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August 16, 2019

By electronic submission to regs.comments@federalreserve.gov

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Comment Letter on the Notice of Proposed Rulemaking Regarding Availability of Information (Docket No. R–1665 and RIN 7100–AF 51)

Ladies and Gentlemen:

Davis Polk & Wardwell LLP appreciates the opportunity to comment on the notice of proposed rulemaking (the **Proposal**) issued by the Board of Governors of the Federal Reserve System (the **Board** and, together with the Federal Reserve Banks, the **Federal Reserve**)[1] that updates the *Rules Regarding Availability of Information* (the **Availability of Information Rules**).[2]

The Availability of Information Rules are long overdue for an update that takes into account the vast expansion in information exchanged between the supervisors and financial institutions in the digital age. We commend the Board for the many improvements in the Availability of Information Rules set out in the Proposal. We support the points made both in the Bank Policy Institute (**BPI**) comment letter and in the American Bankers Association (**ABA**) comment letter. We write separately, however, to make three important policy points about the Availability of Information Rules and the Proposal:

- The amount and type of information made available by the Federal Reserve to supervised financial institutions (**Outgoing Information**) and by supervised financial institutions to the Federal Reserve and other federal and state banking agencies (**Incoming Information**) has increased by an order of magnitude compared to 1966, when the Freedom of Information Act (**FOIA**)[3]

[1] Federal Reserve, *Rules Regarding Availability of Information*, 84 Fed. Reg. 27,976 (June 17, 2019).

[2] 12 C.F.R. pt. 261.

[3] 5 U.S.C. § 552.

was enacted.[4] Understanding the change from a paper-based world to the digital world is key to thinking about revisions to the Availability of Information Rules.

- The Proposal is an opportunity to restore the regulations and supervisory practices concerning confidential supervisory information (**CSI**) to their original roots in FOIA by striking a more appropriate balance between the important policy goals reflected by Exemption 4 (competitively sensitive information)[5] and those reflected by Exemption 8 (CSI).[6] The balance between strict supervisory confidentiality and the recognition that supervised financial institutions should be primarily responsible for determining whether to disclose non-supervisory business and operational information needs to be recalibrated. The exemption for CSI has been incrementally expanded over the years by excessively broad constructions of CSI in the regulatory text and supervisory practice, while the exemption for competitively sensitive information has, until a recent major decision by the Supreme Court in June 2019,[7] been too narrowly construed by the lower courts.

- The threat of criminal sanctions against supervised financial institutions and their directors, officers, employees and agents for the unauthorized disclosure of CSI should be removed from the Availability of Information Rules. There is a serious question as to whether the relevant criminal statute is unconstitutionally vague to the extent that it is construed by the Federal Reserve in the Availability of Information Rules to equate the unauthorized

[4] Each of the federal banking agencies and many state banking agencies have their own regulations governing disclosures under FOIA (or similar state laws) and disclosures of confidential supervisory information. The observations made in this comment letter about the Proposal would apply equally to the analogous regulatory provisions of the other federal banking agencies and many of the state banking agencies.

[5] FOIA Exemption 4 is the exemption most commonly claimed by private-sector entities when seeking to protect competitively sensitive information that must be disclosed to a federal agency. It shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). We use the term "competitively sensitive information" throughout this comment letter as shorthand for the type of information exempt from disclosure pursuant to this exemption.

[6] Neither the statutory language of Exemption 8, nor the regulatory language in the provision implementing Exemption 8 in the Availability of Information Rules, includes the term "CSI" as part of the description of the type of information exempt from disclosure under Exemption 8. *See* 5 U.S.C. § 552(b)(8); 12 C.F.R. § 261.14(a)(8). It is nonetheless commonly understood that the scope of information covered by Exemption 8, as implemented by the Federal Reserve, is coextensive with that covered by the term "CSI." *See* 12 C.F.R. § 261.14(a)(8) (including CSI in the title of the subsection implementing Exemption 8); Proposal § 261.2(b)(1) (defining CSI as "nonpublic information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8)" before providing examples of such information).

[7] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

disclosure of CSI by supervised financial institutions or their directors, officers, employees or agents with the criminal misappropriation of property belonging to the Federal Reserve. Another recent decision by the Supreme Court, also decided in June 2019,[8] has brought this point into focus. The Board has all of the power it needs to punish unauthorized disclosures of CSI by the private sector through its cease and desist, civil money penalty and banking sector prohibitions provisions.

We expand on each of these three points below.

I. There Has Been a Vast Increase in the Information Exchanged between Supervisors and Supervised Financial Institutions

Data and information have profoundly changed since 1966, when FOIA was first enacted and the world was paper-based. To the extent that reports of examination or other supervisory materials were provided by the Federal Reserve to supervised financial institutions, they were in specially prepared, physical bound copies that were kept under lock and key in a file drawer at the financial institution.[9] The volume was limited. Commercially sensitive information provided by financial institutions to the Federal Reserve was also paper-based, limited and typically viewed while examiners were physically on-site.

The volume of information exchanged between the Board and supervised financial institutions, between supervised financial institutions and their outside advisers and within supervised financial institutions has grown exponentially since 1966. Among other changes, documents constituting Incoming Information that once would have been reviewed on-site in hard copy by bank examiners are now commonly shared with examiners via email or through secure document sharing sites. Many conversations between staff of the Federal Reserve and supervised financial institutions that previously would have occurred on phone calls or in person are now documented in emails. It is obvious that the volume of emails is almost beyond the ability of individual humans to keep track of without the assistance of computer search terms or machine learning.

We estimate that each day potentially thousands of PowerPoint slide decks, Excel spreadsheets or other similar documents constituting Incoming Information are shared by people at all levels of financial institutions with Federal Reserve supervisory staff. Much of the Incoming Information in this daily and vast exchange are pulled from, or later used in, a supervised financial institution's internal and external presentations or otherwise used for its

[8] *United States v. Davis*, 139 S. Ct. 2319 (2019).

