.S.C. 80b-4; *see also* Section IV *infra*.

[146] 5 U.S.C. 552(b)(5) (1996).

decision-making from the natural muting of free and frank discussion, which would occur if each voice of opinion and recommendation could be heard and questioned by the world outside the agency."[147] To qualify for the exemption, a document must satisfy two conditions: (1) "its source must be a Government agency, and [(2)] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."[148] Stated differently, the exemption protects only agency documents that would normally be privileged from disclosure in the civil discovery context.[149]

Courts have interpreted the exemption as encompassing not only the attorney-client privilege and the work product doctrine, but also a "deliberative process privilege" designed to protect the decision-making processes of government agencies.[150] The purpose of the deliberative process privilege is "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationale that were not in fact ultimately the grounds for an agency's action."[151] As the Supreme Court has described, the deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them in the government."[152] In reviewing whether an agency properly withheld documents under the privilege, the critical question is whether "disclosure of [the] materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[153]

Importantly, the deliberative process privilege applies only to documents that are both (1) pre-decisional and (2) deliberative.[154] A document qualifies as pre-decisional if it was "prepared in order to assist an agency

[147] O'Reilly, *supra* note 70, § 15:1 ("In enacting Exemption 5, Congress determined that the efficiency of government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to operate in a fishbowl") (footnotes omitted); *see also* Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429 (D.C. Cir. 1992).

[148] Citizens for Responsibility & Ethics in Washing. v. Nat'l Archives & Records Admin., 583 F. Supp. 2d 146, 156 (D.D.C. 2008).

[149] *See id.*

[150] Am. Fed'n of Gov't Emps., AFL-CIO, Local 1164 v. U.S. Dep't of Health & Human Servs., 63 F. Supp. 2d 104, 107 (D. Mass. 1999); *see also* N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

[151] O'Reilly, *supra* note 70, § 15:1.

[152] Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001) (internal quotation and citation omitted) (quoting *Sears, Roebuck & Co.*, 421 U.S. 132, at 151 (1975)).

[153] *Citizens for Responsibility & Ethics*, 583 F. Supp. 2d at 156.

[154] Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 1992).

decision maker in arriving at his decision, rather than to support a decision already made."[155] Examples of pre-decisional documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency."[156] Even after a final agency decision has been made public, pre-decisional documents that otherwise qualify for the privilege remain protected from FOIA disclosure.[157]

A document is deliberative if the materials it contains "bear on the formulation or exercise of agency policy-oriented judgment."[158] As a general matter, purely factual material is not sufficiently deliberative to be withheld under this exemption.[159] As a result, the deliberative process privilege likely could not be used to shield mere compendiums of confidential data regarding financial institutions. At times, however, courts allow protection of agency factual summaries where their exposure would be tantamount to exposing the deliberative process itself. For example, factual material has been protected where it "was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action."[160] Documents that include both the opinions of regulators and factual material may get partial protection. Where facts are "inextricably intertwined with policymaking processes," the whole document can be withheld, but where facts and opinions can be separated, FOIA "allows the full light of publicity to be placed on the facts."[161] As any internal memoranda circulated among the OFR, the FSOC, and the FSOC member agencies are highly likely to contain a substantial amount of raw data, these issues could be determinative of whether the agency memoranda exemption applies. However, "because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process, it may not be possible, absent a court determination, to definitively determine whether data contained in documents will remain confidential or not."[162]

Additionally, because the exemption covers only "inter-agency or intra-agency" documents, any documents created by or communicated to financial institutions themselves are unlikely to be covered.[163] The protection may in some cases extend to communications between agencies and outside con-

---

[155] Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 2002) (quoting Renegotiation Bd. v. Grumman Aircraft, 421 U.S. (1975)).

[156] *Citizens for Responsibility & Ethics*, 583 F. Supp. 2d at 157.

[157] O'Reilly, *supra* note 70, § 15:32.

[158] *Petroleum Info*., 976 F.2d at 1435.

[159] *See* Environmental Protection Agency v. Mink, 410 U.S. 73, 107 (1973).

[160] Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993).

[161] *Id.*

[162] *Citizens for Responsibility & Ethics*, 583 F. Supp. 2d at 157 (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980).

[163] *See e.g.*, Judicial Watch, Inc. v. Dep't of Army, 435 F. Supp. 2d 81, 90–92 (D.D.C. 2006).

sultants hired to assist in policymaking, but this extension applies only when the "consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it."[164] Inasmuch as financial entities have interests of their own separate from the agencies, the exemption will be limited to materials created by and circulated within the agencies themselves.

B. Third-Party Subpoenas

Regardless of whether the exemptions to FOIA disclosure discussed above apply to information collected by the FSOC and the OFR regarding financial stability, these exemptions provide no protection in non-FOIA contexts, such as third-party litigation. Such litigation poses a potentially serious problem, because a litigant involved in an action in which examination materials or other documents possessed by a regulatory agency are relevant to the action may seek that information from the appropriate agency through a third-party subpoena.[165] In the event that the agency receiving the subpoena wishes to avoid disclosure, the agency must assert that the discovery request is overly burdensome,[166] that the material sought is irrelevant,[167] or that it is protected from disclosure by common law privilege.[168] However, well-drafted subpoenas are typically not vulnerable to defeat on grounds of being irrelevant or overly burdensome. Moreover, the most apposite common law privilege—the bank examiner's privilege—is limited in scope.

1. Objections related to Burden and Relevance

Assertions by the FSOC and the OFR that discovery requests are either overly burdensome or irrelevant are unlikely to be effective. The Federal Rules of Civil Procedure require that a party or an attorney who issues and serves a subpoena must "take reasonable steps to avoid imposing [an] undue burden or expense" on the subpoena recipient.[169] The burden rests on the party seeking to quash or modify the subpoena, and in adjudicating such motions, courts consider a variety of factors, including the relevance of the information requested, the need of the party for the production, the breadth of the request for production, the time period covered by the subpoena, the particularity with which the subpoena describes the requested production, the burden imposed, and whether a subpoena is directed at a party or a non-

---

[164] *Klamath*, 532 U.S. at 11.

[165] *See generally* Fed. R. Civ. P. 45.

