

MEMORANDUM TO: Board of Directors

FROM: Howard Whyte
Chief Information Officer &
Chief Privacy Officer

SUBJECT: Delegation of System of Records Notice (SORN) Publication

DATE: 2/19/19

Executive Summary

Staff recommends that the FDIC Board of Director's (Board) consider and approve a change to the current authority delegated concerning the FDIC Privacy Act System of Records Notice (SORN). In short, as detailed further below, staff proposes that the Board delegate authority to the FDIC Senior Agency Official for Privacy (SAOP) to authorize (a) new SORNs and amendment to existing SORNs, and (b) publication of them in the *Federal Register*. This would be a change from the current FDIC practice, whereby the Board has delegated authority to the Executive Secretary to authorize (a) minor amendments to existing SORNs, and (b) publication of them in the *Federal Register*. The Board has retained the power to authorize (a) new SORNs and amend existing SORNs, excluding minor amendments, and (b) publication in the *Federal Register*.

Background

In 2016, the Office of Management and Budget (OMB) issued revised federal agency guidelines for managing information as a strategic resource to reflect changes in law and advances in technology.¹ These guidelines also ensured consistency across the federal

¹ Revised OMB Circular No. A-130, "Managing Information as a Strategic Resource," establishes general policy for information governance, acquisitions, records management, open data, workforce, security and privacy. (Jul. 28, 2016). Reissued OMB Circular No. A-108, "Federal Agency Responsibilities for Review, Reporting and

government with relevant executive orders, presidential directives, more recent federal policies, standards and guidelines.² Pursuant to these 2016 information management circulars, federal agencies, including the FDIC, were required to establish privacy continuous monitoring (PCM) programs, replacing the former biennial SORN review requirement. In addition, these new OMB requirements indicated that the SAOP should be responsible for the content, submission, and continuous monitoring of SORNs, and allow the SAOP to delegate at a task level.³ In light of these updated OMB requirements, staff has re-evaluated the FDIC's SORN approval and clearance and has taken steps to (i) achieve PCM compliance objectives and (ii) align SORN amendment publication authority under the SAOP where practical, while improving efficiencies and reducing undue and unnecessary burden on the Board.

Historically, the Board has retained the power to authorize (a) new SORNs and amend existing SORNs (excluding minor amendments), and (b) publication of them in the *Federal Register*. Staff submitted SORNs to the Board for approval, at minimum, on a biennial basis, in accordance with the Privacy Act and previous implementing guidance. Although there is an existing 1995 delegation, giving the Executive Secretary, or his/her designee, authority "to authorize minor amendments to existing Privacy Act systems of records and take action to ensure that appropriate notice of those minor amendments is published in the *Federal Register*"⁴ (see Attachment A), the Executive Secretary has stated that this delegation has not been exercised for

Publication under the Privacy Act," revises and relocates the guidance previously included in Circular A-130. (Dec. 23, 2016).

² When implemented collectively by federal agencies, these OMB Circulars promote innovation, enable appropriate information sharing, and foster wide-scale and rapid adoption of new technologies, and strengthen security and privacy protections. OMB Circular A-130.

³ Senior Agency Official for Privacy. In 2016, OMB required each federal agency to designate a SAOP. *OMB Memorandum M-16-24, Role and Designation of Senior Agency Officials for Privacy* (OMB, September 2016). In response, the Board designated the FDIC's existing Chief Information Officer (CIO), who serves as Chief Privacy Officer (CPO), to also serve as the agency's SAOP.

⁴ FDIC Board Resolution No. 058266 (January 31, 1995).

a substantial period of time because Privacy Act matters have been handled exclusively by the SAOP, with the concurrence of the General Counsel and Board approval.

Reasons for Reviewing Existing Practice

Board approval for new SORNs, amendments to existing SORNs, and publication of them is not required by federal law, regulation or policy, and could present scheduling difficulty and risks to the FDIC's ability to maintain timely compliance with the Privacy Act, in light of new OMB requirements, cited above. In addition, requiring Board-level approval for new or amended SORNs, or publication of them, is inconsistent with federal best practice, including the authorization level for SORNs used by FDIC's sister financial regulatory agencies. The SAOP is the approval authority for SORNs at the National Credit Union Administration, Federal Reserve Board, Office of the Comptroller of the Currency, Bureau of Consumer Financial Protection, Federal Housing Finance Authority, and Department of Treasury [including Financial Crimes Enforcement Network]. Only the Commodity Futures Trading Commission (CFTC) and Securities and Exchange Commission do not have the SAOP as the final approval authority for SORNs, and, currently, the CFTC is reviewing this practice. (See Attachment B.)

