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FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1301

RIN 4030-AA02

Implementation of the Freedom of Information Act

AGENCY: Financial Stability Oversight Council.

ACTION: Final rule.

SUMMARY: The Financial Stability Oversight Council (the “Council” or “FSOC”) issues this rule to implement provisions of the Freedom of Information Act (the “FOIA”). This final rule implements the requirements of the FOIA by setting forth procedures for requesting access to, and making disclosures of, information contained in Council records.

DATES: Effective date: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Amias Gerety, Deputy Assistant Secretary, Financial Stability Oversight Council, at (202) 622-0502.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (the “Act”) establishes the Council, which, among other functions, is responsible for identifying and responding to threats to the financial stability of the United States. Section 112(d)(5)(C) of the Act provides that the FOIA, “including the exceptions thereunder, shall apply to any data or information submitted under this subsection and subtitle B.”

On March 28, 2011 (76 FR 17038), the Council published a proposed rule that would implement the requirements of the FOIA as they apply to the Council. The proposed rule, among other things, described how information would be made available and the timing and procedures for public requests. See the March 28, 2011 notice for a description of the proposed rule.

II. This Final Rule and Discussion of Public Comments

The comment period closed on May 27, 2011, and the Council received comments from nine entities on the proposed rule. Comments were received from an insurance company, trade associations, a federal government agency, and consumer groups. This section of the preamble sets out significant comments raised, along with FSOC’s responses to these comments, and identifies where the Council has made changes to the regulations.

Several commenters indicated that it was unclear whether FOIA requests could be submitted by electronic means. In response, the regulation has been modified throughout to clarify that FOIA requests may be submitted via the Internet and that online methods may be used throughout the FOIA process. Although it is likely that the Council will initially rely on a

Web form to enable electronic receipt of FOIA requests, the Council anticipates that, eventually, e-mail requests also could be accommodated.

Section 1301.2, as proposed, stated that, even though a FOIA exemption might apply, the Council could make discretionary disclosures if not precluded by law. Some commenters expressed concern that this provision would give the Council unfettered discretion and would result in the unnecessary disclosure of sensitive information. The Council is sympathetic to these concerns and, as suggested by the commenters, has modified the language to make clear that the Council will make discretionary disclosures after weighing the particular facts and circumstances of each request. In considering requests under the FOIA, the Council will carefully consider the balance between protecting sensitive information in accordance with the FOIA, and the public interest in disclosure. It will also take steps to assure consistent handling of multiple requesters for the same information.

Some commenters expressed concern about what they perceived as overly-strict procedural requirements in § 1301.5. The Council has revised this section of the rule to explicitly afford greater latitude for accepting and processing requests that contain one or more technical deficiencies. In particular, § 1301.5(d), as added in the final rule, provides that the Council may not reject a request solely because the request contains one or more technical deficiencies. Moreover, the regulation now more clearly states that requesters will be notified when their requests fail to meet the requirements that allow for adequate and timely processing.

Some commenters suggested that § 1301.5 should also be modified to make clear that fee waiver requests do not necessarily need to be included with the original FOIA request. Rather, commenters urged the Council to allow fee-waiver requests to be submitted at any time prior to

the processing of the FOIA request. Accordingly, the Council modified § 1301.5(b)(7) to allow a requester to seek a fee waiver at a later time.

Regarding the procedures in § 1301.6 governing records originating from other agencies, some commenters suggested that referrals to other agencies be prohibited whereas others suggested that such referrals be required in all cases. The referral procedures as originally proposed are consistent with the statute and with case law, and FSOC has determined to retain those procedures. However, FSOC has modified §1301.6 to more clearly describe how it will treat documents originated by federal agencies and state agencies.

In § 1301.8, governing the format of the agency's response to FOIA requests and its description of the records withheld, some commenters objected to the use of the word "amount" rather than "volume," suggesting that FSOC would only be providing information regarding redactions within documents that were released and would not be providing information regarding the number of responsive documents withheld in their entirety. That was not FSOC's intention, and the language has been modified to address this concern.

It was also suggested that § 1301.8 be modified to make clear that fees being assessed by FSOC will be broken down by search, review, and duplication fees. This commenter also suggested that the Council include a brief description of the subject of the request in acknowledgement letters. The Council agrees and these changes have been incorporated in this final rule.

Two commenters provided views on § 1301.10 related to requests for business information. One commenter urged the Council to modify the provision to state that business

information provided by any submitter, not just a business submitter, should not be disclosed except as provided in § 1301.10. The Council agrees and has changed the references to “business submitter” to “submitter.” Another commenter recommended that the Council broaden the scope of protection of business information beyond Exemption 4 of the FOIA and eliminate the scaled-back notice in § 1301.10(d) if the number of submitters is voluminous. Although the FSOC appreciates these recommendations, it has determined that the proposed changes are not appropriate. The existing language is consistent with the FOIA and Executive Order 12600 (“Predisclosure notification procedures for confidential commercial information”). FSOC has, however, determined to omit the provision contained in § 1301.10(i)(4) of the proposed regulation that stated only limited notice would be provided if the designation made by the submitter appeared obviously frivolous. The omission is intended to simplify the predisclosure notification procedures.

