

**BILLING CODE: 6714-01-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 309**

**RIN 3064-\_\_\_\_\_**

**Revision of the FDIC's Freedom of Information Act Regulations**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Interim final rule and request for comment.

**SUMMARY:** This rule amends the Federal Deposit Insurance Corporation's (FDIC) regulations under the Freedom of Information Act (FOIA) to incorporate certain changes made to the FOIA by the FOIA Improvement Act of 2016 (FOIA Improvement Act). In addition, this rule amends certain provisions to reflect changes brought about by prior amendments to the FOIA that had been incorporated into agency practice and corrects inaccurate contact information and adjusts numbering and lettering of current provisions because of additions to the regulations.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be submitted by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments, which must include the agency name and RIN \_\_\_\_\_, by ONE of the following methods:

- *Agency Web Site:* [www.fdic.gov/regulations/laws/federal/](http://www.fdic.gov/regulations/laws/federal/). Follow instructions for submitting comments on the Agency Web Site.

- *E-mail:* [Comments@fdic.gov](mailto:Comments@fdic.gov). Include "Disclosure of Information" in the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

• *Federal eRulemaking Portal:* <http://www.regulations.gov> . Follow the instructions for submitting comments.

*Public Inspection:* All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226, or by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:** Hugo Zia, Supervisory Counsel, FDIC, FOIA/Privacy Act Group, Legal Division, at [hzia@fdic.gov](mailto:hzia@fdic.gov) or (703) 562-2671; or John Elmore, Counsel, FDIC, FOIA/Privacy Act Group, Legal Division; at [joelmore@fdic.gov](mailto:joelmore@fdic.gov) or (703) 562-2047; or Sarah Jirousek, Counsel, FDIC, FOIA/Privacy Act Group, Legal Division, at [sjirousek@fdic.gov](mailto:sjirousek@fdic.gov) or (703) 562-2125.

**SUPPLEMENTARY INFORMATION:**

**I. Policy Objectives**

The policy objective of this interim final rule is to bring the FDIC's FOIA regulations<sup>1</sup>

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<sup>1</sup> 12 CFR 309.2, .4, .5.

into accord with the changes to the FOIA made by the FOIA Improvement Act,<sup>2</sup> the OPEN Government Act,<sup>3</sup> and the OPEN FOIA Act.<sup>4</sup>

## **II. Background**

This rule amends the FDIC's regulations under the FOIA to incorporate certain changes made to the FOIA, 5 U.S.C. 552, by the FOIA Improvement Act. Among other things, the FOIA Improvement Act requires agencies to provide a minimum of 90 days for requesters to file an administrative appeal. The FOIA Improvement Act also requires agency regulations to address dispute resolution procedures and to provide notification to requesters about the availability of dispute resolution services. The FOIA Improvement Act requires the FDIC 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). This rule updates the FDIC's regulations in 12 CFR Part 309 to reflect those statutory changes.

In addition, as explained below, this rule amends certain provisions to reflect changes brought about by the amendments to the FOIA in the OPEN Government Act and the OPEN FOIA Act. These amendments to the FOIA from 2007 and 2009 have been followed by the FDIC even though the agency's regulations had not been amended.

Finally, the rule corrects one instance of inaccurate contact information and adjusts the numbering and lettering of current provisions because of additions made to the regulations.

## **III. Description of the Rule**

The following changes have been made to the FDIC's FOIA regulations:

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<sup>2</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016).

<sup>3</sup> Pub. L. No. 110-175, 121 Stat. 2524 (2007).

<sup>4</sup> Pub. L. No. 111-83, 123 Stat. 2142, 2184 (2009).

## **Section 309.2 Definitions**

Paragraph (e) of § 309.2 (Definitions) is revised to include the current definition for a record under the FOIA. Section 9 of the OPEN Government Act amended the definitions section of the FOIA, 5 U.S.C. 552(f), by including within the definition of “record” any information “maintained for an agency by an entity under Government contract, for the purposes of records management.” This amendment made clear that records, in the possession of Government contractors for purposes of records management, are considered agency records for purposes of the FOIA. Through this change to the regulations, the FDIC adopts the statutory definition of “record.”

## **Section 309.4 Publicly available records**

Paragraph (a)(2) of § 309.4 (Records available on the FDIC’s World Wide Web page) is revised to replace outdated wording concerning the inspection of records that are required to be made available to the public. In the current version of the FDIC’s regulations, the phrase “via computer telecommunications” is used. The FOIA Improvement Act changed this wording to “for inspection in an electronic format.” Through this change to the regulations, the FDIC adopts the language concerning public inspection of records in the FOIA Improvement Act.

