

purposes of each disclosure of a record to any person or agency. Such accounting also shall contain the name and address of the person or agency to whom or to which each disclosure was made. This log will not include disclosures made to Board employees or agents in the course of their official duties or pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552).

(b) An accounting of each disclosure shall be retained for at least five years after the accounting is made or for the life of the record that was disclosed, whichever is longer.

(c) The Board shall make the accounting of disclosure of a record pertaining to an individual available to that individual at his or her request. Such a request should be made in accordance with the procedures set forth in § 200.5. This paragraph (c) does not apply to disclosure made for law enforcement purposes under 5 U.S.C. 552a(b)(7) and § 200.10(a)(7).

#### **§ 200.12 Notification of systems of Privacy Act records.**

(a) Public Notice. The Board periodically reviews its systems of records and will publish information about any significant additions or changes to those systems in the **Federal Register**. Information about systems of records maintained by other agencies that are in the temporary custody of the Board will not be published. In addition, the Office of the Federal Register biennially compiles and publishes all systems of records maintained by all federal agencies, including the Board.

(b) At least 30 days before publishing additions or changes to the Board's systems of records, the Board will publish a notice of intent to amend, providing the public with an opportunity to comment on the proposed amendments to its systems of records in the **Federal Register**.

#### **§ 200.13 Privacy Act training.**

(a) The Board shall ensure that all persons involved in the design, development, operation, or maintenance of any Board systems of records are informed of all requirements necessary to protect the privacy of individuals. The Board shall ensure that all employees having access to records receive adequate training in their protection and that records have adequate and proper storage with sufficient security to ensure their privacy.

(b) All employees shall be informed of the civil remedies provided under 5 U.S.C. 552a(g)(1) and other implications

of the Privacy Act and of the fact that the Board may be subject to civil remedies for failure to comply with the provisions of the Privacy Act and the regulations in this part.

#### **§ 200.14 Responsibility for maintaining adequate safeguards.**

The Board has the responsibility for maintaining adequate technical, physical, and security safeguards to prevent unauthorized disclosure or destruction of manual and automated records systems. These security safeguards shall apply to all systems of records in which identifiable personal data are processed or maintained, including all reports and output from such systems of records that contain identifiable personal information. Such safeguards must be sufficient to prevent negligent, accidental, or unintentional disclosure, modification, or destruction of any personal records or data; must minimize, to the extent practicable, the risk that skilled technicians or knowledgeable persons could improperly obtain access to modify or destroy such records or data; and shall further ensure against such casual entry by unskilled persons without official reasons for access to such records or data.

(a) *Manual systems.* (1) Records contained in a system of records as defined in this part may be used, held, or stored only where facilities are adequate to prevent unauthorized access by persons within or outside the Board.

(2) Access to and use of a system of records shall be permitted only to persons whose duties require such access to the information for routine uses or for such other uses as may be provided in this part.

(3) Other than for access by employees or agents of the Board, access to records within a system of records shall be permitted only to the individual to whom the record pertains or upon his or her written request.

(4) The Board shall ensure that all persons whose duties require access to and use of records contained in a system of records are adequately trained to protect the security and privacy of such records.

(5) The disposal and destruction of identifiable personal data records shall be done by shredding and in accordance with rules promulgated by the Archivist of the United States.

(b) *Automated systems.* (1) Identifiable personal information may be processed, stored, or maintained by automated data systems only where facilities or conditions are adequate to prevent unauthorized access to such systems in any form.

(2) Access to and use of identifiable personal data associated with automated data systems shall be limited to those persons whose duties require such access. Proper control of personal data in any form associated with automated data systems shall be maintained at all times, including maintenance of accountability records showing disposition of input and output documents.

(3) All persons whose duties require access to processing and maintenance of identifiable personal data and automated systems shall be adequately trained in the security and privacy of personal data.

(4) The disposal and disposition of identifiable personal data and automated systems shall be done by shredding, burning, or, in the case of electronic records, by degaussing or by overwriting with the appropriate security software, in accordance with regulations of the Archivist of the United States or other appropriate authority.

#### **§ 200.15 Systems of records covered by exemptions.**

The Board currently has no exempt systems of records.

#### **§ 200.16 Mailing lists.**

The Board shall not sell or rent an individual's name and/or address unless such action is specifically authorized by law. This section shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

**Ivan J. Flores,**

*Paralegal Specialist, Recovery Accountability and Transparency Board.*

[FR Doc. E9-27878 Filed 11-19-09; 8:45 am]

**BILLING CODE 6820-GA-P**

## **RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD**

### **4 CFR Part 201**

**RIN 0430-AA01**

### **Rule Implementing the Freedom of Information Act**

**AGENCY:** Recovery Accountability and Transparency Board.

**ACTION:** Final rule.

**SUMMARY:** This document institutes the Recovery Accountability and Transparency Board's (Board) final rule implementing a set of procedural regulations under the Freedom of Information Act (FOIA) in accordance with 5 U.S.C. 552, and Public Law 104-231, the Electronic Freedom of

Information Act Amendments of 1996. These regulations have been written to conform to the statutory provisions of the Acts, to expedite the processing of FOIA requests received by the Board, and to ensure the proper dissemination of information to the public.

