# EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

JPMorgan Chase Bank, National Association,

*Plaintiff*,

v.

Argus Information & Advisory Services Inc., Verisk Analytics, Inc. and Trans Union LLC,

*Defendants*.

Civil Action No. 1:24-cv-00348-SB

**BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE AND THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## STATEMENT OF INTEREST

***The Bank Policy Institute ("BPI")***. BPI is a nonpartisan public policy, research, and advocacy group, that represents universal banks, regional banks, and the major foreign banks doing business in the United States. BPI produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues. Plaintiff JPMorgan Chase Bank, N.A. ("Plaintiff") is a member of BPI.

***American Bankers Association ("ABA")***. Established in 1875, the ABA is the united voice of America's $23.4 trillion banking industry, comprised of small, regional, and large national and State banks that safeguard nearly $18.6 trillion in deposits, and extend more than $12.3 trillion in loans. Plaintiff is a member of the ABA.

*Amici* have an interest in this case because Defendants[1] argue that a bank loses its property rights over commercially valuable information that the bank prepared and possessed for business purposes simply because the bank shares a copy of that information with its regulators as part of the bank examination process. *Amici*'s bank members have significant experience with sharing such information with regulators, the overall bank supervisory process, and the property rights banks maintain in their own data. *Amici* regularly file *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's banking industry.

## INTRODUCTION AND SUMMARY OF ARGUMENT

There is no question that Defendants misappropriated data that (i) Plaintiff created for its own business purposes, (ii) Plaintiff then shared with the Board of Governors of the Federal

[1] As only Defendants Argus and Trans Union LLC's Motion to Dismiss raises the data ownership arguments addressed herein, "Defendants" here refers only to Argus Information & Advisory Services Inc. and Trans Union LLC.

Reserve System ("Federal Reserve") and the Office of the Comptroller of the Currency ("OCC") (together, "the Regulators") as part of the Regulators' bank supervisory process, and (iii) was then shared with Defendants acting as the Regulators' data aggregator.[2] Rather, the question before the Court is whether Plaintiff was deprived of a property interest in that data simply because it was delivered to the Regulators for bank examination and reporting purposes.[3] Defendants argue that as soon as Plaintiff shared the data with the Regulators it became Confidential Supervisory Information ("CSI"), with the result that all property rights to the data were transferred to the Regulators. This argument is without merit, creates risk of significant harm to banks and the bank regulatory system, and should be rejected for the following reasons.

*First*, neither the Federal Reserve rules nor the OCC rules deprive banks of all property rights in their data simply because the banks share the data with the Regulators. Although the Regulators may obtain a copy of the data and treat it as CSI in *their* hands for supervisory purposes, it is not CSI in the bank's hands. Defendants cannot point to a single statement from either Regulator or single case from any court negating this basic proposition of law.

*Second*, although the Regulators may consider the copies of bank data or documents that constitute CSI in their *own* hands to also be the Regulators' property, that does not strip banks

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[2] *See* Mot. Dismiss at 6 ("In December 2020, Argus informed the Regulators that certain data provided to Argus by financial institutions may have been referenced for impermissible purposes under the Regulatory Contracts."). In March 2024, Defendant Argus Information & Advisory Services Inc. ("Argus") then agreed to pay $37 million to settle a civil investigation by the Department of Justice and other federal authorities relating to its conduct underlying this case. Compl. at ¶ 4 (D.I. 1); Ex. A (D.I. 1-1).

[3] Banks submit "detailed bank data" to the Regulators in connection with regulatory stress testing programs, which assess how banks are likely to perform under hypothetical economic conditions. *See* FEDERAL RESERVE, 2024 SUPERVISORY STRESS TEST METHODOLOGY, iii, 6–7 (March 2024), *available at* https://www.federalreserve.gov/publications/files/2024-march-supervisory-stress-test-methodology.pdf ("The Federal Reserve develops and implements the models with data it collects on regulatory reports as well as proprietary third-party industry data" and "[f]irms are required to submit detailed loan and securities information for all material portfolios").

of their property interests in the information contained in those copies, and Regulators do not have (or even claim to have) any authority to commercialize banks' commercially valuable information. Much less does it enable an agent of the Regulators to misappropriate this data and be immunized from the consequences of its action.

