IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 (ESH)
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
	)	
Defendants.	)	
_____	)	

PLAINTIFF'S REPLY TO DEFENDANT BOARD OF GOVERNORS' OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff Vern McKinley, by counsel, respectfully submits this reply to the opposition of Defendant Board of Governors of the Federal Reserve System ("the Board") to Plaintiff's cross-motion for summary judgment. As grounds thereof, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

In its opposition, the Board acknowledges the obvious importance of the subject matter of the Freedom of Information Act ("FOIA") request at issue in this lawsuit when it notes, "It bears repeating that the Board's decision to authorize extension of the Temporary Loan to support a non-depository institution marked an extraordinary departure from its traditional role of lending to banks and facilitating inter-bank lending." Reply Brief in Support of Summary Judgment Motion of Defendant Board of Governors of the Federal Reserve System and Opposition to Plaintiff's Summary Judgment Motion ("Def's Opp.") at 15. More specifically, not since the Great Depression had the Board exercised its statutory authority under Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343, to authorize an emergency loan to a non-banking entity such as The Bear Stearns Companies, Inc. ("Bear Stearns").[1] Despite the extraordinary nature of the transaction and contrary to FOIA's presumption of disclosure, the Board continues to improperly withhold information about the transaction based on little more than boilerplate recitations of the legal standards governing its claims of exemption. Because the Board has failed to prove with the requisite degree of specificity that FOIA's exemptions apply to the information at issue, summary judgment should be granted in Plaintiff's favor and the Court should order the release of the withheld information.

[1] As Plaintiff demonstrated in his opening brief, the Board of Governors authorized the Federal Reserve Bank of New York ("FRBNY") to extend a loan to Bear Stearns through an arrangement with JPMorgan Chase & Co. ("JPMorgan").

II. Argument.

A. The Board's Burden of Proof.

To sustain its burden of proof on a claim of exemption under FOIA, an agency must provide a "relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987); *see also Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). An agency cannot satisfy its burden under FOIA by submitting affidavits or declarations that contain conclusory statements or merely recite legal standards. *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996); *Washington Post Co. v. Dep't of Health and Human Services*, 690 F.2d 252, 257 (D.C. Cir. 1982); *Founding Church of Scientology v. Bell*, 603 F.2d 945, 947 (D.C. Cir. 1979) (holding that, without the requisite specificity, "neither reviewing courts nor individuals seeking agency records can evaluate an agency's response to a request for government records").

Moreover, "barren assertions that an exemption statute has been met cannot suffice to establish the fact." *Banks v. Dep't of Justice*, 2010 U.S. Dist. LEXIS 29823, *12 (D.D.C. March 29, 2010) (*quoting Founding Church of Scientology v. Nat'l Security Agency*, 610 F.2d 824, 831 (D.C. Cir. 1979)). "Nor can an agency meet its obligation simply by quoting the statutory language of an exemption." *Id.* (*citing Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993)) (remarking that affidavits "[p]arroting the case law" were insufficient); *Voinche v. Federal Bureau of Investigation*, 412 F. Supp.2d 60, 69 (D.D.C. 2006) (agency failed to satisfy its burden where declaration "merely quote[d] the statutory language" of an exemption).

Despite ample opportunity in both its opening memorandum and its reply/opposition to Plaintiff's cross-motion for summary judgment, the Board has ignored these fundamental requirements of FOIA with respect to many, if not all, of its claims of exemption. The Board's claims of exemption amount to little more than generalized, conclusory assertions that parrot the language of FOIA or the case law applying it. The Board has not met its burden of proof.

B. The Board Continues to Improperly Withhold Information Under FOIA Exemption 4.

For purposes of its Exemption 4 withholdings, the Board appears to have clarified which information was allegedly provided to it voluntarily and which was allegedly provided to it involuntarily:

Voluntary: *Vaughn Index* Item Nos. 7, 14, 15, 20, 30, 31, 32, 33, 37A, 37B, and 38.

Involuntary: *Vaughn Index* Item Nos. 4, 5, 6, 9, 10, 13, 17, 18, 21, 22, and 24.

Def's Opp. at 27, n.11. Why the Board did not previously identify these various claims in a clear and straightforward manner is incomprehensible. Regardless, the Board's Exemption 4 claims fail.

1. "Voluntarily" provided information.

The Board seeks to withhold information allegedly provided to it voluntarily based on nothing more than bald generalizations. *See* Declaration of Alison M. Thro ("Thro Decl.") at Para. 20 (Item Nos. 7, 14, 15, 20, 30, 31, 37A, and 38) ("I am informed, and believe, that these market participants do not customarily disclose this type of information to the public"); *Id.* at para. 22 (Item Nos. 32 and 37B) ("These entities . . . do not customarily disclose this information to the public").

The Board's *Vaughn* Index entries do not yield any additional information and, in some instances, are not comprehensible. *See Vaughn* Index at Item No. 7 ("Release of this confidential business information . . . would not customarily be disclosed to the public by the submitter"), Nos. 14, 15, and 20 ("[T]his confidential information was not customarily released to the public by the submitter"), Item Nos. 30 and 33 ("The information also discloses the methods FRS staff use to obtain confidential proprietary data from financial institutions, disclosure of which . . . would not customarily be disclosed to the public by the submitter"), Item Nos. 31, 37A, and 38 ("The withheld information consists of confidential business data obtained on a strictly confidential and voluntary basis by FRS staff from a subset of primary dealers . . . or would not customarily be disclosed to the public by the submitter"), and Item No. 32 ("In addition, this information . . . is not customarily disclosed to the public by the submitter"). The Board's *Vaughn* Index entry for Item No. 37B provides no additional basis for the withholding of the record.