Paragraph (a)(2)(i)(D) of § 309.4 (Records available on the FDIC’s World Wide Web page) is revised to include the requirement that the FDIC make available for public inspection in an electronic format any record that has been released and (i) that the FDIC determines has become or is likely to become the subject of subsequent requests for substantially the same records, or (ii) that has been requested three or more times. This requirement has been the

practice of the FDIC for a number of years, is in accord with the current practice of the FDIC and is required by the FOIA Improvement Act.

Paragraph (b) of § 309.4 (Public Information Center) is revised to correct inaccurate contact information for the FDIC's Public Information Center. This revision to the regulations is required so that requesters have the correct contact information when inquiring about publicly available records.

### **Section 309.5 Procedures for requesting records**

Paragraph (a)(6) of § 309.5 (Representative of the news media) is revised to include the current definition of "representative of the news media" under the FOIA. Section 3 of the OPEN Government Act amended 5 U.S.C. 552(a)(4)(A)(ii) of the FOIA by expressly providing a definition of "representative of the news media." Through this change to the regulations, the FDIC adopts the definition of "representative of the news media" that is in the OPEN Government Act.

Paragraph (d)(1) of § 309.5 (Receipt of requests) is revised to specify that the FDIC will provide a requester with an individualized tracking number for any FOIA request that satisfies 12 CFR 309.5(b), no matter how long it will take to process the request. Section 7 of the OPEN Government Act amended 5 U.S.C. 552(a) by requiring agencies to assign an individualized tracking number for each request that will require more than ten days to process. This section codified existing requirements set forth in Executive Order 13,392. Providing tracking numbers for every FOIA request that satisfies 12 CFR 309.5(b), including those that will take less than ten days to process, has been the practice of the FDIC for a number of years, is in accord with the current practice of the FDIC and adopts the language of the OPEN Government Act.

Paragraph (d)(4) of § 309.5 is revised to account for a change in numbering because of the addition of § 309.5(h) (Dispute resolution). Previously, the paragraph covering procedures concerning appeals that is cross-referenced in this paragraph was § 309.5(h); it is now § 309.5(i). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (d)(6) of § 309.5 (Checking status of request) is added to notify requesters of the contact information for FDIC's FOIA Service Center (telephone number and web site address), thereby enabling requesters to obtain certain information about the status of their request. Section 7 of the OPEN Government Act amended 5 U.S.C. 552(a) by requiring agencies to establish a telephone number or a web site to allow requesters to inquire about the status of their request, obtain the date an agency originally received their request, and obtain an estimated date for the completion of the agency's processing of their request. This section of the OPEN Government Act codified existing requirements set forth in Executive Order 13,392. The FDIC has a FOIA Service Center that is accessible via the internet and telephone and, through either method, requesters are provided with the date of the FDIC's receipt of their request and the estimated date on which the FDIC will complete its processing of their request. The FDIC has made these services and information available to requesters for a number of years. The addition of this notification provision to the regulations is in accord with the FDIC's current practice and adopts the language in the OPEN Government Act.

Paragraph (d)(7) of § 309.5 (Notification) is revised in numbering because of the addition of § 309.5(d)(6) (Checking status of request). Previously this paragraph was § 309.5(d)(6)

(Notification); it is now § 309.5(d)(7) (Notification). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (d)(8) of § 309.5 (Response to request) is revised in numbering because of the addition of § 309.5(d)(6) (Checking status of request). Previously this paragraph was § 309.5(d)(7); it is now § 309.5(d)(8). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (d)(8)(iii) of § 309.5 (Response to request) is added to require the FDIC to notify requesters, in its response to their request, of their right to seek assistance from the FDIC's FOIA Public Liaison, if the FDIC determines such request satisfies 12 CFR 309.5(b). Section 2 of the FOIA Improvement Act added 5 U.S.C. 552(a)(6)(A)(i)(II), which requires agencies to offer the services of their FOIA Public Liaison when issuing their determinations of requests. The addition of this notification provision to the regulations is in accord with the FDIC's current practice and is required by the FOIA Improvement Act.