*Third*, a bank's continued property rights in the content of its own data supports critical public policy considerations. Banks are subject to extensive supervision, including close and continuous contact with the Regulators. If Defendants' view of data property rights were adopted, banks would be reluctant to share commercially valuable information voluntarily with the Regulators. Accordingly, the quality of bank supervision, which depends so heavily on a candid and cooperative partnership with banks, could deteriorate. In addition, the very act of complying with regulatory mandates would unfairly expose banks to theft and malfeasance by third parties without recourse. Moreover, any time that a regulator used a third party to aggregate, review or analyze data provided by banks, those banks would be exposed to misfeasance or malfeasance without the slightest recourse.

## ARGUMENT

### I. THE AGENCY RULES ESTABLISH THAT BANKS CONTINUE TO HAVE PROPERTY RIGHTS IN INFORMATION CREATED FOR BUSINESS PURPOSES AFTER IT IS SHARED WITH THE REGULATORS.

#### A. Federal Reserve Rules Have Never Deprived Banks of Property Rights in their Data.

The Federal Reserve's regulations relating to CSI have never purported to strip banks of property rights in the content of the data that banks create and possess for business purposes and then share with the Regulators. In the Regulators' hands, the copy of that data is CSI so that it can be protected from unwarranted disclosure by the Regulator. But the regulations do not purport to

change the bank's property rights in the content of this data or authorize the Regulator to commercialize the bank's data merely because it also possesses a copy of it.

The regulation in effect between June 11, 2013 and October 14, 2020 states that CSI "*does not* include documents prepared by a supervised financial institution for its own business purposes and that are in its possession." 12 C.F.R. § 261.2(c)(2) (emphasis added). Thus, the text of the regulation itself includes a direct statement carving out information prepared and possessed by a bank for its own business purposes from the scope of CSI, establishing that banks retain important rights in the data.

As a result of concerns expressed by the industry during the Federal Reserve's 2019-2020 consideration of changes to this rule, the Federal Reserve chose to clarify the CSI definition even further.[4] On August 16, 2019, BPI submitted a comment letter recommending "further clarification of the scope of what is and is not CSI." BPI, Comment 5 (Aug. 16, 2019), *available at* https://bpi.com/wp-content/uploads/2019/09/Rules-Regarding-Availability-of-Information-R-1665-RIN-7100-AF-51.pdf. It asked that the Federal Reserve "clarify and confirm" that "the definition of CSI is not intended to include documents and information created for business purposes simply because the Federal Reserve obtains a copy." *Id*. BPI noted that "[t]he day-to-day functioning of supervised institutions is affected by whether or not information is considered CSI, making it all the more important that the term be defined reasonably and with precision." *Id*. at 2. BPI also observed that, under the current definition, "determining the line between [ ] types of information that may be CSI as opposed to business information can be very difficult and subjective." *Id*. at 3.

[4] On June 17, 2019, the Federal Reserve issued a notice of proposed rulemaking regarding revisions to the rules governing the disclosure of CSI and other non-public information and invited public comment. 84 Fed. Reg. 27976 (June 17, 2019).

When the Federal Reserve issued its final rule on September 15, 2020, it affirmatively addressed the definitional issue that BPI raised. *See* Rules Regarding Availability of Information, 85 Fed. Reg. 57616, 57617 (Sept. 15, 2020). The Federal Reserve explained:

> Commenters were concerned that any document prepared by or for the supervised financial institution for its own business purposes and in its possession would be [CSI] irrespective of its contents provided that the document is also "*created or obtained* in furtherance of the Board's supervisory, investigatory or enforcement activities." We agree that the proposed definition of [CSI] was not sufficiently clear [in the proposed rule] with respect to documents prepared by or for a supervised financial institution for its own business purposes and that are in the institution's possession. The definition is not intended to encompass internal business documents merely because in the Federal Reserve's possession such documents are [CSI]. To address the concerns with the definition of [CSI], we revised the definition by reorganizing paragraph (b)(1) into three separate sentences with clarifying revisions and also by making some clarifying edits to paragraph (b)(2).

*Id*. (emphasis in original).