Section 1301.11, governing administrative appeals, has been modified at the suggestion of the National Archives and Records Administration, Office of Government Information Services (“OGIS”), to remind requesters that OGIS’s mediation services are available as a non-exclusive alternative to litigation.

With respect to § 1301.12, governing fees for processing requests for Council records, several commenters expressed the view that the listed duplication fees in the proposed regulations were too high and did not reasonably reflect the likely costs of duplication. The Council agrees and has reduced the listed fees to accurately reflect the direct costs of duplication.

Some commenters proposed that the FSOC proactively post online the calendars and travel records for high-level FSOC officials. However, the highest-level FSOC officials are the

members of the Council, who generally are heads of other federal agencies. As such, the FSOC has concluded that this request is best directed, on a case-by-case basis, to the specific member agencies.

A couple of commenters proposed that the regulation should require the disclosure of all votes by members of the Council in Council proceedings. The Council has concluded that this is unnecessary because the Council is subject to the requirements of the FOIA, see 5 U.S.C. § 552(a)(5), as well as the Council’s official transparency policy, see <http://www.treasury.gov/initiatives/Documents/FSOCtransparencypolicy.pdf>.

Various other minor changes were made to the regulation – some in response to comments received. For example, in § 1301.7(e)(3), a sentence was added to indicate that if a request is disaggregated, the requester will be notified. In addition, the term “deletion” was replaced with the term “redaction” in § 1301.4, and the term “governmental entity” was removed from § 1301.12. Further, in § 1301.4, the reference to records “clearly of interest to the public at large” has been removed. Certain other suggestions from commenters were inconsistent with the requirements of the FOIA or outside the scope of this rulemaking and have not been adopted in this final rule.

III. Procedural matters

A. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule establishes procedures for access to Council records under the Freedom of

Information Act. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by the Council would be nominal and would not impose a significant economic impact on small entity requesters. Accordingly, a regulatory flexibility analysis is not required.

B. Executive Order 12866

This rule is not a significant regulatory action as defined in Section 3.f of Executive Order 12866.

List of Subjects in 12 CFR Part 1301

Freedom of Information

Financial Stability Oversight Council

Authority and Issuance

For the reasons set forth in the preamble, the Financial Stability Oversight Council adds a new part 1301 to 12 CFR chapter XIII to read as follows:

PART 1301 – FREEDOM OF INFORMATION

Sec.

- 1301.1 General.
- 1301.2 Information made available.
- 1301.3 Publication in the Federal Register.
- 1301.4 Public inspection and copying.
- 1301.5 Requests for Council records.
- 1301.6 Responsibility for responding to requests for Council records.
- 1301.7 Timing of responses to requests for Council records.
- 1301.8 Responses to requests for Council records.
- 1301.9 Classified information.
- 1301.10 Requests for business information provided to the Council.
- 1301.11 Administrative appeals.
- 1301.12 Fees for processing requests for Council records.

Authority: 12 U.S.C. 5322; 5 U.S.C. 552

§ 1301.1 General.

This subpart contains the regulations of the Financial Stability Oversight Council (the “Council”) implementing the Freedom of Information Act (“FOIA”), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to records maintained by the Council. These regulations should be read together with the FOIA, which provides additional information about this topic.

§ 1301.2 Information made available.

(a) General. The FOIA provides for access to records developed or maintained by a Federal agency. The provisions of the FOIA are intended to assure the right of the public to information. Generally, this section divides agency records into three major categories and provides methods by which each category of records is to be made available to the public. The three major categories of records are as follows:

(1) Information required to be published in the Federal Register (see § 1301.3);

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale (see § 1301.4); and

(3) Information required to be made available to any member of the public upon specific request (see §§ 1301.5 through 1301.12).

(b) Right of access. Subject to the exemptions and exclusions set forth in the FOIA (5 U.S.C. 552(b) and (c)), and the regulations set forth in this subpart, any person shall be afforded access to records.

(c) Exemptions. (1) The disclosure requirements of 5 U.S.C. 552(a) do not apply to certain records which are exempt under 5 U.S.C. 552(b); nor do the disclosure requirements apply to certain records which are excluded under 5 U.S.C. 552(c).

(2) Even though a FOIA exemption set forth in 5 U.S.C. 552(b) may apply to the record requested, the Council may, if not precluded by law, elect under the circumstances of that request not to apply the exemption. The fact that an exemption is not applied by the Council in response to a particular request shall have no precedential significance in processing other requests. This policy does not create any right enforceable in court.