Paragraph (d)(8)(iv) of § 309.5 (Response to request) is revised in numbering because of the addition of § 309.5(d)(8)(iii) (Checking status of request). Previously this paragraph was § 309.5(d)(8)(iii); it is now § 309.5(d)(8)(iv). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (d)(8)(iv)(C) of § 309.5 (Response to request) is revised to remove an "and" because of the addition of § 309.5(d)(8)(iv)(E). This removal is necessary to maintain the organizational integrity of the regulations.

Paragraph (d)(8)(iv)(D) of § 309.5 (Response to request) is revised to provide for notification to the requester that the deadline to file an administrative appeal is extended to 90

days, in conformity with the 90-day time period established by the FOIA Improvement Act. Section 2 of the FOIA Improvement Act amended 5 U.S.C. 552(a)(6)(A)(i) by changing the time period for an appeal of adverse determinations, from 30 days to 90 days. This paragraph is also revised to add an “and” because of the addition of § 309.5(d)(8)(iv)(E). These changes are required by the FOIA Improvement Act and for the regulation to remain organized.

Paragraph (d)(8)(iv)(E) of § 309.5 (Response to request) is added to include a requirement that the FDIC notify requesters, in response to an adverse determination of a request that satisfies § 309.5(b), of their right to seek assistance from the FDIC’s FOIA Public Liaison and/or the Office of Government Information Services (OGIS) at the National Archives and Records Administration. Section 2 of the FOIA Improvement Act added 5 U.S.C. 552(a)(6)(A)(i)(III), which requires that when agencies make adverse determinations on requests, they must offer the services of their FOIA Public Liaison and/or OGIS. The addition of this provision concerning notification to the regulations is required by the FOIA Improvement Act.

Paragraph (f)(1)(x) of § 309.5 is revised to account for a change in numbering because of the addition of § 309.5(h) (Dispute resolution). Previously, the paragraph referring to procedures concerning appeals that is cross-referenced in this paragraph was § 309.5(h); it is now § 309.5(i). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (g)(3)(i) of § 309.5 (Exempt information) is revised in numbering and by adding an “and” because of the addition of § 309.5(g)(3)(ii). Previously this paragraph was § 309.5(d)(8)(iii); it is now § 309.5(d)(8)(iv). This adjustment to numbering and the addition of an “and” is necessary to maintain the organizational integrity of the regulations.

Paragraph (g)(3)(ii) of § 309.5 (Exempt information) is added to include a requirement codified in the OPEN FOIA Act that statutes enacted after the date of the enactment of the OPEN FOIA Act must specifically cite to Exemption 3 of the FOIA in order to qualify under Exemption 3. The OPEN FOIA Act was enacted on October 28, 2009, and so this amendment impacts statutes enacted after that date. In order for any statute enacted after that date to qualify as an Exemption 3 statute, it must satisfy one of the traditional requirements, *i.e.*, it must “require that the matters be withheld from the public in such a manner as to leave no discretion on the issue” or it must “establish particular criteria for withholding or refer to particular types of matters to be withheld;” and, the statute enacted after October 28, 2009, must also specifically cite to Exemption 3. Through this change to the regulations, the FDIC is bringing the language concerning withholdings made pursuant to Exemption 3 into accord with the OPEN FOIA Act.

Paragraph (h) of § 309.5 (Dispute resolution) is added to include procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS. Section 3 of the FOIA Improvement Act requires agencies to amend their regulations to include procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS. The FDIC has pointed requesters to its FOIA Service Center at <http://www.fdic.gov>, which contains details about the procedures for contacting these entities in order to engage in dispute resolution. The addition of these procedures to the FDIC’s regulations is required by the FOIA Improvement Act.

Paragraph (i) of § 309.5 (Appeals) is revised in numbering because of the addition of § 309.5(h) (Dispute resolution). Previously this paragraph was § 309.5(h); it is now § 309.5(i).

This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

Paragraph (i)(2) of § 309.5 (Appeals) is revised to extend the time to file an administrative appeal to 90 days, in conformity with the 90-day time period established by the FOIA Improvement Act. Section 2 of the FOIA Improvement Act amended 5 U.S.C. 552(a)(6)(A)(i), changing the time period for appeal of adverse determinations from 30 days to 90 days. This change to the regulations is required by the FOIA Improvement Act.

Paragraph (j) of § 309.5 (Records of another agency) is revised in numbering because of the addition of § 309.5(h) (Dispute resolution). Previously this paragraph was § 309.5(i); it is now § 309.5(j). This adjustment to numbering is necessary to maintain the organizational integrity of the regulations.