**DATES:** Effective November 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Dure, General Counsel, (202) 254-7900.

**SUPPLEMENTARY INFORMATION:** The proposed rule was published in the **Federal Register** on August 3, 2009 (74 FR 38366) for a public comment period to end on October 2, 2009. This rule sets forth the procedures for members of the public to request records from the Board under both the FOIA and the Electronic Freedom of Information Act Amendments of 1996. The rule also sets forth the procedures that the Board will use when responding to such requests. It sets forth the time frames for responses and the current fee schedule for any applicable charges for information. The rule also supplies information about Board materials available to the public through the Board's Web site.

#### Public Comment

The Board received comments from two organizations. One commenter requested an explanation concerning the differences between the proposed FOIA and Privacy Act rules regarding what is procedurally required in order for an individual to request access to records in the custody of the Board. Under the Board's proposed Privacy Act rule, all requests should include, among other things, the requester's full name, address, and telephone number. Requests for Privacy Act records may be made in writing, by fax, by telephone, or *in person*. The commenter contends that there are additional and more stringent requirements placed on a requester who requests access to his or her records in person. More specifically, such a requester must contact the Board's office at least one week before the desired appointment date. In addition, before a requester can review his or her records, the requester must provide proof of identification. Identification should be a valid copy of one of the following: A government ID, a driver's license, a passport, or other current identification that contains both an address and a picture of the requester.

According to the commenter, the process for requesting records under the Board's proposed FOIA rule "seem[s] quite simplified." Under the proposed FOIA rule, all requests for records must

include the requester's full name, address, and telephone number. Such a request can be made in writing, via e-mail, or via fax. The commenter correctly points out that the proposed FOIA rule does not provide the option of an *in-person request*. The commenter concluded that the differences in treatment of requesters for access to the Board's records seem unnecessary, especially with respect to the identification information required of a requester seeking information in person.

The commenter correctly points out the difference between the proposed Privacy Act and FOIA rules, but there is a reason for the difference between them which stems from the laws at issue. Briefly, a Privacy Act request is a request from an individual seeking to review and/or make corrections to federal records, maintained and retrieved in an approved system of records, which are about that individual—with very limited exceptions, no one else can ask for these records. A FOIA request is a request from the general public for copies of specific records maintained by a federal agency—any member of the public can make such a request. When individuals request information about themselves contained in an approved Privacy Act system of records, the request should be handled under the Privacy Act. Requested records about an individual not contained in an approved system of records asked for under the Privacy Act will have their request processed under the FOIA, since no access rights exist under the Privacy Act.

Because the nature of a Privacy Act request is narrow and specific to an individual in an approved system of records, the Board feels that providing the additional provisions to request and examine records in person is reasonable. In addition, in order to ensure that individuals who request to examine records in person are who they claim to be, it is necessary to require that individuals provide the proper proof of identification as set forth in the proposed Privacy Act rules. This Privacy Act requirement is designed to protect requesters from having their personal information disclosed to anyone else.

The other commenter raised concerns regarding the Board's proposed definition of "agency records" under § 201.2. The Board's proposed FOIA rule defines "agency record" as "materials that are in the control of the Board and associated with Board business, as follows: (i) Materials produced by the Board. (ii) Materials produced by staff for the Board. (iii) Materials distributed by presenters at a

Board meeting or Board Committee meeting." The commenter feels that the proposed definition is too narrow. The Board agrees and has therefore modified its definition in a way as to leave open the types of information that may be considered "agency records."<sup>1</sup>

The same commenter raised concerns regarding § 201.3 of the Board's proposed rule—publicly available documents and the electronic reading room. More specifically, § 201.3(b)(6) of the Board's proposed rule provides that "[r]ecords available electronically on the Board's Web site include \* \* \* [c]opies of records repeatedly released in response to FOIA requests." The commenter is concerned that this provision suggests that the Board will make available a narrower category of records than what is required under FOIA. To alleviate any confusion as to whether the Board will track the law, the Board has modified § 201.3(b)(6) to track the language used in the DOJ Guidance, reflecting its intention to comply with the requirement of proactive disclosure and make records of public interest available prior to receiving frequent requests for such information.

Finally, the same commenter raised concerns regarding § 201.14(c) of the Board's proposed rule—appeals and exhaustion of administrative remedies. The commenter feels that the Board has misstated FOIA regarding when a FOIA requester may bring a lawsuit in federal court to challenge an agency's response to his or her FOIA request. The Board feels that proposed § 201.14(c) and (e) confuse the administrative appeals/judicial review issues and therefore withdraws both provisions in their entirety. The Board believes that the case law on this matter—referenced in the U.S. Department of Justice's "Guide to the Freedom of Information Act,"—speaks for itself.<sup>2</sup> As revised, the Board's regulations provide requesters with sufficient procedural information to ensure the proper review of requests.