[166] *See* Fed. R. Civ. P. 45(c)(3)(A)(iv).

[167] *See* Fed. R. Civ. P. 26(b)(1).

[168] The Federal Rules of Civil Procedure limit the scope of discovery to nonprivileged matter. Fed. R. Civ. P. 26(b)(1). The Federal Rules of Evidence do not codify privilege rules but rather provide that the invocation of privilege is generally governed by the common law. *See* Fed. R. Evid. 501.

[169] Fed. R. Civ. P. 45(c)(1).

party.[170] In light of the extensive provisions for production of documents by government agencies already set forth in FOIA, and the procedures established by those agencies for dealing with such discussions,[171] government agencies will be hard-pressed to establish that they would be overly burdened by producing documents that are described in a reasonably tailored subpoena *duces tecum* and are relevant, nonprivileged, and otherwise discoverable.

Objections based on relevance are similarly likely to provide the FSOC and the OFR with only limited protection should third-party litigants seek discovery of sensitive financial information.[172] For example, bank examination reports have frequently been held to be relevant to various civil actions.[173] The requesting party often demonstrates the relevance of these materials by asserting that they may be probative of the regulated entity's knowledge, which in turn may be probative of that entity's compliance with its fiduciary duties or good faith in performing under a contract. It is not difficult to imagine the many scenarios in which litigants will be able to establish that the position data, financial transaction data, or other information gathered by OFR is relevant to their claims.

2. *The Bank Examiner's Privilege*

The argument with the best chance of success if made by the FSOC and the OFR may be the "governmental deliberation privilege," also known as the "bank examiner's privilege," although it carries its own serious limitations.[174] This privilege protects certain materials in the custody or control of a government agency that contain intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policy-making functions.[175] The agency asserting the privilege has the burden of demonstrating its applicability to the documents at issue.[176] As articulated by Judge Weinstein, the privilege serves two purposes:

---

[170] 9 Moore's Federal Practice, § 45.32 (Matthew Bender 3d ed.).

[171] *See supra* at note 35.

[172] *See, e.g.*, Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993) (noting that "[r]elevancy for the purposes of Rule 26 is broadly construed").

[173] *See Discovery of Bank Examination Reports and Use of Bank Examiner Privilege or Bank Examination Privilege in Federal Civil Proceedings*, 151 A.L.R. Fed. 643 ("The importance and relevance in civil litigation of bank reports of examination and related material generated by or for banking regulatory agencies is being increasingly recognized.").

[174] *In re:* Subpoena Served upon the Comptroller of the Currency and the Secretary of the Bd. of Governors of the Fed. Reserve Sys., 967 F.2d 630, 633 (D.C. Cir. 1992). The privilege is also denominated occasionally as the "intragovernmental opinion privilege" or the "deliberative process privilege." *Id.*

[175] *See In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 580 (E.D.N.Y. 1979) (Weinstein, J.) (citing the proposed Federal Rule of Evidence 509 that, although not adopted, "remains a useful guide and standard" in interpreting common law privilege principles).

[176] Schreiber v. Savings Bancorp, Inc., 11 F.3d 217, 220 (D.C. Cir. 1993).

> The primary rationale for the intragovernmental opinion privilege is that effective and efficient governmental decision-making requires a free flow of ideas among government officials and that inhibitions will result if officials know that their communications may be revealed to outsiders. . . . A subsidiary theory supporting the [ ] privilege relies upon a related, though still distinct principle: The judiciary is not authorized to probe the mental processes of an executive or administrative officer . . . Unlike the first ground, which rests upon pragmatic considerations of efficiency and effectiveness, this second justification draws upon constitutional considerations, derived from the doctrine of separation of powers.[177]

The bank examiner's privilege has been described as essential to facilitating the free flow of information between regulators and regulated entities that underlies the iterative process of bank regulation.[178] It is a qualified, rather than absolute, privilege, which shields from discovery agency opinions and recommendations but not purely factual material.[179] Those categories are "neither distinct nor fixed."[180] Citing Justice Holmes' observation that a statement of a conclusion often merely summarizes facts and thereby is factual in nature, Judge Weinstein, in a leading case on the bank examiner's privilege, interpreted the privilege's limitation to nonfactual material quite narrowly.[181] In that action, *In re Franklin National Bank Securities Litigation*, the OCC sought to withhold reports produced during the OCC's periodic examinations of Franklin National Bank in the years before it failed. In one bank examination report, under a section titled "Condition of the Bank," the examiner commented: "Extremely poor. Bank's liquidity position is considered hazardous by this examiner . . . The bank would be hard pressed to meet a substantial decline in deposits and its position would be even more precarious should it lose access to the Federal funds market."[182] Judge Weinstein recognized that "this statement undoubtedly expresses an opinion," yet he nevertheless held that "the examiner's comments . . . are factual statements by a first hand observer of the bank; they should not be

---

[177] *Franklin Nat'l*, 478 F. Supp. at 581. (internal citations and quotation marks omitted).

[178] *Subpoena Served upon the Comptroller*, 967 F.2d at 633; *see also In re* Bankers Trust Co., 61 F.3d 465, 471 (6th Cir. 1995) ("The primary purpose of the privilege is to preserve candor in communications between bankers and examiners, which those parties consider essential to the effective supervision of banking institutions."); Brief of the New York Clearing House Ass'n as *Amicus Curiae* in Support of Petition for Writ of Mandamus at 14, *In re* Bankers Trust Co., 61 F.3d 465 (6th Cir. 1995) (No. 95-3199) ("The value of a bank's voluntary cooperation in an examination lies in the frank judgments, predictions and even hunches shared with examiners by those most familiar with the bank's operations. There is no substitute for these candid insights, which cannot be compelled, nor are there alternative means for regulators to obtain such information.").

[179] *See, e.g.*, *id.* at 634; *Bankers Trust*, 61 F.3d at 471.

[180] *Franklin Nat'l*, 478 F. Supp. at 582.

[181] *Id.* at 583.

[182] *Id.* at 585.

protected from disclosure by the official information privilege."[183] While Judge Weinstein's reasoning can be criticized, in the decades since he issued the decision, courts have consistently held that at least a portion of the bank examination materials sought by a litigant constituted nonprivileged factual matter.[184] As a result, while the bank examiner's privilege, or the broader governmental deliberation privilege, could theoretically encompass information held by the FSOC and the OFR, as a practical matter, so much of that information is likely to be considered factual that the privilege would most likely provide little protection.

