CORPORATION

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August 16, 2019

Via Electronic Delivery

Ms. Ann Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: **Rules Regarding Availability of Information**
Docket No. R-1665 and RIN No. 7100 AF 51

Ladies and Gentlemen:

The Charles Schwab Corporation ("Schwab", "we" or "our")[1] appreciates the ongoing efforts by the Federal Reserve Board and its staff (the "Board") to modernize, tailor and improve the efficiency of its rules. We agree that the Board's regulations relating to the Freedom of Information Act ("FOIA") and its rules governing the disclosure of confidential supervisory information (CSI) are outdated and inefficient and commend the Board for taking action on the pending proposed rulemaking.[2] Our comments will focus on the rules governing the disclosure of CSI as we believe these rules have become particularly anachronistic and unnecessarily burdensome to administer.

We fully support supervised financial institutions being able to disclose CSI to directors, officers, and employees of their affiliates in addition to the currently permitted disclosures to the institutions' parent holding companies. We also agree with the Board's elimination of the requirement in current Section 261.20(b)(2) that a supervised institution's auditors and legal counsel may only view the institution's CSI on its premises.

However, as discussed below, we believe that the proposal does not go far enough in reducing regulatory burden by not eliminating the need for unnecessary regulatory approvals in certain circumstances. Moreover, we are concerned that the proposal may inadvertently increase

[1] The Charles Schwab Corporation (NYSE: SCHW) is a leading provider of financial services, with more than 365 offices and 12.0 million active brokerage accounts, 1.7 million corporate retirement plan participants, 1.3 million banking accounts, and $3.70 trillion in client assets as of June 30, 2019. Through its operating subsidiaries, Schwab engages in wealth management, securities brokerage, banking, asset management, custody and financial advisory services. Schwab provides financial services to individuals and institutional clients through two segments, Investor Services and Advisor Services. The Investor Services segment provides retail brokerage and banking services, retirement plan services and corporate brokerage services to individuals and businesses. The Advisor Services segment provides custodial, trading, and support services to registered investment advisors, as well as retirement business services to independent retirement advisors and record-keepers. Schwab's services in respect of securities activities are primarily securities brokerage and investment advisory services. Substantially all of Schwab's securities brokerage activities are conducted as agent or riskless principal for its clients. Similarly, most of Schwab's asset management and administration revenues are generated through advising registered investment companies and exchange traded funds and its fee-based advisory solutions.

[2] 84 *Fed. Reg.* 27976 (June 17, 2019).

regulatory burden on supervised institutions by expanding the scope of documentation and other information that constitutes CSI and by adding an element of subjectivity that would invariably make it more difficult for institutions to ensure that they are complying with applicable CSI disclosure rules.

1. Areas to Address for Further Efficiencies

A. Harmonization

All four of the Federal banking agencies, including the Consumer Financial Protection Bureau ("CFPB"), have adopted regulations implementing the Freedom of Information Act ("FOIA").[3] All of these regulations include provisions regarding CSI or its equivalent and the persons and entities to whom supervised institutions may disclose such records and information.[4]

The Board, the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the CFPB all perform many of the same regulatory, supervisory, and examination functions vis-à-vis the financial institutions and other entities over which they have jurisdiction. Thus, absent compelling reasons or circumstances to the contrary, Schwab believes that the CSI provisions of all of the agencies' FOIA regulations should be identical or, at a minimum, harmonized, especially as to how they define CSI and to whom supervised institutions may disclose CSI. One excellent example of this is how the Federal Financial Institutions Examination Council ("FFIEC") requires all similarly situated depository institutions to file the same call reports.[5]

Schwab realizes that the Board, acting alone and without the benefit of a statute requiring joint rulemaking or interagency uniformity, does not have the ability to singlehandedly accomplish the goal of harmonized CSI disclosure rules and requirements. However, Schwab is of the view that the Board should endeavor for its own CSI disclosure rules to be consistent with those of the other Federal banking agencies and should not adopt significantly different rules that would make compliance much more difficult for holding companies such as Schwab with multiple regulators.

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[3] *See* 5 U.S.C. § 552 (2019); 12 C.F.R. §§ 4.31 – 4.40 (2019) (OCC); 12 C.F.R. §§ 261.1 – 261.23 (2019) (Board); 12 C.F.R. §§ 309.1 – 309.7 (2019) (FDIC); 12 C.F.R. §§ 1070.10 – 1070.23, 1070.40 – 1070.48 (2019) (CFPB).
[4] 12 C.F.R. § 4.36 (2019) (OCC); 12 C.F.R. § 309.6 (2019) (FDIC); 12 C.F.R. §§ 1070.41 – 1070.43 (2019) (CFPB).
[5] *See* Form FFIEC 031, *Consolidated Report of Condition and Income for a Bank with Domestic and Foreign Offices* (June 2019); *see also* Form FFIEC 041, *Consolidated Report of Condition and Income for a Bank with Domestic Offices Only* (June 2019).