#### **IV. Expected Effects of the Rule**

The FDIC has analyzed the expected effects of the interim final rule and estimates them to be relatively small. The rule makes two primary changes to the existing regulations: extending the deadline for requesters to file an appeal, and establishing procedures for dispute resolution and requiring notice to requesters about the availability of dispute resolution services. These changes help support the policy objective of the FOIA, which is to provide public access to government information.

The provision in the interim final rule that extends the time period for which an appeal will be considered will likely result in a small increase in administrative costs associated with FOIA requests, but that may be offset by a decrease in lawsuits brought since requesters will now have a larger window for seeking administrative review of an adverse request

determination. In the past ten fiscal years, the FDIC has received 238 appeals from FOIA requesters, an average of 24 appeals per fiscal year. The proposed extension of the appeal time period from 30 business days to 90 calendar days will likely result in a general increase in number of appeals, given the larger window for filing an appeal. A general increase in the number of appeals will likely increase administrative costs for the FDIC. Any potential increase in administrative costs as a result of the proposed extension of the appeal period rule is difficult to estimate given that costs will depend upon both the volume of requests received and the extent to which the requests may be subject, in whole or in part, to denial. However, the proposed extension of the appeal period will benefit the public by expanding the deadline for requesters to file an administrative appeal of adverse determinations made by the FDIC.

The proposed establishment of a dispute resolution process also supports public access to government information while likely posing a small increase in administrative costs for the FDIC and/or the OGIS. The establishment of a dispute resolutions process, in addition to the FDIC appeal process, will support public access to government records by providing requesters with an additional mechanism for the review of adverse determinations, in the event of a dispute. Any potential increase in administrative costs as a result of the establishment of a dispute resolution process by the interim final rule is difficult to estimate, given the unpredictable elements noted above.

The proposed interim final rule also makes changes to the FDIC's FOIA regulations to reflect FDIC FOIA practices initially prompted by the OPEN Government Act and the OPEN FOIA Act. Most of the proposed changes to the FDIC FOIA regulations are procedural and

either codify current practice or make benign changes to the FOIA regulations that are unlikely to pose any costs or benefits for the Public.

In conclusion, there is potential for a small increase in administrative costs for the FDIC posed by the proposed revisions, but the policy objective of public access to government information continues to be supported and would in fact be enhanced – as required by the FOIA Improvement Act.

#### **V. Alternatives Considered**

The changes in the interim final rule are mandated by the FOIA Improvement Act and are in accord with the OPEN Government Act and the OPEN FOIA Act. Under the FOIA Improvement Act, the FDIC has no discretion to make or consider alternative specifications to the provisions in the interim final rule. The other technical changes to 12 CFR Part 309 are minor and designed to improve the transparency and readability of the CFR, and therefore FDIC staff did not actively consider alternative approaches to these changes.

#### **VI. Request for Comment**

Pursuant to the Administrative Procedure Act (the “APA”), at 5 U.S.C. 553(b), notice and comment are not required prior to the issuance of a final rule if an agency, for good cause, finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” As discussed above, the FOIA Improvement Act requires the FDIC 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). Because the statutory changes under the FOIA Improvement Act were effective immediately and due to the statutory deadline imposed for rulemaking, the FDIC has concluded that publishing notice and taking

comment before issuing a final rule would be impracticable. In addition, since these changes merely bring the regulations into alignment with the provisions contained in the FOIA Improvement Act, the OPEN Government Act, and the OPEN FOIA Act, and improve the rule's accuracy and organization, publishing prior notice would be unnecessary. Therefore, the FDIC finds good cause exists to publish this rule as final without prior notice and comment and with an effective date as of the date of its publication in the Federal Register to allow the public to benefit immediately. Nevertheless, the FDIC welcomes public comments from any interested person on any aspect of the changes made by this interim final rule. Please refer to the ADDRESSES section above. The FDIC will carefully consider all public comments, if any, in any further development of this rule.