[9] During this paper-based era, reports of examination were treated as "loaned" to bank officers and were sometimes made available only for temporary viewing. John E. Shockey, *Discovery of Examination reports of the Comptroller of the Currency*, 11 The Forum (American Bar Association) 1241, 1242 (1976), *available at* https://www.jstor.org/stable/25761177?seq=1#page_scan_tab_contents.

own business or compliance purposes. Our estimate of thousands of documents containing Incoming Information per day is an educated guess based upon the following reasonable thought exercise. There were 5,239 regulated entities under the supervision of the Federal Reserve in 2018.[10] If one assumes that two PowerPoint slide decks or other documents are sent to the supervisor by each institution each business day, that amounts to over 10,000 documents per day. Under this hypothesis, there would be over 2.5 million documents containing Incoming Information shared each year by regulated entities with the Federal Reserve. We realize that some institutions will share fewer and some more per business day, but the thought exercise shows how high these numbers of slide decks or other documents could reasonably be. The massive volume of Incoming Information revealed by this thought exercise does not take into account the many emails without attachments.

Outgoing Information from the supervisors has also expanded exponentially since 1966. Many more confidential supervisory communications are made available by Federal Reserve staff to supervised financial institutions. The types of supervisory communications have increased far beyond the Federal Reserve's traditional core of formal reports of examination, MRAs or MRIAs. Emails and other informal supervisory communications are also sent by the supervisors. The scope of these communications has also expanded beyond traditional examination ratings or an analysis of loan quality into a wide range of topics related to risk, governance, information technology, talent management, consumer compliance, third-party vendors, cyber security, capital and reputational topics that are of wider interest.

The vast increase in the amount and type of information exchanged reveals the challenges around compliance with the Availability of Information Rules, including as proposed to be amended by the Proposal, and the need for practical, clear solutions.

II. The Balance Needs to Be Recalibrated

As pointed out in a recent speech, "a modern explosion in what has been classified as [CSI] is inconsistent with the rule of law and has made the historic balance between transparency and secrecy untenable."[11] The primary statute that authorizes the Availability of Information Rules is FOIA.[12] The key policy goal of FOIA was to provide **more** disclosure

[10] *See* Board of Governors of the Federal Reserve System, 105th Annual Report, 48 (2018), *available at* https://www.federalreserve.gov/publications/files/2018-annual-report.pdf.

[11] Randall D. Guynn, A Case for Full Model, Scenario and Results Transparency in the Federal Reserve's Stress Testing Process, Presented at the Federal Reserve Stress Testing Conference (July 9, 2019), *available at* https://www.bostonfed.org/news-and-events/events/2019/stress-testing.aspx (citing Statement of Margaret E. Tahyar, Guidance, Supervisory Expectations, and the Rule of Law: How Do the Banking Agencies Regulate and Supervise Institutions?, Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs (Apr. 30, 2019)).

[12] The initial Availability of Information Rules, as adopted in 1967, cited only FOIA as statutory authority. *See Rules Regarding Availability of Information*, 32 Fed. Reg. 9516, 9516 (July 1, 1967). Over

and transparency to the public and to Congressional Oversight Committees in order to preserve and promote the public accountability, political legitimacy and independence of unelected agencies.[13] The Availability of Information Rules implement two key exemptions to required disclosures under FOIA: Exemption 4, which primarily applies to commercially sensitive Incoming Information, and Exemption 8, which primarily applies to confidential supervisory Outgoing Information.[14]

The policy goals behind the two Exemptions as applied to the banking sector reflect the fact that, while many sectors of the economy are heavily regulated in the 21st century, only the banking sector is also supervised. Supervision, by its very nature, requires candid conversations and an open but safe exchange of information. The traditional reason for protecting confidential supervisory information from disclosure has been to avoid financial panics as a result of bank runs and contagion.[15] The traditional reason for protecting

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the course of many revisions, additional statutory authorities were added. *See* 53 Fed. Reg. 20,812, 20,815 (June 7, 1988) (citing the Federal Reserve Act); 62 Fed. Reg. 54,356, 54,359 (Oct. 20, 1997) (citing a number of additional provisions, including from the Federal Reserve Act, Federal Deposit Insurance Act, Bank Holding Company Act, Bank Secrecy Act and Money Laundering Suppression Act). In addition to regulatory provisions directly implementing FOIA, the initial Availability of Information Rules included, among other things, provisions similar to 12 C.F.R. § 261.20 that prohibited supervised financial institutions from disclosing the reports of examination made available to them by the Federal Reserve. *See* 12 C.F.R. § 261.6(b)–(c) as made effective on July 4, 1967, by Federal Reserve, *Rules Regarding Availability of Information*, 32 Fed. Reg. 9516 (July 1, 1967).

[13] *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (stating that "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

[14] FOIA Exemption 8 relates to 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." 5 U.S.C. § 552(b)(8). The statutory provision does not use the term CSI, but it is commonly understood that the scope of information covered by Exemption 8, as implemented by the Federal Reserve, is coextensive with that covered by the term "CSI." *See supra* note 6. Reports of condition, known popularly as call reports, were not public when FOIA was enacted. Gradually, call reports became largely public, with some confidential sections, generally by 1972. Alfred Dennis Mathewson, *From Confidential Supervision to Market Discipline: The Role of Disclosure in the Regulation of Commercial Banks*, 11 J. Corp. L. 139, 144–45 & n.43 (1986), *available at* http://digitalrepository.unm.edu/law_facultyscholarship/388.

[15] It is also an important building block in the common law bank examination privilege. *See* Bank Policy Institute comment letter (Aug. 16, 2019), at 2 (describing ways in which the statutory and regulatory restrictions on the disclosure of CSI serve important policy interests, such as preserving public confidence in the banking system). There may be other legitimate justifications for protecting CSI against disclosure besides avoiding financial panics. But in general, protecting CSI against disclosure is justified only if keeping that information secret is "necessary to prevent a serious, identifiable and immediate public harm such as a financial panic or to encourage regulated firms to voluntarily share proprietary information with the Federal Reserve or other U.S. banking regulators." Randall D. Guynn, A Case for Full Model, Scenario and Results Transparency in the Federal Reserve's Stress Testing Process, Presented at the Federal Reserve Stress Testing Conference (July 9, 2019), *available at* https://www.bostonfed.org/news-and-events/events/2019/stress-testing.aspx. Additionally, those justifications "are only persuasive if there is not a more narrowly tailored means other than secrecy to prevent the public or firm-specific harm." *Id.*

commercially sensitive information has been to encourage financial institutions to share proprietary data so as to improve the quality of supervision.