§ 1301.3 Publication in the Federal Register.

Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)) and subject to the limitations provided in 5 U.S.C. 552(a)(1), the Council shall state, publish and maintain current in the Federal Register for the guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Council; and

(e) Each amendment, revision, or repeal of matters referred to in paragraphs (a) through (d) of this section.

§ 1301.4 Public inspection and copying.

(a) In general. Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall, in conformance with 5 U.S.C. 552(a)(2), make available for public inspection and copying, or, in the alternative, promptly publish and offer for sale:

(1) Final opinions, including concurring and dissenting opinions, and orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the Council but which are not published in the Federal Register;

(3) Its administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released previously to any person under 5 U.S.C. 552(a)(3) and §§ 1301.5 through 1301.12, and which the Council determines have become or are likely to become the subject of subsequent requests for substantially the same records. When the Council receives three (3) or more requests for

substantially the same records, then the Council shall place those requests in front of any existing processing backlog and make the released records available in the Council's public reading room and in the electronic reading room on the Council's website.

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) Information made available online. For records required to be made available for public inspection and copying pursuant to 5 U.S.C. 552(a)(2) and paragraphs (a)(1) through (4) of this section, the Council shall make such records available on its website as soon as practicable but in any case no later than one year after such records are created.

(c) Redaction. Based upon applicable exemptions in 5 U.S.C. 552(b), the Council may redact certain information contained in any matter described in paragraphs (a)(1) through (4) of this section before making such information available for inspection or publishing it. The justification for the redaction shall be explained in writing, and the extent of such redaction shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the redaction is made. If technically feasible, the extent of the redaction shall be indicated at the place in the record where the redaction was made.

(d) Public reading room. The Council shall make available for public inspection and copying, in a reading room or otherwise, the material described in paragraphs (a)(1) through (5) of this section. Fees for duplication shall be charged in accordance with § 1301.12. The location of the Council's reading room is the Department of the Treasury's Library. The Library is located in the Main Treasury Building, 1500 Pennsylvania Avenue, N.W., Washington, D.C.

20220. For building security purposes, visitors are required to make an appointment by calling (202) 622-0990.

(e) Indices. (1) The Council shall maintain and make available for public inspection and copying current indices identifying any material described in paragraphs (a)(1) through (3) of this section. In addition, the Council shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplement unless the Council determines by order published in the Federal Register that the publication would be unnecessary and impractical, in which case the Council shall nonetheless provide copies of the index on request at a cost not to exceed the direct cost of duplication.

(2) The Council shall make the indices referred to in paragraph (a)(5) and (e)(1) of this section available on its website.

§ 1301.5 Requests for Council records.

(a) In general. Except for records made available under 5 U.S.C. 552(a)(1) and (a)(2) and subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall promptly make its records available to any person pursuant to a request that conforms to the rules and procedures of this section.

(b) Form and content of request. A request for records of the Council shall be made as follows:

(1) The request for records shall be made in writing and submitted by mail or via the Internet and should state, both in the request itself and on any envelope that encloses it, that it

comprises a Freedom of Information Act (FOIA) request. A request that does not explicitly state that it is a FOIA request, but clearly indicates or implies that it is a request for records, may also be processed under the FOIA.

(2) If a request is sent by mail, it shall be addressed and submitted as follows: FOIA Request – Financial Stability Oversight Council, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington DC 20220. If a request is made via the Internet, it shall be submitted as set forth on the Council’s Web site.

(3) In order to ensure the Council’s ability to respond in a timely manner, a FOIA request must describe the records that the requester seeks in sufficient detail to enable Council personnel to locate them with a reasonable amount of effort. Whenever possible, the request must include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, the requester must include any file designations or descriptions for the records requested. In general, a requester is encouraged to provide more specific information about the records or types of records sought to increase the likelihood that responsive records can be located.

(4) The request shall include the name of and contact information for the requester, including a mailing address, telephone number, and, if available, an e-mail address at which the Council may contact the requester regarding the request.

(5) For the purpose of determining any fees that may apply to processing a request, a requester shall indicate in the request whether the requester is a commercial user, an educational institution, non-commercial scientific institution, representative of the news media, or “other”

requester, as those terms are defined in § 1301.12(c), or in the alternative, state how the records released will be used. The Council shall use this information solely for the purpose of determining the appropriate fee category that applies to the requester and shall not use this information to determine whether to disclose a record in response to the request.

(6) If a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect, pursuant to § 1301.12(f). Any request that does not seek a waiver or reduction of fees shall constitute an agreement of the requester to pay any and all fees (of up to \$25) that may apply to the request, unless or until a request for waiver is sought and granted. The requester also may specify in the request an upper limit (of not less than \$25) that the requester is willing to pay to process the request.