The Board's claims of exemption fail for a lack of specificity. The Board does not identify any particular market participant who is alleged to have provided the information at issue in Item Nos. 7, 30, 31, 33, 37A, 37B, or 38. Nor does the Board describe the relevant market participant's practice with respect to disclosure of such information to the public or identify the basis for the Board's alleged knowledge about any particular market participant's practice with respect to disclosing information to the public.[2]

[2] Plaintiff's argument that the Board does not claim any of the withheld information is "of a kind that would customarily not be released to the public by the person from whom it was obtained" is not "inexplicable," as the Board contends Def's Opp. at 28, *citing* Plaintiff's Memorandum of Law in Opposition to Defendant Board of Governors' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Plf's Mem.") at 26. Rather, Plaintiff was attempting to demonstrate that the Board has not presented any

The records and information at issue in Item Nos. 30, 31, 32, 33, 37A, 37B, and 38 were not provided to the Board by any market participant, but instead were provided to the Board by the FRBNY. *See* Thro Decl. at para. 20 ("I personally spoke with the FRBNY staff who arranged to receive this information. They informed me that the information was provided based on assurances that it was being requested for policymaking purposes only and that it would *not* be published or otherwise made available to the public.") The Board makes no claim about whether the FRBNY customarily discloses such information to the public. Moreover, whether particular information was provided by financial institutions to the FRBNY based on assurances that "it would not be published or otherwise made public" is not the relevant inquiry under Exemption 4. The only inquiry that is relevant is whether the information "is of a kind that customarily would not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992). An "assurance of confidentiality" is irrelevant to an Exemption 4 analysis. *Id.*

In addition, some of the withheld information was provided by Bear Stearns to the U.S. Securities and Exchange Commission ("SEC"), which then apparently passed along the information to the Board. *Vaughn* Index at Item Nos. 14 and 15 ("This confidential commercial information was obtained by SEC staff from [Bear Stearns] . . . ."), and Item No. 20 ("The withheld confidential financial information was obtained by SEC staff from [Bear Stearns] . . . ."). As Bear Stearns no longer exists and has not existed as an independent entity for more than two years, it is meaningless for the Board to assert that information obtained from Bear Stearns "is of a kind that customarily would not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project*, 975 F.2d at 879. Moreover, the declaration

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evidence about any particular market participant's practices.

submitted by the SEC makes no effort whatsoever to justify the withholding of Item Nos. 14, 15, and 20 under Exemption 4. *See generally* Declaration of Margaret Celia Winter ("Winter Decl."). Ms. Winter's declaration does not even mention Exemption 4. *Id.*

Other withheld information is not confidential information at all. As Plaintiff pointed out, and the Board failed to rebut, some of the information is nothing more than the names of financial institutions. *See* Item No. 7. Other withheld information consists of "repo bid/ask spreads" and "repo collateral haircut data." *See* Item Nos. 31, 32, 37A, and 37B. Professor Helwege testifies in her supplemental declaration that such information is readily available in the marketplace. *See generally* Declaration of Jean Helwege, dated May 9, 2010 and attached hereto as Exhibit 1. Indeed, "[t]o assert that a particular financial institution does or does not customarily release information on repo haircuts is meaningless because this information is readily available in the market place." *Id.* at para. 5. Financial institutions "do not create these prices internally, but instead obtain them from dealers, many of whom also provide this information through trading screens, such as Bloomberg." *Id.* at para. 7. "Any member of the public who is willing to pay the cost of a Bloomberg screen could obtain repo haircuts." *Id.* "It is information known among competitors in the same way that Safeway and Giant know the price of bananas sold by wholesalers." *Id.* If the data is not confidential in the first instance, it cannot be withheld under Exemption 4.

The information at issue in Item Nos. 30, 33, and 38 does not even appear to be "trade secrets and commercial or financial information obtained from a person," but instead is described as "methods for obtaining" such data. *See Vaughn* Index at Item No. 30 ("The withheld information also describes FRBNY staff's methods for obtaining confidential proprietary market data from financial institutions with respect to funding positions and pricing method"); Item No.

31 ("Also, one page describes how the information was obtained . . . ."); and Item No. 38 ("This five-page document . . . describes the method FRBNY staff used to collect confidential proprietary data from a subset of primary dealers on a voluntary basis in order to monitor repo markets"). Methods used by the FRBNY to obtain confidential information from financial institutions obviously are not the same as actual confidential information obtained from financial institutions and cannot be withheld under Exemption 4. 5 U.S.C. § 552(b)(4).

Finally, the Board makes no effort to rebut Plaintiff's argument that information provided by vendors pursuant to contractual agreements is not protected under Exemption 4. The Board claims to have obtained the market data contained in *Vaughn* Index Item Nos. 32 and 37A, via the FRBNY, from the proprietary databases of two financial institutions pursuant to contractual agreements between the FRBNY and the institutions. *See* Thro Decl. at para. 21; *Vaughn* Index at Item No. 32.[3] The Board offers no legal authority for the proposition that Exemption 4 authorizes the withholding of such information. Because FOIA's exemptions are to be construed narrowly (*U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1991)), the Court should decline to extend Exemption 4 to this new category of information.

2. "Involuntarily" provided information.

With respect to information allegedly provided to the Board involuntarily, the Board has given up its claim that disclosure of such information would cause substantial competitive harm to the institutions that provided it. Def's Opp. at 34, n.16. Rather, it has elected to rely solely on

[3] The *Vaughn* Index entry for Item No. 37A makes no mention of the information at issue being obtained through a voluntary arrangement. Only the Thro Declaration makes this assertion. The *Vaughn* Index entry for Item No. 37A asserts that the information contained therein was obtained "from a subset of primary dealers." The Board makes no attempt to explain this apparent contradiction.

its claim that disclosure would "impair the government's ability to obtain necessary information in the future." *Id.*

In three instances, the Board appears to have obtained information from the FRBNY, not from financial institutions themselves. *See Vaughn* Index at Item Nos. 4, 5, and 6. The Board makes no claim that disclosure of the information at issue will impair its ability to obtain information from the FRBNY in the future. In at least one instance, the Board appears to have obtained the information from Bear Stearns. *Id.* at Item No. 13 (identified as "Bear Stearns counterparty exposure"). The Board makes no effort to explain how disclosure of information obtained from an entity that has been defunct for more than two years will impair its ability to obtain necessary information in the future.

