



**BOARD OF GOVERNORS  
OF THE  
FEDERAL RESERVE SYSTEM**

**WASHINGTON, D. C. 20551**

**DIVISION OF BANKING  
SUPERVISION AND REGULATION**

**SR 97-17 (SUP)  
June 6, 1997**

**TO THE OFFICER IN CHARGE OF SUPERVISION  
AT EACH FEDERAL RESERVE BANK**

**SUBJECT: Access to Books and Records of Financial Institutions During  
Examinations and Inspections**

Recently, some financial institutions have restricted examiner access to records maintained at the institutions by claiming that the documents are protected from disclosure by certain legal privileges, such as the attorney-client privilege. Additionally, some financial institutions have expressed concern that, in the event access is given, neither the Federal Reserve nor the institutions may be able to protect documents obtained during the course of an examination or inspection from disclosure to third parties, especially shareholders, customers, or other potential litigants. This letter summarizes the Board's examination authority, identifies the privileges generally asserted by banking organizations, and provides guidance to examiners for dealing with an institution's claim of privilege as a basis for withholding information from an examiner.

Examination Authority

Under the Federal Reserve's statutory examination authority, examiners may review all books and records maintained on the premises of a financial institution that is subject to Federal Reserve supervision. This authority extends to all documents on the premises. The Board's broad examination authority, exercised through the Federal Reserve Banks, is found under various statutes and regulations, including: Section 11 of the Federal Reserve Act, which authorizes the Board to examine the accounts, books, and affairs of each member bank; Section 5 of the Bank Holding Company Act of 1956, which authorizes the Board to examine each bank holding company and nonbank subsidiary thereof; Section 7 of the International Banking Act of 1978, which authorizes the Board to examine each branch or agency of a foreign bank; and Section 25(a) of the Federal Reserve Act and Section 211.7 of Regulation K of the Board of Governors, which authorize the Board to examine Edge and Agreement corporations.

Legal Privileges Asserted by Banking Organizations

The following outlines the types of legal privileges that financial institutions

may cite to protect documents from disclosure to the Federal Reserve:<sup>1</sup>

- Attorney-client privilege: The attorney-client privilege protects communications between a client and its attorney, made without third parties present, for the purpose of securing an opinion on the law or legal services. The privilege also protects the attorney's oral or written legal advice to the client. The privilege, which focuses on communications between attorneys and their clients, is generally waived if the client discloses the content of the communication to any third-party.
- Work-product privilege: The work-product privilege covers documents prepared in anticipation of litigation by an attorney or person hired by the attorney or client to assist in rendering legal services. Disclosure to any adversarial party generally waives the privilege as to all adversarial parties.
- Self-assessment privilege: Some states have enacted legislation to create a new statutory privilege for self-assessments that protects them from disclosure to third parties. Federal courts, however, generally do not recognize any privilege for self-assessments that are conducted by an institution without attorney participation.<sup>2</sup>
- Accountant-client privilege: Some states have enacted legislation to create an accountant-client privilege that protects an accountant's work from disclosure to third parties. Federal courts, however, generally do not recognize any privilege for an accountant's work that is conducted directly for a financial institution.

It is important to recognize that claims of privilege are made traditionally by persons resisting subpoenas or demands for production in the context of litigation. Should a banker refuse to provide a document needed by an examiner, the Board could issue subpoenas pursuant to an order of investigation, and a court would decide the issue should the examined institution resist the subpoena. An argument can be made that the System's statutory authority to conduct on-site examinations overrides any legal privilege the financial institution may have not to disclose the information. However, the law in this area is at present unclear.

In the event that access to a financial institution's books and records that an examiner believes is reasonably necessary to carry out an effective examination is denied under an assertion of privilege, the examiner should immediately contact the appropriate Federal Reserve Bank General Counsel, who should notify Herbert A. Biern, Deputy Associate Director, at (202) 452-2620, in order to coordinate a response.

#### Disclosure to third parties by the Federal Reserve

Documentation obtained from financial institutions during the course of examinations or inspections, as well as examiner workpapers, memoranda, and reports of examination or inspection, are considered by the Board to be confidential supervisory information. It is the Board's practice to protect confidential supervisory information from disclosure to third parties to the greatest extent possible consistent with applicable law and the public interest.

As has been the long-standing practice of the Federal Reserve Banks, your staff should continue to notify Stephen L. Siciliano, Special Assistant to the General Counsel for Administrative Law, in the Board's Legal Division, at (202) 452-3920, concerning all requests for confidential supervisory information, including court orders and subpoenas.

Stephen C. Schemering  
Deputy Director

cc: General Counsels at each Federal Reserve Bank

---

**Footnotes**

1. This summary is not intended to be exhaustive and is based on Board staff's review of the present law, which may be changed by either legislation or court decisions.
2. The Equal Credit Opportunity Act was amended in 1996 to provide a limited privilege for any lender that conducts an adequate self-test, identifies discriminatory practices, and takes appropriate action. The Board will issue regulations in this area later this year.