As a result of this concern, the final text clarified that CSI[5] does *not* include "[d]ocuments prepared by or for a supervised financial institution for its own business purposes that are in its own possession and that do not include confidential supervisory information [ ], *even though copies of such documents in the Board's or Reserve Bank's possession constitute confidential supervisory information*." 12 C.F.R. § 261.2(b)(2) (emphasis added).[6]

Banks have been afforded the same protections under the CSI rules before and after the 2020 revisions. In the 2020 release regarding its final rule, the Federal Reserve noted that "[t]he final rule provides clarifying revisions to the definition of CSI, and, like the proposal, does not expand or reduce the information that falls within the current definition of CSI." Press Release,

[5] The text of the Federal Reserve's regulation defines CSI as "includ[ing] information that is or was created or obtained in furtherance of the [Federal Reserve's] supervisory, investigatory or enforcement activities." 12 C.F.R. § 261.2(b)(1).

[6] In this case, Plaintiff "submitt[ed] the Trade Secret Data directly to Argus at the OCC's express direction." Compl. at ¶ 33. The Federal Reserve also "retained Argus as its data aggregator and directed [Plaintiff] to provide anonymized credit card data to Argus." *Id.* at ¶ 53.

Federal Reserve, *Federal Reserve Board finalizes rule that implements technical, clarifying updates to Freedom of Information Act (FOIA) procedures and changes to rules for the disclosure of confidential supervisory information (CSI)* (July 24, 2020), *available at* https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200724a.htm. The revisions were intended to clarify the existing rules, not change the definition or alter the scope of CSI. Neither the pre-2020 rules nor their revisions transfer property rights in a bank's trade secret data to the government because the government has asked for and received a copy of the information as a supervisory matter without compensation or other consideration.

**B. OCC Rules Also Have Never Deprived Banks of Property Rights in their Data.**

The scope of what qualifies as OCC CSI is defined in 12 C.F.R. § 4.32 (2011), with specific attention to records created or obtained by the OCC in connection with its supervisory responsibilities. However, this CSI designation does *not* extend to all information about a bank that is within the OCC's hands. Indeed, the OCC expressly distinguishes between internal OCC communications and supervisory materials, which are protected as CSI regardless of who possesses them, and a bank's own books, records, and raw data, copies of which are CSI only in the hands of the OCC. This distinction is reinforced by case law, ensuring that banks retain the right to use and disclose their business data even when the Regulators have reviewed or relied upon it.

Section 4.32 lists the types of records that qualify as CSI (which the OCC calls "non-public OCC information"), including: "A record created or obtained: . . . by the OCC in connection with the OCC's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of [a bank]," § 4.32(b)(1)(i)(A); "[c]onfidential information relating to operating and no longer operating national banks," § 4.32(b)(1)(vi); and "[a] report of examination, supervisory correspondence, an investigatory file compiled by the OCC . . . in

connection with an investigation, and any internal agency memorandum, *whether the information is in the possession of the OCC or another individual or entity*." § 4.32(b)(1)(iii) (emphasis added). The specification in § 4.32(b)(1)(iii)—that certain CSI remains CSI even when held by a non-OCC entity, including banks—is not repeated elsewhere in the section. The scope of this "possession" provision is thus confined to the subpart (b)(iii), and so does not apply to other parts of 4.32(b). As the Supreme Court has stated, the existence of a requirement in one part of a statute or regulation does not "create any structural inference that such a requirement must exist" in another. *Jama* v. *ICE*, 543 U.S. 335, 347 (2005). Rather, the inclusion of specific language in § 4.32(b)(1)(iii) signals an exception to a general rule, providing explicit guidance on how these specific materials, which reflect supervisory opinions and guidance, should receive heightened protection.

Courts have confirmed that even when the OCC has reviewed or formed opinions based on a bank's books, records, or data, the information in these materials are distinct from CSI. In *Raffa* v. *Wachovia Corp.*, the plaintiff sought documents exchanged between the bank and the OCC. 2003 WL 21517778 (M.D. Fla. May 15, 2003). The OCC argued that its supervisory reports were protected, but suggested that the plaintiff had "access to a plethora of other information" from the defendant, in the form of bank-held "documents concerning Defendant's banking operations." *Id.* at *2, 4. The court agreed, holding that the bank's "raw data" was a non-privileged source for the "same type of information utilized by bank examiners," that could therefore be produced in discovery. *Id*. at *4; *accord In re Banc One Sec. Litig.*, 209 F.R.D. 418, 427 (N.D. Ill. 2002) (holding that disclosure of OCC CSI was unwarranted where plaintiffs had access to raw factual materials underlying the regulator's opinions). Although the Regulators may collect and analyze banking operations records and data, this information does not automatically become solely the

Regulator's property—banks own and may continue to utilize this "raw data" for their own purposes.

