

Suggested Amendment to S. 337

(Page and line numbers keyed to ALB15124)

On page 6, strike lines 20 and 21 and insert the following:

by law, or otherwise exempted from disclosure under subsection (b)(3).

“(C) For purposes of subparagraph (A)(i)(I)(aa), the disclosure of any matter 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 shall be deemed to harm an interest protected by the exemption described in subsection (b)(8). Subparagraph (A)(ii) shall not apply to a determination by an agency responsible for the regulation or supervision of financial institutions to withhold information requested under this section based on the exemption described in subsection (b)(8).”;

Explanation:

This amendment would protect the integrity of the supervisory examination process and the stability of financial institutions and the financial industry by clarifying that the amendments made by S. 337 do not limit the scope of the protections for confidential supervisory information under 5 U.S.C. 552(b)(8) (commonly referred to as “Exemption 8”).

Exemption 8 was enacted out of an understanding that public disclosure of certain types of highly sensitive information related to the examination of financial institutions would cause a variety of harms to regulated financial institutions. The courts have repeatedly interpreted Exemption 8 broadly, recognizing that the purposes of the exemption are to protect the security of financial institutions and to safeguard the free flow of information between financial institutions and their supervising agencies. *See, e.g., Gregory v. F.D.I.C.*, 631 F.2d 896 (D.C. Cir. 1980). Financial institutions rely on this protection when sharing confidential information with regulators, and disclosure of this information will harm the examination process at the heart of ensuring a safe and sound banking system.

As drafted, S. 337 would create uncertainty about the extent to which financial regulatory agencies could successfully protect this confidential information, which, in turn, would undermine and chill the candid and cooperative relationship between regulators and their supervised institutions. Under S. 337, in order to protect confidential supervisory information under 5 U.S.C. 552(b)(8), a financial regulatory agency would be required to show not only that requested information was protected by Exemption 8 but also that the agency “reasonably foresees” that disclosure would harm an interest protected by Exemption 8. The agency would

also need to show that it is not withholding information merely because “as a technical matter, that the records fall within the scope of an exemption” and that the agency’s concerns are not merely “speculative or abstract.” The quoted language is likely to lead to a substantial amount of litigation. As a result, supervised institutions will be very reluctant to share information with examiners in the open and transparent way they have done to date for fear that this confidential information will be disclosed publicly. This will impede the flow of information needed to conduct robust supervision and will undermine the effectiveness of the supervisory process.

This amendment clarifies that the amendments made by S. 337 are not intended to limit the broad scope of Exemption 8, as reflected in the current practices of financial regulatory agencies and supervised institutions and existing caselaw. It will allow financial regulatory agencies to continue to effectively supervise financial institutions and promote safety and soundness throughout the financial industry.