(i) Any request for waiver or reduction of fees should be filed together with or as part of the FOIA request, or at a later time prior to the Council incurring costs to process the request.

(ii) A waiver request submitted after the Council incurs costs will be considered in accordance with § 1301.12(f); however, the requester must agree in writing to pay the fees already incurred if the waiver is denied.

(7) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by § 1301.7(c).

(c) Request receipt; effect of request deficiencies. The Council shall deem itself to have received a request on the date that it receives a complete request containing the information required by paragraph (b) of this section. The Council need not accept a request, process a request, or be bound by any deadlines in this subpart for processing a request that fails materially

to conform to the requirements of paragraph (b) of this section. If the Council determines that it cannot process a request because the request is deficient, then the Council shall return it to the requester and advise the requester in what respect the request is deficient. The requester may then resubmit the request, which the Council shall treat as a new request. A determination by the Council that a request is deficient in any respect is not a denial of a request for records, and such determinations are not subject to appeal.

(d) Processing of request containing technical deficiency. Notwithstanding paragraph (c) of this section, the Council shall not reject a request solely due to one or more technical deficiencies contained in the request. For the purposes of this paragraph, the term “technical deficiency” means an error or omission with respect to an item of information required by paragraph (b) of this section which, by itself, does not prevent that part of the request from conforming to the applicable requirement, and includes without limitation a non-material error relating to the contact information for the requester, or similar error or omission regarding the date, title or name, author, recipient, or subject matter of the record requested.

§ 1301.6 Responsibility for responding to requests for Council records.

(a) In general. In determining which records are responsive to a request, the Council ordinarily will include only information contained in records that the Council maintains, or are in its possession and control, as of the date the Council begins its search for responsive records. If any other date is used, the Council shall inform the requester of that date.

(b) Authority to grant or deny requests. The records officer shall be authorized to make an initial determination to grant or deny, in whole or in part, a request for a record.

(c) Referrals. When the Council receives a request for a record or any portion of a record in its possession that originated with another agency, including but not limited to a constituent agency of the Council, it shall:

(1) In the case of a record originated by a federal agency subject to the FOIA, refer the responsibility for responding to the request regarding that record to the originating agency to determine whether to disclose it; and

(2) In the case of a record originated by a state agency, respond to the request after giving notice to the originating state agency and a reasonable opportunity to provide input or to assert any applicable privileges.

(d) Notice of referral. Whenever the Council refers all or any part of the responsibility for responding to a request to another agency, the Council shall notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred and of the part of the request that has been referred.

§ 1301.7 Timing of responses to requests for Council records.

(a) In general. Except as set forth in paragraphs (b) through (d) of this section, the Council shall respond to requests according to their order of receipt.

(b) Multitrack processing. (1) The Council may establish tracks to process separately simple and complex requests. The Council may assign a request to the simple or complex track based on the amount of work and/or time needed to process the request. The Council shall process requests in each track according to the order of their receipt.

(2) The Council may provide a requester in its complex track with an opportunity to limit the scope of the request to qualify for faster processing within the specified limits of the simple track(s).

(c) Requests for expedited processing. (1) The Council shall respond to a request out of order and on an expedited basis whenever a requester demonstrates a compelling need for expedited processing in accordance with the requirements of this paragraph (c).

(2) Form and content of a request for expedited processing. A request for expedited processing shall be made as follows:

(i) A request for expedited processing shall be made in writing or via the Internet and submitted as part of the initial request for records. When a request for records includes a request for expedited processing, both the envelope and the request itself must be clearly marked “Expedited Processing Requested.” A request for expedited processing that is not clearly so marked, but satisfies the requirements in §1301.7(c)(2)(ii) and (iii), may nevertheless be granted.

(ii) A request for expedited processing shall contain a statement that demonstrates a compelling need for the requester to obtain expedited processing of the requested records. A “compelling need” may be established under the standard in either paragraph (c)(2)(ii)(A) or (B) of this section by demonstrating that:

(A) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester shall fully explain the circumstances warranting such an expected threat so that the Council may make a reasoned determination that a delay in obtaining the requested records would pose such a threat; or

(B) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. A person “primarily engaged in disseminating information” does not include individuals who are engaged only incidentally in the dissemination of information. The standard of “urgency to inform” requires that the records requested pertain to a matter of current exigency to the American general public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

(iii) The requester shall certify the written statement that purports to demonstrate a compelling need for expedited processing to be true and correct to the best of the requester’s knowledge and belief. The certification must be in the form prescribed by 28 U.S.C. 1746: “I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date].”

(3) Determinations of requests for expedited processing. Within ten (10) calendar days of its receipt of a request for expedited processing, the Council shall decide whether to grant the request and shall notify the requester of the determination in writing.