In addition, in several instances, the Board appears to have redacted nothing more than the names of financial institutions from various emails. *See Vaughn* Item Nos. 4, 5, 9, 17, 18, and 24. The Board makes no effort to explain why the names of these entities should be considered confidential "trade secrets and commercial or financial information" (5 U.S.C. §552(b)(4)), much less how disclosure of these names will impair its ability to obtain necessary information in the future.

In other instances, the records themselves raise questions about whether the redacted information was provided by the financial institution in question or by some other sources. *See Vaughn* Index at Item No. 9 ("Coryann Stefansson just called and said that this is the info (still preliminary and probably not super accurate but kind of in the ball park at least) that she has about the exposure of the major banks to Bear . . . ."), Item No. 13 ("Here are exposures to BS that I have now"), Item No. 17 ("that's about right, but the cash situation is grimmer. They have an overdraft with [Redacted] that will use up a good part of the committed lines"), Item No. 18

("If people have been playing by the risk management rules, they have been [ma]rking to market and getting margin, so direct exposure should be limited. [Redacted] has the most exposure . . . ."), Item No. 22 (table of credit default swaps held by commercial banks in the third quarter of 2007).[4] Item Nos. 17 and 18 could have come from Bear Stearns, the institution in question, or some other source. Given the ambiguity of the records themselves, the Board should have explained how it knows where it allegedly obtained the information.

Moreover, the sum total of the evidence of "impairment" presented by the Board is contained in the few sentences from the Declaration of Coryann Stefansson ("Stefansson Decl.") quoted in the Board's brief. Def's Opp. at 31-32. Far from providing a "relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply" (*King*, 830 F.2d at 219), Ms. Stefansson's declaration offers little more than the bald claim that disclosure would impair the Board's ability to obtain necessary information in the future because Ms. Stefansson says so. It is insufficient to sustain the Board's burden of proof with respect to Exemption 4.[5] *Washington Post Co.*, 690 F.2d at 257 (rejecting Exemption 4 claim where agency submitted a "single conclusory affidavit" in which an agency official stated his opinion that disclosure "would impair the Department's ability to obtain candid and accurate information in the future").

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[4] Plaintiff previously identified an alternative source for this same data. Plf's Mem. at 41 *citing* Bekesha Decl. at Exhibit 2, Table 1. While the Board dismissed this source, it still begs the question that the Board has failed to identify the source of the information with any particularity.

[5] The Board's reply also ignores Plaintiff's reference to the fact Ms. Stefansson did not sign her own declaration. Plf's Mem. at 19, n.7. The Court should treat the declaration as a nullity.

C. The Board Continues to Improperly Withhold Information Under FOIA Exemption 5.

1. The "consultant corollary."

In his opening memorandum, Plaintiff demonstrated that much of the information withheld under Exemption 5's deliberative process privilege was obtained not by the Board, but by the FRBNY. Plf's Mem. at 27-28. Plaintiff also demonstrated that it has been the Board's position that the FRBNY is not a government agency. *Id.* In its opposition, the Board does not argue that the FRBNY is an agency. Instead, the Board invokes the "consultant corollary" and argues that the FRBNY was acting as a consultant to the Board. Def's Opp. at 7.

Exemption 5 of FOIA allows an agency to withhold records or information that is "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552 (b)(5). The U.S. Supreme Court has held that communications between a government agency and an outside consultant could constitute an intra-agency communication if "the consultant does not represent an interest of its own . . . when it advises the agency." *Dep't of the Interior v. Klamath Water Users Protective Association,* 532 U.S. 1, 11 (2001) ("*Klamath*"). Moreover, the consultant's "only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* Although FRBNY staff may have gathered data and shared and discussed it with the Board, the FRBNY's interests are not identical to those of the Board. As Plaintiff demonstrated in its opening brief, in enacting Section 13(3) of the Federal Reserve Act, Congress gave the Board the power to authorize Federal Reserve Banks, such as the FRBNY, to extend loans to non-banks in "unusual and exigent circumstances," but it gave the Federal Reserve Banks the final say as to whether to

actually extend such loans. Plf's Mem. at 4. Before the loan could be extended, the FRBNY was required by law to make its own finding, specifically, that the recipient of the prospective loan "is unable to secure adequate credit accommodations from other banking institutions." 12 U.S.C. § 343. The FRBNY's role thus is fundamentally different from that of an outside consultant.[6] The FRBNY, as a private corporation engaged in the business of banking, has its own interests and obligations in the commercial activity of extending loans. Plf's Mem. at 3-4. If the interests of the various banks of the Federal Reserve System were the same as the interests of the Board, Congress would have authorized the Board to extend credit directly. Similarly, even if the Board authorizes the extension of a loan, the FRBNY is not required to extend the loan. Whether a loan is extended is determined by business practices and what is best for the FRBNY.

Importantly, the Board's argument fails to address the most recent case law from the U.S. Court of Appeals for the D.C. Circuit ("the D.C. Circuit") regarding the "consultant corollary." In *Nat'l Institute of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008), the D.C. Circuit interpreted "intra-agency" communication to include "agency records containing comments solicited from non-governmental parties . . . whose counsel [an agency] sought." In other words, such records are properly classified as intra-agency records if they had been created at the request of the agency and "for the purpose of aiding the agency's deliberative process." *Id*. at 681 (internal citations omitted). Nowhere does the Board assert that it asked the FRBNY to gather and discuss data with the Board. Nor does the Board assert that the FRBNY

[6] The Board's own regulations state that it may delegate authority but only "by published order or rule." 56 C.F.R. § 265.1. The process of gathering and discussing data which may be used in a determination to authorize FRBNY to extend a loan is not contained in the functions delegated to Federal Reserve Banks. *See* 56 C.F.R. § 265.11.

gathered data for the purpose of aiding the Board's deliberative process. In fact, it is likely that the FRBNY gathered data in furtherance of its own interests: to determine whether it would extend an emergency loan to Bear Stearns.

2. The deliberative process privilege.

The Board seeks to withhold every factual input it considered in authorizing the FRBNY to extend an emergency loan to Bear Stearns, claiming that all of these factual inputs are protected by Exemption 5's deliberative process privilege. In this regard, the Board's assertion that "Exemption 5 does not require [a] defendant to establish that disclosure would injure the agency's deliberations" (Def's Opp. at 7) is just plain wrong.