Moreover, the broad interpretation of what constitutes a nonprivileged factual matter is not the only weakness of the qualified bank examiner's privilege. Courts have held that even materials containing nonfactual opinions and therefore within the scope of the privilege may be subject to disclosure if, upon application of a balancing test, the interests of the party seeking the documents outweigh those of the Government. In applying the balancing test, the district court must consider:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are voidable.[185]

These factors will frequently weigh in favor of disclosure. For example, in *Franklin National Bank*, the court found that the examination reports were not merely relevant but that they "provide a unique and objective contemporaneous chronicle of the financial decline of Franklin National Bank; no satisfactory substitute exists."[186] The court assessed the other factors and concluded that disclosure of the examination reports was warranted.

The potential harm caused to the agency, and to the regulated entity that is the subject of the disclosed materials, may be mitigated by the district court inspecting the subpoenaed documents *in camera* in the first instance and, upon determining that some or all of the documents must be disclosed, issuing a protective order governing the disclosure. Both of these protections

---

[183] *Id.*

[184] *Schreiber*, 11 F.3d at 221 (noting "that every court that has examined the nature of bank examination reports thus far has found them to be at least partly factual"); *Discovery of Bank Examination Reports and Use of Bank Examiner Privilege or Bank Examination Privilege in Federal Civil Proceedings*, 151 A.L.R. Fed. 643 ("[T]here is usually some portion of the report of examination that remains discoverable, as purely factual material is outside the scope of the privilege. Further, it may be that whatever portions of the report arguably constitute deliberative material within the scope of the privilege, [they are] so intertwined with discoverable factual material that the whole may be rendered discoverable subject to appropriate protective order or redaction.").

[185] *Schreiber*, 11 F.3d at 220–21 (quoting *Franklin Nat'l*, 478 F. Supp. at 583).

[186] *Franklin Nat'l*, 478 F. Supp. at 586.

are standard judicial practice in litigation surrounding the assertion of the bank examiner's privilege. In *Schreiber*, the Circuit Court of Appeals for the District of Columbia, citing to numerous district court decisions, recommended that on remand the district court "fashion a practical protective order, one that reconciles the agencies' interest in confidentiality with the plaintiff's potential need to introduce some or all of the subpoenaed documents (or information therefrom) into evidence at a public trial."[187]

Thus, while the risk of disclosure of confidential information following third-party subpoenas served on the FSOC and the OFR cannot be determined with precision at this stage, the lack of any protection in the Dodd-Frank Act itself, coupled with the generally weak protections available in the Federal Rules of Civil Procedure or at common law, should be cause for concern.[188] As the law stands, when a private plaintiff's need is sufficiently great, the courts' inclination to enforce subpoenas served on regulatory agencies may overcome the best intentions of the FSOC and the OFR to keep confidential any market-sensitive information collected under the Dodd-Frank Act.

C. Disclosure to Congress

While the majority of this Article is devoted to the risks of disclosure of confidential systemic risk data directly to the public, it is worth noting that the FSOC and the OFR may also be compelled to disclose confidential information to Congress itself. Congress has a variety of means at its disposal to obtain information from financial regulatory agencies, either by subpoena, through the General Accounting Office (GAO), or by a simple request.[189] In enacting FOIA, Congress was careful to make clear that none of the exemptions agencies may use to avoid disclosure to the public apply to requests from Congress. The statute in subparagraph (d) flatly states that it "is not author[ized] to withhold information from Congress."[190] As the legislative history of FOIA shows, Congress took the position that as a body it had "additional rights of access to all Government information which it deems necessary to carry out its functions."[191] The United States Court of Appeals for the District of Columbia has concluded that "it is evident that in enacting the FOIA Congress intended to maintain its ready access to the information necessary for it to fulfill its legislative function."[192] Indeed, that court has suggested that Congress intended for FOIA to apply neither to requests from Congress as a whole nor to requests from "committees, committee [chair-

---

[187] *Schreiber*, 11 F.3d at 222.

[188] *See, e.g.*, Schapiro statement, *supra* note 81.

[189] *See generally* Louis Fisher, *Congressional Access to Information Using Legislative Will and Leverage*, 52 Duke L.J. 323 (Nov. 2002).

[190] *See* 5 U.S.C. § 552(d).

[191] H.R. Rep. No. 1497, at 10 (1965).

[192] Murphy v. Dep't of the Army, 613 F.2d 1151, 1156 n.12 (D.C. Cir. 1979).

men], individual members, and staff personnel."[193] Because Congress rarely acts as a body other than when it formally enacts legislation, "a construction of [subparagraph (d)] which would relate it only to action of Congress as an entity would render the provision largely meaningless."[194]

Once confidential information is in congressional hands, as a practical matter, there is nothing to prevent a member from making that information available to the public. There are some striking recent examples of members of Congress publicizing confidential records kept by financial regulators. For example, in 2008, Sen. Charles Grassley (R-IA), the then-ranking member of the Senate Finance Committee, posted on the committee's website an unedited copy of a report by the SEC's Inspector General on Bear Stearns & Co., removing 136 redactions the Inspector General had made at the request of the SEC's Division of Trading and Markets.[195] Congressionally created commissions have also publicly divulged previously confidential information about financial firms. For example, the Financial Crisis Inquiry Commission in January publicly released confidential documents from the Federal Reserve and the OCC discussing Citigroup.[196]

As a legal matter, there is little that can be done to stop members of Congress from publicly disclosing sensitive material because of the protection afforded to legislators by the Constitution's Speech and Debate Clause.[197] "Once documents are in congressional hands, courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties."[198] So long as the disclosure would serve a valid legislative purpose, courts are simply without power to intervene.[199]

IV. Confidentiality Protection Elsewhere in the Dodd-Frank Act

Certain sections of the Dodd-Frank Act illustrate how Congress can more effectively address concerns over confidentiality than the courts. In the three sections of the Dodd-Frank Act discussed below, Congress created protections for certain categories of confidential information. This portion of the Article also discusses the merits and flaws of the congressional decision-

---

[193] *See id.* at 1156.