(4) Effect of granting expedited processing. If the Council grants a request for expedited processing, then the Council shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable. The Council may assign expedited requests to their own simple and complex processing tracks based upon the amount of

work and/or time needed to process them. Within each such track, an expedited request shall be processed in the order of its receipt.

(5) Appeals of denials of requests for expedited processing. If the Council denies a request for expedited processing, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying expedited processing. The requester shall clearly mark its appeal request and any envelope that encloses it with the words “Appeal for Expedited Processing.”

(d) Time period for responding to requests for records. Ordinarily, the Council shall have twenty (20) days (excepting Saturdays, Sundays, and legal public holidays) from when a request that satisfies the requirements of § 1301.5(b) is received by the Council to determine whether to grant or deny a request for records. The twenty-day time period set forth in this paragraph shall not be tolled by the Council except that the Council may:

(1) Make one reasonable demand to the requester for clarifying information about the request and toll the twenty-day time period while it awaits the clarifying information; or

(2) Toll the twenty-day time period while awaiting receipt of the requester’s response to the Council’s request for clarification regarding the assessment of fees.

(e) Unusual circumstances. (1) In general. Except as provided in paragraph (e)(2) of this section, if the Council determines that, due to unusual circumstances, it cannot respond either to a request within the time period set forth in paragraph (d) of this section or to an appeal within the time period set forth in § 1301.11, the Council may extend the applicable time periods

by informing the requester in writing of the unusual circumstances and of the date by which the Council expects to complete its processing of the request or appeal. Any extension or extensions of time shall not cumulatively total more than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays).

(2) Additional time. If the Council determines that it needs additional time beyond a ten-day extension to process the request or appeal, then the Council shall notify the requester and provide the requester with an opportunity to limit the scope of the request or appeal or to arrange for an alternative time frame for processing the request or appeal or a modified request or appeal. The requester shall retain the right to define the desired scope of the request or appeal, as long as it meets the requirements contained in this part.

(3) As used in this paragraph (e), “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components or component offices having substantial subject matter interest therein.

(4) Where the Council reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated. The Council may disaggregate and treat as separate requests a single request that has multiple unrelated components. The Council shall notify the requester if a request is disaggregated.

§ 1301.8 Responses to requests for Council records.

(a) Acknowledgement of requests. Upon receipt of a request that meets the requirements of § 1301.5(b), the Council ordinarily shall assign to the request a unique tracking number and shall send an acknowledgement letter or e-mail to the requester that contains the following information:

- (1) A brief description of the request;
- (2) The applicable request tracking number;
- (3) The date of receipt of the request, as determined in accordance with § 1301.5(c); and
- (4) A confirmation, with respect to any fees that may apply to the request pursuant to § 1301.12, that the requester has sought a waiver or reduction in such fees, has agreed to pay any and all applicable fees, or has specified an upper limit (of not less than \$25) that the requester is willing to pay in fees to process the request.

(b) Initial determination to grant or deny a request. (1) In general. The Council records officer (as designated in § 1301.6(b)) shall make initial determinations to grant or to deny in whole or in part requests for records.

(2) Granting of request. If the request is granted in full or in part, the Council shall provide the requester with a copy of the releasable records, and shall do so in the format specified by the requester to the extent that the records are readily producible by the Council in the requested format. The Council also shall send the requester a statement of the applicable fees, broken down by search, review and duplication fees, either at the time of the determination or shortly thereafter.

(3) Denial of requests. If the Council determines that the request for records should be denied in whole or in part, the Council shall notify the requester in writing. The notification shall:

(i) State the exemptions relied on in not granting the request;

(ii) If technically feasible, indicate the volume of information redacted (including the number of pages withheld in part and in full) and the exemptions under which the redaction is made at the place in the record where such redaction is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(iii) Set forth the name and title or position of the responsible official;

(iv) Advise the requester of the right to administrative appeal in accordance with § 1301.11; and

(v) Specify the official or office to which such appeal shall be submitted.

(4) No records found. If it is determined, after an adequate search for records by the responsible official or his/her delegate, that no records could be located, the Council shall so notify the requester in writing. The notification letter also shall advise the requester of the right to administratively appeal the Council's determination that no records could be located (*i.e.*, to challenge the adequacy of the Council's search for responsive records) in accordance with § 1301.11. The response shall specify the official to whom the appeal shall be submitted for review.

§ 1301.9 Classified information.

(a) Referrals of requests for classified information. Whenever a request is made for a record containing information that has been classified, or may be appropriate for classification, by another agency under Executive Order 13526 or any other executive order concerning the classification of records, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by the Council because it contains information classified by another agency, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the underlying information or shall consult with that agency prior to processing the record for disclosure or withholding.

(b) Determination of continuing need for classification of information. Requests for information classified pursuant to Executive Order 13526 require the Council to review the information to determine whether it continues to warrant classification. Information which no longer warrants classification under the Executive Order's criteria shall be declassified and made available to the requester, unless the information is otherwise exempt from disclosure.

