

## **FEDERAL RESERVE SYSTEM**

### **12 CFR PART 261**

**Docket No. R-1556 RIN 7100 AE 65**

#### **RULES REGARDING AVAILABILITY OF INFORMATION**

**AGENCIES:** Board of Governors of the Federal Reserve System (“Board”)

**ACTION:** Interim Final Rule and Request for Comment.

**SUMMARY:** The Board is adopting, and inviting comment on, an interim final rule to amend its regulations for processing requests under the Freedom of Information Act (“FOIA”) pursuant to the FOIA Improvement Act of 2016 (the “Act”). The amendments clarify and update procedures for requesting information from the Board, extend the deadline for administrative appeals, and add information on dispute resolution services.

**DATES:** This interim final rule is effective December 27, 2016. Comments should be received on or before [60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

You may submit comments, identified by Docket No. R-1556 and RIN No. 7100 AE-65, by any of the following methods:

- Agency Web Site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.
- Fax: (202) 452-3819 or (202) 452-3102.
- Mail: Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street (between 18th and 19th Streets NW) Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:**

*Board:* Katherine Wheatley, Associate General Counsel, (202) 452-3779; or Misty Mirpuri, Senior Attorney, (202) 452-2597; Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, D.C. 20551.

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

This interim rule reflects changes to the Board’s Rules Regarding Availability of Information (“Board’s Rules”) required by the FOIA Improvement Act of 2016 (the “Improvement Act”).<sup>1</sup> The Improvement Act addresses a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process. Accordingly, the Board is adopting this interim final rule to comply with the statutory requirements of the Improvement Act.

### **II. Description of the Final Rule**

This interim final rule makes conforming amendments throughout part 261 of the Board’s Rules to adopt the statutory exemptions and exceptions required by the Improvement Act. It also explains general policies and procedures for requesters seeking access to records and for processing requests by the Board’s Freedom of Information Office.

*Section 261.10 — Published information.* The Improvement Act requires agencies to make certain records available in an electronic format. Thus,

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<sup>1</sup> Pub. L. 114–185, 130 Stat. 538 (2016).

we are amending this section to include language that the Index to Board Actions will be maintained in an electronic format. In addition, we are removing the reference to the pedestrian entrance for Publications Services because it is no longer accurate.

*Section 261.11 — Records available for public inspection.* We are amending this section, including its heading, to clarify when and how the Board's records will be available for public inspection. Specifically, we are removing references to "copying" and adding in the text of the rule that records will be available "in an electronic format" to reflect the Improvement Act's change.<sup>2</sup> We are also removing outdated information about records created after 1996 and incorrect information about procedures for obtaining certain reporting forms from the National Technical Information Service. As required by the Improvement Act, this section will now also provide that the Board will make available for public inspection records that have been released under section 261.12 and have been requested three or more times.

*Section 261.12 — Records available to public upon request.* We are amending this section to remove one of the Board's FOI Office's

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<sup>2</sup> 5 U.S.C. 552(a)(2).

incorrect facsimile number and adding the Board’s website address for individuals to submit FOIA requests to the Board online.

*Section 261.13 — Processing requests.* We are amending this section to describe the process for the Board to extend its time for response in unusual circumstances. We are also adding language reflecting that all responses to FOIA requests will advise the requester of his or her right to seek assistance from the Board’s FOIA Public Liaison. In keeping with the language of FOIA, the new language refers to “adverse determinations” rather than “denials.” The new language describes adverse determinations that may be appealed, and extends the time for appeal from 10 days to 90 days in accordance with the Improvement Act. The revised language also provides that when making an adverse determination, the Board will advise the requester of the right to seek dispute resolution services from the Board’s FOIA Public Liaison or from the Office of Government Information Services. We are also adding an e-mail address for requesters to submit an appeal to the Board.

*Section 261.14 — Exemptions from disclosure.* We are adding language to state that the Board will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date on which the records were requested, and that the Board will

withhold records only when it reasonably foresees that disclosure would harm an interest protected by an exemption described in the section, as required by the Improvement Act.

*Section 261.17 — Fee schedules; waiver of fees.* We are amending this section to provide restrictions on the Board’s ability to charge fees as required by the Improvement Act.

