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Billing code ____

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part __

RIN 4030-AA02

Proposed Rules to Implement the Freedom of Information Act

AGENCY: Financial Stability Oversight Council.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Financial Stability Oversight Council (the “Council”) proposes regulations to implement the Freedom of Information Act (the “FOIA”).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at [http:// www.regulations.gov](http://www.regulations.gov). Electronic submission of comments allows the commenter maximum time to prepare and submit a

comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Mail: Send comments to Financial Stability Oversight Council, 1500 Pennsylvania Avenue, NW, Washington DC 20220.

Note: To receive consideration as public comments, comments must be submitted through the method specified above. Again, all submissions must refer to the title of the notice.

Public Inspection of Public Comments. All properly submitted comments will be available for inspection and downloading at <http://www.regulations.gov>.

Additional Instructions. In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Amias Gerety, Deputy Assistant Secretary for the Financial Stability Oversight Council, at (202) 622-8716. All responses to this Notice should be submitted via <http://www.regulations.gov> to ensure consideration.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (the “Act”) established the Council to identify and respond 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.” These proposed regulations would implement the requirements of the FOIA as they apply to the Council.

II. Section-by-Section Analysis

§ 1.1 General.

This section states that the purpose of the regulations is to implement the FOIA.

§ 1.2 Information made available.

This section outlines the types of records that the FOIA requires the Council to make available to the public, either as a matter of course or by request. The section also describes generally the conditions under which a person may request access to Council records. Finally, it sets forth the Council’s policy for making discretionary disclosures of its records that are otherwise withholdable pursuant to the FOIA exemptions.

§ 1.3 Publication in the Federal Register.

This section implements the requirement of the FOIA that certain agency records be published in the Federal Register as a matter of course, including certain of the Council’s organizational documents and rules of procedure.

§ 1.4 Public inspection and copying.

This section implements the requirement of the FOIA that certain agency records be made available to the public as a matter of course, including through publication on the Council's website and in a public reading room, including final opinions, statements of policy and interpretations, staff manuals, and copies of certain frequently requested and previously released Council records.

§ 1.5 Requests for Council records.

This section sets forth general procedures for the public to follow when requesting copies of Council records. The section states the Council's requirements for the form and content of such requests, instructions for submitting requests, and general instructions for requesting fee waivers and/or expedited processing of requests. This section furthermore identifies the consequences to the requester of not following the prescribed instructions.

§ 1.6 Responsibility for responding to requests for Council records.

This section outlines certain procedures that govern the Council's responses to FOIA requests. In particular, this section describes the default document date range that the Council will apply when searching for records responsive to requests, identifies persons responsible for making initial determinations as to whether to grant or deny requests, and sets forth circumstances under which the Council will refer FOIA requests to other agencies for consultation or direct response to requesters.

§ 1.7 Timing of responses to requests for Council records.

This section identifies the statutory deadline for the Council to respond to FOIA requests and describes circumstances in which the Council may extend or toll this deadline. This section also sets forth the order in which the Council will respond to FOIA requests along with procedures for requesting expedited processing of requests. This section identifies the standards by which the Council shall determine whether to grant requests for expedited processing as well as the procedure for appealing denials of such expedited processing requests.

§ 1.8 Responses to requests for Council records.

This section details procedures for the Council to follow when notifying requesters of its receipt of their requests. It also outlines the Council's procedure, upon granting requests, for producing copies of or providing public access to requested records. Likewise, it contains procedures for the Council to follow when denying requests in whole or in part and when no responsive records are located.

§ 1.9 Classified Information.

This section explains the Council's procedure for responding to requests for records that are classified in accordance with Executive Order No. 13526. It also sets forth the Council's policy of conducting declassification reviews when classified documents become subject to FOIA requests.

§ 1.10 Requests for business information provided to the Council.