The OCC itself consistently articulates this position when it intervenes in discovery disputes involving its CSI. Court filings by the OCC delineate what the agency considers to be CSI and what it does not. For example, in *In re Cap. One Data Breach Sec. Litig.* (19-MD-02915), plaintiffs filed a motion to compel defendants to produce materials containing the CSI of the Federal Reserve and the OCC without seeking permission from the Regulators to access this information. Together with the Federal Reserve, the OCC filed a non-party Motion to Intervene in Opposition to Plaintiffs' Motion to Compel. *Non-Parties Bd. Of Governors of the Fed. Res. Sys. and OCC Mem. In Opp'n to Pl.s' Mot. to Compel, In re Cap. One Data Breach Sec. Litig.*, (19-MD-02915) (E.D. Va. May 29, 2020) (D.I. 511). The OCC reasoned that, under its regulations,[7] "non-privileged information in Capital One's possession *prepared for its own internal business purposes, rather than supervisory reasons*, [ ] that does not reveal CSI or non-public OCC information, may be produced to the plaintiffs *even if a copy was also provided to bank regulators*, provided that production does not reveal supervisory communications." *Id.* at 20 n.10 (emphasis added).

## II. REGULATORS' POSSESSION OF COPIES OF BANK DATA DOES *NOT* EXTINGUISH BANKS' PROPERTY RIGHTS TO IT.

Although the Regulators may classify copies of bank documents in their possession as CSI,[8] this does not strip banks of their property interests in the information in those documents.

[7] In the Motion, OCC characterized its CSI regulations as "[s]imilar[]" to the Federal Reserve's 12 C.F.R. § 261.2(b)(2), in that "it may deny a request for non-public OCC information if 'other evidence reasonably suited to the requester's need is available from another source,' *e.g.*, a bank's own books and records." D.I. 511 at 20, n.10 (citing 12 C.F.R. § 4.35(a)(2)(iii)).

[8] Under the Federal Reserve and OCC's regulations, CSI in the hands of the Regulator is considered "the property" of the Regulator. 12 C.F.R. § 261.20; 12 C.F.R. § 4.32(b)(1)-(2). The

The Regulators can use CSI information for specific purposes, such as in furtherance of their supervisory function, but they and their agents do not have the authority to misappropriate and commercialize the data, as Defendants did here.

Both the Federal Reserve and the OCC incorporate the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(8) and its exemptions into their regulations defining CSI. Section 261.1 of the C.F.R., which is the provision describing the authority, purpose, and scope of Federal Reserve CSI, states that "Subpart B implements the Freedom of Information Act (FOIA)." 12 C.F.R. § 261.1(b)(2). Similarly, § 4.32 defines OCC CSI to include "information that the OCC is not required to release under the FOIA." *Id.* at § 4.32(b)(1). Within the FOIA, Congress enacted Exemption 8, which protects information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of" federal financial institution supervisory agencies. 5 U.S.C. § 552(b)(8). Courts have interpreted Congress's purpose in enacting Exemption 8 to "have been to safeguard the relationship between the banks and their supervising agencies." *Consumers Union of U.S., Inc.* v. *Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); *see also Bloomberg, L.P.* v. *U.S. Sec & Exch. Comm'n*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004) ("[T]he purpose of [Exemption 8] is…to ensure that [financial] institutions continue to cooperate with regulatory agencies without fear that their confidential information will be disclosed.").[9]

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regulations do not cite to any statutory authority for this proposition.

[9] The legislative history of Exemption 8 likewise shows that it was enacted to encourage industry members to share confidential and proprietary information with the government, by protecting those who submit information from having their rights disturbed by disclosure or misappropriation. *See* H.R. Rep. No. 89–1497, at 2487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418 (explaining that the Exemption's purpose is to "assure the confidentiality of information obtained by the Government," including "[t]rade secrets and commercial or financial information," as this information is "given to an agency in confidence . . . . [W]here the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor

Congress has also made clear that banks do not lose the key property right of attorney-client privilege over the information in CSI by specifically legislating that "[t]he submission by any person of any information to the . . . Federal banking agency . . . for any purpose in the course of any supervisory or regulatory process . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority." 12 U.S.C. § 1828(x)(1).