The purpose of the deliberative process privilege "rests most fundamentally on the belief that, were 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." *Dudman Comm. Corp. v. Dep't of the Air Force*, 815 F.2d 1563, 1567 (D.C. Cir. 1987). As the Court in *Dudman Comm. Corp.*, explained:

> Congress enacted Exemption 5 to protect the executive's deliberative processes – not to protect specific materials. Although courts focusing merely on the nature of the material sought will usually act consistently with the congressional purpose, they will in some instances reach plainly inappropriate results . . . Courts therefore began to focus less on the nature of the materials sought and more on the effect of the materials' release: the key question in Exemption 5 cases became whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Dudman Comm. Corp., 815 F.2d at 1568. Thus, in order to succeed on a deliberative process privilege claim under Exemption 5, an agency must demonstrate that the record at issue "would actually inhibit candor in the decision making process if available to the public." *Army Times Pub. Co.*, 998 F.2d at 1072. "An agency cannot meet its statutory burden of justification by

conclusory allegations of possible harm." *Mead Data Central, Inc.*, 556 F.2d at 258. "It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA."[7] *Id.*

The Board does not even try to demonstrate that disclosure of the withheld records and information "would actually inhibit candor" or otherwise harm its decision making process. Rather, its declarations merely allege that the withheld records and information are predecisonal and deliberative, and even these allegations are nothing more than boilerplate conclusions. Thro Decl. at para. 17 ("Because this information was considered by Board members and Board and Reserve Bank staff as part of the process of deliberation leading up to the Board's decision to extend the Temporary Loan, I considered it exempt under Exemption 5"); 19 ("Because I was informed by staff who participated in the deliberations that this information and these analyses were considered by the Board and staff advising the Board as part of the ongoing process of deliberation leading up to the decision to authorize the Temporary Loan, I considered these documents to be pre-decisional"); and 22 ("these factual considerations and legal analyses were presented orally to the Board prior to its decision and were later reduced to writing. Because these documents reflect pre-decisional, deliberative considerations, I considered them to be exempt from disclosure under FOIA Exemption 5"); Stefansson Decl. at paras. 12-14. The declaration submitted by the SEC at least mentions harm to the decision making process, but it offers nothing more than a generalized, boilerplate conclusion; it is not even particular to the records and information at issue. Winter Decl. at para. 7 ("In my opinion, SEC employees would

[7] Ironically, while claiming that a demonstration of harm is not part of an Exemption 5 deliberative process privilege analysis, the Board also argues, in attempting to justify its withholding of purely factual material, that release would harm its decision making process. Def's Opp. at 10. It even cites *Dudman Comm. Corp.*, which clearly sets forth the "harm" element of an Exemption 5 deliberative process privilege analysis. *Id.*

hesitate to offer their candid opinions to superiors or coworkers, as well as colleagues in other federal agencies, if they knew that their opinions of the moment might be made a matter of public record at some future date").

In many instances, the Board seeks to use Exemption 5's deliberative process privilege to withhold merely the names of financial institutions. It makes the obvious overstatement that "revealing their names would be tantamount to revealing the Board's decision making process." Def's Opp. at 11. Yet, the Board does not show, nor can it show, that the release of these names would "discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman*, 815 F.2d at 1568.

In other instances, the withheld information is nothing more than raw market data -- statistics, pricing, and exposure data and the financial condition of markets. The Board admits as much. Def's Opp. at 11-12; Stefansson Decl. at paras. 11-14. Yet, again, it fails to demonstrate how disclosure of such raw market data will disclose the Board's deliberations, much less chill them in a way that will harm the Board's decision making in the future. *Dudman*, 815 F.2d at 1568. In this regard, this case differs substantially from *Quarles v. Dep't of the Navy*, 893 F.2d 390 (D.C. Cir. 1990), in which the Court upheld the withholding of certain cost estimates made by agency officials because the estimates themselves reflected the exercise of the agency judgment, or from *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), in which the Court upheld the withholding of factual summaries made by an agency official based on evidence entered into the lengthy record of a public hearing. Raw market data is just that; it does not require the exercise of any judgment by an agency such that its disclosure will cause harm to future agency deliberations. At a minimum, such information should be segregated from any truly deliberative material and made available to the public.

3. The attorney work product doctrine.

The Board continues to withhold Item No. 38 under Exemption 5, citing the attorney work product doctrine. Item No. 38 is a draft affidavit apparently prepared by an FRBNY attorney several days after the Board's March 14, 2008 decision to authorize the emergency loan to Bear Stearns and subsequently provided to the Board's attorneys. The affidavit purportedly describes "factual considerations and legal analyses" presented orally to the Board.[8] Thro Decl. at para. 22. Because it was allegedly prepared by a lawyer, the Board claims the affidavit is protected from disclosure by the attorney work product doctrine.

Unlike in *Nat'l Institute of Military Justice*, however, there is no factual demonstration that the Board had solicited or retained the FRBNY lawyer to act as an attorney or consultant for the Board. *Nat'l Institute of Military Justice*, 512 F.3d 677, 679. Thus, the "consultant corollary" does not apply here, just as it does not apply to other records or information originating from the FRBNY over which the Board has invoked Exemption 5's deliberative process privilege.

Moreover, the absence of any evidence that the Board solicited or retained the FRBNY attorney who prepared the affidavit to act on the Board's behalf also raises the question: Who can invoke the protections of the attorney work product doctrine? Because the attorney who prepared the affidavit was an FRBNY attorney, the attorney's client was the FRBNY, not the Board. Consequently, the protections of the attorney work product doctrine, to the extent they even apply, belong to the FRBNY, not the Board. The FRBNY is not a party to this litigation

[8] The mere fact that the affidavit is in draft form does not preclude its disclosure. As the Court noted in *Dudman Comm. Corp.*, an agency cannot withhold factual material "merely by stating that it is in a draft document." 815 F.2d at 1569. "In such a case, the agency will usually be able to excise the material from the draft document . . . and thus the agency will usually be able to release the material without disclosing any deliberative process." *Id.*

and has not invoked the doctrine's protections. *See, e.g., U.S. v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1297 (D.C. Cir. 1980).