## **VII. Regulatory Analysis**

### *Riegle Community Development and Regulatory Improvement Act*

Section 302 of the Riegle Community Development and Regulatory Improvement Act<sup>5</sup> generally requires that regulations prescribed by federal banking agencies which impose additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter unless the regulation is required to take effect on another date pursuant to another act of Congress or the agency determines for good cause that the regulation should become effective on an earlier date. This interim final rule makes revisions in the FDIC's FOIA regulations, because these changes are merely bringing the regulations into alignment with the provisions contained in the FOIA Improvement Act, the OPEN Government Act, and the OPEN FOIA Act, as well as for purposes of accuracy and organization. It does not

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<sup>5</sup> 12 U.S.C. 4802.

impose any new or additional reporting, disclosures, or other requirements on insured depository institutions. Additionally, as previously noted, the FOIA Improvement Act requires the FDIC 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). Accordingly, this interim final rule will be effective upon publication.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA)<sup>6</sup> applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed above, consistent with section 553(b)(B) of the APA, the FDIC has determined for good cause that general notice and opportunity for public comment is not necessary. Accordingly, the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Nonetheless, the FDIC observes that because this interim final rule only amends the FDIC's regulations under the FOIA to incorporate certain changes made by the FOIA Improvement Act, the OPEN Government Act, and the OPEN FOIA Act, and for purposes of accuracy and organization, it should not have a significant economic impact on a substantial number of small entities. The FDIC requests comment on these conclusions.

#### *The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999: Assessment of Federal Regulations and Policies on Families*

The FDIC determined that this interim final rule will not affect family wellbeing within the meaning of section 654 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.<sup>7</sup>

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<sup>6</sup> Pub. L. 96-354, Sept. 19, 1980, codified to 5 U.S.C. 601 *et seq.*

<sup>7</sup> Pub. L. 105-277, 112 Stat. 2681 (1998).

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995<sup>8</sup> states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has determined that this interim final rule does not create any new, or revise any existing, collections of information under the Paperwork Reduction Act. Consequently, no information collection request will be submitted to the OMB for review. The FDIC invites comment on its PRA determination.

### *Plain Language Act*

Section 722 of the Gramm-Leach-Bliley Act requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000.<sup>9</sup> The FDIC invites comment on how to make this rule easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could the FDIC present the rule more clearly?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Does the rule contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes would achieve that?

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<sup>8</sup> 44 U.S.C. 3501–3521.

<sup>9</sup> Pub. L. 106-102, 113 Stat. 1338 (1999).

- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the FDIC incorporate to make the rule easier to understand?

**List of Subjects in 12 CFR Part 309**

Federal Deposit Insurance Corporation, Procedure and Rules of Practice, Disclosure of Information.

Accordingly, for the reasons stated in the preamble, 12 CFR Chapter 3, Subchapter A, Part 309 is amended as follows:

**PART 309 – DISCLOSURE OF INFORMATION**

1. The authority citation for Part 309 continues to read as follows:

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1819 “Seventh” and “Tenth.”

2. Section 309.2 is amended by revising paragraph (e) to read as follows:

**§ 309.2 Definitions.**

\* \* \* \* \*

(e) The term *record* means:

(1) any information that would be an agency record subject to the requirements of this section when maintained by the FDIC in any format, including an electronic format; and

(2) any information described under subparagraph (1) that is maintained for the FDIC by an entity under Government contract, for purposes of records management.

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3. Section 309.4 is amended by revising paragraph (a)(2)(i) introductory text, and paragraphs (a)(2)(D) and (b) to read as follows:;

**§ 309.4 Publicly available records.**

(a) *Records available on the FDIC's World Wide Web page.*

\* \* \* \* \*

(2) *Documents required to be made available for inspection in an electronic format.*

(i) The following types of documents created on or after November 1, 1996, and required to be made available for inspection in an electronic format, may be found on the FDIC's World Wide Web page located at: <http://www.fdic.gov>:

\* \* \* \* \*

(D) Copies of all records released to any person under § 309.5:

(i) That, because of the nature of their subject matter, the FDIC determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(ii) That have been requested 3 or more times; and

\* \* \* \* \*

(b) *Public Information Center.* The FDIC maintains a Public Information Center or "PIC" that contains Corporate records that the Freedom of Information Act requires be made available for regular inspection and copying, as well as any records or information the FDIC, in its discretion, has regularly made available, to the public. The PIC has extensive materials of interest to the public, including many Reports, Summaries and Manuals used or published by the Corporation that are made available, by appointment, for inspection and copying. The PIC is open from 9:00 AM to 4:00 PM, Monday through Friday, excepting federal holidays. It is located at 3501 North Fairfax Drive, Room E-1005, Arlington, VA 22226. The PIC may be reached during business hours by calling 1(877) 275-3342 or 1-(703) 562-2200.