B. The Board Should Permit the Disclosure of CSI in the Context of Horizontal Reviews

In a horizontal review, Large Institution Supervision Coordinating Committee ("LISCC") and Large and Foreign Banking Organizations ("LFBO") firms are examined at the same time on a single topic so that the Board can assess them on a consistent basis to identify risks and common trends.[6] We understand that the Board does not apply the same standards or have the same supervisory expectations of all firms in all horizontal reviews, and that reviews are oftentimes tailored to take into account differences in size, complexity and risk profile.[7] At the same time, the Board is able to distinguish between effective practices in a given area and those that are not. The Board is also able to identify what are considered to be better practices engaged in by the largest, most systemic firms that are subject to heightened expectations.

Schwab believes that giving firms subject to horizontal reviews the opportunity to share and discuss their practices, as well as feedback they had received from the Board, with each other would have significant systemic benefits to the extent that enabling such discussions would promote the resiliency of all large financial institutions. With such information, institutions collectively would have a much better understanding of what other firms and the Board consider to be effective and ineffective practices.

The potential flow of information and transparency resulting from these discussions would also greatly benefit firms subject to the reviews by making them more aware of the range of processes, procedures and practices in a given area. This knowledge base, in turn, would facilitate firms' enhancement of their own practices and put them in a much better position to meet supervisory expectations. Providing firms with a better understanding of the practices of the most systemic firms would also likely result in an improvement in their own practices by enabling them to compare their own practices to the better practices. Armed with this information, institutions could then assess the effectiveness of their own practices taking into account their differences from the systemic firms. For firms with plans to grow or enter new business lines involving greater complexity and/or an increased risk profile, knowledge of current practices and heightened expectations in a particular area will provide a much better understanding of the practices that may be expected of them going forward.

Participation in horizontal review discussions would be entirely voluntary. Firms not interested in sharing information about their own practices and horizontal review feedback from the Board would not be required to do so. Additionally, to ensure that the Board is aware of such discussions taking place, Board approval would be required for the firms to disclose CSI to each

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[6] The Bd. of Governors of the Fed. Reserve Sys., *Supervision and Regulation Report*, 18 (May 2019).
[7] *Id.* at 18-19 ("Horizontal reviews . . . provide a clear picture of the relative risk in an individual firm and allow supervisors to align supervisory expectations with the firm's risk profile.")

other.[8] To the extent that a Board approval requirement is imposed, the Board should set forth the standards that it will use in determining whether or not to grant its approval in order to further the transparency of its decision-making process.[9]

Schwab believes that any risk of unauthorized disclosure of CSI in these types of situations would be very low. All of the recipients of CSI would be Board-supervised institutions, which would be well aware of the need to keep such information confidential and to limit the disclosure of CSI to that permitted under the Board's CSI disclosure provisions. Thus, in Schwab's view, the benefits of greater resiliency and adoption of more effective practices would far outweigh any concerns arising from the disclosure and sharing of horizontal review-related CSI among firms subject to those reviews.

C. The Board Should Permit Disclosure of CSI by Supervised Institutions to Other Federal and State Banking Regulators Without the Need to Obtain Prior Board Approval

Under the Board's CSI disclosure proposal, upon the concurrence of a supervised institution's central point of contact ("CPC"), the institution may disclose Board CSI to the OCC, FDIC, CFPB, and state financial agencies upon the CPC's determination that "the receiving agency has a legitimate supervisory or regulatory interest in the information."[10] In our view, another banking regulator, either of one of the institution's subsidiary banks or the CFPB, would have a legitimate supervisory or regulatory interest in all of the common use case situations where documents containing Board CSI would be requested. Examples include reports of examination, supervisory letters for areas subject to overlapping jurisdiction, and holding company board and committee minutes and related board package materials, which oftentimes contain Board CSI.

Moreover, there should be no concern from the Board's perspective that CSI disclosed to another bank regulator would be subsequently improperly disclosed by that regulator, as all of the Federal banking agencies understand the importance of keeping CSI, whether their own or another agency's, confidential. We further understand that the Federal banking agencies have already entered into memoranda of understanding with each other regarding CSI that provide additional protections that the Board's CSI will not be disclosed to third parties without the Board's knowledge and consent.

