John L. Douglas

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Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Submitted electronically to
regs.comments@federalreserve.gov

RE: Docket Number R-1665; Comment on Notice of Proposed Rulemaking Amending the Board's Rules Regarding Availability of Information

I write in response to the Board's notice of proposed rulemaking and request for comment regarding contemplated changes to the Board's rules governing the disclosure of confidential supervisory information.

I write in my personal capacity. I have over forty years of experience as a banking attorney, practicing in major law firms representing numerous financial institutions of all sizes and types. I previously served as General Counsel of the Federal Deposit Insurance Corporation, and currently serve as an executive with a diversified financial company that, among other things, owns a federal savings bank. My comments are personal, based upon my experience dealing with financial institutions, regulators, and information deemed to be confidential supervisory information. They are not made on behalf of my current or any former employer.

While I applaud the desire to clarify the rules surrounding CSI, I believe that the restrictions on the use and disclosure of such information far exceed any valid regulatory purpose, interfere with the free and open flow of information upon which our institutions and markets operate, result in critical information gaps hindering management of and advice to regulated financial institutions, and serve as unnecessary traps for unwary or unwitting parties.

My concern arises from the expansive nature of the proposed definition of CSI. CSI includes "any information 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." It also includes "any portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information."

The breadth of the definition could encompass virtually every document generated by a financial institution. As an example, the Board's supervisory staff generally obtains copies of board and committee minutes of a regulated financial institution; may obtain and review compensation plans and information; will review internal audit reports and compliance plans; will review business plans in connection with applications; and will routinely ask for, obtain and review a multitude of documents "in furtherance of its supervisory, investigative or enforcement activities." Converting this information into CSI places severe restrictions on who can see and use this information, including shareholders, potential investors, merger partners, consultants and advisors, and triggers an obligation to seek approval prior to disclosing this information except to a select number of internal personnel that have a "need for the information in the performance of their official duties." Other regulators may have access to the CSI, as may legal counsel and auditors subject to written restrictions, but all others will need to obtain approval from the Board or its delegates. Practice shows that requests are rarely granted.

While there is an attempted carve-out from the broad definition by excluding "documents prepared by a supervised financial institution for its own business purposes and that are in its possession," the caveat that follows swallows the exclusion, for documents covered by the broad definition (e.g., obtained in connection with the Board's supervisory activities) are still considered CSI.

I suspect the Board doesn't really intend to cover such things as board minutes and business plans; however, the restrictions surrounding CSI do in fact interfere with candid disclosures to investors, advisors and potentially even employees of relevant, material information. For example, if a bank has a problem with its AML compliance, why should it be able to disclose that item to its shareholders if there is no exam finding or regulatory-required remediation plan, but not be able to do so if there is a MOU or MRA addressing the subject? If a bank has a regulatory problem that precludes it from engaging in a particular transaction, why should it not disclose the issue to its advisors that could guide and advise it appropriately? And because diversified firms are subject to a multitude of regulators, why should an item of concern to one regulator not be appropriately disclosed to another regulator of the same entity? Indeed, if a bank has a regulatory issue of significance, regardless of whether it was self-identified or brought to its attention by a regulator, why should that information not be appropriately disclosed to a potential merger partner who will have to live with the issue if the transaction proceeds?

Institutions can and should make their own judgment about the disclosure and use of information material to its business, operations and condition. Indeed, publicly-traded institutions have an affirmative obligation to disclose material information. Restricting disclosure of the information because it also the subject of some regulatory action interferes with the free flow of information

upon which our businesses and markets operate. Markets and customers can evaluate the information and its importance, just as they do with virtually every other company and industry. I see no good argument why any information should be hidden or unavailable simply because it is also of supervisory interest or concern.

If there is a need to preserve the concept, I would strongly suggest that the term "CSI" be limited to those materials generated by the Board which it determines contain sensitive information that it believes would not be appropriately understood by the public. Such material would be clearly identified and marked. This might include limited, sensitive portions of reports of examination; it might include investigatory documents provided by the Board as it evaluates possible violations of laws, rules or regulations; it might include documents addressing certain individuals or entities under certain circumstances. By the same token, the Board could direct that materials prepared by the institution and submitted to the Board in connection with these limited matters should also be considered CSI in order to preserve open and free regulatory correspondence. Absent these limited exceptions, the institution can and should determine its own disclosure obligations surrounding the matter.

I would suggest a more appropriate definition of CSI would be "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 provided by the Board or a Federal Reserve Bank under delegated authority to a supervised financial institution, disclosure of which the Board or Reserve Bank believes would not be appropriately evaluated or understood by third parties, and that is clearly designated as confidential supervisory information, as well as material delivered by the supervised financial institution to the Board or a Federal Reserve Bank in connection therewith as required by the Board or the Federal Reserve Bank." This appropriately puts the burden on the Board to evaluate the impact of possible disclosure of the information, and leaves the burden on the financial institution to address its disclosure obligations to third parties. It also allows free and open communication among the Board and the financial institution with respect to those matters that should appropriately be treated as confidential.

Treating every regulatory concern as confidential underestimates the ability of institutions, customers, advisors, shareholders and investors to process and evaluate the information in the context of all of the other information surrounding a financial institution. Calling information CSI, prohibiting its disclosure and wrapping a regulatory process surrounding its use and disclosure is inconsistent with the way our system should operate.

I strongly suggest that the Board take this opportunity to step back and rethink the scope and nature of the regulatory communications that should be treated as confidential. The breadth of the proposed definition will, in my view, have pernicious effects.

I very much appreciate the opportunity to submit these comments and would be delighted to respond to questions or concerns you may have.

Sincerely,

John L. Douglas