[194] *Id.* at 1156–57.

[195] Mark Pittman et al., *Cox's SEC Censors Report on Bear Stearns Collapse*, Bloomberg News, Oct. 7, 2008, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=AV2fpp3blAgY.

[196] Bradley Keoun & Donal Griffin, *Citigroup Ignored 2005 CDO Alarm After Shedding OCC 'Handcuffs,' FCIC Says*, Bloomberg News, Jan. 28, 2011, *available at* http://www.bloomberg.com/news/2011-01-28/citigroup-ignored-2005-bond-warning-after-shedding-handcuffs-.html.

[197] U.S. Const. Art. I, § 6, cl. 1.

[198] FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 970 (D.C. Cir. 1980).

[199] *See id.*

making with respect to disclosure policy. It concludes that, overall, Congress is in a better position than courts to create the appropriate balance between transparency and confidentiality.

In Section 929I, Congress comprehensively exempted a broad class of information collected by the SEC from disclosure pursuant to FOIA or a third-party subpoena.[200] After the passage of the Dodd-Frank Act, Section 929I appropriately became the target of bipartisan criticism that it went too far not only in shielding confidential information, but also in insulating the SEC from scrutiny, and it was hastily repealed. On the other hand, Congress specifically exempted from FOIA in Section 404 information collected by the SEC from certain investment advisers. This information was also placed beyond the reach of litigants' third-party subpoenas, with a few exceptions. There are lessons to be learned from Section 404's more narrow tailoring of the express exemption. Although it is aimed only at preventing disclosure of information provided by investment advisers, its approach could easily be replicated to protect information from a wider group of financial institutions. Finally, this portion of the Article compares the legislative solution reached in Section 1103 of the Dodd-Frank Act, which governs future releases of information about lending by the Federal Reserve banks, with what would have been the policy results of the court-driven principles established by the *Bloomberg* case.

A. The Brief Life of Section 929I

Section 929I's inclusion in the Dodd-Frank Act marked the temporarily successful culmination of an effort by the SEC, dating back several years, to persuade Congress to provide regulated entities with greater certainty that the information they share with the SEC would not be publicly disclosed.[201] As SEC Chairman Mary L. Schapiro explained in a letter to Senator Christopher Dodd, Chairman of the Committee on Banking, Housing, and Urban Affairs:

> Section 929I addresses a significant and longstanding impediment to the agency's ability to quickly obtain important information from entities registered with the SEC when performing examinations. In our examination and surveillance efforts, we often seek to gather highly sensitive and proprietary information and records from regulated firms including, for example, customer information, trading algorithms, internal audit reports, trading strategy information, portfolio manager trading records and exchanges' electronic trading and surveillance specifications and parameters.

[200] Dodd-Frank Act § 929I, *repealed by* 111 P.L. 257; 124 Stat. 2646 (2010).

[201] Letter from Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, to the Honorable Christopher J. Dodd, Chairman, Comm. on Banking, Hous. and Urban Affairs, U.S. Senate (July 30, 2010).

> Such information is critical for us to effectively perform our oversight function and detect possible misconduct. Prior to the Dodd-Frank Act, regulated entities not infrequently refused to provide Commission examiners with sensitive information due to their fears that it ultimately would be disclosed publicly. . . . The Commission's resulting inability to obtain this information hindered our capacity to enforce the securities laws and protect investors.[202]

In Section 929I, Congress amended the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 to exempt all information collected by the SEC from disclosure under FOIA.[203] Section 929I also provided protection from disclosure by the SEC in response to third-party subpoenas, as each of the three acts was further amended to provide that "the Commission shall not be compelled to disclose" records or information collected from financial institutions for use in the Commission's surveillance, risk assessment, or other regulatory or oversight activities.[204]

Following the passage of Dodd-Frank, Section 929I quickly became controversial, with opponents charging that the breadth of the new FOIA exemption would eliminate all transparency from the workings of the SEC.[205] The outcry was triggered when the Fox Business News network reported that the Commission was relying on Section 929I to object to a preexisting FOIA request the network submitted for information relating to the SEC's failed oversight of Bernie Madoff and R. Allen Sanford, both of whom were the subject of ongoing litigation.[206] In a letter to Rep. Darrell E. Issa (R-CA), the ranking member on the House Committee on Oversight and Government Reform, Chairman Schapiro wrote that the SEC had not formally asserted Section 929I in the litigation, but that its counsel had told Fox's counsel and the judge's law clerk that Section 929I "could provide an additional basis for withholding documents the Commission has already withheld pursuant to other FOIA exemptions."[207] Sen. Ted Kaufman (D-DE), the day after the SEC filed the objection, stated that Section 929I "drops a net over [information received by the SEC] that is much too wide" and thus "needs a 'do-over.'"[208] Although he noted the SEC's legitimate concerns regarding confidentiality and disclosure, he concluded that "[o]ver the last

---

[202] *Id.*

[203] *See generally* Dodd-Frank Act § 929I.

[204] *See id.*

[205] *See* Edward Wyatt, *S.E.C. Defends Exemptions in New Law*, N.Y. Times, Sept. 15, 2010, http://www.nytimes.com/2010/09/16/business/16sec.html.

[206] Dunstan Prial, *SEC Says New Regulation Law Exempts it from Public Disclosure*, Fox Business, July 28, 2010, *available at* www.foxbusiness.com/markets/2010/07/28/sec-says-new-finreg-law-exempts-public-disclosure/.

[207] Letter from Mary L. Schapiro, Chairman, U.S. Sec. & Exchange Commission, to the Honorable Darrell E. Issa, Ranking Member, Committee on Committee on Oversight and Government Reform, U.S. House of Representatives (Aug. 24, 2010).