Unfortunately, the FOIA exemption for competitively sensitive information has, until recently, been so narrowly construed by the lower courts as to leave insufficient protection and assurances for the private sector. The decision in a very recent Supreme Court case, *Food Marketing Institute v. Argus Leader Media*,[16] has restored Exemption 4 to its statutory roots by overturning the 1974 appellate court decision that was the basis of that narrow construction.[17] Specifically, the Court in *Food Marketing Institute* held that a company is not required to show that "substantial competitive harm" would result from disclosure of information in order for such information to be subject to Exemption 4.[18] As a result, the reference to this standard in the Board's current and proposed regulations[19] conflicts with Supreme Court precedent interpreting a statute, is overridden by that statute under the Supremacy Clause[20] and therefore no longer has any legal effect, and we expect that it will be removed from the regulations.

The more robust Exemption 4 that was restored by *Food Marketing Institute* is uniquely suited for the bank supervisory relationship, given the constant flow of commercially sensitive Incoming Information in the bank supervisory relationship and the need for candid conversations between supervised financial institutions and the banking agencies. We therefore believe that the Board should go a step further than merely excising the substantial competitive harm standard from the Availability of Information Rules[21] and, in line with *Food Marketing Institute*, provide an explicit assurance of privacy in the revised regulations with respect to commercially sensitive Incoming Information provided by financial institutions to the Board. Providing that assurance would make the Availability of Information Rules more consistent with the originally intended scope of Exemption 4 in FOIA and honor the policy goal of encouraging candid conversations with supervisors. A key reason to rely more on the now more robust Exemption 4, rather than an overreliance on Exemption 8, is that it then leaves financial institutions the choice of when and if to disclose such information to investors, rating agencies, Congressional Oversight Committees or others, which may be restricted if the information is classified as CSI.[22] It also removes the threat of criminal prosecution for the disclosure of such proprietary business information

[16] 139 S. Ct. 2356 (2019).

[17] *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

[18] 139 S. Ct. at 2360–61.

[19] 12 C.F.R. § 261.15(b); Proposal § 261.17(b).

[20] U.S. Const. art. VI, cl. 2

[21] We believe that removing the substantial competitive harm language is required by the binding precedent in *Food Marketing Institute*.

[22] We call to your attention the comment letter written by John L. Douglas, a former FDIC General Counsel, which contains many excellent examples illustrating this point.

under the Federal Reserve's traditional view that the unauthorized disclosure of CSI is the misappropriation of property belonging to the Federal Reserve under 18 U.S.C. § 641.

During the same period that Exemption 4 has been inappropriately narrowed, the definition of CSI has been dramatically expanded, while remaining vague and ambiguous. The chart attached as Appendix A illustrates how incremental changes in the text of the Availability of Information Rules since 1967 have expanded the scope of the definition of CSI, especially with respect to Incoming Information.[23] This textual expansion, when coupled with the increase in the amount of Outgoing Information and the number of areas of supervisory focus, means that, as a practical matter, there has been a vast expansion in what is treated or potentially treated as CSI. To make matters worse, the Proposal, as elegantly argued by the BPI comment letter and the ABA comment letter, would expand the definition of CSI with respect to Incoming Information in ways that move far beyond FOIA's language and policy intent.[24] The chart attached as Appendix B to this comment letter illustrates this significant expansion and compares the Board's current and proposed definitions of CSI to those of the other banking agencies.

The further expansion of the CSI definition in the Proposal is in stark contradiction with the Board's press release, which described the changes to the Availability of Information Rules as "technical" and stated that no expansion in the definition of CSI was contemplated.[25] We suspect, therefore, that the expansion was inadvertent and unintended, but we recommend that it be corrected. We further recommend that the Proposal be revised to narrow CSI to its roots in the core bank examination reports and related supervisory findings.[26]

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[23] The two key exceptions to this overall trend is that the regulation no longer makes consent orders confidential in light of a statutory change, *see* Appendix A, and reports of condition, or call reports, are now largely public with some confidential portions. *See supra* note 14.

[24] The most troublesome aspects of the Proposal relate to the language about (1) information "obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities" being included in the definition of CSI and (2) unauthorized "use" of CSI being prohibited. *See* Proposal § 261.2(b)(1) (adding the "obtained" language to the definition of CSI); Proposal § 261.20(a) (disallowing the "use" of CSI and other nonpublic information for an unauthorized purpose). We strongly support the arguments in the BPI comment letter on these points. One interesting idea presented in the BPI comment letter to help mitigate these issues would be to classify documents created for the business purposes of a supervised financial institution as CSI when they are in the hands of the Federal Reserve but not classify them as CSI when they are in the hands of the supervised financial institution. *See* Bank Policy Institute comment letter, at 3.

[25] *See* Federal Reserve Press Release, "Federal Reserve Board requests public comment on technical updates to its Freedom of Information Act procedures and on changes to its rules governing the disclosure of confidential supervisory information" (June 14, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190614a.htm ("The revision to the definition of CSI is for clarification purposes and would not expand or reduce the information that falls within the definition.").

[26] Longer term, we believe that CSI should be more tightly linked to financial stability, but we realize that such a fundamental rethinking would require revisions in how examination reports are written, ratings are assigned and other supervisory findings are put into place, essentially a cultural change in how the

We believe that it would be appropriate for the Board, and other federal banking agencies, to rethink when CSI might, as a general matter, be in tension with the securities laws.[27] The fact that control of the disclosure of CSI under Exemption 8 belongs to the banking agencies who can formally or informally disclose CSI at any time to any person without advance warning to the supervised financial institutions to which the CSI relates should create a heavy burden of public accountability for classifying any Incoming Information as CSI instead of proprietary information subject to Exemption 4.[28] We recommend that disclosure of CSI, whether Incoming Information or Outgoing Information, should be permitted without the prior authorization of the Federal Reserve when a supervised financial institution determines that it is required under the securities laws to disclose such information.

