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January 23, 2017

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Submitted via e-mail to comments@fdic.gov as per instructions in the Federal Register, Vol. 81, No. 225/Tuesday, November 22, 2016/Rules and Regulations

RE: Revision of the Federal Deposit Insurance Corporation (FDIC) Freedom of Information Act Regulation, 12 CFR Part 309, RIN 3064-AE53

We offer these comments on behalf of the National Archives and Records Administration's Office of Government Information Services (OGIS) regarding revisions to the FDIC's Freedom of Information Act (FOIA) regulations, 12 CFR Part 309, RIN 3064-AE53.

We applaud the FDIC for updating its FOIA regulations to reflect the FOIA Improvement Act of 2016 and prior amendments, and for seeking public comment on its rule. We also appreciate your efforts to ensure that requesters are informed of the ability to seek dispute resolution services from the FDIC FOIA Public Liaison and OGIS.

OGIS, created by Congress in the OPEN Government Act of 2007, has the statutory mandate under the Freedom of Information Act (FOIA) to offer mediation services to resolve disputes between FOIA requesters and agencies, review agency FOIA policies, procedures, and compliance, and identify procedures and methods for improving FOIA compliance. As part of our compliance mission, we comment on proposed new and updated agency FOIA regulations and other notices related to FOIA. The FOIA Improvement Act of 2016 requires that agencies review and issue FOIA regulations to ensure consistency with the amended statute and that the

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regulations include procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS.

We submit the following comments:

§309.5 Procedure for requesting records

We appreciate you including of information regarding the ability of the requester to seek dispute resolution services from the agency FOIA Public Liaison and OGIS in the case of a denial in part or in whole in §309.5(d)(8). We note that the statute requires requesters to be notified of the availability of dispute resolution services in the case of an “adverse determination” (5 U.S.C. 552 § a(6)(A)(i)(III)). It is unclear whether your use of the phrase “a denial in part or in whole” includes “no records” responses as well as denials of requests for fee waivers and/or expedited processing which requesters also are entitled to appeal. We recommend clarifying.

In your new proposed section §309.5 (h) *Dispute resolution*, we note that you direct requesters to the FDIC’s FOIA Service Center web page for information about engaging in dispute resolution services through the FOIA Public Liaison or OGIS. We note that as of December 16, 2016, the FDIC’s webpage includes outdated contact information for OGIS and an imprecise description of our dispute resolution services. We encourage you to add the following information to your regulation:

A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

We also ask that you include the following paragraph:

Dispute resolution is a voluntary process. If the FDIC participates in the dispute resolution services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

This language describes the dispute resolution process and the agency's role in working to resolve disputes. It is similar to language suggested by the Department of Justice (DOJ) in Section VIII(d) of the Template for Agency FOIA Regulations (<https://www.justice.gov/oip/template-agency-foia-regulations>).

We also recommend that you revise §309.5(i) *Appeals* to comply with guidance from OIP directing agencies to alert FOIA requesters of their right to seek OGIS's mediation services as a nonexclusive alternative to litigation as part of the agency's appeal determination, (<http://www.justice.gov/oip/foiapost/2010foiapost21.htm>).

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With regard to (a) *Definitions*, you may also wish to consider adding the terms *requester category* and *fee waiver*. We have found that even experienced requesters can still confuse those terms. Specifically, we suggest that you add:

(9) *Requester category* means one of the three categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review and duplication, including commercial requesters; non-commercial scientific or educational institutions or news media requesters; and all other requesters.

(10) *Fee waiver* means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied including that the information is in the public interest and is not requested for a commercial interest.

In §309.5(b), we note that FDIC directs requesters to submit requests using an online form or via facsimile or letter. Later in the section, however, the regulation refers to how requesters should check on the status of requests submitted using the online form, or via email, facsimile or regular mail. We recommend that you revise your regulation to consistently reflect the various methods for sending a FOIA request to the FDIC.

We also suggest that agencies provide requesters with an estimated amount of fees, including a breakdown of the fees for search, review and/or duplication. Language notifying requesters that you will provide an estimate can be added to §309.5(f)(1)(iv), which requires that FDIC notify the requester if it determines that fees will likely exceed the amount the requester has agreed to pay, and is in accordance with Section X(e) of DOJ's Template for Agency FOIA Regulations.

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