

provides that the FDIC Division Director having primary authority over exempt records may disclose those records to other federal supervisory agencies and certain non-supervisory federal agencies for any legitimate purpose. The proposed rule refers the reader to the Right to Financial Privacy Act of 1978 (RFPFA) for a complete list of supervisory agencies and the RFPFA further provides that no notice of the disclosure of exempt records would be required to be given to customers as a condition of such disclosure. The proposed rule was also amended to provide for the disclosure of information obtained in the course of the FDIC's exercising supervisory or examination authority to any foreign bank regulatory or supervisory authority per the conditions and limitations contained in § 206 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

The current rule set forth at § 309.6(c)(4) has been substantially rewritten for clarity. The listing of the contents of criminal referrals has been deleted due to the standardization of referral forms. In § 309.6(b)(4) of the proposed rule, criminal referrals may be made to either state or federal authorities without the provision of notice to customers, as provided in the RFPFA. Additionally, exempt records may be disclosed to appropriate state or federal authorities by the Director of the Corporation's Division having primary authority over those records when there is a belief that there are federal or state civil or criminal law violations. The listing of exceptions for when notice of a disclosure of records must be provided to the customer have been deleted and a reference to applicable provisions of the RFPFA has been provided.

In proposed § 309.6(b)(5), modifications were made to provide that exempt records pertaining to a depository institution may be disclosed to the servicers of such institution by the FDIC Division Director having primary authority over those records.

Proposed § 309.6(b)(6) sets forth the conditions under which exempt records may be disclosed to third parties and was modified to provide that exempt records may be disclosed to third parties by the FDIC Division Director with primary authority over such records for good cause, but only pursuant to a written request, and only after requiring such conditions as are necessary to protect the confidentiality of the records. Extraneous language was also deleted from the provision.

Proposed § 309.6(b)(7) sets forth the conditions under which depository institutions or other third parties in

possession of FDIC exempt records may be authorized to disclose the records. This paragraph has been modified to provide that third parties may be authorized by the FDIC Division Director with primary authority over those records to disclose any exempt records, but only pursuant to a written request, and only after requiring such conditions as are necessary to protect the confidentiality of the records.

Proposed § 309.6(b)(8) permits the General Counsel (or designee) to disclose or authorize disclosure of exempt records or information (including testimony) in litigation in response to a subpoena or otherwise for good cause and in the interests of justice. The amendments would also clarify the FDIC's current position that the General Counsel's authority extends to records or information held by *former* FDIC employees or officials when the records were obtained in course of the former employee's employment with the FDIC. Significantly, the amendments are intended to clarify that, in situations where the FDIC has not been made a party to litigation, prior to serving a subpoena or other legal process on the FDIC, a requester must first exhaust their administrative procedures by seeking disclosure of FDIC records pursuant to the procedures set forth § 309.5. Such requirement provides the FDIC with the opportunity to exercise its discretion regarding whether an exempt record should be disclosed. The lengthy list of the exceptions for when notice to the customer must be provided has been deleted and replaced by a simple citation to the exceptions provided by the RFPFA.

Paragraph § 309.6(c)(9) of the current rule was deleted from the proposed rule since other amendments to the rule clarified the authority of Division Directors involving records over which they have primary authority.

Under proposed § 309.6(b)(9), the Chairman would be able to authorize the disclosure or withholding of exempt records or information whenever the public interest is served by such action. The provision extends the Chairman's authority to former employees or officials and governs testimony as well as records.

Proposed § 309.6(b)(10) clarifies that any disclosure of exempt records by the FDIC would be discretionary, that FDIC officials have authority to condition disclosure, that all steps must be taken to protect the confidentiality of exempt information, and that should exempt records be disclosed, such disclosure should be pursuant to appropriate protective orders or confidentiality

agreements and with appropriate redaction.

7. *Service of process.* Section 309.7 in the proposed rule provides notice of the appropriate means of serving process on the FDIC, that persons in possession of FDIC exempt records who receive a subpoena must notify the FDIC, and that persons in possession of FDIC exempt records must appear as required and refuse to produce such records or testify thereon in the absence of authorization from the FDIC. If the FDIC is named as a party, service of process must conform to Federal Rules of Civil Procedure. The amendments clarify that former FDIC employees or officials in possession of FDIC records must notify the FDIC of any subpoena or legal process served on them which relates to exempt records or information, and must not disclose such records or information without the General Counsel's authorization.

8. *Generally.* The term "records" has replaced the terms "information" and "documents" in appropriate places throughout the regulation in order to clarify that, in most instances, requests made under the rule would involve requests for disclosure of records maintained by the Corporation. The term "information" was retained in various places in the rule in recognition of the limited circumstances where more than records might be sought.

Certain references to "Reports of Examination" have been deleted to make clear that the regulation governs all exempt records.

Certain references to "Division of Supervision" have been deleted and/or replaced with other office designations to make clear that other Divisions may have primary authority over an exempt record.

References to "or anyone he designates in writing" has been replaced by "or designee" to provide simplicity and a gender neutral term.

III. Matters of Regulatory Procedure

Administrative Procedure Act

This proposed rulemaking is in compliance with the Administrative Procedure Act (5 U.S.C. 553) and allows for a 60-day comment period.

Authority

These amendments are promulgated under the FDIC's general authority to prescribe, through its Board of Directors, such rules and regulations as it may deem necessary to carry out the provisions of the Federal Deposit Insurance Act or any other law which the FDIC has the responsibility of administering or enforcing (except to the extent that authority to issue such