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supervisory process works. Over the longer term we believe that these changes, which would increase transparency and public accountability, and decrease unaccountable supervisory discretion, would make sense. Since they would require more fundamental changes, we view them as beyond the scope of this comment letter. We note the transparency and accountability initiatives by Vice Chairman Quarles and Chairman McWilliams, which should, over time, help provide assurance that CSI is wielded solely for financial stability or other legitimate purposes, *see* note 15, and would not have the purpose or effect of shielding agency personnel from an appropriate level of public accountability and Congressional oversight.

[27] For example, it is hard to see why financial institutions should not have the option to disclose their supervisory ratings if they conclude that their supervisory ratings would be material to investors under the securities laws. *See* Margaret E. Tahyar, *Are Bank Regulators Special?*, Banking Perspectives (The Clearing House Association, 2018), *available at* https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special. Many have forgotten that when the ratings systems were first developed, supervisory ratings were not even shared with bank management, a situation that had changed by 1982. *See* Ron Feldman et al., *The Impact of Supervisory Disclosure on the Supervisory Process: Will Bank Supervisors be Less Likely to Downgrade Banks?* 5–6, 25 (Aug. 2003), *available at* https://www.researchgate.net/publication/228201443_The_Impact_of_Supervisory_Disclosure_on_the_Supervisory_Process_Will_Bank_Supervisors_be_Less_Likely_to_Downgrade_Banks. As a result, the interaction of ratings and securities disclosure was not thought through at the time. We also call to your attention the comment letter written by John L. Douglas, a former FDIC General Counsel.

[28] During the financial crisis, some examination reports were transferred to Congress and briefly posted on Congressional websites. *See* Annette L. Nazareth and Margaret E. Tahyar, *Transparency and Confidentiality in the Post Financial Crisis World—Where to Strike the Balance?*, 1 Harv. Bus. L. Rev. 145, 181 (2011), *available at* http://www.hblr.org/download/HBLR_1_1/Nazareth_Tahyer-Transparency_Confidentiality.pdf. There has also been an increase in signaling via the media and in informal leaks of information. Margaret E. Tahyar, *Are Bank Regulators Special?*, Banking Perspectives (The Clearing House Association, 2018), *available at* https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special; *see also* Statement of Margaret E. Tahyar, Guidance, Supervisory Expectations, and the Rule of Law: How Do the Banking Agencies Regulate and Supervise Institutions?, Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs (Apr. 30, 2019). Finally, a state banking agency recently chose to disclose details of certain examinations, including regulatory ratings, in the context of a dispute with a bank and the OCC over who should be the primary regulator of the bank's New York branch. *See* Letter from Shirin Emami, Executive Deputy Superintendent-Banking, N.Y. State Dept. of Fin. Servs., to Marva V. Cummings, Director for District Licensing, OCC (Nov. 13, 2017), *available at* http://online.wsj.com/public/resources/documents/charter_1115.pdf.

III. The Availability of Information Rules Should Clarify That the Disclosure of CSI by Supervised Financial Institutions or Their Representatives Is Not a Criminal Offense

The Board, the OCC and the Federal Deposit Insurance Corporation (**FDIC**) all take the view that the unauthorized disclosure of CSI may be subject to criminal penalties under 18 U.S.C. § 641. Federal Reserve staff, as well as the staff of the other banking agencies, in our experience, more frequently than is appropriate raise the specter of such criminal sanctions against individual private sector employees. It is also common practice that examination reports contain a statement that the reports are property belonging to the examining agency and that unauthorized disclosure of the reports is subject to the penalties under 18 U.S.C. § 641. As the number of emails and other correspondence has exploded in the digital age, this assertion has been expanded via regulation so that all CSI is asserted to be property belonging to the banking agency.

Nothing in FOIA – a civil statute designed to increase disclosure – contemplates a criminal prohibition related to Exemption 8. Similarly, nothing in the sections of the Federal Reserve Act cited as authority for the Availability of Information Rules[29] contemplates a criminal prohibition related to CSI.[30] The relevant criminal statute, 18 U.S.C. § 641, is not designed to, and does not, explicitly prohibit the disclosure of CSI.[31] Instead, it is a general statute relating to the misappropriation of federal government property.[32] We suspect that, in 1967, the general federal property law was pressed into service by the banking agencies because of a view that no other statutory authority was readily available to prohibit disclosure of bank examination reports and other forms of CSI by the private sector.[33] As a result,

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[29] Federal Reserve Act sections 9, 11(i), (k) and 25A, codified at 12 U.S.C. § 321 *et seq.*, 12 U.S.C. § 248(i), (k) and 12 U.S.C. § 611 *et seq*., respectively.

[30] The initial Availability of Information Rules adopted in 1967 included provisions similar to 12 C.F.R. § 261.20, which prohibits unauthorized disclosure of CSI and states that CSI made available to a supervised financial institution remains the "property" of the Board, and cited only FOIA as authority. *See* note 12. The Board later stated, however, that the provisions of Subpart C of the Availability of Information Rules "address the Board's general authority over its records under the Federal Reserve Act." 52 Fed. Reg. 13,458, 13,461 (Apr. 23, 1987). Of the sections of the Federal Reserve Act cited as authority for the Availability of Information Rules, only section 25A contemplates criminal penalties, *see* 12 U.S.C. § 630, but these penalties relate to the theft of an Edge Act corporation's property, not disclosure of CSI or theft of Federal Reserve property.

[31] In contrast, 18 U.S.C. § 1906 clearly and explicitly makes it a crime for a bank examiner to disclose the names of borrowers or the collateral for loans of any member bank or any bank insured by the FDIC, among other regulated entities.

[32] While we refer to "property" in this comment letter for the sake of simplicity, the statute also refers to records, among other specific forms of property. 18 U.S.C. § 641.