§ 1301.10 Requests for business information provided to the Council.

(a) In general. Business information provided to the Council by a submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) Definitions. For purposes of this section:

(1) Business information means information from a submitter that is trade secrets or other commercial or financial information that may be protected from disclosure under Exemption 4.

(2) Submitter means any person or entity from whom the Council obtains business information, directly or indirectly. The term includes corporations, state, local, and tribal governments, and foreign governments.

(3) Exemption 4 means Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(c) Designation of business information. A submitter of business information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten (10) years after the date of the

submission unless the submitter on his or her own initiative requests otherwise, and provides justification for, a longer designation period.

(d) Notice to submitters. The Council shall provide a submitter with prompt written notice of receipt of a request or appeal encompassing the business information of the submitter whenever required in accordance with paragraph (e) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information. When a voluminous number of submitters must be notified, the Council may post or publish such notice in a place reasonably likely to accomplish such notification.

(e) When notice is required. The Council shall provide a submitter with notice of receipt of a request or appeal whenever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) The Council has reason to believe that the information may be protected from disclosure under Exemption 4 because disclosure could reasonably be expected to cause substantial competitive harm to the submitter.

(f) Opportunity to object to disclosure. (1) Through the notice described in paragraph (d) of this section, the Council shall notify the submitter in writing that the submitter shall have ten (10) days from the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays) to provide the Council with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under Exemption 4, including a

statement of why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. In the event that the submitter fails to respond to the notice within the time specified, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a submitter pursuant to this paragraph (f) may itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the Council shall advise the requester that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the Council shall invite the requester to agree to an extension of time so that the Council may review the submitter's objection to disclosure.

(g) Notice of intent to disclose. The Council shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information responsive to the request. If the Council decides to disclose business information over the objection of a submitter, the Council shall provide the submitter with a written notice which shall include:

(1) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date which is not less than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of the final decision to release the

requested information has been provided to the submitter. Except as otherwise prohibited by law, notice of the final decision to release the requested information shall be forwarded to the requester at the same time.

(h) Notice of FOIA lawsuit. Whenever a requester brings suit seeking to compel disclosure of business information covered in paragraph (c) of this section, the Council shall promptly notify the submitter.

(i) Exception to notice requirement. The notice requirements of this section shall not apply if:

(1) The Council determines that the information shall not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public; or

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1987 Comp., p. 235).

§ 1301.11 Administrative appeals.

(a) Grounds for administrative appeals. A requester may appeal an initial determination of the Council, including but not limited to a determination:

(1) To deny access to records in whole or in part (as provided in § 1301.8(b)(4));

(2) To assign a particular fee category to the requester (as provided in § 1301.12(c));

(3) To deny a request for a reduction or waiver of fees (as provided in § 1301.12(f)(7));

(4) That no records could be located that are responsive to the request (as provided in § 1301.8(b)(5)); or

(5) To deny a request for expedited processing (as provided in § 1301.7(c)(5)).

(b) Time limits for filing administrative appeals. An appeal, other than an appeal of a denial of expedited processing, must be submitted within thirty-five (35) days of the date of the initial determination or the date of the letter transmitting the last records released, whichever is later. An appeal of a denial of expedited processing must be made within ten (10) days of the date of the initial determination to deny expedited processing (see § 1301.7).

(c) Form and content of administrative appeals. The appeal shall—

(1) Be made in writing or via the Internet;

(2) Be clearly marked on the appeal request and any envelope that encloses it with the words “Freedom of Information Act Appeal” and addressed to Financial Stability Oversight Council, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington DC 20220;

(3) Set forth the name of and contact information for the requester, including a mailing address, telephone number, and, if available, an e-mail address at which the Council may contact the requester regarding the appeal;

(4) Specify the date of the initial request and date of the letter of initial determination, and, where possible, enclose a copy of the initial request and the initial determination being appealed; and

(5) Set forth specific grounds for the appeal.

(d) Processing of administrative appeals. Appeals shall be stamped with the date of their receipt by the office to which addressed, and shall be processed in the approximate order of their receipt. The receipt of the appeal shall be acknowledged by the Council and the requester advised of the date the appeal was received and the expected date of response.

(e) Determinations to grant or deny administrative appeals. The Chairperson of the Council or his/her designee is authorized to and shall decide whether to affirm or reverse the initial determination (in whole or in part), and shall notify the requester of this decision in writing within twenty (20) days (exclusive of Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal, unless extended pursuant to § 1301.7(e).

(1) If it is decided that the appeal is to be denied (in whole or in part) the requester shall be—

(i) Notified in writing of the denial;

(ii) Notified of the reasons for the denial, including the FOIA exemptions relied upon;

(iii) Notified of the name and title or position of the official responsible for the determination on appeal;

(iv) Provided with a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia in accordance with 5 U.S.C. 552(a)(4)(B); and

(v) Provided with notification that mediation services may be available to the requester as a non-exclusive alternative to litigation through the Office of Government Information Services in accordance with 5 U.S.C. 552(h)(3).