It would run counter to Congress' stated purposes to find that the inclusion of commercially sensitive information within the scope of CSI automatically transfers all property and commercialization rights of that data to the federal government and its agents. Although the Regulators may own and control their own *copies* of such information, there has never been the expectation that the Regulators could then use the information in those copies for their own commercial purposes, and it would interfere with banks' property rights if the Regulators could. As in copyright doctrine, "the commercial value of the right lies primarily in exclusivity." *Harper & Row Publishers, Inc.* v. *Nation Enter.'s*, 471 U.S. 539, 553 (1985). Just as the purchaser of a copyrighted book may own their particular volume without acquiring rights over the author's intellectual property, so too Regulators possess as CSI the specific materials submitted to them without depriving banks of their rights in their own proprietary information.

Banks' property rights in their confidential data and trade secrets are also protected by the Takings Clause of the Fifth Amendment, as there has never been any expectation that sharing bank information with the Regulators could lead to the Regulators commercializing it. *See, e.g.*, *Ruckelshaus* v. *Monsanto Co*., 467 U.S. 986, 1003–04 (1984) (EPA's public disclosure of trade

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such obligations").

secret data obtained through a regulatory licensing scheme was a Fifth Amendment taking). To avoid raising any "constitutional doubts," the Court should not interpret the Regulators' rules to extinguish a bank's property rights in its information every time it shares information with the Regulators. *Jennings* v. *Rodriguez*, 583 U.S. 281, 286 (2018).

## III. POLICY CONSIDERATIONS REQUIRE BANKS TO MAINTAIN PROPERTY RIGHTS IN THEIR TRADE SECRET DATA.

### A. The Practical Realities of Information Sharing in the Regulatory System Make Defendants' Interpretation Unworkable.

Defendants' expansive interpretation of the scope of Federal Reserve and OCC CSI is unworkable, as it would impose untenable restrictions on banks' use of their own records and data, which are the bank's property.

The OCC and Federal Reserve have authority to regularly review broad aspects of a bank's operations, including certain transactional records, payroll, human resources, and tax returns. *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: BANK SUPERVISION PROCESS (2018) (detailing areas of supervision); 12 C.F.R. § 4.6 (providing that the OCC "is required to conduct a full-scope, on-site examination of every national bank and Federal savings association at least once during each 12-month period); *Id.* at § 7.4000 (providing that the OCC may conduct an "examination of a bank," "inspection of a bank's books and records," and "regulat[e] and supervis[e] . . . activities authorized or permitted pursuant to federal banking law"). The Regulators' supervisory reach was described in *In re Subpoena Served Upon the Comptroller of Currency and the Sec'y of the Bd. of Governors of the Fed. Rsrv. Sys*:

> This relationship is both extensive and informal. It is extensive in that bank examiners concern themselves with all manner of a bank's affairs: Not only the classification of assets and the review of financial transactions, but also the adequacy of security systems and of internal reporting requirements, and even the quality of managerial personnel are of concern to the examiners.

967 F.2d 630, 633–34 (D.C. Cir. 1992) (citing Office of the Comptroller of the Currency,

Comptroller's Handbook For National Bank Examiners § 1.1, at 1–3 (1990); Board of Governors of the Federal Reserve System, Commercial Bank Examination Manual § 1.1 at 1–2 (1988)).

Given the comprehensive range of information subject to regulatory oversight, interpreting these agencies' CSI to encompass all material that a bank shares with the OCC or Federal Reserve in furtherance of their supervisory function would lead to impractical results. Under Defendants' reading of the regulations, whenever a bank shares its own business data with a Regulator, that bank would, in perpetuity, need to seek permission from the Regulator to disclose or utilize their own operational data—from routine payroll records to internal reports—or risk facing criminal penalties. *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2019-15, SUPERVISORY RATINGS AND OTHER NONPUBLIC OCC INFORMATION: STATEMENT ON CONFIDENTIALITY (2019) ("Any person who discloses or uses nonpublic information except as expressly permitted by the OCC or as provided by the OCC's regulations may be subject to the criminal penalties provided in 18 U.S.C. 641."). Disclaiming bank property rights over the broad swaths of data and records reviewed by the Regulators could lead to absurd results within the bank as well. For example, if the Regulators possess exclusive property rights and control over these records, must a bank then reject a demand from its shareholders to "inspect" the bank's "books and records"? Del. Code Ann. tit. 8, § 220 (West 2010). Defendants' reading would introduce uncertainty and instability into the operations of banks both internally and in their dealings with the Regulators.