[33] Margaret E. Tahyar, *Are Bank Regulators Special?*, Banking Perspectives (The Clearing House Association, 2018), *available at* https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special. In earlier times, the report of examination was

improper disclosure of CSI by a supervised financial institution falls within the ambit of 18 U.S.C. § 641 only because the banking agencies have declared, by regulation, that it is the property of or a record of the federal government.[34] Under the Proposal, the scope of CSI that would "remain property of the Board" would be further **expanded** to include information "obtained" from the supervised financial institutions, not just CSI that the Federal Reserve has "made available" to a supervised financial institution.[35] In other words, all Incoming Information would now be covered.[36]

The Board should instead move in the opposite direction and remove from the Availability of Information Rules the concept of CSI in possession of a supervised financial institution being the "property" of the Board and adopt a policy of not referring alleged violations of the CSI disclosure restrictions by supervised financial institutions to the Department of Justice for criminal prosecution.[37]

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viewed as belonging to the banking regulators and was merely loaned to bank officers. *See supra* note 9. Today, when reports of examination are shared digitally, the loan analogy no longer makes sense.

[34] The Availability of Information Rules make this connection by stating that "[a]ll confidential supervisory information and other information made available under this section shall remain the property of the Board." 12 C.F.R. § 261.20(g). The OCC regulations go further by explicitly stating that those who share CSI without the OCC's permission "may be subject to the penalties provided in 18 U.S.C. § 641" and by citing 18 U.S.C. § 641 as an authority for the regulations. 12 C.F.R. § 4.37(b)(1)(ii); 12 CFR pt. 4 (list of authorities).

[35] *Compare* 12 C.F.R. § 261.20(a) (current regulation restricting information sharing and designating certain information as Federal Reserve "property," which is limited in scope to information "made available" by the Federal Reserve) *with* Proposal § 261.20(a) (stating that "[a]ll [CSI] and other nonpublic information . . . remains the property of the Board"). The removal of the "made available" limitation would also result in <u>all</u> "other nonpublic information," which would include, among other things, documents exempt from disclosure under Exemption 4, becoming subject to the disclosure restrictions in section 261.20(a) of the Proposal and being considered "property" of the Board. We assume that the Board did not intend to classify competitively sensitive Incoming Information as the "property" of the Board, as it would otherwise seem to criminalize disclosure of a supervised financial institution's own financial or business information without the Federal Reserve's prior consent if the Incoming Information was provided to or merely obtained by the Federal Reserve. We recommend that the Board clarify in the final regulations that this is not its intent and revise section 261.20(a) of the Proposal accordingly. We realize that there is a similar flaw in the OCC and FDIC regulations, but we believe that this error was not deeply considered at the time. *See* 12 C.F.R. § 4.37(b)(1); 12 C.F.R. § 309.6(a). This potential expansion of the scope of information deemed to be Board property raises another serious question about whether the provisions that state that CSI and other nonpublic information are property of the Board are unconstitutionally vague in the context of potential criminal penalties.

[36] *See* Bank Policy Institute comment letter, at 3 (arguing that "[t]he Federal Reserve should clarify and confirm that documents and information created by a supervised financial institution for its own business purposes are not CSI when in the institution's possession, and therefore may be shared by the institution without Federal Reserve approval under the CSI rules").

[37] Federal Reserve employees who steal CSI, convert CSI to their own use or intentionally improperly disclose CSI, including to the media, should remain subject to criminal sanctions. We note that actual situations of criminal prosecution or pleas have largely been of banking agency employees. *See, e.g.*, *United States v. Gross*, No. 15-766 (S.D.N.Y. Nov. 4, 2016), Doc. 1. Nevertheless, there has been a strong

We believe that decriminalizing CSI disclosure by supervised financial institutions, or their directors, officers, employees or agents, is a more appropriate approach for the following reasons. The first relates to the chilling effect from the threat of criminal sanctions. Currently, the threat of becoming subject to criminal sanctions for improper sharing of CSI causes an unnecessary and counterproductive level of fear among the employees of supervised financial institutions when it comes to sharing CSI internally or sharing documents with third-party advisers. Given the ambiguities in the definition of CSI, which will remain even if all recommendations in this comment letter, the BPI comment letter and the ABA comment letter are followed, there is a rational concern that, despite their best efforts to redact or remove CSI from documents shared with advisers, there might be some CSI that was missed. There is fear, which would be made worse by the Proposal's further expansion of the definition of CSI, that an errant email, an incorrect interpretation of the ambiguous definition of CSI or the exercise of supervisory discretion in a manner that does not strictly adhere to the rules could lead to criminal charges. This fear may inhibit beneficial information sharing, remediation and risk management in both large, complex organizations and smaller institutions. Another variation of this potential chilling effect has been seen very recently when the OCC issued a bulletin reminding financial institutions of their confidentiality responsibilities and potential criminal liability just two weeks before the CEOs of the nation's largest banks were scheduled to testify before the House Financial Services Committee.[38] Such reminders, coupled with the overbroad and vague definition of what may constitute CSI, could have the practical effect of limiting the information made available to Congressional oversight committees to the detriment of supervised financial institutions and the public, or of placing supervised financial institutions and their employees in the untenable position of having to choose between (a) complying with, *e.g.*, Congressional subpoenas (or being held in contempt for not complying) and (b) refusing to comply in order to avoid the threat of criminal sanctions for disclosing CSI if the relevant banking agency does not consent to the disclosure. There are also many instances in which CSI is in tension with the securities laws, as has long been noted by many, and the chilling impact of a potential criminal prosecution heightens that tension.

Second, the civil penalties the Board can impose upon supervised financial institutions and their directors, officers, employees and agents for violations of the CSI disclosure restrictions are sufficient to punish and dissuade such violations. The Board's civil

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increase in leaks of confidential supervisory information, often by the bank regulators themselves, since the financial crisis. Margaret E. Tahyar, *Are Bank Regulators Special?*, Banking Perspectives (The Clearing House Association, 2018), *available at* https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special. To the extent these leaks of CSI are attributable to banking agency employees, criminal sanctions for such actions are appropriate.