The Board notes that the Improvement Act provides federal agencies with no discretion in the implementation of the rule, and requires that conforming amendments to agency-specific rules become effective within 180 days of the Act’s enactment. Accordingly, this interim rule is final and effective on December 27, 2016. The Board is providing an opportunity for comment and will address any comments received in a subsequent rulemaking.

### **III. Administrative Law Matters**

#### *Administrative Procedure Act*

This rule is not subject to the provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. 553, requiring notice, public participation, and deferred effective date. The FOIA Improvement Act of 2016 provides federal agencies with no discretion in the implementation of the substantive amendments made in this rule, and it also requires that conforming amendments to agency-specific

rules become effective as of December 27, 2016. For these reasons, the Board finds good cause to determine that public notice and comment for these amendments is unnecessary, impracticable, or contrary to the public interest, pursuant to the APA, 5 U.S.C. 553(b)(B), and that good cause exists to dispense with a deferred effective date pursuant to 5 U.S.C. 553(d)(3). The Board is providing, however, an opportunity for comment and will address any comments received in the final rule that adopts the interim rule as final.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., applies only to rules for which an agency publishes a general notice of proposed rulemaking. Because the Board has determined for good cause that a notice of proposed rulemaking for this rule is unnecessary, the Regulatory Flexibility Act does not apply to this final rule.

#### *Paperwork Reduction Act Analysis*

There is no collection of information required by this interim final rule that would be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

## *Plain Language*

Section 722 of the Gramm-Leach-Bliley Act requires each federal banking agency to use plain language in all rules published after January 1, 2000. In light of this requirement, the Board believes this interim rule is presented in a simple and straightforward manner and is consistent with this “plain language” directive.

## **List of Subjects**

### **12 CFR Part 261**

Administrative practice and procedure, Confidential business information, Freedom of information, Reporting and recordkeeping requirements

## **BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

### 12 CFR Chapter II

### **Authority and Issuance**

For the reasons set forth in the **SUPPLEMENTARY INFORMATION**, the Board of Governors of the Federal Reserve System amends 12 CFR chapter II as follows:

### **PART 261 — RULES REGARDING AVAILABILITY OF INFORMATION**

1. The authority citation for part 261 continues to read as follows:



**Authority:** 5 U.S.C. 552; 12 U.S.C. 248(i) and (k), 321 et seq., 611 et seq., 1442, 1467a, 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o), 1821(t), 1830, 1844, 1951 et seq., 2601, 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq.; 15 U.S.C. 77uuu(b), 78q(c)(3); 29 U.S.C. 1204; 31 U.S.C. 5301 et seq.; 42 U.S.C. 3601; 44 U.S.C. 3510.

2. In § 261.10 paragraphs (e) and (f) are amended as follows:

**§261.10 Published information.**

\* \* \* \* \*

(e) Index to Board actions. The Board's Freedom of Information Office maintains, in electronic format, an index to Board actions, which is updated weekly and provides identifying information about any matters issued, adopted, and promulgated by the Board since July 4, 1967. Copies of the index may be obtained upon request to the Freedom of Information Office subject to the current schedule of fees in §261.17.

(f) Obtaining Board publications. The Publications Services Section maintains a list of Board publications that are available to the public. In addition, a partial list of publications is published in the Federal Reserve Bulletin. All publications issued by the Board, including available back issues, may be obtained from Publications Services, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Subscription or other charges may apply to some publications.

3. In § 261.11,

(A) The heading is amended.

(B) Paragraphs (a) and (b)(1) are amended, and paragraphs (a)(4) and (c) are revised, to read as follows:

**§261.11 Records available for public inspection**

(a) Types of records made available. Unless they were published promptly and made available for sale or without charge, the following records shall be made available for inspection in an electronic format:

\* \* \* \* \*

(4) Copies of all records, regardless of form or format –

(i) That have been released to any person under § 261.12; and

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

(B) That have been requested three or more times;

\* \* \* \* \*

(b)(1) Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551.

(2) \* \* \*

(c) Privacy protection. The Board may delete identifying details from any record to prevent a clearly unwarranted invasion of personal privacy.

4. In § 261.12, paragraph (b)(2) is amended to read as follows:

**§261.12 Records available to public upon request.**

\* \* \* \* \*

(b)(2) The request shall be submitted in writing to the Freedom of Information Office, Board of Governors of the Federal Reserve System, 20th & C Street, N.W., Washington, D.C. 20551; or sent by facsimile to the Freedom of Information Office, (202) 872-7565; or submitted electronically

to <http://www.federalreserve.gov/forms/efoiaform.aspx>. The request shall be clearly marked FREEDOM OF INFORMATION ACT REQUEST.