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Section 309.5 is amended by:

- a. Revising paragraph (a)(6), (d)(1), and (d)(4);
- b. Redesignating paragraphs (d)(6) and (d)(7) as paragraphs (d)(7) and (d)(8), respectively and adding new paragraph (d)(6);
- c. Redesignating paragraph (d)(8)(iii) as paragraph (d)(8)(iv) and adding a new paragraph (d)(8)(iii);
- d. Revising paragraphs (d)(8)(iv)(C) and (d)(8)(iv)(D) and adding paragraph (d)(8)(iv)(E);
- e. Revising paragraphs (f)(1)(x) and (g)(3);
- f. Redesignate paragraphs (h) and (i) as paragraphs (i) and (j), respectively;
- g. Add new paragraph (h); and
- h. Revise paragraph (i)(2).

The additions and revisions read as follows:

**§ 309.5 Procedures for requesting records.**

(a) *Definitions.* For purposes of this section:

\* \* \* \* \*

(6) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”)

who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media will be considered to be news-media entities. A freelance journalist will be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by that entity. A publication contract would present a solid basis for such an expectation; the FDIC may also consider the past publication record of the requester in making this determination.

(d) \* \* \*

(1) *Receipt of requests.* Upon receipt of a request that satisfies paragraph (b) of this section, the FOIA/PA Group will acknowledge receipt of the request in writing to the requester and provide the requester with an individualized tracking number for the request. The date of receipt for such request, including one that is addressed incorrectly or that is referred by another agency, is the date the FOIA/PA Group actually receives the request.

\* \* \* \* \*

(4) A requester seeking expedited processing will be notified whether expedited processing has been granted within ten (10) working days of the receipt of the request. If the request for expedited processing is denied, the requester may file an appeal pursuant to the procedures set forth in paragraph (i) of this section, and the FDIC shall respond to the appeal within ten (10) working days after receipt of the appeal.

\* \* \* \* \*

(6) *Checking status of request.* A requester may check on the status of a request using the tracking number assigned to the request to obtain information about the request including the date on which the FDIC originally received the request and an estimated date on which the FDIC will complete action on the request. The status of a request may be obtained (a) online at the FDIC's FOIA Service Center, at <http://www.fdic.gov>, if the request was submitted electronically using the FDIC's online FOIA request form, or (b) by calling the FDIC's FOIA Service Center at (202) 898-7021, if the request was submitted by e-mail, facsimile or regular mail.

(7) *Notification.*

\* \* \* \* \*

(8) *Response to request.* \* \* \*

\* \* \* \* \*

(iii) The right of the requester to seek assistance from the FDIC's FOIA Public Liaison;  
and

(iv) \* \* \*

(C) The exemptions relied on for the denial;

(D) The right of the requester to appeal the denial to the FDIC's General Counsel within 90 calendar days following receipt of the notification, as specified in paragraph (i) of this section; and

(E) The right of the requester to seek dispute resolution services from the FDIC's FOIA Public Liaison and/or the Office of Government Information Services (OGIS).

(f) \* \* \*

(1) \* \* \*

(x) As part of the initial request, a requester may ask that the FDIC waive or reduce fees if disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Determinations as to a waiver or reduction of fees will be made by the FOIA/PA Group, Legal Division (or designee) and the requester will be notified in writing of his/her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph may be appealed to the FDIC's General Counsel (or designee) pursuant to the procedure set forth in paragraph (i) of this section.

(g) \* \* \*

(3) Records specifically exempted from disclosure by statute, provided that such statute:

(i)(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(ii) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. 552(b)(3);

\* \* \* \* \*

(h) *Dispute resolution.* A requester seeking to engage in dispute resolution may make a request to the FOIA Public Liaison and/or OGIS by following the procedures set forth online in the FDIC's FOIA Service Center at <http://www.fdic.gov>.

(i) \* \* \*

(2) A person whose initial request for records under this section, or whose request for a waiver of fees under paragraph (f)(1)(x) of this section, has been denied, either in part or in whole, has the right to appeal the denial to the FDIC's General Counsel (or designee) within 90 calendar days after receipt of notification of the denial. Appeals of denials of initial requests or for a waiver of fees must be in writing and include any additional information relevant to consideration of the appeal.

\* \* \* \* \*

Dated at Washington, DC, this \_\_\_ day of November, 2016

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

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**Robert E. Feldman,**  
*Executive Secretary*