Thus, Schwab strongly agrees with the positions taken by the Bank Policy Institute and the American Bankers Association that supervised institutions should be able to disclose CSI to the other Federal and state bank regulators without the need for CPC or any other Board

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[8] Board approval would also be necessary since a requesting firm would need to learn from Board the names of the other firms that were subject to the horizontal review.

[9] In this regard, we would recommend inclusion in any horizontal review CSI disclosure provision of language similar to that set forth in proposed Section 261.23(d)(1).

[10] 84 *Fed. Reg.* at 27988 (proposed Section 261.21(b)(2)).

concurrence or approval. At most, institutions should only be required to provide notice to their CPCs of their disclosures of Board CSI to the other regulators. This would be a much less burdensome approach.

Alternatively, Schwab believes that if a CPC concurrence/Board approval requirement is imposed, institutions should not be required to play a "middleperson" role when they are requested to provide materials that either are or contain Board CSI. When another regulator requests such materials, the institution should merely be required to inform the other regulator that the requested materials constitute or include Board CSI. At that point, the other regulator should then make its request directly to the institution's CPC. In our view, this approach would make the most sense since the other regulator will be in the best position, rather than the institution itself, to explain why it has "a legitimate supervisory or regulatory interest in the information."

D. The Board Should Permit Supervised Institutions to Disclose CSI to Consultants, Temporary Workers, and Technology and Other Similar Service Providers Without CPC Approval Provided They Enter the Type of Written Agreement Contemplated by Section 261.41(b)(3)(i)-(v) of the CSI Disclosure Proposal

Schwab also believes that the Board should expand the types of third parties to which institutions should be able to disclose CSI without the need for Board or CPC approval to include not only legal counsel and auditors, but also consultants, temporary workers, and technology and other service providers (collectively, "service providers") if the institution deems their services to be necessary and appropriate. We recognize that service providers may not have the same extent of professional obligations as legal counsel and auditors to maintain the confidentiality of and keep secure any CSI they receive from an institution, but in our view this difference is substantially mitigated by requiring service providers to enter into written agreements containing the same confidentiality and other safekeeping provisions proposed for legal counsel and auditors that are set forth in Section 261.41(b)(3)(i)-(v) of the CSI disclosure proposal. We also note in this regard that the OCC for some time has permitted national banks and federal savings associations to disclose CSI to consultants without OCC approval,[11] and treating consultants the same as legal counsel and auditors and not requiring prior approval appears to have created no issues for the OCC of which we are aware.

Consequently, Schwab joins both the Bank Policy Institute and the American Bankers Association in their comment letters in urging the Board not to impose any approval or concurrence requirement in order for supervised institutions to be able to disclose CSI to their service providers. As the Bank Policy Institute observed in its letter, consultants oftentimes play a critical role in helping institutions satisfy applicable regulatory requirements, and often there are time-sensitive situations where it would be burdensome for an institution to have to wait for

[11] 12 C.F.R. § 4.37 (b)(2) (2019).

prior CPC approval before retaining a service provider. Thus, at most, we could only support a notification procedure where an institution would provide its CPC with the information set forth in proposed Section 261.21(b)(4)(i)(A)-(C), including (i) the purpose and scope of the service provider's engagement, (ii) the specific business need to disclose CSI to the service provider, and (iii) the specific documents or materials the institution will share with the service provider.

2. Avoiding Ambiguity and Overbreadth

A. The Board Should Not Revise its Definition of CSI to Include All Information Obtained in Furtherance of its Supervisory, Investigatory, or Enforcement Activities

Schwab has serious concerns about the Board's expansive definition of CSI set forth in proposed Section 261.2(b), which would potentially transform all documents and information prepared by a supervised institution for its own business purposes into CSI if those materials are subsequently requested and obtained by the Board. Under the current CSI disclosure provisions in 12 CFR Part 261, CSI is defined in relevant part as: "(iii) Any documents prepared by, on behalf of, or for the use of the Board, a Federal Reserve Bank, a federal or state financial institution supervisory agency, or a bank holding company or other supervised financial institution."[12] However, there is also a carve out in the regulation that excludes from the definition of CSI "documents prepared by a supervised financial institution for its own business purposes and that are in its possession."[13]

In the CSI disclosure proposal, the Board would revise its definition of CSI to include, in pertinent part, "information that is or was created or obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities." (emphasis added).[14] The Board's proposal also continues to contain an exclusion from the definition for documents prepared by a supervised institution for its own business purposes, but that exclusion is rendered essentially meaningless by the inclusion of the qualifying language at the end of the exclusion: "except to the extent included in [the above definition of CSI]."[15] Together, these two proposed revisions would potentially sweep into the definition of CSI any documents or other information prepared by an institution for its own business purposes that are subsequently provided to, and thereby obtained by, the Board.