[38] *See* OCC, Bulletin 2019-15: Statement on Confidentiality (Mar. 25, 2019), *available at* https://www.occ.gov/news-issuances/bulletins/2019/bulletin-2019-15.html.

enforcement authority includes extensive cease and desist powers,[39] the authority to prohibit a director, officer, employee or agent from the banking sector,[40] the institution-affiliated party provisions[41] and the authority to issue civil money penalties,[42] among other punitive powers. Clearly, the Board now has available to it sufficient civil authority to punish and dissuade violations of the CSI disclosure restrictions by supervised financial institutions.[43]

A third compelling reason to cease seeking criminal prosecution of alleged violations of the CSI disclosure restrictions by supervised financial institutions, or their directors, officers, employees or agents, is that the current and proposed definitions of CSI are so broad and lacking in clarity that there is a serious question as to whether they would be unconstitutionally vague if they were used in an attempt to establish criminal liability. It is well established that a law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement, is unconstitutional.[44] The Supreme Court has held that "regulated parties should know what is required of them so they may act accordingly," and laws must give sufficient precision and guidance "so that those enforcing the law do not act in an arbitrary or discriminatory way."[45]

A recent Supreme Court case, decided in June 2019, is an apt reminder of these standards. As noted by the majority in that decision,

> "Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write

[39] 12 U.S.C. § 1818(b).

[40] 12 U.S.C. § 1818(e).

[41] The Financial Institutions Reform, Recovery, and Enforcement Act (**FIRREA**) in 1989 introduced the term "institution-affiliated party," which expanded the list of individuals who could be subject to enforcement actions (including, in certain cases, independent contractors such as attorneys). *See* 12 U.S.C. § 1818(u).

[42] 12 U.S.C. § 1818(i)(2).

[43] Before the Financial Institutions Supervisory Act, in 1966, the Board had limited authority to issue civil penalties. At the time that the first FOIA regulations were passed a year later, enforcement action under these expanded powers was still quite limited. The situation today is very different, especially after the further expansion of the Board's civil authority in FIRREA in 1989.

[44] *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.") (Holmes, J.). As the en banc Fourth Circuit recently reiterated, the void-for-vagueness doctrine requires a greater amount of clarity where "criminal penalties may be imposed for violations of a law," but "even laws that nominally impose only civil consequences warrant a 'relatively strict test' for vagueness if the law is 'quasi-criminal' and has a stigmatizing effect." *Manning v. Caldwell*, 930 F.3d 264, 272–73 (4th Cir. 2019) (en banc) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–500 (1982)).

[45] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Davis*, 139 S. Ct. at 2325.

> statutes that give ordinary people fair warning about what the laws demand of them. Vague laws transgress both of these constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity . . . ."[46]

Even with the best data and governance controls, the scope of the information that may fall within the definition of CSI is so large that it is easy to imagine how a director, officer, employee or agent of a supervised financial institution could handle CSI without ever realizing it is CSI or is "derived" therefrom.[47] Such a person, therefore, would not have the requisite knowledge of how they are supposed to treat such information under the Availability of Information Rules, let alone realize that it is subject to 18 U.S.C. § 641. The entire edifice of the criminal law is even more inappropriate when the information is Incoming Information from the supervised financial institution that has been merely "obtained" by the Federal Reserve.

We also have serious concerns about the constitutionality of making it a crime for supervised financial institutions, or their directors, officers, employees or agents, to "use"[48] CSI for an unauthorized purpose, were the Department of Justice to take the view that a violation of the Board's CSI disclosure restrictions is a violation of 18 U.S.C. § 641, given that the way in which a director, officer, employee or agent might, over a very long period and in different circumstances, "use" any background knowledge of CSI in other circumstances. Criminalizing the "use" of CSI would come close to creating a thought crime. For example, does the Board really mean to criminalize a holding company director's "use" of the knowledge of how the supervisors might treat a topic in the future based on her knowledge of what they have indicated in the past for the subsidiary bank?

In the event that the Board is unwilling to adopt the policy described above, it should adopt a policy whereby it would refer alleged violations of the CSI disclosure restrictions by supervised financial institutions to the Department of Justice for criminal prosecution under 18 U.S.C. § 641 only when the behavior at issue is egregious. The Board should also adopt a policy that prohibits individual supervisory staff from threatening or referring to criminal prosecution directors, officers, employees or agents of a supervised financial institution unless the General Counsel of the Federal Reserve has provided written approval.

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[46] *Davis*, 139 S. Ct. at 2323.

[47] Proposal § 261.2(b)(1) (stating that information "derived" from CSI would itself be CSI).

[48] Proposal § 261.20(a) (disallowing the "use" of CSI and other nonpublic information for an unauthorized purpose).

IV. Conclusion

The comments in this comment letter generally apply to the OCC's and FDIC's rules, and the fact that the rules of all three banking agencies have, through a series of incremental changes, become significantly different since their origins in 1967 when they exhibited a much greater degree of consistency, including with respect to fundamental matters such as the definition of CSI or a similar term, greatly increases the complexity of complying with each agency's rules, especially given that most financial institutions must comply with the rules of at least two banking agencies. The Board should take the first step by simplifying the Availability of Information Rules and returning them to their roots as we have suggested in this comment letter.

For these reasons, we strongly support changes to revise, clarify and update for the digital age the Availability of Information Rules, as well as the similar rules of the OCC and the FDIC.

* * *

Davis Polk thanks the Federal Reserve for its consideration of our comments. If you have any questions, please do not hesitate to contact Margaret E. Tahyar at (212) 450-4379, Randall D. Guynn at (212) 450-4239, or Eric McLaughlin at (212) 450-4897.