Options

Given the state of affairs described above, staff recommends that the Board consider and approve one of two remedial options for the delegation of authority to the SAOP to authorize new SORNs and amendments to existing SORNs and publication of them summarized below (and explained in more detail in Appendix A with advantages and disadvantages to each),

Option 1. Rescind existing delegation to the Executive Secretary, and delegate authority to the SAOP, to authorize (a) minor amendments to existing SORNs, and (b) publication of them in the *Federal Register*.

The Board would rescind authority delegated to the Executive Secretary, and delegate authority to the SAOP (or designee), to authorize (a) minor amendments to existing SORNs, and (b) publication of them in the *Federal Register*, with the concurrence of the General Counsel (or designee). The Board would continue to retain the power to authorize (a) new SORNs and amend existing SORNs (excluding minor amendments), and (b) publication of them in the *Federal Register*.

Option 2. Rescind existing delegation to the Executive Secretary, and delegate authority to the SAOP, to authorize (a) new SORNs and amendments to existing SORNs, and (b) publication of them in the *Federal Register*. (Recommended)

The Board would rescind authority delegated to the Executive Secretary, and delegate authority to the SAOP (or designee), to authorize (a) new SORNs and amendments to existing SORNs⁵ and (b) publication of them in the *Federal Register*, with the concurrence of the General Counsel (or designee). The SAOP would keep the Board duly apprised of all SORN-related matters, at minimum, via quarterly updates to the Board or as otherwise necessitated or requested by the Board.

Recommendation

Staff recommends Option 2, rescinding the authority that the Board delegated to the Executive Secretary, and delegate authority to the SAOP (or designee), to authorize (a) new SORNs and amendments to existing SORNs, and (b) publication of them in the *Federal*

⁵ Pursuant to the FDIC's Major Matters Resolution, (i) the SAOP, who oversees a Division Director and an Office Director, through his or immediate supervisor (if any), is responsible and accountable for ensuring that matters that may be subject to the resolution are brought to the attention of the Chairperson of the Board to determine whether such matters should be considered by the Board, and (ii) the Board reserved to itself consideration of matters which would establish or change existing Corporation policy, could attract unusual attention or publicity, or would involve an issue of first impression. (Res. No. 074956) (Jun. 19, 2007).

Register, with the concurrence of the General Counsel (or designee). Option 2 would greatly increase the efficient and sound operation of the FDIC's SORN clearance process, make the FDIC approval authority consistent with federal best practice, and align the FDIC with the authorization levels the SORN clearance process used by FDIC's sister financial regulatory agencies. It would also realign the delegation to the FDIC officer currently responsible for content, submission, and continuous monitoring of SORNs—the SAOP—and help achieve OMB PCM compliance objectives, while improving efficiencies and reducing undue and unnecessary burden on the Board.

Option 1 could present risks to the FDIC's ability to maintain timely compliance with the Privacy Act and OMB guidance, particularly for new SORNs and major (non-minor) SORN amendments.

Attached is a Board resolution that would accomplish Option 2, which could be revised in accordance with the Board's decision in this matter.

Concur:

Charles Yi ✓
General Counsel

Attachment A

FEDERAL DEPOSIT INSURANCE CORPORATION

CERTIFIED COPY OF RESOLUTION OF THE BOARD OF DIRECTORS

I, Robert E. Feldman, Acting Executive Secretary of the Federal Deposit Insurance Corporation, do hereby certify that the attached is a true and correct copy of a resolution duly adopted at a meeting of the Board of Directors of said Corporation, regularly called and held on the 31st day of January, 1995, at which a quorum was present, and that the same has not been amended or rescinded and is now in full force and effect.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Corporation to be affixed hereto, in the City of Washington and District of Columbia, this 31st day of January, 1995.

(SEAL)

058266

Acting Executive Secretary
Federal Deposit Insurance Corporation

RESOLUTION

WHEREAS, the Privacy Act requires that federal agencies ensure that published notices of Privacy Act systems of records accurately describe those systems; and

WHEREAS, the Privacy Act requires that an amended system notice be published in the Federal Register when minor changes are needed; and

WHEREAS, the Office of the Executive Secretary of the Federal Deposit Insurance Corporation ("FDIC") has recommended that the Board of Directors of the FDIC delegate authority to the Executive Secretary (or designee) in future cases to authorize minor amendments to existing Privacy Act systems of records and take action to ensure that appropriate notice of those minor amendments is published in the Federal Register; and

WHEREAS, the recommended delegation of authority will enhance the efficient operation of the FDIC in the discharge of its responsibilities under the Privacy Act.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of the FDIC delegates authority to the Executive Secretary (or designee) to authorize minor amendments to existing Privacy Act systems of records and take action to ensure that appropriate notice of those minor amendments is published in the Federal Register.

BE IT FURTHER RESOLVED, that this delegation of authority be effective immediately.

BE IT FURTHER RESOLVED, that the Executive Secretary provide written semiannual reports to the Board of Directors summarizing the actions taken under this delegation of authority.