Schwab understands the stated reasoning by the Board in the preamble to the CSI disclosure proposal that it was revising the definition of CSI to ensure that all information created or obtained by the Board in furtherance of its activities would be exempt from disclosure under Exemption 8 of FOIA, 5 U.S.C. § 552(b)(8). However, we do not believe that equating

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[12] 12 C.F.R. § 261.2(c)(1)(iii) (2019).
[13] 12 C.F.R. § 261.2(c)(2) (2019).
[14] 84 *Fed. Reg.* at 27981.
[15] *Id.*

CSI with all information subject to Exemption 8 is the proper way to achieve this result. In Schwab's view, this aspect of the proposal significantly undercuts other proposed reforms and runs counter to the spirit of the proposal.

Under the Board's proposed definition of CSI, materials for a board of directors meeting could conceivably be transformed into CSI if the board package materials were "obtained" by the Board, even if none of the materials in the package otherwise contained any CSI. Similarly, if a supervised institution prepared a strategic plan for its own business use for the coming year, that too would become CSI once obtained by the Board. Thereafter, the institution would be precluded from sharing any of the information included in its strategic plan with securities analysts or in any of its securities filings without Board approval.

Accordingly, Schwab joins with the comments made by the Bank Policy Institute and the American Bankers Association and respectfully submits that the revised definition would impose a significant compliance and disclosure burden on supervised institutions, as the universe of what information constitutes CSI subject to disclosure restrictions would be greatly expanded. The proposed CSI definition would also make it much more difficult for institutions to determine whether documents and other materials they prepare for their own business purposes are subject to CSI disclosure restrictions.

Instead of revising the definition of CSI in the CSI disclosure proposal, we recommend that (i) the Board should de-link Exemption 8 of FOIA from the definition of CSI, (ii) the existing exception for documents prepared by institutions for their own business purposes and that are in its possession be preserved, and (iii) the current definition be retained.

B. The Board Should Not Qualify an Institution's Internal Disclosure of CSI to Directors, Officers and Employees of the Institution and the Institution's Affiliates by Requiring that Such Individuals Have a Need for the Information "in the Performance of Their Official Duties"

As noted previously, Schwab strongly supports the Board's proposal to permit an institution to disclose CSI not only to its own directors, officers, and employees and those of its holding company, but also the directors, officers, and employees of its other affiliates. However, we are concerned about the very subjective and confusing qualification in proposed Section 261.21(b)(1) that those receiving CSI from the institution have a need for such information "in the performance of their official duties." As the Bank Policy Institute notes in its comment letter, it is unclear what constitutes an employee's "official duties" and what an institution might need to do to in terms of documenting its analysis that the employee is acting within their official duties when in receipt of the CSI, which would be a very burdensome requirement.

As the Bank Policy Institute also observed, the subjective and confusing nature of the phrase "in the performance of their official duties" is likely to lead to unpredictable and

inconsistent interpretations and results in practice. Schwab is also concerned that the qualification could cause the Board either to second guess an institution's business judgment that an employee should be granted access to CSI in a particular instance or to require an institution to justify its decision to disclose CSI to the employee.

For these reasons, Schwab joins the Bank Policy Institute and the American Bankers Association in recommending that the Board revise its proposal to utilize a broader standard to permit an institution to share CSI with its and its affiliates' officers, directors and employees "when necessary or appropriate for business purposes." Such an approach would avoid the additional uncertainties created by the proposed "in the performance of their official duties" language. It would also have the additional benefit of promoting harmonization of the Federal banking agencies' CSI disclosure rules, as the OCC currently uses the same phraseology in the CSI provisions of its own FOIA regulations.[16]

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Again, Schwab welcomes the opportunity to offer its comments and recommendations on the Board's CSI disclosure proposal. Should the Board's staff wish to discuss any of these matters further, we are available to address any questions and would appreciate the opportunity for further dialogue to discuss or clarify our position on any of the issues discussed herein.

Sincerely yours,

John Buchman

John A. Buchman
Regulatory Counsel

[16] 12 C.F.R. § 4.37(b)(2) (2019).