Yours Sincerely,

DAVIS POLK & WARDWELL LLP

By: _____
Margaret E. Tahyar

Appendix A

Davis Polk

Appendix A: Expansion of the Federal Reserve's Definition of CSI

	1967	*1988*	*1997*	*2019 Proposal*
CSI Definition	*The core operative language was* "examination, operating, or condition reports prepared by, on behalf of, or for the use of, the Board or a Federal Reserve Bank, relating to the affairs of any bank of affiliate therefore, bank holding company or subsidiary thereof, broker, finance company, or any other person engaged, or proposing to engage, in the business of banking, extending credit, or managing or controlling banks" *Certain other items kept confidential in the original text are similar to CSI, but many of them are related to statutory provisions that were revised by subsequent legislation or are not relevant to Incoming CSI. For the sake of completeness, we note they included* "information relating to proceedings for (i) the issuance of a cease-and-desist order, or order of suspension or removal, under the Financial Institutions Supervisory Act of 1966; (ii) the termination of membership of a State bank in the Federal Reserve System pursuant to section 9 of the Federal Reserve Act (12 U.S.C. 327); (iii) the suspension of a bank from use of the credit facilities of the Federal Reserve System pursuant to section 4 of the Federal Reserve Act (12 U.S.C. 301); and (iv) the granting or revocation of any approval, permission, or authority, except to the extent provided in this Part and except as provided in Part 262 of this chapter concerning bank holding company and bank merger applications"	"Confidential supervisory information" means cease and desist orders, suspension or removal orders, or other orders or actions under the Financial Institutions Supervisory Act of 1966, as amended, the Bank Holding Company Act of 1956, as amended, or the Federal Reserve Act of 1913, as amended; reports of examination and inspection, confidential operating and condition reports, **and any information derived from, related to, or contained in them.** "Confidential supervisory information" **may consist of** documents prepared by, on behalf of, or for the use of the Board, a Reserve Bank, a Federal or state financial institutions supervisory agency, or a bank or bank holding company.	Confidential supervisory information means: (i) Exempt information consisting of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports; (ii) **information gathered by the Board in the course of any** investigation, suspicious activity report, cease-and-desist orders, civil money penalty enforcement orders, suspension, removal or prohibition orders, or other orders or actions under the Financial Institutions Supervisory Act of 1966, the Bank Holding Company Act of 1956, the Federal Reserve Act, the International Banking Act of 1978, and the International Lending Supervision Act of 1983; except (A) Such final orders, amendments, or modifications of final orders, or other actions or documents that are specifically required to be published or made available to the public pursuant to 12 U.S.C. 1818(u), or other applicable law, including the record of litigated proceedings; and (B) The public section of Community Reinvestment Act examination reports, pursuant to 12 U.S.C. 2906(b); and (iii) **Any documents prepared by, on behalf of, or for the use of** the Board, a Federal Reserve Bank, a Federal or State financial institutions supervisory agency, or a bank or bank holding company or other supervised financial institution. Confidential supervisory information **does not include documents prepared by a supervised financial institution for its own business purposes and that are in its possession**.	Confidential supervisory information means nonpublic information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8) and **includes information that is or was created or obtained** in furtherance of the Board's supervisory, investigatory, or enforcement activities, including activities conducted by a Federal Reserve Bank (Reserve Bank) under delegated authority, relating to any supervised financial institution, including, **without limitation**, reports of examination, inspection, and visitation; confidential operating and condition reports, supervisory assessments, investigative requests for documents or other information, supervisory correspondence or other supervisory communications; **any portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information**; and **any information derived from, related to, or contained in such documents.** Confidential supervisory information does not include: (i) Documents prepared by or for a supervised financial institution for its own business purposes and that are in its possession **except to the extent included [in the definition of CSI]**; or (ii) Final orders, amendments, or modifications of final orders, or other actions or documents that are specifically required to be published or made available to the public pursuant to 12 U.S.C. 1818(u), the Community Reinvestment Act, or other applicable law.
Davis Polk Comments	The defined term CSI was not included in the initial Availability of Information Rules. The language in the first paragraph above is the progenitor of the defined term. The scope of the 1967 provision restricting information sharing by financial institutions was limited to the reports of examination and, therefore, even narrower than the progenitor of the CSI definition. *Compare* 12 C.F.R. 261.6(b) (1967) *with* 12 C.F.R. 261.(a) (1967). The scope of "CSI" in the initial rules was quite narrow compared to today. The banking agency that retains the closest link to the original rules is the FDIC, the rules of which prohibit the disclosure of "records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions." *See* 12 C.F.R. § 309.6(a).	It was only in 1988 that CSI was first used as a defined term. It is unclear whether the statement that CSI "may consist of [certain documents]" was meant to explain what types of documents might fall within the definition of CSI given in the preceding sentence or create a new category of CSI and thereby expand the definition given in the preceding sentence.	The definition of CSI was expanded to include a large amount of documents generated by financial institutions by (1) including information "gathered by the Board in the course of" investigations and enforcement orders and (2) clearly including as a separate, additional prong of the definition "documents prepared by, on behalf of, or for the use of the Board." The expansion noted above was partially tempered by excluding from the definition of CSI business purpose documents in the possession of a financial institution. The possession language has not been read to mean that sharing with the Board removes the document from the possession of the financial institution. Cease and desist orders, suspension and removal orders and other orders were removed from the 1988 definition because of the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which required the Board to publish all final enforcement orders. *See* 12 U.S.C. § 1818(1)(B).	Given the broad scope of documents, such as board minutes, routine PowerPoint presentations, financial information and policies and procedures, among many others, that examiners continuously obtain, the addition of information "obtained" in furtherance of the Board's supervisory, investigatory, or enforcement activities would further greatly expand the definition of CSI, especially given that any (1) internal documents containing, referring to or revealing information in "obtained" information or (2) information derived from, related to or contained in "obtained" information would also be CSI. See the BPI letter for how this information is intermixed with information prepared for business purposes. Furthermore, the business purpose exception is qualified by a reference to the definition of CSI, rendering it ineffectual. We expect this was inadvertent.

Note: This chart is meant to be read as a companion piece to the accompanying Davis Polk comment letter. It presents the definition of CSI in each version of the Federal Reserve's Availability of Information Rules. Significant changes to the definition are shown in green font and the implications of or reasons for these changes are explained in the Davis Polk Comments row.