(2) If the Council grants the appeal in its entirety, the Council shall so notify the requester and promptly process the request in accordance with the decision on appeal.

§ 1301.12 Fees for processing requests for Council records.

(a) In general. The Council shall charge the requester for processing a request under the FOIA in the amounts and for the services set forth in paragraph (b) through (d) of this section, except if a waiver or reduction of fees is granted under paragraph (f) of this section, or if, pursuant to paragraph (e)(4) of this section, the failure of the Council to comply with certain time limits precludes it from assessing certain fees. No fees shall be charged if the amount of fees incurred in processing the request is below \$25.

(b) Fees chargeable for specific services. The fees for services performed by the Council shall be imposed and collected as set forth in this paragraph (b).

(1) Duplicating records. The Council shall charge a requester fees for the cost of copying records as follows:

- (i) \$.15 per page, up to 8 ½ x 14", made by photocopy or similar process.
- (ii) Photographs, films, and other materials – actual cost of duplication.
- (iii) Other types of duplication services not mentioned above – actual cost.
- (iv) Material provided to a private contractor for copying shall be charged to the requester at the actual cost charged by the private contractor.

(2) Search services. The Council shall charge a requester for all time spent by its employees searching for records that are responsive to a request, including page-by-page or line-by-line identification of responsive information within records, even if no responsive records are found. The Council shall charge the requester fees for search time as follows:

(i) Searches for other than electronic records. The Council shall charge for search time at the salary rate(s) (basic pay plus sixteen (16) percent) of the employee(s) who conduct the search. This charge shall also include transportation of employees and records at actual cost. Fees may be charged for search time even if the search does not yield any responsive records, or if records are exempt from disclosure.

(ii) Searches for electronic records. The Council shall charge the requester for the actual direct cost of the search, including computer search time, runs, and the operator's salary. The fee for computer output shall be the actual direct cost. For a requester in the "other" category, when the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search (*i.e.*, the operator), the charge for the computer search will begin.

(3) Review of records. The Council shall charge a requester for time spent by its employees examining responsive records to determine whether any portions of such record are withholdable from disclosure, pursuant to the FOIA exemptions of 5 U.S.C. 552(b). The Council shall also charge a requester for time spent by its employees redacting any such withholdable information from a record and preparing a record for release to the requester. The Council shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.*, basic pay plus sixteen (16) percent) of the employees who conduct the review. Fees may be charged for review time even if records ultimately are not disclosed.

(4) Inspection of records in the reading room. Fees for all services provided shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records.

(5) Other services. Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at the actual cost to the Council. Charges permitted under this paragraph may include:

(i) Certifying that records are true copies; and

(ii) Sending records by special methods (such as by express mail, etc.).

(c) Fees applicable to various categories of requesters. (1) Generally. The Council shall assess the fees set forth in paragraph (b) of this section in accordance with the requester fee categories set forth below.

(2) Requester selection of fee category. A requester shall identify, in the initial FOIA request, the purpose of the request in one of the following categories:

(i) Commercial. A commercial use request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The Council may determine from the use specified in the request that the requester is a commercial user.

(ii) Educational institution. This refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. This category does not include requesters seeking records for use in meeting individual academic research or study requirements.

(iii) Non-commercial scientific institution. This refers to an institution that is not operated on a “commercial” basis, as that term is defined in paragraph (c)(2)(i) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(iv) Representative of the news media. This refers to 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. In this paragraph (c)(2)(iv), 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 subscription or by 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 shall be considered to be news media entities. A freelance journalist shall 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 the entity. A publication contract would present a solid basis for such an expectation; the Council may also consider the past publication record of the requester in making such a determination.

(v) Other Requester. This refers to a requester who does not fall within any of the categories described in paragraphs (c)(2)(i)-(iv) of this section.

(d) Fees applicable to each category of requester. The Council shall apply the fees set forth in this paragraph, for each category described in paragraph (c) of this section, to requests processed by the Council under the FOIA.

(1) Commercial use. A requester seeking records for commercial use shall be charged the full direct costs of searching for, reviewing, and duplicating the records they request as set forth in paragraph (b) of this section. Moreover, when a request is received for disclosure that is primarily in the commercial interest of the requester, the Council is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the

public interest. The Council may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records or no records are located.

(2) Educational and non-commercial scientific uses. A requester seeking records for educational or non-commercial scientific use shall be charged only for the cost of duplicating the records they request, except that the Council shall provide the first one hundred (100) pages of duplication free of charge. To be eligible, the requester must show that the request is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. These categories do not include a requester who seeks records for use in meeting individual academic research or study requirements.