This section sets forth the Council's procedure for responding to requests for records that contain information submitted to the government by businesses. In particular, this section details

the circumstances under which the Council must notify businesses of FOIA requests that seek information comprising information these businesses submitted to the government. This section also provides business submitters with an opportunity to object to the Council's release of their information in response to such FOIA requests and sets forth a procedure for doing so. Finally, the section explains the procedure that governs the Council's consideration of and responses to such objections.

§ 1.11 Administrative appeals.

This section identifies the grounds for which requesters may appeal certain of the Council's FOIA-related determinations, including its determinations to deny requests, in whole or in part, its determinations that no responsive records exist, its determinations to assign requesters to particular fee categories, and its determinations to deny requests for fee waivers and expedited processing. This section also sets forth the procedure that requesters must follow when filing administrative appeals, including the form and content of appeals, and the procedure that governs the Council's responses to such appeals.

§ 1.12 Fees for processing requests for Council records.

This section sets forth the Council's fee schedule for FOIA-related services and describes the circumstances under which the Council will charge fees to requesters for searching for, reviewing and duplicating responsive records. Such fees are assessable based upon the nature of each FOIA requester and the nature and usage of services that are required for the Council to respond to FOIA requests. This section also describes the grounds and procedures for requesting a reduction or waiver of fees, and the Council's procedure for responding to such requests.

Finally, the section explains how requesters can make payment to the Council as well as the circumstances in which the Council may require requesters to prepay fees.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would establish procedures for access to Council information 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. The Council invites comments on the impact of this proposed rule on small entities.

IV. Executive Order 12866

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

List of Subjects

Financial Stability Oversight Council, Freedom of Information Act.

Financial Stability Oversight Council

Authority and Issuance

For the reasons set forth in the preamble, the Financial Stability Oversight Council proposes to add a new part ____ to Title 12 of the Code of Federal Regulations, to read as follows:

Part _____

Sec.

Subpart A – Freedom of Information Act

- § 1.1 General.
- § 1.2 Information made available.
- § 1.3 Publication in the Federal Register.
- § 1.4 Public inspection and copying.
- § 1.5 Requests for Council records.
- § 1.6 Responsibility for responding to requests for Council records.
- § 1.7 Timing of responses to requests for Council records.
- § 1.8 Responses to requests for Council records.
- § 1.9 Classified Information
- § 1.10 Requests for business information provided to the Council
- § 1.11 Administrative appeals.
- § 1.12 Fees for processing requests for Council records.

Authority: 12 U.S.C. § 5322

Subpart A – Freedom of Information Act

§ 1.1 General.

Purpose and scope. 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 the Council’s records. These regulations should be read together with the FOIA, which provides additional information about this topic.

§ 1.2 Information made available.

(a) *General.* The FOIA provides for access to records developed or maintained by Federal agencies. 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 section 1.3 of this subpart);

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale (see section 1.4 of this subpart); and

(3) Information required to be made available to any member of the public upon specific request (see sections 1.5 through 1.12 of this subpart).

(b) *Right of Access.* Subject only 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 information or records in the possession of the Council.

(c) *Exemptions.*

(1) The disclosure requirements of 5 U.S.C. 552(a) do not apply to certain matters which are exempt under 5 U.S.C. 552(b); nor do the disclosure requirements apply to certain matters 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 records requested, the Council may, if not precluded by law and in its sole discretion, make discretionary disclosures of its records. The fact that the 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.

§ 1.3 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 the following information:

(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.

§ 1.4 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 the following information:

(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 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 sections 1.5 through 1.12 of this subpart, and which the Council determines have become or are likely to become the subject of subsequent requests for substantially the same records because they are clearly of interest to the public at large. 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, if created on or after November 1, 1996, 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 by computer telecommunications.* 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) *Deletion of identifying details.* To prevent a clearly unwarranted invasion of personal privacy, the Council may delete identifying details contained in any matter described in paragraphs (a)(1) through (4) of this section before making such matters available for inspection or publishing it. The justification for the deletion shall be explained fully in writing, and the extent of such deletion 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 deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion 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 section 1.12 of this subpart. 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.