[208] SEC FOIA Exemption, 156 Cong. Rec. S6513 (2010).

few years, the credibility of our markets has been damaged. Only transparency can best restore that credibility; any exemptions to transparency should hence be narrowly crafted."[209]

Over the course of the following weeks, congressmen from both parties reiterated the point that the breadth of Section 929I was inconsistent with the Dodd-Frank Act's overarching goal of restoring transparency to the financial markets and accountability to the financial regulators.[210] Nongovernmental organizations concerned with government accountability and transparency also spoke out against the provision, noting the SEC's "troubling history of being overly aggressive in withholding records from the public."[211] Four bills were introduced in the House and one in the Senate to repeal or narrow Section 929I.[212]

SEC Chairman Schapiro defended the provision and issued guidance that limited its construction in important ways: SEC staff was instructed to invoke Section 929I only if the information sought was obtained pursuant to the SEC's examination authority; not to invoke Section 929I in non-FOIA litigation in which either the SEC or the U.S. Government is a party; and to make disclosures, where permitted by law, when the need for confidentiality is outweighed by the public's interest in transparency and accountability.[213] Congress, however, was not placated by this guidance, noting that the SEC could withdraw the instruction at any time. Thus, Congress passed Senate Bill 3717, expressly repealing Section 929I. President Obama signed it into law on October 5, 2010.[214] Admittedly, Section 929I, as drafted, was extremely broad, indeed, even broader than what the SEC staff likely initially requested. It was arguably even broader than the exemptions that the banking agencies currently enjoy from disclosure of confidential supervisory information, which rely largely on the examination exemption and the traditional common law bank examination privilege.[215]

The repeal statute, while eliminating the broad exemptions created by Section 929I, nonetheless expanded overall FOIA protection by broadening

---

[209] *Id.*

[210] Freedom of Information Act Amendments, 156 CONG. REC. H6952 (2010) (statements of Representative Barney Frank (D-MA), Representative Spencer Bachus (R-AL), and Representative Darrel Issa (R-CA)).

[211] Statements on Introduced Bills and Joint Resolutions, 156th CONG. REC. S6886 (2010) (letter of support authored by ten nongovernmental organizations concerned with government accountability and transparency).

[212] S. 3717, 111th Cong. (2010); H.R. 5924, 111th Cong. (2010); H.R. 5948, 111th Cong. (2010); H.R. 5970, 111th Cong. (2010).

[213] *Legislative Proposals to Address Concerns over the SEC's New Confidentiality Provision: Hearing of the H. Comm. on Financial Services*, 111th Cong. (2010) (statement of Mary L. Schapiro, SEC Chairman).

[214] 111 P. L. 257; 124 Stat. 2646 (2010).

[215] The Federal Reserve, for example, relies upon a combination of 18 U.S.C. 641 which makes it a crime to retain government property and a regulation which asserts that bank examination reports are the property of the Federal Reserve, 12 C.F.R. § 261.1 (2011) as well as Exemption 8 [and the common law bank examination privilege].

the definition of "financial institution" under the examination exemption.[216] It provides that any entity that is regulated by the SEC is a "financial institution" for the purposes of the examination exemption, thereby removing ambiguity for some entities that were regulated by the SEC but not previously determined by a court to be "financial institutions" for the purposes of the examination exemption.[217]

In the bigger picture, however, the passage and repeal of Section 929I must be viewed as a failure. The new regulatory architecture created by the Dodd-Frank Act posed a challenge to Congress: to responsibly and creatively adopt a new disclosure and protection regime for the SEC, the OFR, the FSOC, and the other financial regulators in light of the unprecedented collection of financial information that the Dodd-Frank Act requires. Congress, understandably occupied with a myriad of other concerns, did not rise to this challenge in the first instance, and the combination of Section 929I's breadth and the relative paucity of consideration it received in the legislative process rendered it vulnerable to attack. When the inevitable attack arrived, Congress missed a second opportunity to construct the necessary new regime, reflexively reverting to the decades-old FOIA exemption regime and, among other things, repealing useful protections concerning third-party subpoenas.

It is notable, however, that at least according to the public statements of a few Congressmen, the issue has not been finally resolved. Senator Kaufman[218] stated that "[i]t may be that Congress needs to give the SEC some additional ability to compel documents. . .or perhaps provide some narrowly tailored classification to a FOIA exemption for financial information of a particularly proprietary nature."[219] Representatives Franks (R-CA) and Issa made similar statements when urging their colleagues to pass the repeal statute,[220] and Representative Towns (D-NY) spoke favorably of the substance of the guidance the SEC issued related to Section 929I.[221] Although the thrust of the political discussion surrounding the repeal revealed a Congress more interested in promoting transparency and accountability at the SEC than in protecting sensitive financial information, the statements above provide hope that Congress may be willing to revisit the issue and strike a better

---

[216] *Id.*

[217] *See* Dodd-Frank Act. While the expansion of the definition of "financial institution" could be read as applying only to FOIA requests made to the SEC, we think it is better read as applying to FOIA requests generally.

[218] Senator Kaufman did not run for office in 2010. He has been succeeded by Senator Christopher Coons.

[219] SEC FOIA Exemption, 156 CONG. REC. S6513 (2010).

[220] Freedom of Information Act Amendments, 156 CONG. REC. H6952 (2010) (statements of Representative Barney Frank (D-MA) and Representative Darrel Issa (R-CA)).

[221] *House Financial Services Committee Hold Hearings on Dodd-Frank Exemption from Freedom of Information Act Requests; SEC Issues Guidance to Staff*, ALSTON & BIRD FINANCIAL CRISIS BLOG (Sept. 17, 2010), *available at*: http:www.alston.com/financialmarketscrisis blog/blog.aspx?entry=4007.

balance in the future, not only for the SEC but also for the OFR, the FSOC, and the other financial supervisors.

B. Section 404

Congress also undertook a more aggressive approach to protecting confidential information in Section 404 of the Dodd-Frank Act, which pertains to the regulation of advisers to private funds, including hedge funds.[222] Section 404 greatly increased the amount of sensitive financial information that investment advisers to private funds must maintain, file, and make available for SEC and, potentially, FSOC, inspection. It simultaneously constructed thoughtful but narrowly tailored protections against disclosure of the information once collected.