(3) News media uses. A requester seeking records under the news media use category shall be charged only for the cost of duplicating the records they request, except that the Council shall provide the requester with the first one hundred (100) pages of duplication free of charge.

(4) Other requests. A requester seeking records for any other use shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, as set forth in paragraph (b) of this section, except that the Council shall provide the first one hundred (100) pages of duplication and the first two hours of search time free of charge. The Council may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located. (e) Other circumstances when fees are not charged. Notwithstanding paragraphs (b), (c), and (d) of this section, the Council may not charge a requester a fee for processing a FOIA request if—:

(1) Services were performed without charge;

(2) The cost of collecting a fee would be equal to or greater than the fee itself;

(3) The fees were waived or reduced in accordance with paragraph (f) of this section; or

(4) The Council fails to comply with any time limit under §§ 1301.7 or 1301.11, and no unusual circumstances (as that term is defined in § 1301.7(e)) or exceptional circumstances apply to the processing of the request; or

(5) The requester is an educational or noncommercial scientific institution or a representative of the news media (as described in paragraphs 1301.12(c)(2)(ii)-(iv) of this section), then the Council shall not assess the duplication fees.

(f) Waiver or reduction of fees. (1) A requester shall be entitled to receive from the Council a waiver or reduction in the fees otherwise applicable to a FOIA request whenever the requester:

(i) Requests such waiver or reduction of fees in writing and submits the written request to the Council together with or as part of the FOIA request, or at a later time consistent with § 1301.5(b)(7) to process the request; and

(ii) Demonstrates that the fee reduction or waiver request is in the public interest because:

(A) Furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Furnishing the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the requirements of paragraph (f)(1)(ii)(A) of this section, the Council shall consider:

(i) The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated;

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding;

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(3) To determine whether the requester satisfies the requirement of paragraph (f)(1)(ii)(B) of this section, the Council shall consider:

(i) Any commercial interest of the requester (with reference to the definition of “commercial use” in § 1301.12(c)(2)(i)), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. In the administrative process, a requester may provide explanatory information regarding this consideration; and

(ii) Whether the public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Council ordinarily shall presume that, if a news media requester satisfies the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver or reduction of fees, a waiver or reduction shall be granted for those records.

(5) Determination of request to reduce or waive fees. The Council shall notify the requester in writing regarding its determinations to reduce or waive fees.

(6) Effect of denying request to reduce or waive fees. If the Council denies a request to reduce or waive fees, then the Council shall advise the requester, in the denial notification letter, that the requester may incur fees as a result of processing the request. In the denial notification letter, the Council shall advise the requester that the Council will not proceed to process the request further unless the requester, in writing, directs the Council to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than \$25) that the requester is willing to pay to process the request. If the Council does not receive

this written direction and agreement/specification within thirty (30) days of the date of the denial notification letter, then the Council shall deem the FOIA request to be withdrawn.

(7) Appeals of denials of requests to reduce or waive fees. If the Council denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester shall clearly mark its appeal request and any envelope that encloses it with the words “Appeal for Fee Reduction/Waiver.”

(g) Notice of estimated fees; advance payments. (1) When the Council estimates the fees for processing a request will exceed the limit set by the requester, and that amount is less than \$250, the Council shall notify the requester of the estimated costs, broken down by search, review and duplication fees. The requester must provide an agreement to pay the estimated costs, except that the requester may reformulate the request in an attempt to reduce the estimated fees.

(2) If the requester fails to state a limit and the costs are estimated to exceed \$250, the requester shall be notified of the estimated costs, broken down by search, review and duplication fees, and must pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. Alternatively, the requester may reformulate the request in such a way as to constitute a request for responsive records at a reduced fee.

(3) The Council reserves the right to request advance payment after a request is processed and before records are released.

(4) If a requester previously has failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or the pending request.

(5) When the Council acts under paragraphs (g)(1) through (4) of this section, the administrative time limits of twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) from receipt of initial requests or appeals, plus extensions of these time limits, shall begin only after any applicable fees have been paid (in the case of (g)(2), (g)(3), or (g)(4)), a written agreement to pay fees has been provided (in the case of (g)(1)), or a request has been reformulated (in the case of (g)(1) or (g)(2)).

(h) Form of payment. Payment may be made by check or money order paid to the Treasurer of the United States.

(i) Charging interest. The Council may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Council. The Council will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) Aggregating requests. If the Council reasonably determines that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Council may aggregate those requests and charge accordingly. The Council may presume that multiple requests involving related matters submitted within a thirty (30) calendar day period have been made in order to avoid fees. The Council shall not aggregate multiple requests involving unrelated matters.

Dated: _____, 2012_____

Alastair Fitzpayne
Deputy Chief of Staff and Executive Secretary,
Department of the Treasury