#### Executive Order No. 12866

These proposed regulations do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, review by the Office of Management and Budget is not required.

#### Regulatory Flexibility Act

These proposed regulations will not have a significant economic impact on

<sup>1</sup> The Board will follow the U.S. Department of Justice's "Guide to the Freedom of Information Act" in determining what constitutes an agency record. See U.S. Department of Justice "Guide to the Freedom of Information Act," (2009), at 33.

<sup>2</sup> See id. at 97.

a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided by the Regulatory Flexibility Act, as amended, is not required.

#### Paperwork Reduction Act

These proposed regulations impose no additional reporting and recordkeeping requirements. Therefore, clearance by the Office of Management and Budget is not required.

#### List of Subjects in 4 CFR Part 201

Administrative practice and procedure; Freedom of Information; Reporting and recordkeeping requirements.

■ Therefore, the Board amends Title 4 of the Code of Federal Regulations by adding Part 201 to read as follows:

### CHAPTER II—RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

#### PART 201—PUBLIC INFORMATION AND REQUESTS

Sec.

- 201.1 Scope.
- 201.2 Definitions.
- 201.3 Publicly available documents and electronic reading room.
- 201.4 Board records exempt from public disclosure.
- 201.5 Requests for Board records.
- 201.6 Responsibility, form, and content of responses.
- 201.7 Time of responses to requests.
- 201.8 Fees.
- 201.9 Restrictions on charging fees.
- 201.10 Notice of anticipated fees.
- 201.11 Requirements for waiver or reduction of fees.
- 201.12 Denials.
- 201.13 Business information.
- 201.14 Appeals.
- 201.15 Preservation of records.
- 201.16 Other rights and services.
- 201.17 How to track a FOIA request.

**Authority:** 5 U.S.C. 301, 5 U.S.C. 552 as amended; Executive Order 12600, 3 CFR, 1987 Comp., p. 235.

##### § 201.1 Scope.

This part sets forth the policies and procedures of the Recovery Accountability and Transparency Board (Board) regarding public access to documents under the Freedom of Information Act (FOIA or the Act), 5 U.S.C. 552. The provisions in the Act shall take precedence over any part of the Board's regulations in conflict with the Act. This part gives the procedures the public may use to inspect and obtain copies of Board records under the FOIA, including administrative procedures which must be exhausted before a requestor invokes the jurisdiction of an

appropriate United States District Court for the Board's failure to respond to a proper request within the statutory time limits, for a denial of Board records or challenges to the adequacy of a search, or for denial of fee waiver.

##### § 201.2 Definitions.

For words used in this document, unless the context indicates otherwise, singular includes the plural, plural includes the singular, present tense includes the future tense, and words of one gender include the other gender.

(a)(1) *Agency records*—Materials that are in the control of the Board and associated with Board business, including:

(i) Materials produced by the Board.  
(ii) Materials produced by staff for the Board.

(iii) Materials distributed by presenters at a Board meeting or Board Committee meeting.

(2) All references to records include the entire record and/or any part of the record.

(b) *Board*—The Recovery Accountability and Transparency Board.

(c) *Chairman*—The Chairman of the Board is designated or appointed by the President.

(d) *Designated FOIA Officer*—The person designated to administer the Board's activities in regard to the regulations in this part. The FOIA Officer shall be:

(1) The Board officer having custody of, or responsibility for, agency records in the possession of the Board.

(2) The Board officer having responsibility for authorizing or denying production of records from requests filed under the FOIA.

(e) *Executive Director*—The chief operating officer of the Board.

(f) *Member*—An individual appointed to serve on the Board pursuant to Title XV, Subtitle B of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

(g) *Days*—Standard working days, excluding weekends and federal holidays.

##### § 201.3 Publicly available documents and electronic reading room.

(a) Many Board records are available electronically at the Board's Web site (<http://www.recovery.gov>).

(b) Records available electronically on the Board's Web site include:

(1) The rules and regulations of the Board.

(2) Statements of policy adopted by the Board.

(3) Board reports to the President and Congress, including the Committees on Appropriations of the Senate and House of Representatives.

(4) Congressional Testimony of the Chairman of the Board.

(5) Biographical information about the Chairman and other Board members.

(6) Copies of records frequently requested and released in response to FOIA requests.

(c) The cost of copying information available in the Board office shall be imposed in accordance with the provisions of § 201.8.

##### § 201.4 Board records exempt from public disclosure.

5 U.S.C. 552 provides that the requirements of the FOIA do not apply to matters that are:

(a) Specifically authorized under the criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such an executive order.

(b) Related solely to the internal personnel rules and practices of the Board.

(c) Specifically exempted from disclosure by another federal statute, provided that such statute:

(1) Requires that records are withheld from the public in such a manner that leaves no discretion on the issue; or

(2) Establishes criteria for withholding or refers to particular types of matters to be withheld.