(3) \* \* \*

\* \* \* \* \*

5. In § 261.13, paragraphs (e)(3), (f)(4), and (f)(5) are revised, and paragraphs (i), (i)(1), and (i)(3) are amended. The revisions and amendments read as follows:

**§ 261.13 Processing requests.**

\* \* \* \* \*

(e) (3) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), the Board may:

(i) Extend the 20-day time limit for a period of time not to exceed 10 working days, where the Board has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; and

(ii) Extend the 20-day time limit for a period of more than 10 working days where the Board has provided the requester with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or with an opportunity to arrange an alternative time frame for processing the original request or a modified request, and has notified the requester that the Board's FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Board and of the requester's right to seek dispute resolution services from the Office of Government Information Services.

(f) \* \* \*

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

(5) When an adverse determination is made (including determinations that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; the requested record is not readily reproducible in the form or format sought by the requester; deny fee waiver requests or other fee categorization matters; and deny requests for expedited processing), the Secretary will advise the requester in writing of that determination and will further advise the requester of: -

(i) The right of the requester to appeal to the Board any adverse determination within 90 days after the date of the determination as specified in paragraph (i) of this section;

(ii) The right of the requester to seek dispute resolution services from the Board's FOIA Public Liaison or the Office of Government Information Services; and

(iii) The name and title or position of the person responsible for the adverse determination.

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(i) Appeal of an adverse determination. In the case of an adverse determination, the requester may file a written appeal with the Board, as follows:

(1) The appeal shall prominently display the phrase FREEDOM OF INFORMATION ACT APPEAL on the first page, and shall be addressed to the Freedom of Information Office, Board of Governors of the Federal Reserve System, 20th & C Streets, N.W., Washington, D.C. 20551; or sent by facsimile to the Freedom of Information Office, (202) 872-7562 or 7565; or sent by e-mail to [FOIA-Appeals@frb.gov](mailto:FOIA-Appeals@frb.gov).

(2) \* \* \*

(3) The appeal shall be filed within 90 days of the date on which the adverse determination was issued, or the date on which documents in

partial response to the request were transmitted to the requester, whichever is later. The Board may consider an untimely appeal if:

(i) \* \* \*

(ii) \* \* \*

\* \* \* \* \*

6. In § 261.14, paragraph (a) is amended to read as follows:

**§261.14 Exemptions from disclosure.**

(a) Types of records exempt from disclosure. Pursuant to 5 U.S.C. 552(b), the following records of the Board are exempt from disclosure under this part. The Board shall withhold records or information only when it reasonably foresees that disclosure would harm an interest protected by an exemption described in this paragraph 261.14(a) or when disclosure is prohibited by law. In applying the exemption in subparagraph (a)(5) of this section, the Board will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date on which the records were requested.

\* \* \* \* \*

7. In § 261.17, paragraph (i) is added to read as follows:

**§261.17 Fee schedules; waiver of fees.**

\* \* \* \* \*

(i) Restrictions on charging fees.

(1) If the Board fails to comply with the FOIA's time limits in which to respond to a request, the Board may not charge search fees, or, in the instances of requests from requesters described in paragraph (c)(2) of this

section, may not charge duplication fees, except as permitted under subparagraphs (2) through (4) of this paragraph.

(2) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. § 552(a)(6)(B), and has provided timely written notice to the requester and subsequently responds within the additional 10 working days as provided in § 261.13(e)(3), the Board may charge search fees, or, in the case of requests from requesters described in paragraph (c)(2) of this section, may charge duplication fees.

(3) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. § 552(a)(6)(B), and more than 5,000 pages are necessary to respond to the request, then the Board may charge search fees, or, in the case of requesters described in paragraph (c)(2) of this section, may charge duplication fees, if the Board has:

(i) Provided timely written notice to the requester in accordance with the FOIA; and

(ii) Discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. § 552(a)(6)(B)(ii).

(4) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

**By order of the Board of Governors of the Federal Reserve System, December 15, 2016.**

*Robert deV. Frierson (signed)*

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**Robert deV. Frierson,  
Secretary of the Board.**