Moreover, the Board appears to have backtracked from its claim that the affidavit was prepared in anticipation of litigation. In his opening memorandum, Plaintiff demonstrated that the attorney work product doctrine applies only where "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). To meet this standard, "the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d 881 884 (D.C. Cir. 1998). In this regard, it is irrelevant that the shareholders of Bear Stearns may have filed suit against JPMorgan over the subsequent merger of the two companies. The Board has still failed to identify some articulable claim that might have been brought against it or, since the affidavit was prepared by an FRBNY attorney, against the FRBNY, arising from the March 14, 2008 loan authorization.

Obviously recognizing this failure, the Board argues that it and/or the FRBY might have been "drawn into litigation by Bear Stearns shareholders," presumably as a witness or some other, non-party capacity. Def's Opp. at 16 & n.5. However, the Board presents no authority to support the proposition that the attorney work product doctrine applies to work product prepared by or for persons or entities that anticipate they may be called as witnesses in litigation between others or otherwise drawn into litigation between others. The attorney work product doctrine protects "the adversary process itself" based on the belief that "the integrity of our system would suffer if *adversaries* were entitled to probe each other's thoughts and plans concerning the case." *Coastal States Gas Corp.*, 617 F.2d at 864 (emphasis added); Fed.R.Civ.P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in

anticipation of litigation or for trial by or for another party"). It does not protect non-parties. *Id.* The Board does not demonstrate that it would be "adverse" to a party to pending or reasonably anticipated litigation.

Finally, because the Board has failed to demonstrate that the attorney work product doctrine protects the affidavit from disclosure, the Board "common interest" argument fails as well. The Board's bald claim that the affidavit was "prepared by an FRBNY attorney and conveyed to Board attorneys in anticipation of possible litigation stemming from the Board's decision to authorize the [t]emporary [l]oan" (Thro Decl. at para. 22) fails to demonstrate that the FRBNY had "a subjective belief that litigation was a real possibility" or that this belief was "objectively reasonable," much less that the FRBNY had a common interest with the Board in any litigation in which the two entities might have been parties. *In re Sealed Cases*, 146 F.3d at 884; *American Telephone and Telegraph Co.*, 642 F.2d at 1298.

In sum, the Board's broad brush attempt to invoke the attorney work product doctrine over Item No. 38 must fail.

D. The Board Continues to Improperly Withhold Information Under FOIA Exemption 8.

In its cross-motion, Plaintiff demonstrated that, while Exemption 8 may have been crafted broadly, a broad application of the exemption does not eliminate an agency's obligation to provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King*, 830 F.2d at 219 *quoting Mead Data Central, Inc.*, 566 F.2d at 251; *see also Founding Church of Scientology*, 603 F.2d at 947. Plaintiff also demonstrated that the Board's submissions -- its *Vaughn* index and accompanying declarations --

failed to satisfy this burden, along with the burden of proving that the information was "prepared by, or on behalf of, or for the use of an agency."[9] 5 .U.S.C. § 552(b)(8).

In its opposition, the Board has done nothing to remedy its insufficient submissions. It still makes no effort to demonstrate why any particular piece of withheld information -- which as demonstrated above is nothing more than the name of a financial institution in many instances-- may be withheld pursuant to Exemption 8. It identifies no particular bank examiner's report or condition or operating report to which the information relates. It does not state who prepared the report (including whether the report was prepared by, on behalf of, or for the Board or the FRBNY) or when the report was prepared. It does not state pursuant to what specific authority the report was prepared. It does nothing more than regurgitate the language of Exemption 8. *See* Declaration of Alison M. Thro at para. 17 ("This information, which is related to examination, operating, or condition reports prepared by, on behalf of or for the use of an agency (the Board) responsible for the regulation or supervision of financial institutions . . ."); *Vaughn* Index at Document Nos. 11 and 12 ("The withheld information relates to examination, operating, or condition reports prepared by, or on behalf of or for the use of the SEC in connection with its supervision and regulation of [Bear Stearns]"); Declaration of Michelle A. Danis at para. 5 ("[T]he information contained in these records all relate to information obtained from Bear Stearns by SEC staff in connection with its supervision and regulation of Bear Stearns through the [Consolidated Supervised Entity] program, which included drafting examination reports highlighting areas of risk . . . .").[10] Again, such "barren assertions" fail to satisfy the Board's

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[9] This latter point is particularly important in light of the fact that some of the information was gathered by the FRBNY, not the Board.

[10] Further adding to the general confusion created by the Board's inconsistent if not

burden. *Banks*, 2010 U.S. Dist. LEXIS 29823 at*12; *see also Army Times Pub. Co.*, 998 F.2d at 1070; *Voinche*, 412 F. Supp.2d at 69.

If, in the alternative, it is the Board's argument that the various email and attached tables are not contained in or relate to "examination, operating, or condition reports," but themselves constitute such reports, then the Board's claims fail for another reason. While Exemption 8 may have been crafted broadly, it is not without limits. Such reports have a clear and definite meaning. *See, e.g., In re: Franklin Nat'l Bank Securities Litigation*, 478 F. Supp. 577, 579 (E.D.N.Y. 1979) (describing the bank examination process generally and the contents of "Reports of Examination" generated as part of that process); Declaration of Vern McKinley, dated May 16, 2010 and attached hereto as Exhibit 2, ("McKinley Decl") at para. 10; *see also* Plf's Mem. at 34, n.14. The terms "operating or condition reports" also has a widely accepted definition in the U.S. and internationally. McKinley Decl. at para. 11. Such reports refer to periodic submissions by financial institutions on activities for daily, monthly, quarterly, or annual reporting. *Id.* The U.S. Supreme Court has recognized that FOIA's exemptions "are 'limited' in scope and 'do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F. Supp.2d 149, 165 (D.D.C. 2009) (*quoting Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). To construe Exemption 8's use of the term "examination, operation, or condition reports" as including names of institutions referenced in email exchanges and the other information the Board seeks to withhold would ignore the plain language of the exemption and

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conflicting declaration and *Vaughn* index (*see, e.g.*, Plf's Mem. at 14-20), Ms. Danis' declaration claims Exemption 8 over Item Nos. 14 and 15 as well as Document Nos. 11 and 12. The Board has never asserted or argued that it is attempting to withhold Item Nos. 14 and 15 under Exemption 8, however.

the ordinary meaning of its terms. It also would be antithetical to the mandate that FOIA exemptions be construed narrowly. *Rose*, 425 U.S. at 361.