Section 404 amended the Investment Advisers Act of 1940[223] to require advisers to private funds to maintain records and reports, subject to periodic SEC inspection, regarding each private fund they advise. Such records and reports must include details on each private fund's: (1) assets under management; (2) use of leverage, including off-balance sheet leverage; (3) counterparty credit risk exposure; (4) trading and investment positions; (5) valuation policies and practices; (6) types of assets held; (7) side arrangements or side letters; (8) trading practices; and (9) such other information deemed necessary or appropriate by the SEC, in consultation with the FSOC, for the assessment of systemic risk or in the public interest and for the protection of investors.[224] Section 404 further provides that the SEC must issue rules requiring each investment adviser to a private fund to file reports containing such information as the SEC deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.[225] Finally, Section 404 requires the SEC to provide the FSOC with copies of "all reports, documents, records, and information" provided to the SEC under the Investment Advisers Act that the FSOC "may consider necessary for the purpose of assessing the systemic risk posed by a private fund."[226]

Section 404 provides enhanced assurance that the government will keep this information confidential. The SEC "may not be compelled to disclose any report or information contained therein required to be filed with the Commission under this subsection," with exceptions related to requests from Congress, other governmental agencies, or related to court actions brought by the Government.[227] This broad language would protect the confidentiality

---

[222] *See* Dodd-Frank Act §§ 401–416. Title IV also may be referred to as the Private Fund Investment Advisers Registration Act of 2010. *See id.* § 401.

[223] 15 U.S.C. 80b-1 *et seq.*

[224] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(3), (4), (6).

[225] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(4), (5).

[226] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(7)(A).

[227] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(8).

of information not only from FOIA requests but also from third-party subpoenas.[228] Similarly, with respect to the information provided to the FSOC by the SEC, Section 404 specifically provides that the FSOC is exempt from FOIA disclosure "with respect to any report, document, record, or information made available to the Council" though this new mechanism.[229]

Section 404 is an example of a balanced and tailored approach to confidentiality that takes into account the new post Dodd-Frank Act regulatory regime. Section 404 provides enhanced protection for a defined list of highly proprietary and competitively sensitive confidential information both from third-party subpoenas and from disclosure by a governmental agency, except in limited (but potentially important) circumstances—including requests from Congress. While providing a useful precedent, Section 404 has limited application; it is narrow in scope and specifically tailored to protect a particular type of information. It is worth considering whether comparable protections ought to be applied to other sections of the Dodd-Frank Act and for other actors in appropriate circumstances. As a policy matter, it seems odd that the subset of investment advisors would have more definitive protections for trading and proprietary information than core actors in the financial sector such as banks, broker-dealers, and bank holding companies, to name just a few.

C. Section 1103—Congressional Balance over Judicial Winners and Losers

Finally, in Section 1103 of the Dodd-Frank Act, Congress, responding to public concerns about the Federal Reserve's emergency lending during the peak of the financial crisis, imposed an obligation on the Federal Reserve to disclose, after a delay, emergency lending and lending under the discount window.[230]

Section 1103 provides an excellent example of how Congress can draw a more finely nuanced balance than the courts, which, by their nature, are forced to pick winners and losers. Congress enacted Section 1103 in response to intense public interest in the entities that received emergency lending at the height of the financial crisis. Access to this information had been the subject of a FOIA suit, discussed in Part III.1, by Fox News and Bloom-

---

[228] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(10).

[229] Dodd-Frank Act § 404(2); 15 U.S.C. § 80b-4(b)(7)(B) ("The Council shall maintain the confidentiality of information received under this paragraph in all such reports, documents, records, and information, in a manner consistent with the level of confidentiality established for the Commission pursuant to paragraph (8). The Council shall be exempt from section 552 of title 5, United States Code, with respect to any information in any report, document, record, or information made available, to the Council under this subsection."). Interestingly, Section 404, while purporting to expressly exempt materials from FOIA, does not explicitly invoke 5 U.S.C. § 552(b)(3), as required by the OPEN FOIA Act of 2009. *See* discussion of the OPEN FOIA Act, *supra* page 23.

[230] *See* Dodd-Frank Act § 1103(b).

berg against the Board of Governors of the Federal Reserve. The Federal Reserve sought to withhold the information under the trade secrets exemption.[231] After losing in the Second Circuit, the Federal Reserve declined to pursue the case.[232]

Section 1103 required the Federal Reserve *going forward* to disclose the identities of borrowers and the amounts borrowed from the discount window and in emergency programs, but only after a delay of a year in the case of emergency programs and eight quarters, or two years, in the case of the discount window.[233] By contrast, the precedent established in the *Bloomberg* case, absent Section 1103, would have required immediate disclosure of such data. Courts, unlike Congress, are not inclined to create nuanced frameworks governing the type of data that might be protected and provide for an appropriate delay in the release of sensitive information in order to mitigate potential competitive harm.

In the view of the authors, the congressional policy choices are more nuanced and create better policy than a court could in this situation. Future borrowers from the Federal Reserve's discount window and emergency programs will know in advance that their actions will become public over time and can act and plan accordingly. Ultimately, taxpayers and policymakers will have access to information that will appropriately inform future policy decisions.

V. Implications and Policy Recommendations

Existing regulations, including FOIA and other provisions of federal financial regulatory law, may inadequately address the challenges posed by the government's vast new data collection authority vested in the FSOC and the OFR. Whether reviewing courts would ultimately protect certain types of information collected by or transferred to the FSOC and the OFR from disclosure is almost beside the point. The lack of clarity and the uneven treatment in the Dodd-Frank Act encourages litigation in this sensitive area. Even litigation which is ultimately successful in preserving confidentiality could seriously harm the goals of the Dodd-Frank Act by undermining the faith of financial institutions, their customers, and clients that their data will be pro-

---

[231] *See* Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143, 147 (2d Cir. 2010), *cert. denied sub nom.* Clearing House Ass'n L.L.C. v. Bloomberg L.P., __ U.S. __ (2011).

[232] The Clearing House, however, concerned about a potential narrowing of the trade secrets exemption, unsuccessfully asked the Supreme Court to review the case.

[233] Dodd-Frank Act §1103(b)(2). The Office of the Solicitor General opposed certiorari in *Bloomberg* despite what it argued were errors in the Second Circuit's application of FOIA partly because of a recognition that Congress had, in Section 1103, "struck a balance between the government's interest in preserving the confidentiality of the Board's discount-window and emergency-loan related information and the public interest in disclosure of such information." Brief for Federal Respondent in Opposition, Clearing House Ass'n L.L.C. v. Bloomberg L.P., __ U.S. __ (2011) (No. 10-543).

tected, thus making full cooperation on the part of financial institutions less likely. To be sure, there is a danger in granting financial regulators too much freedom from public scrutiny and permitting them to possibly use exemptions from FOIA in a way that conceals evidence of potential missteps by the agency in fulfilling its regulatory mission. This danger should be taken into account in crafting a solution, but given the countervailing peril of the exposure of highly sensitive proprietary or customer information, leaving the outcome to the whims of litigation is not a preferable option.

To avoid this scenario, the financial regulatory agencies that are members of the FSOC should develop sensible rules defining, *ex ante*, what categories of information they believe should be protected from disclosure. This would include a list of material the agency believes will fall under the protection of one of the exemptions, as well as a list of pre-2009 statutes the agency believes create an express exemption for certain categories of information. The agencies should also follow the example the SEC put forward during the debate over the repeal of Section 929I by adopting guidelines for when the agency would disclose information despite its understanding that an exemption could apply. Such an approach will assure both financial institutions and markets that sensitive information shared with regulators to assess systemic risk will not unexpectedly end up exposed to competitors, but would also result in increased certainty for members of the public who seek to hold the financial supervisors accountable.

To that end, the financial regulatory agencies should act decisively to define what categories of information obtained by the FSOC and the OFR will be subject to disclosure and in what formats and under what time frames, and what will be deemed to fall within an exemption to FOIA. Pursuant to authority granted by FOIA, each FSOC member agency has promulgated its own set of implementing regulations to effectuate FOIA's provisions.[234] The FSOC recently proposed FOIA regulations as well.[235] At present these regulations do not afford specific protection from disclosure of the types of information collected by the FSOC and the OFR— they simply repeat the statutory standards.[236] Given the unique role of the FSOC and the OFR and the sensitive nature of the information they will be collecting, the

[234] *See* 12 C.F.R. § 4.12 (2010) (OCC); 12 C.F.R. § 261.14 (2010) (Federal Reserve); 12 C.F.R. § 309.5 (2010) (FDIC); 12 C.F.R. § 792.11 (2010) (NCUA); 12 C.F.R. § 1202.4 (2010) (FHFA); 17 C.F.R. § 145.5 (2010) (CFTC); 17 C.F.R. § 200.80 (2010) (SEC); 31 C.F.R. § 1.2 (2010) (Treasury). The Bureau of Consumer Financial Protection, established by the Dodd-Frank Act, has not yet promulgated regulations on any topic, but is subject to FOIA and must take steps to protect information protected from disclosure by FOIA. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 1022(c)(8), 1082 (2010).

[235] FSOC Proposed Rules to Implement the Freedom of Information Act 12 C.F.R. pt. 1301 http://www.treasury.gov/initiatives/Documents/FOIA%20NPR%20Final.pdf.

[236] The supervisory agencies' implementing regulations mainly reiterate the language of the FOIA exemptions in laying out the categories of records exempt from disclosure, but do not expand on the idea of what information should fall into these broad categories. *See, e.g.*, 17 C.F.R. § 200.80 (2010) (SEC); 12 C.F.R. § 261.14 (2010) (Federal Reserve); 31 C.F.R. § 1.2 (2010) (Treasury).

member agencies each should update their regulations to reflect an understanding that confidential information collected by these two organizations is shielded from disclosure and covered by applicable FOIA exemptions. For example, agencies could revise their regulations to clarify what information they consider to be "contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of" those agencies under the examination exemption. Moreover, it may be advisable for the agencies to clarify which institutions they consider to be "financial institutions" for purposes of that exemption.[237]

A regulatory solution would admittedly provide less certainty than would an act of Congress, because it is highly unlikely that member agencies' pronouncements on the applicability of FOIA would be given *Chevron*[238] deference. Because FOIA applies government-wide and no one agency is charged with enforcing the statute, agency interpretations of FOIA provisions in their implementing regulations are not entitled to *Chevron* deference by the courts.[239] Therefore, a court's interpretation of the FOIA statute, not the agency's, would control.

The one area in which agencies can make regulations that are entitled to *Chevron* deference relates to the express exemption. Because that exemption

[237] In congressional testimony, SEC Chairman Mary Schapiro expressed some concern about the scope of the term "financial institution" under FOIA. *See Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (Sept. 16, 2010) (statement of Hon. Mary L. Schapiro, Chairman, U.S. Secs. & Exch. Comm'n). Congress later amended the Securities Exchange Act to provide that, for purposes of FOIA Exemption 8, "any entity for which the [Securities and Exchange Commission] is responsible for regulating, supervising, or examining under this title is a financial institution." Pub. L. No. 111-257, 124 Stat. 2646 (2010). However, there remains some uncertainty whether all of the entities that will be providing information, directly or indirectly, to the FSOC and the OFR would be covered by the term "financial institution," because these entities may collect or obtain information from entities that are not regulated, supervised or examined by the SEC. *See* Dodd-Frank Act §102(a)(4) (most large companies "predominantly engaged in financial activities" are subject to FSOC and OFR oversight.). The Dodd-Frank Act, in describing the authority of the FSOC and the OFR, uses the term "financial company" rather than "financial institution." *See generally id.* §§ 111–156. However, in light of the fact that the Act elsewhere defines "financial institution" in a similar way, we believe that were the issue properly presented, a well-informed court would determine that all entities falling within the Dodd-Frank Act's definition of "financial company" were also "financial companies" for the purposes of Exemption 8.