(d) Trade secrets, and commercial or financial information obtained from a person and privileged or confidential.

(e) Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the Board.

(f) Personnel, medical, or similar files that disclosing would constitute a clearly unwarranted invasion of personal privacy.

(g) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records of information:

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of any confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement agency in the course of a criminal investigation or by an agency conducting a lawful security

intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition reports, prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) Geological and geophysical information and data, including maps, concerning wells.

#### **§ 201.5 Requests for Board records.**

(a) To request Board records, you may:

(1) Write: FOIA Officer, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006;

(2) Send a request via e-mail at [FOIA@ratb.gov](mailto:FOIA@ratb.gov); or

(3) Fax: (202) 254-7970.

(b) When requesting records under this section you must state, in writing:

(1) Your full name,

(2) Address,

(3) Telephone number, and

(4) At your option, electronic mail address.

(c) When making a request for records about a person, Privacy Act regulations also may apply. Please check the regulations for additional requirements before submitting a request. When making a request for records about someone other than yourself, you must include either:

(1) Written authorization signed by the person permitting you to see the records; or

(2) Proof that the individual is deceased (e.g., a death certificate or obituary).

(d) A request will be considered received for purposes of § 201.7 on the date that it is received by the Board's FOIA office. For prompt handling, write "Freedom of Information Act Request" on the letter and envelope or in the subject line of the e-mail request or fax.

(e) Each request must clearly describe the desired records in sufficient detail to enable Board personnel to locate them with reasonable effort. Response to requests may be delayed if the records are not clearly described.

(f) Whenever possible, requests should include specific information about each record sought, such as date,

title or name, author, recipient, and subject.

(g) If the FOIA Officer determines that the request does not clearly describe the records sought, he or she will either advise you of the additional information needed to locate the record or otherwise state why the request is insufficient.

You will then be given the opportunity to provide additional information or to modify your request.

(h) Submitting a FOIA request shall be considered a commitment by the requestor to pay applicable fees required under § 201.8 unless the requestor seeks a waiver of fees. When making a request, you may specify a willingness to pay fees up to a specific amount.

(i) The FOIA does not require the Board to:

(1) Compile or create records solely for the purpose of satisfying a request for records.

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some time in the future.

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requestor that the records have been destroyed or otherwise disposed of.

#### **§ 201.6 Responsibility, form, and content of response.**

The Board's Executive Director or his/her designated FOIA Officer is authorized to grant or deny any request for a record and determine appropriate fees. When determining which records are responsive to a request, the Board will include only records in its possession as of the date of the request.

(a) If no records are responsive to the request, the FOIA Officer will notify the requestor in writing.

(b) When the FOIA Officer denies a request in whole or in part, he/she will notify the requestor in writing. The response will be signed by the FOIA Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reasons for the denial, including the FOIA exemption(s) that the FOIA Officer has relied on in denying the request; and

(3) A statement that the denial may be appealed under § 201.14 and a description of the requirements of that section.

(c) *Referrals.* When a request for a record not created by the Board is received, the Board shall refer the requestor to the issuing agency in writing, providing the address of the agency contact and the section(s) referred.

(d) *Timing of responses to requests sent to other agencies.* The Board shall

provide, within the FOIA deadline, responses only to those parts of the request not referred.

(e) *Agreements on referrals.* The Board may make agreements with other agencies to eliminate the need for referrals for particular types of records.

#### **§ 201.7 Timing of responses to requests.**

(a) *General.* The Board shall normally respond to requests in the order of their receipt.

(b) *Acknowledgement of requests.* On receipt of a request, the Board shall send an acknowledgement letter or an e-mail confirming the requestor's agreement to pay fees under § 201.8 and providing a request number for future reference.

(c) *Time limits for responding to FOIA requests.* The Board shall make an initial determination to grant or deny a request for records within 20 days (excluding Saturday, Sunday and holidays) after the date of receipt of the request, as described in § 201.5(d), except as stated in paragraph (f) of this section. Once the Board determines whether it can grant a request entirely or in part, it shall notify the requestor in writing. The Board shall advise the requestor of any fees to be charged under § 201.8 and shall disclose records promptly on payment of the fees. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record when technically feasible.

(d) *Unusual circumstances.* (1) If the statutory time limits for processing a request cannot be met because of "unusual circumstances" as defined in the FOIA (5 U.S.C. 552(6)(B)(iii)), the Board shall promptly notify the requestor in writing, explaining the circumstances and giving the date by which the request can be completed or if the Board cannot complete the request. If the extension is for more than 10 working days, the Board shall provide the requestor with an opportunity to:

(i) Modify the request so that it can be processed within the time limit; or

(ii) Arrange an alternative time period for processing the original request.

(2) If the Board believes that multiple requests submitted by a requestor or by requestors acting in concert constitute a single request that would otherwise involve unusual circumstances, and if the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing.* (1) Requests and appeals shall be taken out of order and given expedited processing whenever it is determined that they involve:

(i) Circumstances that could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged activity if made by a person primarily engaged in disseminating information.