§ 1.5 Requests for Council records.

(a) *In general.*

(1) Except for records made available under 5 U.S.C. section 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 state, both in the request itself and on any envelope that encloses it, that it comprises a Freedom of Information Act request.

(2) The request shall be addressed and submitted as follows: Financial Stability Oversight Council, Attention: FOIA Request for Council Records, 1500 Pennsylvania Avenue, NW, Washington DC 20220.

(3) The request shall 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 should 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 should include any file designations or descriptions for the records requested. As a general rule, the more specific the requester is about the records or type of records requested, the more likely the Council will be able to locate those records in response to the request;

(4) The request must 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) The request shall state whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them.

(6) 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, governmental entity, or "other" requester, as those terms are defined in section 1.12(c) of this subpart. For the same purpose, a request for records shall also state how the records released will be used. The Council shall not use this information to determine the releasability of any record or records.

(7) 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 as is required by section 1.12(f) of this subpart. 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, as otherwise set forth in section 1.12 of this subpart, except that the requester may specify in the

request an upper limit (of not less than \$25) that the requester is willing to pay to process the request.

(8) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by section 1.7(c) of this subpart.

(c) *Request receipt; effect of request deficiencies.* The Council shall deem itself to have received a request only if, and 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 to conform to the requirements of paragraph (b) of this section. If a request is deficient in any respect, then the Council may 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 access, and such determinations are not subject to appeal.

§ 1.6 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 records in its possession as of the date the Council begins its search for them. If any other date is used, the Council shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The Council records officer shall be authorized to make an initial determination to grant or deny a request for a record of the Council.

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

(1) Respond to the request regarding that record, after consulting with the originating agency to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the originating agency to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(d) *Notice of referral.* Whenever the Council refers all or any part of the responsibility for responding to a request to another agency, it 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.

§ 1.7 Timing of responses to requests for Council records.

(a) *In general.* Except as set forth in paragraphs (b) through (d) of this subpart, 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.

(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 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.”

(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” is defined as follows:

(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 could 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 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 it 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 section 1.11 of this subpart. 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 Section 1.5(b) is received by the Council to determine whether to grant or deny a request for records. The twenty (20) 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 (20) day time period while it awaits the clarifying information; or

(2) toll the twenty (20) day time period while it addresses any dispute with the requester regarding the assessment of fees.

(e) *Unusual circumstances.* (1) Where 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 section 1.11 of this subpart, 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). However, if the Council determines that it needs additional time beyond a ten (10) 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 subpart.

(2) As used in this paragraph, “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.

(3) 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.

§ 1.8 Responses to requests for Council records.

(a) *Acknowledgements of requests.* Upon receipt of a request that meets the requirements of Section 1.5(b), the Council shall assign to the request a unique tracking number. The Council shall send an acknowledgement letter to the requester within ten (10) calendar days of receipt of the request that contains the following information:

(1) identifies the applicable request tracking number;

(2) identifies the date of receipt of the request, as determined in accordance with section 1.5(c) of this subpart; and

(3) confirms, with respect to any fees that may apply to the request pursuant to section 1.12 of this subpart, 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 officer designated in Section 1.6(b) to this subpart shall make initial determinations either 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 documents, and shall do so in the format specified by the requester to the extent that the documents are readily producible by the Council in the requested format, or shall permit the requester to inspect the documents in accordance with section 1.8(b)(3) of this subpart. The Council shall also send the requester a statement of the applicable fees, either at the time of the determination or shortly thereafter.

(3) *Inspection of records.* In the case of a request for inspection, the requester shall be notified in writing of the determination, when and where the requested records may be inspected, and of the fees incurred in complying with the request. The Council shall then promptly make the records available for inspection at the time and place stated, in a manner that will not interfere with the Council's operations and will not exclude other persons from making inspections. The requester shall not be permitted to remove the records from the room where inspection is made. If, after making inspection, the requester desires copies of all or a portion of the requested records, copies shall be furnished upon payment of the established fees prescribed by section 1.12 of this subpart. Fees may be charged for search and review time as stated in section 1.12 of this subpart.