[238] *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[239] *See, e.g.*, Al-Fayed v. CIA, 254 F.3d 300, 307 (D.C. Cir. 2001) (stating that "it is precisely because FOIA's terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*); AT&T Inc. v. FCC, 582 F.3d 490, 496 (3d Cir. 2009) (stating that "[t]he FCC's interpretation of Exemption 7(C) is not entitled to deference under *Chevron* . . . because FOIA applies government-wide, and no one agency is charged with enforcing it"); Retired R.R. Workers Ass'n. v. R.R. Retirement Bd., 830 F.2d 331, 334 (D.C. Cir. 1987) ("No single agency is entrusted with FOIA's primary interpretation. . ."); *see also*, Tax Analysts v. IRS, 117 F.3d 607, 613 (D.C. Cir. 1997); Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983); Anderson v. Dep't of Health and Human Serv., 907 F.2d 936, 951 (10th Cir. 1990).

turns on the question of whether sought-after information is specifically exempted from FOIA by *another* statute, agency regulations can receive deference to the extent that they interpret the exempting statute, rather than FOIA. However, the usual limitations apply: the agency must be the one charged with administering the statute, the statute must be ambiguous, and the agency's interpretation must be reasonable. As an example of this analysis, in *Tax Analysts v. IRS*, the IRS sought to prevent disclosure of several Field Service Advice (FSA) memoranda pursuant to Section 6103 of the Internal Revenue Code. The IRS argued that these FSAs contained "data" that was prepared or collected with respect to a tax return as defined in Section 6103 and should therefore be withheld under the express exemption of FOIA.[240] The court determined that Section 6103 of the Internal Revenue Code is indisputably an express exemption statute because it "specifically exempt[s] certain matters from disclosure to the general public and leav[es] the IRS with no discretion to reveal those matters publicly."[241] The court then reasoned that the IRS was entitled to *Chevron* deference for its interpretation of the type of information that should be shielded from disclosure under Section 6103 because the IRS is the agency charged with administering the Internal Revenue Code.[242] However, the court ultimately refused to withhold the FSAs under express exemption because the IRS's interpretation of the term "data" in Section 6103 was "not a permissible construction of the statute" and the legal analyses contained in the FSAs were not "return information" under Section 6103.[243]

Even where *Chevron* deference is not available, properly crafted regulations could nonetheless receive some form of deference. Courts, for example, have not yet discounted the possibility of affording these interpretations the pre-*Chevron* standard of "*Skidmore* deference."[244] Where *Chevron* is inapplicable, *Skidmore* deference allows a court to give some weight to an agency interpretation based on factors that give the interpretation "power to persuade, if lacking power to control."[245] If a court chose to afford *Skidmore* deference to an agency's interpretation of FOIA, the court would thus regard

---

[240] *Tax Analysts*, 117 F.3d at 611.

[241] *Id.*

[242] *Id.* at 613.

[243] *Id.* at 616.

[244] Skidmore v. Swift & Co., 323 U.S. 134 (1944). Although *Skidmore* has only been applied in situations where an agency is interpreting a statute it administers, its use outside that context has not been rejected. *See* John Fitzgerald Duffy & Michael E. Herz, A Guide to Judicial and Political Review of Federal Agencies 140–142 (2005) ("*Chevron* does not apply to agency interpretations of statutes that apply to multiple agencies, such as the APA or FOIA or NEPA. It is less clear whether *Skidmore* applies with regard to such statutes"); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000); U.S. v. Mead Corp., 533 U.S. 218, 234–35 (2002).

[245] *Skidmore*, 323 U.S. at 140. In *U.S. v. Mead*, the Supreme Court, having decided that *Chevron* deference was not warranted, established that "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency interpretation may merit some deference, given the 'specialized experience and broader investigations and information' available to the agency." 533 U.S. 218, 235 (2002).

the agency's interpretation as persuasive authority in determining whether to treat information as confidential, even while the court's interpretation would ultimately control.

Some measure of deference is even more likely if all of the FSOC member agencies collectively determine to interpret the FOIA exemptions in the same way. In some cases, courts that have declined to afford *Chevron* deference in the FOIA context have reasoned that deference is inappropriate because the meaning of FOIA should be the same regardless of which agency it is being applied to.[246] Applying this logic, if all FSOC member agencies changed their regulations to reflect their collective understanding that certain categories of confidential information transferred to FSOC and OFR should be protected from disclosure, it could assuage courts' concerns regarding inconsistent applications of FOIA to this information. Some deference should therefore be appropriate.

Such joint or coordinated rulemaking would also work to allay a related concern of courts: that an agency's expertise is not relevant in the FOIA context because although an agency may have some expertise regarding how FOIA applies to that agency, it does not have government-wide expertise.[247] The FSOC member agencies as a whole will possess comprehensive expertise regarding information collected by FSOC and OFR, and their collective expertise in this context could be persuasive.

While a regulatory solution is perhaps the most achievable, particularly in the short term, Congress is in the strongest position to revisit these issues and to take decisive action by amending the Dodd-Frank Act to address the confidentiality issues in a more thoughtful manner. As shown by the examples of Sections 404 and 929I, Congress has the tools to ensure the confidentiality of broad categories of information. If and when Congress returns to these issues, however, it must be careful to draw the line between oversight and confidentiality in a place that makes sense both politically and from a regulatory policy perspective in order to avoid a repeat of the Section 929I experience. If agencies are given too much ability to resist requests for disclosure, the perception is that those tools will be used to insulate the agencies from accountability. Accordingly, Congress should empower supervisors to protect confidential information without giving them carte blanche to completely cut off public scrutiny.

---

[246] *See, e.g.*, *Tax Analysts*, 117 F.3d at 613 ("No one federal agency administers FOIA. The meaning of FOIA should be the same no matter which agency is asked to produce its records. One agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency."); *Pub. Citizen Health Research Grp.*, 704 F.2d at 1287 (refusing to be bound by an agency's interpretative regulation because "any other conclusion would produce an intolerable situation in which different agencies could adopt inconsistent interpretations of the FOIA and substantially complicate the administration of the Act").

[247] *Al-Fayed*, 254 F.3d at 306 (regarding agency-specific 'expertise' as unpersuasive for a term of general applicability because FOIA terms set a "government-wide rather than agency-specific standard").

VI. Conclusion

The Dodd-Frank Act has created a major new information collection, storage, and analysis apparatus and, as a result, has created new opportunities for information to be disclosed. The goals of the FSOC's and OFR's information collection are important and laudable. However, a Congressional and regulatory blueprint for what should remain confidential in the post financial crisis world and what should become public or subject to FOIA requests has yet to be drawn. The authors' concern, as laid out in this Article, is that this lack of attention means that the decision to disclose will be made in unpredictable and costly litigation—as is traditional under FOIA—rather than through regulatory or congressional policy. This Article argues that the financial regulators or Congress should set forth policy parameters that align more closely with the new financial oversight regime.