(2) Requests for expedited processing may be made either at the time of the initial request or at a later time.

(3) Requests for expedited processing must include a statement explaining in detail the basis for requesting expedited processing. For example, a requestor under § 201.8 must establish that his/her professional activity is news reporting, although it need not be his/her sole occupation. The requestor also must establish a particular urgency to inform the public about government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days of receipt of a request for expedited processing, the Board shall decide whether to grant the request and notify the requestor of its decision. If a request for expedited treatment is granted, the request shall be processed as soon as practicable. If a request for expedited processing is denied, an appeal of that decision shall be acted on expeditiously.

(f) *Tolling of time limits.* (1) The Board may toll the 20-day time period to:

(i) Make one request for additional information from the requester; or

(ii) Clarify the applicability or amount of any fees, if necessary, with the requester.

(2) The tolling period ends upon the Board's receipt of information from the requester or resolution of the fee issue.

#### § 201.8 Fees.

(a) *General.* The Board shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under § 201.9 or where a waiver or reduction of fees is granted under § 201.11. Fees must be paid before the copies of records are sent. Fees may be paid by check or money order payable to the Treasury of the United States.

(b) *Definitions for this section.* (1) *Commercial use request*—A request from, or on behalf of, a person who seeks information for a purpose that furthers his/her commercial, trade, or profit interests including furthering those interests through litigation. The

Board shall try to determine the use to which a record will be put. When the Board believes that a request is for commercial use either because of the nature of the request or because the Board has cause to doubt the stated use, the Board shall ask the requestor for clarification.

(2) *Direct costs*—Expenses that the Board incurs in searching for, duplicating, and reviewing records in response to a request. Direct costs include the full salary of the employee performing the work and the cost of duplication of the records. Overhead expenses, such as the cost of space, heating, and lighting, are not included.

(3) *Duplication*—Making a copy of a record or the information in the record, to respond to a request. Copies can be in paper, electronic, or other format. The Board shall honor a requestor's preference for format if the record is readily reproducible in that format at a reasonable cost.

(4) *Educational institution*—A public or private undergraduate, graduate, professional or vocational school that has a program of scholarly research. For a request to be in this category, a requestor must show that the request is authorized by and made under the auspices of the qualifying institution and that the records will be used for scholarly research.

(5) *Noncommercial scientific institution*—An institution that is not operated on a commercial basis, as defined in paragraph (b)(1) of this section and is operated solely for conducting scientific research that does not promote any particular product or industry. For a request to be in this category, the requestor must show that the request is authorized and made under the auspices of the qualifying institution and that the records will be used for further scientific research.

(6) *Representative of the news media*—Any person who, or entity that, gathers information of potential interest to a segment of the public, uses editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A freelance journalist shall be regarded as working for a news media entity if the person 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 is one example of a basis for expecting publication that ordinarily would satisfy this standard. The Board may consider past publication records of the requester in determining whether he or she qualifies as a "representative of the news media."

(7) *Review*—Examining a record to determine whether any part of it is exempt from disclosure, and processing a record for disclosure. Review costs are recoverable even if a record is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under § 201.13 but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search*—The process of looking for and retrieving records, including page-by-page or line-by-line identification of information within records and reasonable efforts to locate and retrieve information from records maintained in electronic form. The Board shall ensure that searches are done in the most efficient and least expensive way that is reasonably possible.

(c) *Fees.* In responding to FOIA requests, the Board shall charge the following fees unless a waiver or a reduction of fees has been granted under § 201.11.

(1) *Search.* (i) Search fees shall be charged for all requests subject to the limitations of § 201.9. The Board may charge for time spent searching even if no responsive record is located, or if the record(s) located are withheld as exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$5. If a search and retrieval requires the use of professional personnel, the fee will be \$8 for each quarter hour. If the time of managerial personnel is required, the fee will be \$10 for each quarter hour.

(iii) For computer searches for records, requestors will be charged the direct costs of conducting the search although certain requestors (*see* § 201.9(a)) will be charged no search fee and certain other requestors (*see* § 201.9(b)) will be entitled to two hours of manual search time without charge. Direct costs include the cost of operating a computer for the search time for requested records and the operator salary for the search.

(2) *Duplication.* Duplication fees for paper copies of a record will be 10 cents per page for black and white and 20 cents per page for color. For all other forms of duplication, the Board shall charge the direct costs of producing the copy. All charges are subject to the limitations of §§ 201.9 and 201.11.

(3) *Review.* When a commercial-use request is made, review fees shall be charged as stated in paragraph (c)(1) of this section. These fees apply only to the initial record review, when the Board determines whether an

exemption applies to a particular record. Charges shall not be imposed for review at the administrative appeal level if an exemption is applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The costs of that review shall be charged. All review fees shall be charged at the same rates as those charged in paragraph (c)(1) of this section.

#### **§ 201.9 Restrictions on charging fees.**

(a) When determining search or review fees:

(1) No search fee shall be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) The Board shall provide without charge to all but commercial users:

(i) The first 100 pages of black and white duplication (or the cost equivalent); and

(ii) The first two hours of search by a clerical staff member (or the cost equivalent).

(3) When the total fee for a request will be \$14.00 or less for any request, no fee shall be charged.

(b) The Board will not assess search and/or duplication fees, as applicable, if it fails to respond to a requester's FOIA request within the time limits specified under 4 CFR 201.7, and no "unusual" circumstances (as defined in 5 U.S.C. 552(a)(6)(B) and 4 CFR 201.7(d)) or "exceptional" circumstances (as defined in 5 U.S.C. 552(a)(6)(C)) apply to the processing of the request.

#### **§ 201.10 Notice of anticipated fees.**

(a) *General.* The Board shall advise the requestor in writing of any applicable fees. If only a part of the fee can be estimated readily, the Board shall advise the requestor that this may be only a part of the total fee. After the requestor has been sent a fee estimate, the request shall not be considered received until the requestor makes a firm commitment to pay the anticipated total fee. Any such agreement must be made by the requestor in writing and must be received within 60 days of the Board's notice. If the requestor does not provide a firm commitment to pay the anticipated fee within 60 days of the notice, the request shall be closed. The requestor may be given an opportunity to work with the Board to change the request and lower the cost.

(b) *Charges for other services.* When the Board chooses as a matter of administrative discretion to provide a special service, such as certifying that

records are true copies or sending them by other than ordinary mail, the Board shall pay the costs of providing the services unless previous arrangements have been made with the requestor.

(c) *Charging interest.* The Board may charge interest on any unpaid bill starting on the 31st day following the date of billing. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and shall accrue from the date of the billing until payment is received by the Board. The Board shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended.

(d) *Aggregating requests.* If the Board reasonably believes that a requestor or a group of requestors acting together is trying to divide a request into a series of smaller requests for the purpose of avoiding fees, the Board may aggregate the requests and charge accordingly. The Board shall assume that multiple requests of the same type made within a 30-day period have been made in order to avoid fees. If requests are separated by a longer period, the Board shall aggregate them only if there is a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters shall not be aggregated.

(e) *Advance payments.* When a requestor has previously failed to pay promptly a properly charged FOIA fee to the Board or another agency, the Board shall require proof that full payment has been made to that agency before it begins to process that requestor's FOIA request. The Board shall also require advance payment of the full amount of the anticipated fee. When advance payment is required, the request is not considered received until payment has been made.

#### **§ 201.11 Requirements for waiver or reduction of fees.**

(a) Fees for processing your request may be waived if you meet the criteria listed in paragraph (b) of this section. The burden is on you to justify entitlement to a fee waiver. Requests for fee waivers are decided on a case-by-case basis. The fact that you have received a fee waiver in the past does not mean you are automatically entitled to a fee waiver for every request you may submit, because the essential element of any fee waiver determination is whether the release of the particular documents sought in the request will likely contribute significantly to public understanding of the operations or activities of the government. The Board will rely on the fee waiver justification you have submitted in your request letter. If you do not submit sufficient

justification, your fee waiver request will be denied. The Board may, at its discretion, communicate with you to request additional information if necessary. However, the Board must make a determination on the fee waiver request within the statutory time limit, even if the Board has not received such additional information. In certain circumstances, a partial fee waiver may be appropriate, if some, but not all, of the requested records are likely to contribute significantly to public understanding of the operations and activities of the government.

(b) The Board will waive fees (in whole or part) if disclosure of all or part of the information is in the public interest because its release:

(1) Is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Is not primarily in the commercial interest of the requester.

#### **§ 201.12 Denials.**

(a) When denying a request in any respect, the Board shall notify the requestor of that determination in writing. The types of denials include:

(1) Denials of requests, including a determination:

(i) To withhold any requested record in whole or in part;

(ii) That a requested record does not exist or cannot be located;

(iii) That a record is not readily reproducible in the form or format sought;

(iv) That what has been requested is not a record subject to the FOIA; and

(v) That the material requested is not a Board record (e.g., material produced by another agency or organization).

(2) A determination on any disputed fee matter, including a denial of a request for a fee waiver.

(3) A denial of a request for expedited processing.

(b) The denial letter shall be signed by the FOIA Officer or designee and shall include all of the following:

(1) The name and title of the person responsible for the denial.

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied in denying the request.

(3) An estimate of the volume of records withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if it would harm an interest protected by an applicable exemption.

(4) A statement that the denial may be appealed under § 201.14 and a description of the requirements of § 201.14.

**§ 201.13 Business information.**

(a) *In general.* Business information obtained by the Board from a submitter shall be disclosed under the FOIA only under this section.

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

(1) Business information—commercial or financial records obtained by the Board that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter—any person or entity from which the Board obtains business records, either directly or indirectly. The term includes but is not limited to corporations and state, local, tribal, and foreign governments.

(c) *Designation of business information.* Submitters of business information shall designate any part of the record considered to be protected from disclosure under Exemption 4 of the FOIA by appropriately marking the material. This may be done either at the time the record is submitted or at a reasonable time thereafter. This designation lasts for 10 years after submittal unless the submitter requests and provides justification for a longer period.

(d) *Notice to submitters.* The Board shall provide a business submitter with prompt written notice of any FOIA request or appeal that seeks its business information under paragraph (e) of this section, except as provided in paragraph (h) of this section, to give the submitter an opportunity to object to that disclosure under paragraph (f) of this section. The notice shall either describe the records requested or include copies of the records.

(e) *Required notice.* The Board shall give notice of a FOIA request seeking business information when:

(1) The submitter has designated that the information is considered protected from disclosure under Exemption 4 of the FOIA; or

(2) The Board has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(f)(1) *Objecting to disclosure.* A submitter shall have 30 days to respond to the notice described in paragraph (d) of this section. If a submitter has an objection to disclosure, it is required to submit a detailed written statement including:

(i) All grounds for withholding any of the information under any exemption of the FOIA, and

(ii) In the case of Exemption 4, the reason why the information is a trade secret, commercial, or financial information that is privileged or confidential.

(2) If a submitter fails to respond to the notice in paragraph (d) of this section within 30 days, the Board shall assume that the submitter has no objection to disclosure. The Board shall not consider information not received by the Board until after a disclosure decision has been made. Information provided by a submitter under this paragraph might itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* The Board shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the business records. Whenever the Board decides to disclose business records over the objection of a submitter, it shall give the submitter written notice, that will include:

(1) A statement of the reason(s) the submitter's objections were not sustained;

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

(3) A specified disclosure date at a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements in paragraphs (d) and (g) of this section shall not apply if:

(1) The Board determines that the information should not be disclosed;

(2) The information has been published legally or has been officially made available to the public;

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

(4) The objection made by the submitter under paragraph (f) of this section appears frivolous. In such a case, the Board shall promptly notify the submitter of its decision using the guidelines in paragraph (g) of this section.

(i) *Notice of FOIA lawsuit.* When a requestor files a lawsuit seeking to compel the disclosure of business information, the Board shall promptly notify the submitter.

(j) *Corresponding notice to requestors.* When the Board provides a submitter with either notice and an opportunity to object to disclosure under paragraph (d) of this section or with its intent to disclose requested information under paragraph (g) of this section, the Board also shall notify the requestor(s). When a submitter files a lawsuit seeking to prevent the disclosure of business information, the Board shall notify the requestor(s).

**§ 201.14 Appeals.**

(a)(1) *Appeals of adverse determinations.* If you are dissatisfied with the Board's response to your request, you may appeal to the Board's Executive Director:

(i) By mail to: Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006;

(ii) By e-mail to: [FOIA@ratb.gov](mailto:FOIA@ratb.gov); or

(iii) By fax to: 202-254-7970.

(2) The appeal must be in writing and must be received within 30 days of the date of the Board's response. The appeal letter, e-mail or fax may include as much or as little related information as you wish, as long as it clearly identifies the Board determination that you are appealing, including the assigned request number, if known. For prompt handling, please mark your appeal "Freedom of Information Act Appeal."

(b) *Responses to appeals.* Requestors shall be notified in writing of the decision on the appeal. A decision affirming an adverse determination shall include a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and shall include the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, the request shall be reprocessed in accordance with that appeal decision.

(d) *Denial of appeal.* An adverse determination by the Executive Director shall be the final action of the Board.

**§ 201.15 Preservation of records.**

The Board shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code of the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit.

**§ 201.16 Other rights and services.**

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is entitled under the FOIA.

**§ 201.17 How to track a FOIA request.**

(a) *Tracking number.* The Board will issue a tracking number to all FOIA requesters within 5 days of the receipt of the request (as described in § 201.7(b)). The tracking number will be sent via electronic mail if the requester has provided an electronic mail address.



Otherwise, the Board will mail the tracking number to the requester's physical address, as provided in the FOIA request.

(b) *Status of request.* FOIA requesters may check the status of their FOIA request(s) by contacting the FOIA Officer at [FOIA@ratb.gov](mailto:FOIA@ratb.gov) or (202) 254-7900.

Ivan J. Flores,

*Paralegal Specialist, Recovery Accountability and Transparency Board.*

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## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 3

[Docket ID OCC-2009-0018]

RIN 1557-AD25

### FEDERAL RESERVE SYSTEM

#### 12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R-1361]

### FEDERAL DEPOSIT INSURANCE CORPORATION

#### 12 CFR Part 325

RIN 3064-AD42

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 567

[No. OTS-2009-0020]

RIN 1550-AC34

### Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Capital—Residential Mortgage Loans Modified Pursuant to the Home Affordable Mortgage Program

**AGENCY:** Office of the Comptroller of the Currency, Department of the Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Department of the Treasury (the agencies).

**ACTION:** Final rule.

**SUMMARY:** The agencies have adopted a final rule to allow banks, savings associations, and bank holding companies (collectively, banking organizations) to risk weight for purposes of the agencies' capital

guidelines mortgage loans modified pursuant to the Home Affordable Mortgage Program (Program) implemented by the U.S. Department of the Treasury (Treasury) with the same risk weight assigned to the loan prior to the modification so long as the loan continues to meet other applicable prudential criteria.

**DATES:** The final rule becomes effective December 21, 2009.

#### FOR FURTHER INFORMATION CONTACT:

OCC: Margot Schwadron, Senior Risk Expert, Capital Policy Division, (202) 874-6022, or Carl Kaminski, Senior Attorney, or Ron Shimabukuro, Senior Counsel, Legislative and Regulatory Activities Division, (202) 874-5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Barbara J. Bouchard, Associate Director, (202) 452-3072, or William Tiernay, Senior Supervisory Financial Analyst, (202) 872-7579, Division of Banking Supervision and Regulation; or April Snyder, Counsel, (202) 452-3099, or Benjamin W. McDonough, Counsel, (202) 452-2036, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263-4869.

FDIC: Ryan Sheller, Senior Capital Markets Specialist, (202) 898-6614, Capital Markets Branch, Division of Supervision and Consumer Protection; or Mark Handzlik, Senior Attorney, (202) 898-3990, or Michael Phillips, Counsel, (202) 898-3581, Supervision Branch, Legal Division.

OTS: Teresa A. Scott, Senior Policy Analyst, (202) 906-6478, Capital Risk, or Marvin Shaw, Senior Attorney, (202) 906-6639, Legislation and Regulation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

#### SUPPLEMENTARY INFORMATION:

##### Background

Under the agencies' general risk-based capital rules, loans that are fully secured by first liens on one-to-four family residential properties, that are either owner-occupied or rented, and that meet certain prudential criteria (qualifying mortgage loans) are risk-weighted at 50 percent.<sup>1</sup> If a banking organization holds both a first-lien and a junior-lien mortgage on the same property, and no other party holds an intervening lien, the loans are treated as a single loan secured by a first-lien mortgage and risk-weighted at 50 percent if the two loans, when

aggregated, meet the conditions to be a qualifying mortgage loan. Other junior-lien mortgage loans are risk-weighted at 100 percent.<sup>2</sup>

In general, to qualify for a 50 percent risk weight, a mortgage loan must have been made in accordance with prudent underwriting standards and may not be 90 days or more past due. Mortgage loans that do not qualify for a 50 percent risk weight are assigned a 100 percent risk weight. Each agency has additional provisions that address the risk weighting of mortgage loans. Under the OCC's general risk-based capital rules for national banks, to receive a 50 percent risk weight, a mortgage loan must "not [be] on nonaccrual or restructured."<sup>3</sup> Under the Board's general risk-based capital rules for bank holding companies and state member banks, mortgage loans must be "performing in accordance with their original terms" and not carried in nonaccrual status in order to receive a 50 percent risk weight.<sup>4</sup> Generally, mortgage loans that have been modified are considered to have been restructured (OCC), or are not considered to be performing in accordance with their original terms (Board). Therefore, under the OCC's and Board's general risk-based capital rules, such loans generally must be risk weighted at 100 percent. Under the FDIC's general risk-based capital rules, a state nonmember bank may assign a 50 percent risk weight to any modified mortgage loan, so long as the loan, as modified, is not 90 days or more past due or in nonaccrual status and meets other applicable criteria for a 50 percent risk weight.<sup>5</sup> Under the OTS's general risk-based capital rules, a savings association may assign a 50 percent risk weight to any modified residential mortgage loan, so long as the loan, as modified, is not 90 days or more past due and meets other applicable criteria for a 50 percent risk weight.<sup>6</sup>

On June 30, 2009, the agencies published in the **Federal Register** an interim final rule (interim rule) to allow banking organizations to risk weight mortgage loans modified under the Program using the same risk weight assigned to the loan prior to the modification, so long as the loan continues to meet other applicable

<sup>2</sup> See 12 CFR Part 3, Appendix A, section 3(a)(3)(iii) (OCC); 12 CFR parts 208 and 225, Appendix A, section III.C.4. (Board); 12 CFR part 325, Appendix A, section II.C. (FDIC); and 12 CFR 567.6(1)(iv) (OTS).

<sup>3</sup> 12 CFR Part 3, Appendix A, section 3(a)(3)(iii) (OCC).

<sup>4</sup> 12 CFR parts 208 and 225, Appendix A, section III.C.3. (Board).

<sup>5</sup> 12 CFR Part 325, Appendix A, section II.C. (FDIC).

<sup>6</sup> 12 CFR 567.1, 12 CFR 567.6(a)(1)(iii) (OTS).

<sup>1</sup> See 12 CFR Part 3, Appendix A, section 3(a)(3)(iii) (OCC); 12 CFR parts 208 and 225.