Appendix B

Appendix B: Comparison of Select Aspects of CSI Rules that Illustrate the Expansion of CSI in the Proposal as Applied to Incoming Information						
	Proposed Federal Reserve	**Current Federal Reserve**	**OCC**	**FDIC**	**CFPB**	**Davis Polk Comments**
Scope of CSI **Note:** Descriptions of scope focus on documents prepared by a financial institution that might be deemed CSI and generally exclude aspects of the relevant regulatory definitions that relate to core documents prepared by the agencies – i.e., this chart focuses on Incoming Information, not Outgoing Information, as defined in our comment letter. The OCC and FDIC do not use the term "CSI" but their rules reflect the same concept.	Information that is or was **created or obtained** in furtherance of the Board's supervisory, investigatory, or enforcement activities	Any documents **prepared by, on behalf of, or for the use of** the FRB, a Federal Reserve Bank, a federal or state financial institution supervisory agency or a bank, bank holding company, or other supervised financial institution **Information gathered** by the FRB in the course of any investigation or enforcement order	Any record **created or obtained** by the OCC or the OTS in connection with the performance of its responsibilities	Records that are contained in or related to "examination", operating, or condition reports **prepared by, on behalf of, or for the use of** the FDIC or any agency responsible for the regulation or supervision of financial institutions	Documents, including reports of examination, **prepared by, on behalf of, or for the use of** the CFPB or any other federal, state or foreign government agency in the exercise of supervisory authority over a regulated entity, and any information derived from such documents Any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services, or to assess whether an institution should be considered a covered person or is subject to the CFPB's supervisory authority	- Addition of information obtained by the FRB would greatly expand the scope of CSI, especially in conjunction with the change to the business purpose documents exclusion. - OCC language, which comes from a 1995 revision, is a policy error, should not be adopted and does not track the FOIA statute. It was not deeply explained by the OCC at the time. - Given the banking agencies' historical view that improper disclosure of CSI can result in criminal charges, it is important that the scope of CSI is very clear and no broader than necessary.

Note: This chart is meant to be read as a companion piece to the accompanying Davis Polk comment letter. It presents select aspects of the CSI rules of relevant agencies to illustrate the expansion of CSI in the Proposal as applied to Incoming Information.

Appendix B: Comparison of Select Aspects of CSI Rules that Illustrate the Expansion of CSI in the Proposal as Applied to Incoming Information						
	Proposed Federal Reserve	**Current Federal Reserve**	**OCC**	**FDIC**	**CFPB**	**Davis Polk Comments**
Exclusion of documents created for business purposes from definition of CSI	CSI does not include documents prepared by or for a supervised financial institution for its own business purposes and that are in its possession **except to the extent included in the definition of CSI** (**New Business Purpose Carveout**)	CSI does not include documents prepared by a supervised financial institution for its own business purposes and that are in its possession	The OCC does not explicitly exclude documents prepared by a financial institution for its own business purposes from the definition of CSI *As noted in the cell below, the OCC uses the phrase "business purpose" in the entirely different context of permitted sharing of CSI within the supervised financial institution*	Because the FDIC's definition of CSI is much narrower than the FRB's current or proposed definitions and more closely tracks the original wording of the Federal Reserve and FDIC in 1967, a business purpose documents exclusion is not necessary	CSI does not include documents prepared by a financial institution for its own business purposes and that the CFPB does not possess	- In the digital age, when masses of PowerPoints, emails and other informal documents are shared with agencies, it is critical that documents prepared by the financial institution for its own business use not be transformed into CSI; the New Business Purpose Carveout would gut this key exemption, which seems like an accident.

Note: This chart is meant to be read as a companion piece to the accompanying Davis Polk comment letter. It presents select aspects of the CSI rules of relevant agencies to illustrate the expansion of CSI in the Proposal as applied to Incoming Information.

Appendix B: Comparison of Select Aspects of CSI Rules that Illustrate the Expansion of CSI in the Proposal as Applied to Incoming Information						
	Proposed Federal Reserve	**Current Federal Reserve**	**OCC**	**FDIC**	**CFPB**	**Davis Polk Comments**
Sharing of CSI within financial institutions	Qualitative requirement: internal sharing permitted "only to the extent those individuals have a need for the information in the performance of their official duties" Sharing with affiliates: permitted without prior permission	No qualitative requirement Sharing with affiliates: only sharing with parent BHC or SLHC permitted without prior permission	Qualitative requirement: internal sharing permitted "when necessary or appropriate for business purposes" Sharing with affiliates: only sharing with parent holding company permitted without prior permission	No qualitative requirement Sharing with affiliates: only sharing of report of examination with parent BHC or SLHC (subject to certain requirements) permitted without prior permission	Qualitative requirement: internal sharing permitted "to the extent that the disclosure of such CSI is relevant to the performance of such individuals' assigned duties" Sharing with affiliates: permitted without prior permission	- The expansion of this permission to include sharing of CSI with affiliates is very helpful. - The qualitative requirement that was added is overly strict and risks limiting beneficial information sharing, especially given the broad definition of CSI; the OCC's and CFPB's formulations are more reasonable. - The reference to "in the performance of official duties" is borrowed from similar language that applies to the official sector and does not travel well to the private sector. -The determination of whether any qualitative requirement is met should be made by the financial institution and not second guessed by FRB staff as

Note: This chart is meant to be read as a companion piece to the accompanying Davis Polk comment letter. It presents select aspects of the CSI rules of relevant agencies to illustrate the expansion of CSI in the Proposal as applied to Incoming Information.

Appendix B: Comparison of Select Aspects of CSI Rules that Illustrate the Expansion of CSI in the Proposal as Applied to Incoming Information						
	Proposed Federal Reserve	**Current Federal Reserve**	**OCC**	**FDIC**	**CFPB**	**Davis Polk Comments**
						long as there are reasonable protocols for safeguarding the information.
Limits on "use" of information	Prohibition on the unauthorized **use** of CSI, in addition to disclosure: "no person may **use** any such information for an unauthorized purpose or disclose any such information without the prior written permission of the General Counsel"	Prohibition on disclosure only	Prohibition on the unauthorized **use** of CSI, in addition to disclosure: "Any person who discloses or **uses** non-public OCC information except as expressly permitted by the Comptroller of the Currency or as ordered by a Federal court, under paragraph (b)(1)(i) of this section, may be subject to the penalties provided in 18 U.S.C. 641."	Prohibition on disclosure only	Prohibition on disclosure only	- The FRB's current regulations, as well as those of the FDIC and CFPB, prohibit unauthorized **disclosure** of CSI. - The OCC formulation, adopted in 1995, that prohibits "use" should not be followed because it is impossible to track or prohibit how people or institutions might "use" the generalized knowledge of CSI. - Expanding the prohibition to include unauthorized **use** of CSI makes it ambiguous and much more expansive.

Note: This chart is meant to be read as a companion piece to the accompanying Davis Polk comment letter. It presents select aspects of the CSI rules of relevant agencies to illustrate the expansion of CSI in the Proposal as applied to Incoming Information.