Attachment B

Financial Regulatory Community SORN Approval Authority

	Board/Agency Head Involvement	Who approves SORNs?
NCUA	Board Secretary signs Federal Register submission but does not provide input.	SAOP
FRB	Secretary of Board signs the Federal Register notice but does not provide input.	SAOP
OCC	No	SAOP/Official delegated by SAOP
CFPB	No	SAOP
CFTC	Commission does review and approve, but SAOP reviews and approves all SORNs before final approval by the Commission.	Commission
FHFA	Director signs what SAOP approves but does not separately approve.	SAOP
Treasury (including FinCEN)	No	SAOP
SEC	Commission has to approve before transmission to OMB.	Commission
FDIC	Board has to approve before transmittal to OMB.	Board

*Source: Federal Privacy Council Financial Regulators Community of Practice survey, February 2019.

Appendix A

Options to Delegate Authority to the SAOP¹ to Authorize New and Amended SORNs² and SORN Publications in the *Federal Register*

Summary:

- Option 1. (1) Rescind Existing SORN Delegation to the Executive Secretary.
 (2) Delegate Authority to the SAOP to Authorize:
 (a) minor amendments to existing SORNs, and
 (b) publication of them in the *Federal Register*.
- Option 2. (1) Rescind Existing SORN Delegation to the Executive Secretary.
 (2) Delegate Authority to the SAOP to Authorize:
 (a) new SORNs and amendments to existing SORNs, and
 (b) publication of them in the *Federal Register*.

Option 1. Rescind Existing SORN Delegation to the Executive Secretary and Delegate Authority to the SAOP to authorize (a) *minor* amendments to existing SORNs, and (b) publication of them in the *Federal Register*.

- (1) The FDIC Board would rescind the SORN delegation to the Executive Secretary or his/her designee dated January 31, 1995.
- (2) The FDIC Board would delegate to the SAOP the authority to authorize:
 (a) minor amendments to existing SORNs, and
 (b) publication of them in the *Federal Register*, with the concurrence of the General Counsel.

Advantages

This option would realign the delegation for minor amendments to the FDIC offices responsible for the content, submission, and continuous monitoring of SORNs, which would enhance the efficient operation of the FDIC in the discharge of its responsibilities under the Privacy Act.

Disadvantages

Limiting SAOP approval to only minor SORN amendments is inconsistent with current federal guidance and best practice, including the authorization level for changes to SORNs used by FDIC's sister financial regulatory agencies. In addition, it could present risks to the FDIC's ability to maintain timely compliance with the Privacy Act and OMB guidance, particularly for new SORNs and those requiring major (non-minor) amendments.

¹ Senior Agency Official for Privacy (SAOP). In 2016, OMB required each federal agency to designate a SAOP. *OMB Memorandum M-16-24, Role and Designation of Senior Agency Officials for Privacy* (OMB, September 2016). In response, the FDIC designated its existing Chief Information Officer (CIO), who serves as Chief Privacy Officer (CPO), to also serve as the agency's SAOP.

² Privacy Act Systems of Records Notices.

Option 2. Rescind Existing SORN Delegation to the Executive Secretary and Delegate Authority to the SAOP to authorize (a) new SORNs and amendments to existing SORNs, and (b) publication of them in the *Federal Register* (Recommended)

- (1) The FDIC Board would rescind the delegation to the Executive Secretary or his/her designee dated January 31, 1995.
- (2) The FDIC Board would delegate to the SAOP the authority to authorize:
 - (a) new and amendments to existing SORNs,³ and
 - (b) publication of them in the *Federal Register*, with the concurrence of the General Counsel. The SAOP would keep the Board duly apprised of all SORN-related matters, at minimum via quarterly updates to the Board or as otherwise necessitated or requested by the Chairman or the Board.

Advantages

Realigning authorization for SORN publication with the SAOP is consistent with current federal guidance and best practice, including OMB memoranda and authorization level for changes to SORNs used by FDIC's sister financial regulatory agencies. This option would also streamline and align the clearance process with the FDIC offices currently charged with handling Privacy Act matters, thereby enhancing the efficient operation of the FDIC in the discharge of its responsibilities under the Privacy Act, while reducing undue and unnecessary burden on the Board.

Disadvantages

It could present risks to FDIC's ability to maintain timely compliance with the Privacy Act and implementing guidance for those SORNs still subject to Board approval prior to publication.

³ Pursuant to the FDIC's Major Matters Resolution, (i) the SAOP, who oversees a Division Director and an Office Director, through his or her immediate supervisor (if any), is responsible and accountable for ensuring that matters that may be subject to the resolution are brought to the attention of the Chairperson of the Board to determine whether such matters should be considered by the Board, and (ii) the Board reserved to itself consideration of matters which would establish or change existing Corporation policy, could attract unusual attention or publicity, or would involve an issue of first impression. (Res. No. 074956) (Jun. 19, 2007).