The Board cites FOIA's Exemption 8 in trying to withhold responsive information from thirteen items -- *Vaughn* Index Item Nos. 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 21, 22, and 24 -- which it describes as "emails or tables." *See* Def's Opp. at 17. The records from which the Board seeks to withhold this information are reproduced as completely as possible:

Item No. 4 (Bates No. 000007)

"**[Redacted]** has adamantly stressed that it is continuing to provide liquidity to Bear Stearns . . . **[Redacted]** did experience some hedge fund counterparties that tried to novate [Credit Default Swaps] where Bears Stearns was the counterparty. **[Redacted]** rejected these trades. **[Redacted]** noted that Bear Stearns may face difficulty involving portfolio disagreements (e.g. valuation disputes) as there are more and more rumors of weakness."

Item No. 5 (Bates No. 000008)

"Several [Large Financial Institutions (**[Redacted]**) report gradual reductions in various lines to Bear, with most closely reviewing existing positions. [Large Financial Institutions] generally seem satisfied with Bear's liquidity (according to **[Redacted]** Bear appears to be reducing [short term] funding and staggering long-term debt), but don't seem interested in financing derivative/repro transactions with longer terms, unique structures, etc."

Item No. 6 (Bates Nos. 000008-9)

"Most [Large Financial Institutions] reported closely monitoring Bear Stearns from a credit perspective, but did not take specific action, preferring to wait out market rumors. Several firms indicate that the market may have erroneously perceived a Moody's downgrade of several Bear securitizations as a downgrade of the firm. Institution-specific tidbits: **[Redacted]**."

Item No. 9 (Bates No. 000017)

"Coryann Stefansson just called and said that this is the info (still preliminary and probably not super accurate but kind of in the ball park at least) that she has about the exposure of major banks to Bear. The biggest appears to be **[Redacted]**. The other major ones are **[Redacted]** for progressively smaller amounts. She also said that [Redacted] should be in the list, but nobody could confirm it."

Item No. 10 (Bates No. 000020 and 000051 (duplicate))

"Brian, don't know if this helps, but just as an FYI this was a small set of charts/tables I had put together for Robard . . . . **[Redacted]** (Attachment Entitled 'Bear Info.ppt')."

Item No. 11 (Bates No. 000004, 000022 (see Item No. 12, below), 000023, 000030-31, and 000038-39)

"Please see email below. Apparently there was some misinformation in the press regarding Bear Stearns . . . Our main contact at the SEC, Matt Eichner **[Redacted].**" (Bates No. 000004).

* * *

"Tim spoke with Eric who indicated **[Redacted]**." (Bates No. 000023).

* * *

"Notes from call with SEC on [Bear Stearns] **[Redacted]**." (Bates Nos. 000030-31).

* * *

"Summary of Bear's exposure to various institutions. Assumes Bear gets zero where they are in the money. Nets within entity but not across entities (entities not shown on this report -- we have details). **[Redacted]** (Attachment Entitled 'Largest Bank Broker Group Exposures to [Bear Stearns]')."

Item No. 12 (Bates No. 000022)

"[S]ome detail on the repo funding: **[Redacted]** . . . **[Redacted]** . . . [S]ome confusion worth us clarifying **[Redacted]** I think this is where the angst is coming from **[Redacted]**."

Item No. 13 (Bates No. 000029)

"Here are the exposures to [Bear Stearns] that I have now. **[Redacted]**"

Item No. 17 (Bates No. 000034)

"[T]hat's about right, but the cash situation is grimmer. They have an overdraft with **[Redacted]** that will use up a good part of the committed lines, and much of the 14 billion in assets is already in hock. They are talking to JPM, but it is not clear what might happen . . . ."

Item No. 18 (Bates No. 000035)

"If people have been playing by the risk management rules, they have been [marking to market] and getting margin, so direct exposure should be limited. **[Redacted]** has the most exposure - 3 b overdraft in [Bear Stearns] and some derivative [co]ntracts, but unless Deborah has new info, not clear on how much exposure on the latter . . . ."

Item No. 21 (Bates No. 000043)

Redacted Spreadsheet "Bear Stearns Counterparty Credit Exposure March 14 Morning Call."

Item No. 22 (Bates No. 000044)

"Please forgive typos and wording but the content gets at some the concerns we expressed last night. [Credit Default Swap] players. Top 25 comm[ercial] banks held [Credit Default Swaps worth 14 trillion at [Third Quarter 2007] up 2 trillion from the previous quarter . . . all numbers below are [Third Quarter 2007] **[Redacted]**."

Item No. 24 (Bates No. 000052)

"Market updates:

[Redacted] working through short-term operational issues **[Redacted]**.

[JPMorgan] conducting normal activity, but will look to Fed if [Bear Stearns] can't perform on try-party exposure.

[Redacted] customers probing about novations.

[Redacted] reaching out to Tim Geitner (sic) about forming a working group to ensure safe settlement processes

[Redacted] has small unsecured funding needs; **[Redacted]**."

When viewed in the context of the actual records from which the withheld information has been redacted, it is all the more apparent that the Board's mere parroting of the language of Exemption 8 fails to satisfy its burden of demonstrating that this information is "contained in or related to examination, operating, or condition reports." *Army Times Pub. Co.*, 998 F.2d at 1070; *Banks*, 2010 U.S. Dist. LEXIS 29823 at*12; *Voinche*, 412 F. Supp.2d at 69.