Broadening the scope of these Regulators' definition of CSI, with a resulting loss of property rights for the bank, would not only be unworkable for banks and be at odds with other legal requirements, but it would also miss the mark with respect to what the Regulators are truly interested in protecting—information related to their supervisory functions. *See, e.g.*, OFF. OF THE

COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2005-4, INTERAGENCY ADVISORY ON THE CONFIDENTIALITY OF THE SUPERVISORY RATING AND OTHER NONPUBLIC SUPERVISORY INFORMATION (2005) (describing a prohibition on the release of CSI including "CAMELS" ratings, "RFI/C(D) rating, ROCA rating, CORE rating, and CAMEO rating[s]" from the OCC and the Federal Reserve, *inter alia*). The Regulators have no need for a privilege or exclusive property right in information that does not pertain to their regulatory functions.

### B. Defendants' Proposal Would Chill Communications Between Banks and the Regulators.

If Defendants' proposed interpretation were endorsed by the Court, it would severely chill communications between the Regulators and banks, as banks would be unwilling to voluntarily share commercially valuable information with the Regulators at the risk of public disclosure or misuse of the data by the Regulators or third parties, turning the purposes of CSI upside-down.[10] Congress and the Regulators have long recognized the importance of protecting candid communications between banks and the Regulators to promote the effective supervision of banks. Indeed, Congress enacted statutory protections to enable banks to share privileged information with the Regulators for supervisory purposes without risk of waiver. *See* 12 U.S.C. § 1828(x)(1) ("[t]he submission by any person of any information to . . . any Federal banking agency . . . for

[10] On the flip side, withholding data that the Regulators mandate be shared is hardly a viable option for banks due to the potentially severe penalties for lack of compliance with regulatory requests. *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICIES AND PROCEDURES MANUAL, PPM 5310-3, 6–7 (May 25, 2023) ("[T]he OCC has a presumption in favor of a formal bank enforcement action when . . . the board and management have refused or failed to satisfactorily maintain the bank's books and records; have attempted to place unreasonable limitations on how, when, or where an examination is conducted; or have imposed limits or restrictions on examiner access to the bank's personnel, books, or records."). The banks would thus have to choose between two highly undesirable outcomes.

any purpose in the course of any supervisory or regulatory process . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege . . . .").

As both the Federal Reserve and OCC acknowledge, "[t]he quality of bank supervision depends heavily upon an institution's candor in responding to the questions and requests of bank examiners and its willingness to be forthcoming in supplying information requested by bank examiners." *Non-Parties Bd. Of Governors of the Fed. Res. Sys. and OCC Mem. In Opp'n to Pl.s' Mot. to Compel* at 3, *In re Capital One Data Breach Sec. Litig*. (19-MD-02915), D.I. 511 at 20 n.10.

The courts have reached the same conclusion, noting the critical need to preserve the close and candid relationship between banks and their supervising agencies to ensure effective oversight. *See In re Subpoena Served upon the Comptroller of the Currency*, 967 F.2d at 634 ("Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank."); *Ball* v. *Bd. of Governors of Fed. Rsrv. Sys.*, 87 F. Supp. 3d 33, 57 (D.D.C. 2015) ("If a financial institution cannot expect confidentiality, it may be less cooperative and forthright in its disclosures, even if an examination is mandatory."); *Redland Soccer Club, Inc.* v. *Dep't of Army of U.S.*, 55 F.3d 827, 854 (3d Cir. 1995) ("[W]ere agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.") (internal citations omitted).

The willingness of banks to cooperate with the Regulators' requests for data would significantly diminish, if, as Defendants propose here, responding to those requests automatically

strips banks of their property rights in that data and opens the door to misuse of that data. Regulatory oversight is designed to promote the safety and soundness of financial institutions, not to deprive banks of property rights with respect to their internal business data. The safety and soundness of financial institutions would be dramatically impaired if banks were to lose property rights in their data, the exact opposite result of what the examination regime is intended to safeguard. Banks need property rights in their own data to conduct their daily operations and ensure sensitive and commercially valuable proprietary information is not misappropriated. Defendants' position, which stretches the definition of CSI beyond recognition, goes too far.

## CONCLUSION

For these reasons, *Amici* urge the Court to reject the arguments by Defendants that Plaintiff lacks property rights in its trade secret data.

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