(4) *Denial of request.* If it is determined that the request for records should be denied in whole or in part, the requester shall be notified in writing. The notification shall:

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

(ii) If technically feasible, indicate the amount of information deleted and the exemptions under which the deletion is made at the place in the record where such deletion 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 section 1.11 of this subpart; and

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

(5) *No records found.* If it is determined, after an adequate search for records by the responsible official or his/her delegate, that no records have been found to exist, the responsible official will so notify the requester in writing. The notification letter shall also advise the requester of the right to administratively appeal the Council's determination that no records exist (*i.e.*, to challenge the adequacy of the Council's search for responsive records) in accordance with section 1.11 of this subpart. The response shall specify the official to whom the appeal shall be submitted for review.

§ 1.9 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 release 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.

§ 1.10 Requests for business information provided to the Council.

(a) *In general.* Business information provided to the Council by a business 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 trade secrets or commercial or financial information obtained by the Council from a submitter 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* refers to Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(c) *Designation of business information.* A submitter of business information will 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 business submitters.* The Council shall provide a business submitter with prompt written notice of receipt of a request or appeal encompassing its business information 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 notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *When notice is required.* The Council shall provide a business 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 business submitter.

(f) *Opportunity to object to disclosure.*

(1) Through the notice described in paragraph (d) of this section, the Council shall notify the business submitter in writing that he/she 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 a submitter fails to respond to the notice within the time specified in it, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the requester shall be advised 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 requester will be invited to agree to a voluntary extension of time so that the Council may review the business submitter's objection to disclosure.

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

(1) A statement of the reasons for which the business 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 business 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;

(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); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, the Council shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

§ 1.11 Administrative appeals.

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the Council:

(1) To deny access to records in whole or in part (as provided in section 1.8(b)(4) of this subpart);

(2) To assign a particular fee category to the requestor (as provided in section 1.12(c) of this subpart);

(3) To deny a request for a reduction or waiver of fees (as provided in section 1.12(f)(7) of this subpart);

(4) That no records exist that are responsive to the request (as provided in section 1.8(b)(5) of this subpart); or

(5) To deny a request for expedited processing (as provided in section 1.7(c)(5) of this subpart).

(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 section 1.7 of this subpart).

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

(1) Be made in writing and signed by the requester or his or her representative;

(2) Be labeled “Freedom of Information Act Appeal” and addressed to and submitted to the officer specified in paragraph (e) of this section in the manner set forth in Section 1.5(b) of this subpart;

(3) Set forth the name of and contact information for the requester, including a mailing address, telephone number, or 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 the initial determination (in whole or in part) or to grant the request for records 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 section 1.7(e) of this subpart.

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

(A) Notified in writing of the denial;

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

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

(D) 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).

(2) If the initial determination is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

§ 1.12 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 where a waiver or reduction of fees is granted under paragraph (f) of this section, or where, pursuant to paragraph (e)(iv) of this section, the failure of the Council to comply with certain time limits precludes it from assessing certain fees.

(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.

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

(i) \$.20 per page, up to 8 1/2×14 inch, 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. However, where a single class of employee is used exclusively (*e.g.*, all administrative/clerical, or all professional/executive), an average rate for the range of grades typically involved may be established. This charge shall include transportation of employees and records necessary to the search 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 "all 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. However, when a single class of employee is used exclusively (*e.g.*, all administrative/clerical, or all professional/executive), an average rate for the range of grades typically involved may be established. Fees may be charged for review time even if records ultimately are not disclosed.

