



INSTITUTE OF INTERNATIONAL BANKERS

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By Electronic Mail

New York State Department of Financial Services
1 State Street
New York, NY 10004

Re: *Proposed 3 NYCRR Part 7, Superintendent's Regulations: Information Subject to Confidential Treatment Under Section 36.10 of the Banking Law*

The Institute of International Bankers (“IIB”) appreciates the opportunity to comment on proposed Part 7 of Title 3 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“Part 7”). The IIB represents internationally headquartered financial institutions from over 35 countries around the world doing business in the United States. Our members consist principally of international banks that operate branches and agencies, bank subsidiaries and broker-dealer subsidiaries in the United States; many IIB members maintain a presence in New York.

On November 27, 2019, the New York State Department of Financial Services (“NYDFS” or the “Department”) initially proposed Part 7 to create certain exceptions to restrictions on the use and disclosure of confidential supervisory information (“CSI”) as set forth in NY Banking Law § 36.10 (“Section 36.10”). Among other things, the proposal would have allowed NYDFS-supervised institutions to disclose NYDFS CSI—such as first-day letters, examination reports and other communications—to their legal counsel and independent auditors without first obtaining the Department’s approval.

In a comment letter filed on January 27, 2020, the IIB expressed enthusiastic support for these proposed revisions to the NYDFS CSI framework and thanked Superintendent Lacewell for her leadership and vision. Nonetheless, given Superintendent Lacewell’s commitment to modernizing the NYDFS CSI framework, we respectfully suggested various revisions that our members believed would be helpful to supervised institutions and advance the Department’s stated objectives.

On September 9, the Department issued a revised version of the 2019 proposal for final adoption as Part 7 (the “Revised Proposal”). The IIB commends the NYDFS for continuing to refine its approach to these issues and for thoughtfully reflecting feedback from industry during the first comment

The Institute’s mission is to help resolve the many special legislative, regulatory and tax issues confronting **internationally headquartered** financial institutions that engage in banking, securities and/or insurance activities in the United States.



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period. On behalf of our members, the IIB wishes to express enthusiastic support for the Revised Proposal and, again, to applaud the NYDFS for its leadership on these issues.

We endorse many of the revisions reflected in the Revised Proposal including:

- Clarification that authorization for the disclosure of CSI to counsel or auditors extends to those “retained or engaged” by regulated entities as opposed to those “employed by” such institutions, as originally proposed.
- Extending Part 7 to CSI disclosures made to “external” counsel and provides that the Department’s written approval is not required to disclose CSI to such counsel or independent auditors provided the relevant engagement letter includes appropriate confidentiality provisions.
- Permitting CSI to be shared “to the extent necessary and appropriate for business purposes.” We believe this helpful change will place effective guardrails around the disclosure of CSI Part 7 without requiring unnecessary expenditure of time or resources determining—or adjudicating disputes over—who has a “need to know” the information.
- Eliminating the proposed requirement that supervised institutions “keep a written record of all [CSI] disclosed pursuant to the provisions of this Part.” We welcome this revision, as this recordkeeping obligation would have proven burdensome and unnecessary given that, under existing document retention requirements and industry practices, supervised institutions will, upon request, be able to identify readily any persons or firms to which CSI has been disclosed.
- Removing the requirement that lawyers and auditors secure affirmative consent from other supervisory agencies before receiving information that may constitute joint CSI.

In the spirit of proposing refinements that could further enhance the final rule, however, the IIB respectfully offers the following.

- **The disclosure of CSI to legal counsel and auditors, without prior approval, should not be conditioned on the existence of a specific written agreement containing CSI-related provisions.**

The Revised Proposal limits CSI disclosure to legal counsel and auditors engaged pursuant to written agreements containing specific provisions regarding their use and disclosure of CSI. We respectfully submit that this is both unnecessary and burdensome.

First, lawyers and auditors are subject to licensure requirements and codes of professional conduct that, among other things, prohibit the disclosure of client confidential information. Accordingly, counsel and auditors retained or engaged by a regulated entity are duty bound to maintain CSI in confidence irrespective of a specific agreement requiring them to do so. Applicable codes of professional responsibility and disciplinary processes are sufficient to protect CSI in the possession of lawyers and auditors from unauthorized use and disclosure; the Department need not, and should not, add additional confidentiality requirements.



Further, many regulated entities have longstanding relationships with external counsel and auditors pursuant to agreements that do not contain specific CSI-related provisions. Re-papering these arrangements to satisfy Part 7 would create a burden for regulated entities that is not warranted, especially because disclosure of CSI relating to a client would be a breach of professional responsibility.

- **Part 7 should permit CSI disclosures, without prior approval, to service providers engaged by legal counsel or auditors to assist in serving the regulated entity.**

As currently drafted, the Revised Proposal permits disclosure of CSI to legal counsel and auditors that have been retained or engaged by regulated financial institutions. Although, as noted, the IIB enthusiastically supports this provision, we submit that its scope should be extended to include service providers to such legal counsel and auditors (*e.g.*, risk management consultants, e-discovery vendors) that also have been engaged to assist the institution. It is frequently necessary for counsel and auditors to rely on these types of secondary service providers in the course of their representation.

Permitting CSI to be disclosed to counsel and auditors without the Department's approval while requiring the Department to approve onward disclosure to *their* service providers would frustrate the apparent intent of Part 7 and introduce inefficiency. We encourage the Department to consider revising Part 7 accordingly.

- **Part 7 should state clearly that documents created for internal business purposes do not become CSI simply because they have been provided to the Department.**

In the regulatory change summary accompanying release of the Revised Proposal, NYDFS explained that documents created for internal business purposes are not CSI if they are in a regulated entity's possession, even though copies that have been provided to NYDFS and are in its possession would be. Because questions regarding the proper treatment of internal documents that may have been provided to a supervisory agency frequently arise, our members welcomed the Department's comment in the regulatory change summary. That said, we believe that including language to this effect in the rule text itself would provide optimal clarity for regulated entities.

- **NYDFS should clarify that requests for specific disclosures of CSI should be made to the regulated entity's central point of contact and that disclosure of NYDFS CSI to other supervisory agencies may be made with the concurrence of the central point of contact.**

The process for requesting specific disclosures of CSI could, in our members' experience, benefit from greater clarity and consistency. In particular, our members appreciate the Department's prompt responses to requests for specific disclosures and hope that remains consistent in the future. It would also be helpful for the Department to make clear, in Part 7 or accompanying guidance, that such requests should be made in the first instance to the regulated entity's central point of contact ("CPC") rather than to the Office of the General Counsel or other division within the Department. As the Department's primary representative to the regulated entity, CPCs are best positioned to serve this role and to coordinate the decision making process within the Department.



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To this end, we also respectfully submit that the Department should confirm that disclosure of NYDFS CSI can be made to another U.S. supervisory agency with jurisdiction upon concurrence of a regulated entity's CPC. Such an approach would align Part 7 with the CSI regulations of other banking agencies and also would serve larger interests of supervisory coordination and cooperation.

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The IIB applauds the Department and Superintendent Lacewell for making substantial improvements to proposed Part 7 and fully supports its adoption. We appreciate your consideration, including of the additional refinements suggested above, and stand ready to answer any questions or provide further information. Please contact the undersigned (646-213-1147, bpolichene@iib.org) or our General Counsel, Stephanie Webster (646-213-1149, swebster@iib.org), if we can be of assistance.

Very truly yours,

A handwritten signature in cursive script that reads "Briget Polichene".

Briget Polichene
Chief Executive Officer