

DATE: October 27, 2016

MEMORANDUM TO: Board of Directors

FROM: Charles Yi
General Counsel
Chief FOIA Officer



SUBJECT: Interim Final Rule Amending the FDIC's Freedom of Information Act Regulations at 12 C.F.R. §309.2 (Definitions), 12 C.F.R. §309.4 (Publicly available records) and 12 C.F.R. §309.5 (Procedures for requesting records)

RECOMMENDATION

Staff recommends that the Board of Directors (Board) issue an interim final rule (Interim Final Rule), with request for comment, which would amend 12 C.F.R. §309.2 (Definitions), 12 C.F.R. §309.4 (Publicly available records), and 12 C.F.R. §309.5 (Procedures for requesting records), three of the FDIC's regulations implementing the Freedom of Information Act (FOIA), 5 U.S.C. §552, as amended. If adopted, all provisions of the Interim Final Rule would be subject to public comment for a period of 60 days from the date of publication of the Interim Final Rule in the *Federal Register*.

EXECUTIVE SUMMARY

The FOIA, which took effect on July 4, 1967, provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Since that time, Congress has periodically updated the original statute through legislative amendments, including (1) the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Pub. L. No. 110-175, 121 Stat. 2524,

(2) the OPEN FOIA Act of 2009 (OPEN FOIA Act), Pub. L. No. 111-83, 123 Stat. 2142, 2184, and (3) most recently, the FOIA Improvement Act of 2016 (FOIA Improvement Act), Pub. L. No. 114-185, 130 Stat. 538, which was signed by the President on June 30, 2016. The FOIA Improvement Act requires the head of each agency to review the agency's FOIA regulations and to issue regulations which incorporate the changes made by the FOIA Improvement Act not later than 180 days after the date of its enactment (*i.e.*, by December 27, 2016).

The proposed Interim Final Rule amends and updates the provisions of 12 C.F.R. §§ 309.2, 309.4 and 309.5, three of the FDIC's existing FOIA regulations, to reflect the changes made to the FOIA by the FOIA Improvement Act as well as earlier by the OPEN Government Act and the OPEN FOIA Act. In addition, the Interim Final Rule more accurately describes certain current FDIC practices and procedures in the area of FOIA.

DISCUSSION

Substantive revisions to the FDIC's FOIA regulations (12 C.F.R. Part 309) were last made in 1998 following the enactment of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048. As noted, the FOIA Improvement Act requires the head of each agency, no later than 180 days after enactment, to review the agency's FOIA regulations and to issue regulations on the procedures for the disclosure of records that comport with the amendments made by the FOIA Improvement Act. Moreover, the requirement to update the FDIC's FOIA regulations in light of FOIA Improvement Act amendments affords the opportunity to

incorporate desirable revisions in light of the OPEN Government Act and the OPEN FOIA Act.

The FOIA Improvement Act addressed a range of procedural issues under the FOIA, including requirements that federal agencies establish a minimum of 90 days for requesters to file an administrative appeal and that agencies offer certain dispute resolution services at various times throughout the FOIA process. These and other FOIA Improvement Act requirements apply to any FOIA request made after June 30, 2016, the date the Act was signed by the President, and are incorporated into the Interim Final Rule.

Regulatory changes to conform to the OPEN Government Act include: (1) adding definitions of “representative of the news media” and “news” for purposes of determining fees for request processing, and (2) including in the definition of “record” for FOIA purposes any information “maintained for an agency by an entity under Government contract, for the purposes of records management.”

The OPEN FOIA Act amended FOIA Exemption 3, 5 U.S.C. §552(b)(3), which authorizes the withholding of information under the FOIA where the information is specifically exempted from disclosure by another federal statute, by adding a requirement that any statute enacted after October 28, 2009, specifically cite to Exemption 3 in order to qualify as a withholding statute under Exemption 3. This amendment to the FOIA is also incorporated into the Interim Final Rule.

It should be noted that the FDIC has been following these provisions of the OPEN Government Act and the OPEN FOIA Act since their enactment even though not explicitly incorporated in the FDIC’s regulations to date.

The following descriptions of proposed revisions cover the full range of FOIA regulation revisions being proposed by staff under the three statutes referred to above:

Proposed revisions to 12 C.F.R. §309.2

The Interim Final Rule replaces the existing definition of the term “records” with the definition set forth in the OPEN Government Act. §309.2(e).

Proposed revisions to 12 C.F.R. §309.4

The Interim Final Rule amends the existing FOIA regulation concerning publicly available records by adding language to reflect that the FDIC will make agency records available to requesters in an electronic format and post records online that are requested three or more times under the FOIA. §309.4(a)(2).

Proposed revisions to 12 C.F.R. §309.5

Significant amendments made by the Interim Final Rule to the existing regulation include the addition of language that:

- Adopts the statutory definition of “representative of the news media.” §309.5(a)(6).
- Requires the FDIC to acknowledge receipt of a FOIA request in writing and provide the requester with an individualized tracking number for the request. §309.5(d)(1).
- Provides instructions to requesters on how to check the status of their requests. §309.5(d)(6).
- Requires the FDIC, when it makes a determination on a FOIA request, to advise the requester of the right to seek assistance from the FDIC FOIA

Public Liaison (currently the head of the FDIC's Office of the Ombudsman).

- Requires the FDIC to notify the requester of the right to seek dispute resolution services from the FDIC's FOIA Public Liaison or the Office of Government Information Services (OGIS), if a determination is adverse to the requester.
- Enlarges the deadline to file an administrative appeal with the FDIC following an adverse determination on a request from 30 business days after receipt of the adverse determination notification, to 90 calendar days after the date of the adverse determination. §§309.5(d)(8)(iii), (d)(8)(iv)(D), (d)(8)(iv)(E), and (i)(2).
- Requires statutes enacted after October 28, 2009 to specifically cite to FOIA Exemption 3 in order to qualify as a withholding statute under Exemption 3. §309.5(g)(3)(i)(B)(ii).
- Provides information to requesters on how to seek dispute resolution services from the FDIC FOIA Public Liaison or the OGIS. §309.5(h).

Nature of Action: Interim Final Rule

The Interim Final Rule provides a 60-day comment period to allow the public the opportunity to participate in the rulemaking process. At the close of the comment period, the comments will be promptly and carefully considered by staff and recommendations with respect thereto will be presented to the Board to enable the Board to take appropriate action, if necessary. Adoption of an Interim Final Rule (as opposed to a Notice of Proposed Rulemaking) is appropriate given the requirement in the FOIA Improvement

Act that agencies issue regulations incorporating its revisions to the FOIA within 180 days from enactment of that Act.

CONCLUSION

Revision of 12 C.F.R §§309.2, 309.4, and 309.5 is required by statute, necessary to bring the FDIC's FOIA regulations in line with amendments to the FOIA, and reflects current procedures and practice. Thus, staff recommends that the Board approve the attached Interim Final Rule and authorize its publication in the *Federal Register*.

STAFF CONTACTS

Legal Division

Hugo A. Zia
Supervisory Counsel
FOIA/Privacy Act Group
(703) 562-2671

John F. Elmore
Counsel
FOIA/Privacy Act Group
(703) 562-2047

Sarah Jirousek
Counsel
FOIA/Privacy Act Group
(703) 562-2125