III. Conclusion.

Given the extraordinary nature of the Board's action on March 14, 2008 -- exercising powers it had not exercised since the Great Depression -- the basis for the Board's action is of obvious and substantial public interest. The Board's failure to justify its claims of exemption are all the more egregious in light of the extraordinary nature of the Board's action. For the reasons set forth in Plaintiff's opening memorandum and the reasons set forth above, summary judgment should be entered in Plaintiff's favor, and the Board should be compelled to release the withheld information.

Dated: May 17, 2010

Respectfully submitted,

/s/ Paul J. Orfanedes
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Attorneys for Plaintiff

EXHIBIT 1

I, JEAN HELWEGE, declare as follows:

1. I submit this declaration in support of Plaintiff Vern McKinley's Reply to the Opposition of Defendant Board of Governors of the Federal Reserve System to Plaintiff's Cross-Motion for Summary Judgment. I make this declaration on my own personal knowledge, except as to matters expressly stated to be upon information and belief, and as to those, I believe them to be true.

2. My credentials and experience were set forth in the declaration I previously submitted in this matter, dated March 7, 2010.

I. Discussion of the Information Sought by Vern McKinley

3. Mr. McKinley requested the release of information from the Board of Governors of the Federal Reserve System ("Board of Governors") regarding its decision to authorize the Federal Reserve Bank of New York ("FRBNY") to extend a loan to The Bear Stearns Companies Inc. ("Bear Stearns") via JPMorgan Chase Bank, N.A. ("JPMorgan") pursuant to the Board of Governors' authority under Section 13(3) of the Federal Reserve Act. In my March 7, 2010 declaration, I concluded that information on the "haircuts" applied to repurchase agreements ("repos") was customarily available to competitors and the public, and that its release would not cause competitive harm.

4. The Board of Governors asserted in its reply brief/opposition to Mr. McKinley's cross-motion for summary judgment that my conclusion regarding repo haircuts was flawed for two reasons: (1) I conflated the terms "customarily disclosed" with "publicly available" by using the term "customarily available"; and (2) I did not make a distinction between information disclosed by the industry and information disclosed by the particular firms at issue.

II. Discussion of the Board of Governors' Reply/Opposition

5. I assert that the repo haircuts are both customarily disclosed and publicly available. To state that they are not is akin to arguing that the price of bananas at the wholesale level is not customarily disclosed and therefore not publicly available. Anyone who wishes to know the price of the bananas or the haircut applied to a repo could obtain this information simply by becoming a customer of the vendor, be it a fruit wholesaler or a primary dealer. Like banana prices, haircuts are not specific to the customer, as the risk in repos is a function of the collateral, not the counterparty. Stated another way, haircuts are specific to classes of collateral. Therefore, the haircuts reported by one dealer are the same as the haircuts reported by another for the same class of collateral. To assert that a particular financial institution does or does not customarily release information on repo haircuts is meaningless because this information is readily available in the marketplace.

6. In this regard, mutual funds are obliged to obtain repo haircut information to calculate their net asset values ("NAVs"). A repo haircut directly affects the value of the repo, and that value goes into the calculation of the value of the entire mutual fund portfolio (the NAV). If the prices were not the same across various dealers, the SEC would have regulations stating which dealers' prices could be used in calculating NAVs. It has no such regulation.

7. Mutual funds, which number in the thousands and have multitudes of employees who could observe these prices and share them with anyone, obtain valuations for individual repo transactions for use in calculating NAVs. They do not create these prices internally, but instead obtain them from dealers, many of whom also provide the information through trading screens, such as Bloomberg. Any member of the public who is willing to pay the cost of a Bloomberg screen could obtain repo haircuts. The Board of Governors claims that revealing this

information would cause harm, but it is information that is known among competitors in the same way that Safeway and Giant know the price of bananas sold by wholesalers. Unlike grocers and fruit wholesalers, the hedge funds and dealers are competing for the same profits because the latter engage so heavily in proprietary trading.

8. The Board of Governor also asserts that NAV reveals the aggregate value of a fund, not any specific transaction's value, suggesting that mutual fund shareholders would not be able to discern sharp increases in repo haircuts from Securities and Exchange Commission ("SEC") filings. This assertion neglects the fact that mutual funds are required to report their holdings in their SEC filings on a semi-annual basis, and those reports contain values of specific transactions. They are available to the fund's shareholders on the SEC's website and typically also through the fund manager's website. If the value changed dramatically from the last filing, the daily NAV of the fund will have changed to reflect the lost value of the specific security. For money market mutual funds, which are active participants in the repo market, the NAV is equal to one dollar (except in dire circumstances). If one single repo transaction falls in value dramatically (meaning that the haircut has increased sharply), many repo transactions will suffer the same fate because the haircuts apply to a class of collateral, not a specific transaction. If a large part of the money market mutual fund's assets fall in value, the fund will not be able to maintain the NAV of one dollar (it will "break the buck"). In this sense, the aggregate value of the fund (its NAV) reveals the extent to which haircuts have risen on repos. Even a loss of one cent on the NAV would be noticed by its shareholders, as only a few money market mutual funds have ever broken the buck.

9. In sum, repo haircuts, being based on collateral types, are publicly available and customarily disclosed. They do not constitute information that could be used to cause harm to a

primary dealer. Dealers' customers obtain this information regularly, even if they are on opposite sides of a transaction competing against dealers to earn the highest returns on their investments. Money market mutual funds are required to obtain this information for their daily NAV calculations, and they report them in their regular SEC filings.

I declare under the penalty of perjury that the foregoing is true and correct. Executed in Columbia, South Carolina on this 9th day of May, 2010.

Jean Helwege

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 ESH
	)	
v.	)	
	)	
FEDERAL DESOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
Defendants.	)	
_____	)	

DECLARATION OF VERN MCKINLEY

I, Vern McKinley, hereby declare as follows:

1. I am the plaintiff in the Freedom of Information Act ("FOIA") lawsuit captioned *McKinley v. Federal Deposit Insurance Corporation, et al.*, Case No. 09-1263 (ESH), pending in the U.S. District Court for the District of Columbia. In addition, I am an independent consultant and attorney who regularly advises government counterparts from central banks, deposit insurance institutions, and financial institution supervisory agencies worldwide on legal and policy issues.

2. I also am a former employee of the Federal Deposit Insurance Corporation ("FDIC") and the Board of Governors of the Federal Reserve, among other agencies. I began my career with the FDIC in 1985 as an Assistant Bank Examiner in the Dallas Region during the banking crisis in Texas in the 1980s. I was responsible for working on bank examinations and in that capacity I reviewed the periodic operating and condition reports of banks for accuracy against the instructions for such reports issued by the Federal Financial Institutions Examination Council (FFIEC).

3. In 1988, I began working at the Board of Governors of the Federal Reserve ("Federal Reserve") as a Research Assistant in the Division of Monetary Affairs. Under the supervision of economists, I was responsible for working with and had access to confidential data on the System Open Market Account, which is the portfolio of securities through which monetary policy is implemented, among other duties.

4. From 1990 to 1995, I worked for the Resolution Trust Corporation (as an employee of the FDIC) and its Oversight Board as a unit and section chief in the Office of the Chief Financial Officer. I worked with confidential data on operating financial institutions that were likely or probable candidates for failure.

5. After attending George Washington University Law School as a Part Time (Evening) Division student, I worked as an attorney for the Treasury Department's Office of Thrift Supervision from 1996 to 1999. I worked with financial institution application information of a confidential nature.

6. From 1999 to the present, I have advised a number of central banks, deposit insurers and financial institution supervisors in the U.S. and globally regarding their operations. I have worked with a wide range of confidential financial institution data and agency examination, operational and condition data.

7. Based on my experience as detailed above, I am familiar with the considerations involved in assessing the need for keeping financial institution financial data confidential.

8. With regard to the issue of "examination, operating or condition reports" I am familiar with such reports primarily as a result of my experience at the FDIC, the RTC and as an

advisor to central banks, deposit insurers and financial institution supervisors in the US and globally.

9. The analysis of "examination, operating or condition reports" should be bifurcated into two segments: 1) Examination reports; 2) Operating and condition reports.

10. The phrase "examination reports" has a widely accepted definition, not only in the US but also internationally. Examinations reports are developed from on-site examinations at financial institutions, which may be regularly scheduled full examinations or targeted visitations prompted by follow-up on specific information that has been flagged. These reports summarize the financial standing of an institution and describe in detail examiners' comments on issues ranging from the capital, asset, earnings and liquidity position of the institution to the examiners' judgment of the quality of management. To encourage candor from examiners in their assessment, such reports are kept confidential from the management of the institution and the public generally. Such reports may also contain loan and borrower level detail on classified or problem loans and assets. For this reason and the obvious privacy considerations confidential treatment of these reports is standard treatment. The international practice also leads to confidential treatment of such reports, largely following or consistent with the US practice.

11. The phrase "operating or condition reports" also has a widely accepted definition in the US and internationally. Such reports refer to periodic submissions by financial institutions for daily, monthly, quarterly or annual reporting. These reports are discussed on the site of the FFIEC, as well as the individual agencies such as the FDIC.[1] The FDIC website notes in

[1] http://www.ffiec.gov/forms041.htm

regard to these reports: "Reports of Condition and Income data are a widely used source of timely and accurate financial data regarding a bank's condition and the results of its operations. The information is extensively used by the bank regulatory agencies in their daily offsite bank monitoring activities. Reports of Condition and Income data are also used by the public, the Congress of the United States, state banking authorities, researchers, bank rating agencies and the academic community."

12. Given the fiscal cost of recent interventions in systemic financial institutions during the recent crisis in the 2000s (e.g. Bear Stearns) and the prior crisis in the 1980s (e.g. Continental Illinois), a heightened level of disclosure is often demanded for such interventions. For example, in the enabling statue of the FDIC, the Federal Deposit Insurance Act, there is a provision for assisting systemic financial institutions added in the aftermath of the Continental Illinois intervention, also known as the systemic risk exception (12 USC 1823(c)(4)(G)). This provision mandates a high level of scrutiny, disclosure and accountability on the FDIC, Treasury Department and the Board of Governors of the Federal Reserve. At the core of this regime is a requirement that the Secretary of the Treasury document any determination under the provision and retain it for a review by the Comptroller General of the United States, and the Comptroller General is directed to review the basis, purpose and likely effect of the determination. [2] According to the Board of Governors of the Federal Reserve, it has also applied a heightened level of disclosure and scrutiny to its recent interventions in systemic institutions. A supporting declaration by Brian Madigan, Director of the Board's Division of

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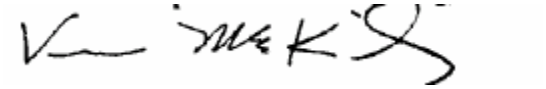
http://www.fdic.gov/regulations/resources/call/

[2] The purpose of the GAO review is likely for the purpose of making the FDIC accountable for its use of the systemic risk exception. Richard Scott Carnell, "A Partial Antidote to Perverse Incentives: The FDIC Improvement Act of 1991," *Annual Review of Banking Law* 12, (1993), p. 368.

Monetary Affairs, in the case of *Bloomberg LP v. Board of Governors of the Federal Reserve System* outlines the heightened level of disclosure regarding systemic institutions such as Bear Stearns.[3]

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed in Kiev, Ukraine on this 17th Day of May 2010.



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Vern McKinley

[3] See Declaration of Brian F. Madigan, February 27, 2009, paragraph 16 ("However, with the exception of lending in connection with certain specific systemically important institutions such as Bear Stearns or AIG, neither the Board nor the Federal Reserve Banks publicly disclose the names of borrowers at the DW [discount window] or the SCLFs [special credit and liquidity facilities], identify specific collateral pledged for specific loans, the terms, the rates for specific loans, the valuation of specific loans, vis-à-vis the collateral pledged (the haircut), collateral rejected for specific loans, or other information that could lead to identification of borrowers by counterparties, market analysts, news media organizations, or the public at large.").