(4) *Inspection of records.* 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. This includes, but is not limited to:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as 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 itself, in the initial FOIA request, as one of the following categories of requesters for purposes of that request:

(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 wanting 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 subparagraph, 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) *Governmental entity.* This refers to any requester that constitutes a state, local, or foreign government or an international governmental organization.

(vi) *“Other” Requester.* This refers to a requester who does not fall within any of the previously described categories.

(3) *Determination of proper fee category.* Within twenty (20) calendar days of its receipt of a request, the Council shall make a determination as to the proper fee category to apply to a requester. The Council shall inform the requester of the determination in the request acknowledgment letter, or if no such letter is required, in writing. The Council shall base its determination upon a review of the requester's submission and the Council's own records. Where the Council has reasonable cause to doubt the use to which a requester will put the records

sought, or where that use is not clear from the request itself, the Council may seek additional clarification before assigning the request to a specific category.

(4) *Appeals of adverse determinations of fee categories.* If and once the Council assigns a requester to a fee category, then the requester shall have the right to appeal the Council's determination in accordance with section 1.11 of this subpart. The Council shall communicate this appeal right as part of its written notification to the requester of an adverse fee category determination. The requester shall clearly mark its appeal request and any accompanying envelope with the words "Appeal of Fee Category Determination."

(d) *Fees applicable to each category of requester.* The following fee schedule applies to Council requests processed under the FOIA. Specific levels of fees are prescribed for each category of requester defined in paragraph (c) of this section.

(1) *Commercial use requesters.* These requesters 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 Institution Requesters.* These requesters 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,

requesters 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 requesters who want records for use in meeting individual academic research or study requirements.

(3) *Requesters who are Representatives of the News Media.* These requesters shall be charged only for the cost of duplicating the records they request, except that the Council shall provide them with the first one hundred (100) pages of duplication free of charge.

(4) *Governmental entities.* These requesters shall receive the records they request free of charge.

(5) *All Other Requesters.* Requesters who do not fit any of the categories described above 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. Requests from persons for records about themselves filed in the Council's systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for duplication, after the first one hundred (100) pages are furnished free of charge.

(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 any of the following applies:

(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) If the Council fails to comply with any time limit under sections 1.7 or 1.11 of this subpart, and no unusual circumstances (as that term is defined in section 1.7(e)) or exceptional circumstances apply to the processing of the request, then the Council shall not assess search fees, or if the requester is an educational or noncommercial scientific institution (as set forth above in section 1.12(c)(2)(ii) & (iii) of this subpart), then the Council shall not assess 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; 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), the Council shall consider the following factors:

(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 has satisfied the requirements of paragraph (f)(1)(ii)(B), the Council shall consider the following factors:

(i) The Council shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in section 1.12(c)(2)(i) of this subpart), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Council ordinarily shall presume that where a news media requester has satisfied 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) *Determinations of requests to reduce or waive fees.* The Council shall decide whether to grant or deny a request to reduce or waive fees prior to processing a request and within twenty

(20) calendar days of its receipt of the request. The Council shall notify the requester of the determination in writing.

(6) *Effect of denying requests 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 if the Council proceeds to process the request. The notification letter shall also 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 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 section 1.11 of this subpart. 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) *Advance notice and prepayment of fees.*

(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 requester shall be notified of the estimated costs. The requester must provide an agreement to pay the estimated costs; however,

the requester shall also be given an opportunity to reformulate the request in an attempt to reduce fees.

(2) If the requester has failed to state a limit and the costs are estimated to exceed \$250.00, the requester shall be notified of the estimated costs and must pre-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. The requester shall also be given an opportunity to 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 prepayment after a request is processed and before documents are released.

(4) If a requester has previously 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 fees have been paid, a written agreement to pay fees has been provided, or a request has been reformulated.

(h) *Form of payment.* Payment may be made by check or money order payable to Financial Research Fund.

(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.* Where the Council reasonably believes 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 of this type made within a thirty (30) calendar day period have been made in order to avoid fees. Where requests are separated by a longer period, the Council will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

Dated:
