

EXPORT-IMPORT BANK**12 CFR Part 404****[Docket No. EIB–2022–0004]****Freedom of Information Act Requirements****AGENCY:** Export-Import Bank of the United States.**ACTION:** Final rule.

SUMMARY: The Export-Import Bank of the United States (EXIM) is publishing revised regulations under the Freedom of Information Act (FOIA). The revisions incorporate amendments to the FOIA under the FOIA Improvement Act of 2016, developments in case law, and changes in Federal and EXIM policies. The revisions also clarify procedural requirements.

DATES: This rule is effective August 10, 2022.

FOR FURTHER INFORMATION CONTACT: Chief Freedom Information Act Officer Lisa Terry at lisa.terry@exim.gov; (202) 565–3290.

SUPPLEMENTARY INFORMATION:**I. Background**

EXIM has revised its regulations under the FOIA, 5 U.S.C. 552. The revisions incorporate changes in law under the FOIA Improvement Act of 2016, developments in case law, and changes in Federal and EXIM policies. While incorporating these changes, EXIM has also sought to simplify and clarify its regulations. The final rule replaces EXIM's current FOIA regulations in their entirety (12 CFR 404.1 through 404.11).

II. Discussion

The numbered paragraphs immediately below provide an overview of the changes to the regulations. At the conclusion of this preamble, the new regulations are set forth in their entirety.

1. Amended: Authority.

The authority citation for part 404 is amended to include additional cites to EXIM's statutory charter (12 U.S.C. 635(a)(1)) and the rulemaking provisions of the Administrative Procedures Act (5 U.S.C. 553). Citations to executive orders imposing administrative requirements on EXIM are removed. The amended general authority is 12 U.S.C. 635(a)(1); 5 U.S.C. 552, 5 U.S.C. 552(a), 5 U.S.C. 553.

2. Redesignation of §§ 404.12 through 404.23.

Old section	New section
404.12	404.14
404.13	404.15

Old section	New section
404.14	404.16
404.15	404.17
404.16	404.18
404.17	404.19
404.18	404.20
404.19	404.21
404.20	404.22
404.21	404.23
404.22	404.24
404.23	404.25

3. Redesignation of §§ 404.24 through 404.36.

Old section	New section
404.24	404.26
404.25	404.27
404.26	404.28
404.27	404.29
404.28	404.30
404.29	404.31
404.30	404.32
404.31	404.33
404.32	404.34
404.33	404.35
404.34	404.36
404.35	404.37

4. Amended: § 404.1, General provisions.

This section is amended to clarify the purpose and scope of the FOIA regulations and to remove the current paragraph (b) setting forth EXIM policy. EXIM policy complies with the FOIA and related guidance, as set forth in the remainder of the regulations, and the current (un-amended) paragraph (b) is either duplicative or could cause confusion.

Current paragraphs (d) and (e) describe EXIM's proactive disclosures and provide EXIM's internet address and mailing address. This information is amended and moved to §§ 404.2, Proactive disclosures, and 404.3, Request requirements.

5. Removed: Current § 404.2, Definitions.

This section is eliminated, with most of the definitions relocated to the sections in which the defined terms are used. The majority of the relocated definitions pertain to current § 404.16, Schedule of fees. The definitions of "Confidential business information" and "Submitter" are relocated to the section currently labelled "Confidential business information." The regulations change the phrase "confidential business information" to "confidential commercial information" for greater consistency with the statutory language, related case law, and applicable guidance. "Working days" was relocated to the section addressing time for processing, previously at § 404.5.

Several other definitions are eliminated as unnecessary due to their

being common usage, duplicative of information contained elsewhere, or otherwise sufficiently clear in meaning from the context in which they were used. These terms are eliminated for purposes of brevity and clarity. This includes the definitions of "appeal," "final determination," "initial determination," "person," "redaction," "request," and "requester."

The current definition of "trade secrets" is eliminated as legally incorrect.

6. Amended: § 404.2, Proactive disclosures.

This section is renumbered from current § 404.3 to § 404.2 and renamed "Proactive disclosures." The current wording describes procedures for accessing a physical reading room at EXIM's headquarters, while the revision includes the online reading room now required by the FOIA. The amended section also states that EXIM's FOIA Liaison is available to help requesters locate information online. In addition, the amended section newly describes the data that EXIM posts at data.exim.gov on EXIM's transactions.

7. Amended: § 404.3, Request requirements.

This section is renumbered from current § 404.4 to § 404.3. This section encourages potential requesters to review the information publicly available on the EXIM website before submitting a request. EXIM believes it is in requesters' best interest to review the significant amount of information available online before submitting a request.

This section also states the electronic means for submitting a request, including by email to foia@exim.gov, through the online portal at www.exim.gov/about/foia or in the alternative, to the national request portal at <https://www.foia.gov>. The current requirement that requesters sign their request was eliminated as inconsistent with the FOIA and EXIM's past practice of accepting unsigned electronic submissions. Requesters would instead need to provide contact information.

The current statement that a general request to pay applicable fees is deemed a request to pay up to \$50.00 was eliminated. This statement is viewed as potentially inconsistent with the Office of Management and Budget's (OMB's) FOIA Fee Guidelines, which requires agencies to notify requesters of fees exceeding \$25.00.

This section also clarifies and updates the language that sets forth the process for obtaining records by the requester (or a third party), and the need for a request to provide an adequate

description of the records. The section also provides for FOIA Public Liaison assistance in reformulating a request.

8. *Added:* § 404.5, Responsibility for responding to requests.

This newly added section provides the Freedom of Information and Privacy Office the authority to respond to requests, establish a “cut off” date for searches at the time the search is conducted, address classified information, and describe EXIM’s procedures for working with other agencies in the processing of requests—including through consultations, referrals, and other types of coordination.

9. *Amended:* § 404.6, Time for processing.

This section is renumbered from current § 404.5 to § 404.6. It newly incorporates the statutory definition of “unusual circumstances” and “working days.” This section also provides for multitrack processing, with the following tracks: expedited, simple, and complex. This section also seeks to clarify the current language and add additional detail to the expedited processing provisions.

10. *Amended:* § 404.7, Release of records.

This section is renumbered from current § 404.6 to § 404.7 and renamed. It includes the foreseeable harm requirement for discretionary exemptions, added by the FOIA Improvement Act of 2016.

The current paragraph (a), addressing the “creation of records,” was eliminated as both inconsistent with the FOIA and unnecessary. Even though this subsection is eliminated, EXIM would retain the authority to create appropriate records.

As indicated in this section, the current paragraph (d) addressing the “cut off” date for searches is amended and relocated to § 404.5.

11. *Amended:* § 404.8, Responses to requests.

Section 404.8, Initial determination, is renamed for purposes of clarity and greater consistency with other agency FOIA regulations. The section also newly provides for communication with requesters by email and EXIM’s online portal, newly provides for the acknowledgement of requests, and more fully describe EXIM obligations when there is either a full grant of the requested records or an adverse determination of some kind. This section also newly addresses FOIA exclusions under 5 U.S.C. 552(c).

As required by the FOIA Improvement Act of 2016, this section requires EXIM to notify requesters of the services provided by the Office of

Government Information Services (OGIS).

12. *Amended:* § 404.9, Confidential commercial information.

This section is renumbered from current § 404.7, Confidential business information, to § 404.9 and renamed. The title “confidential business information” is changed to “confidential commercial information” to better match the wording of the requirements in Exemption 4, case law, related guidance, and other agency FOIA regulations. The protections and procedures remain the same and are in accordance with Executive Order 12600, but the amendments here seek to provide additional detail and clarity for requesters based on the legal standards applicable under Exemption 4.

13. *Amended:* § 404.10, Schedule of fees.

This section is renumbered from current § 404.9 to § 404.10. As referenced above, this section newly incorporates amended versions of the definitions that are currently located in a general definitions section at § 404.2. The amended language also updates and provides additional detail on EXIM’s fee practices, consistent with OMB’s Fee Guidelines.

The rate for clerical search and review time are increased from \$16.00/hour to \$33.00/hour. The rate for professional search and review time are increased from \$32.00/hour to \$57.00/hour. This reflects increased labor rates since the regulations were last updated in 1999.

Notice of anticipated fees are generally provided when the estimated fees exceed \$25.00, unless a requester has already agreed to pay more or has received a waiver. This is lowered from the current \$50.00 to match OMB’s Fee Guidelines.

14. *Amended:* § 404.11, Fee waivers or reductions.

This section is renumbered from current § 404.10 to § 404.11. As with the prior two sections addressed above, this section is expanded to provide additional guidance and clarity for requesters. The substantive standards for seeking fee waivers are governed by the FOIA and related case law, however, and would remain unchanged. Current paragraph (e), Employee Requests, are removed because the FOIA is generally not needed for employees or applicants to obtain information related to a complaint of discrimination. Discrimination complaints are governed by procedures established by the Equal Employment Opportunity Commission and, regardless, EXIM would retain the authority to grant discretionary fee waivers and reductions.

15. *Amended:* § 404.12, Administrative appeals.

This section is renumbered from current § 404.11 to § 404.12. The changes are provided for the electronic submission of appeals and to notify appellants of the ability to seek assistance from OGIS.

16. *Amended:* § 404.13, Preservation of records.

This newly added section provides for the preservation of all correspondence associated with a request, as well as all requested records, under appropriate records schedules. It also prohibits the destruction or modification of records while they are subject to a pending request, administrative appeal, or lawsuit.

17. *Amended:* Subparts B and C.

Cross references in subparts B and C are updated to reflect section redesignations in the subparts.

Regulatory Flexibility Act Certification

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The changes to EXIM’s FOIA regulations are predominantly procedural in nature and many incorporate already binding law and policy. While the changes also increase the rates that EXIM uses to charge certain FOIA requesters the direct costs of responding to a request, this updated fee schedule reflects current EXIM costs and EXIM remains only able to charge its direct costs of searching for, reviewing, and duplicating the records processed for requesters. There are a number of possible exceptions and waivers that reduce the number of requesters and small entities that may be affected by the fee changes and, even when charged, these fees are typically small. When needed, EXIM is able to work with requesters to modify their request to reduce the chargeable fees while still obtaining the core information they seek.

As a result, the changes are unlikely to have an economic impact on requesters regardless of their size and resources. Accordingly, EXIM hereby certifies that these amendments to the FOIA regulations would not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

This final rule is not a “significant regulatory action” for purposes of Executive Order 12866.

Executive Order 13771

This final rule is not a regulatory action under Section 2 of Executive Order 13771 because it is not significant under Executive Order 12866 and does not constitute a significant guidance document.

Paperwork Reduction Act

This regulation does not contain a “collection of information” as defined by the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

List of Subjects in 12 CFR Part 404

Administrative procedures, Freedom of information.

Text of Amendments

For the reasons stated in the preamble, EXIM amends 12 CFR part 404 as follows:

PART 404—INFORMATION DISCLOSURE

■ 1. The authority citation for part 404 is revised to read as follows:

Authority: 12 U.S.C. 635(a)(1); 5 U.S.C. 552, 5 U.S.C. 552(a), 5 U.S.C. 553.

Section 404.7 also issued under E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

Section 404.21 also issued under 5 U.S.C. 552a note.

Subpart C also issued under 5 U.S.C. 301, 12 U.S.C. 635.

§§ 404.24 through 404.36 [Redesignated as §§ 404.26 through 404.38]

■ 2. Redesignate §§ 404.24 through 404.36 as §§ 404.26 through 404.38.

§§ 404.12 through 404.23 [Redesignated as §§ 404.14 through 404.25]

■ 3. Redesignate §§ 404.12 through 404.23 as §§ 404.14 through 404.25.

■ 4. Revise subpart A to read as follows:

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

404.1 General provisions.

404.2 Proactive disclosures.

404.3 Request requirements.

404.5 Responsibility for responding to requests.

404.6 Time for processing response to requests.

404.7 Release of records.

404.8 Responses to requests.

404.9 Confidential commercial information.

404.10 Schedule of fees.

404.11 Fee waivers or reductions.

404.12 Administrative appeals.

404.13 Preservation of records.

§ 404.1 General provisions.

(a) *Purpose.* This subpart contains the rules that the Export-Import Bank of the United States (EXIM) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. This subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines).

(b) *Scope.* Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with EXIM's Privacy Act regulations in subpart B of this part as well as under this subpart.

(c) *Delegation.* Any action or determination in this subpart which is the responsibility of a specific EXIM employee may be delegated.

§ 404.2 Proactive disclosures.

(a) Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through the EXIM internet site at <https://www.exim.gov/about/foia/frequently-requested-records-and-proactive-disclosures> and <https://data.exim.gov/>. EXIM is responsible for determining which records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. EXIM must ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. EXIM's FOIA Public Liaison can assist individuals in locating records particular to the agency. The contact information for the Public Liaison is available at <https://www.exim.gov/about/foia>, along with other FOIA resources.

(b) EXIM proactively discloses information at data.exim.gov on applications and transactions, whether denied or authorized, including: unique identifiers EXIM assigns; approval and declination decisions; the expiration date for a guarantee or insurance policy; whether an insurance policy was brokered or not; whether an approved transaction was cancelled after approval; the country where the credit risk is; the financing program or product that was applied for, including the type of any insurance; the primary export product; a product description; the length of financing on a deal; the principal applicant; the principal

lender; the principal exporter; the city and state of the primary exporter; the company name of the principal borrower; the primary source of repayment; the amount of financing approved or declined; the amount of the loan or guarantee that has been disbursed or the amount that has been shipped on an insurance policy; the undisbursed exposure amount; the portion of the disbursed/shipped amount that has not been repaid; the portion of an approved amount that assisted a small business; the portion of an approved company that assisted a woman owned company; the portion of an approved amount that assisted a minority owned company; the interest rate being applied to a direct loan; and whether a working capital amount is pursuant to an extension of a previously approved working capital facility.

§ 404.3 Request requirements.

(a) Before submitting a FOIA request, potential requesters are encouraged to review the information publicly available at <https://www.exim.gov/about/foia/frequently-requested-records-and-proactive-disclosures> and <https://data.exim.gov/>. The material you seek may be immediately available at no cost.

(b)(1)(i) A request for records must be made directly to EXIM in writing. Requests may be submitted to the EXIM FOIA Office:

(A) By email to foia@exim.gov;

(B) Using the online form available at <https://www.exim.gov/about/foia>;

(C) Using the online FOIAExpress PAL Portal available at <https://palprod.eximefoia.com/>; and

(D) By mail addressed to the Freedom of Information and Privacy Office, 811 Vermont Ave. NW, Washington, DC 20571.

(E) In the alternative, requests may be submitted to the national request portal at <https://www.foia.gov>.

(ii) Additional resources and contact information are available at <https://www.exim.gov/about/foia>.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as set forth at § 404.16(d). This requires the request and signature to be notarized. Requester may instead submit a statement under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance

with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, EXIM can require a requester to supply additional information if necessary, in order to verify that a particular individual has consented to disclosure.

(c)(1) Each request must describe the records sought in sufficient detail to enable EXIM personnel to locate the records with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help EXIM identify the requested records, such as relevant dates, format, subject matter, title, transaction or reference number, and the name of any person to whom the record is known to relate. For assistance in drafting a records request, requesters can contact EXIM's FOIA Public Liaison.

(2) If after receiving a request EXIM determines that it does not reasonably describe the records sought, EXIM must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with EXIM's FOIA contact or FOIA Public Liaison. If, after contacting the requestor, EXIM is unable to clarify the timeframe for which a particular request seeks records, EXIM may deem the request to be a request for records created within the preceding twelve months.

(d) Requests may specify the preferred form or format (including electronic formats) for the records sought. EXIM will accommodate your request if the records are readily reproducible in that form or format.

(e) Requesters must provide contact information, such as their phone number, email, and mailing address, to assist EXIM in communicating with them and providing released records.

(f) A request must state the requester's willingness to pay any applicable fees or contain a request for a fee waiver. A requester may set a maximum amount the requester is willing to pay. The fee schedule and related provisions are provided in § 404.10. The ability to request fee waivers is set forth at § 404.11. EXIM will not process your request while clarifying fee issues.

§ 404.5 Responsibility for responding to requests.

(a) *In general.* In determining which records are responsive to a request, EXIM ordinarily will only include

records that qualify as agency records under the FOIA on the date EXIM begins its search. If any other date is used, EXIM must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Freedom of Information and Privacy Office is authorized to grant or deny any requests for records. This is the initial determination that can be appealed. The Freedom of Information and Privacy Office is also responsible for coordinating the search for responsive records and other matters concerning the processing of the request.

(c) *Consultation, referral, and coordination.* When reviewing records located by EXIM in response to a request, EXIM will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. With any such record, EXIM must proceed in one of the following ways:

(1) *Consultation.* When records originated with EXIM, but contain within them information of interest to another agency or Federal Government office, EXIM will typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When EXIM determines that a different agency is best able to determine whether to disclose the record, EXIM will typically refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the agency processing the request and the originating agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever EXIM refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure in paragraph (c)(2) of this section is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption under FOIA, such

as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, EXIM will typically coordinate with the originating agency to seek its views on the releasability of the record. Subsequently, EXIM will convey the release determination for the record that is the subject of the coordination to the requester.

(d) *Classified information.* On receipt of any request involving classified information, EXIM must determine whether the information is currently and properly classified in accordance with applicable laws. When a request involves a record containing information that has been classified or may be appropriate for classification by another agency under an applicable Executive order, EXIM must refer the request for response to the agency that classified the information, or should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), EXIM must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by EXIM will be handled according to the date that the first agency received the FOIA request.

(f) *Agreements regarding consultations and referrals.* EXIM may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 404.6 Time for processing response to requests.

(a) *In general.* EXIM is obligated to respond to requests within 20 working days of the date of receipt of the request unless unusual circumstances exist. EXIM ordinarily processes requests according to their order of receipt.

(b) *Definitions.* As used in this section:

(1) *Unusual circumstances* means, only to the extent reasonably necessary to the proper process of requests:

(i) The need to search for and collect requested records from facilities 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 with another agency that has a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein. EXIM shall conduct any such consultations with all practicable speed.

(2) *Working days* means all calendar days excluding Saturdays, Sundays, and Federal Government holidays.

(c) *Date of receipt.* A request will be deemed to have been received on the date that the request is received in the Freedom of Information and Privacy Office, provided that the requester has met all the mandatory requirements of § 404.4. EXIM will notify the requester of the date on which a request was officially received in the acknowledgment correspondence.

(d) *Order of processing.* EXIM will ordinarily process requests in order of receipt within their processing track.

(e) *Multitrack processing.* EXIM has designated processing tracks that distinguish between expedited, simple, and complex requests based on the estimated amount of work or time needed to process the request. Among the factors EXIM considers are the number of offices involved, the number of pages involved in processing the request and the need for consultation or referrals. EXIM will advise requesters of the track into which their request falls and, when appropriate, EXIM may offer the requester an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(f) *Unusual circumstances.* When EXIM cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and extends the time limit on that basis, EXIM must, before expiration of the 20-day period to respond, notify

the requester in writing of the unusual circumstances involved and of the date by which EXIM estimates processing of the request will be completed. Where the extension exceeds 10 working days, EXIM must provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. EXIM’s FOIA contact or Public Liaison is available for this purpose. EXIM will also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(g) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, EXIM may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. EXIM cannot aggregate multiple requests that involve unrelated matters.

(h) *Expedited processing.* (1) EXIM must process requests and appeals on an expedited basis when EXIM determines that the requester or appellant has demonstrated:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) In the case of a requester who is primarily engaged in disseminating information, an urgency to inform the public concerning actual or alleged Federal Government activity. A requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester’s sole occupation. Such a requester also must establish a particular urgency to inform the public about the Government activity involved in the request—one that extends beyond the public’s right to know about Government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted to the EXIM’s Assistant General Counsel for Administrative Law and Board Support.

(3) A request for expedited processing and other submissions in support of the request must be accompanied by a statement certified by the requester to be

true and correct to the best of his or her knowledge and belief. EXIM may waive this formal certification requirement as a matter of discretion. The statement must be in the form prescribed by 28 U.S.C. 1746:

(i) If executed within the United States: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date]. (signature).”

(ii) If executed outside the United States: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).”

(i) *Determination.* Upon receipt of a request for expedited processing, EXIM will consider the request and notify the requester of its determination within 10 calendar days of receipt of the request. If a request for expedited treatment is granted, the request will be given priority and will be placed in a processing track for expedited requests and processed as soon as practicable.

(j) *Appeal.* A requester may file an administrative appeal, as set forth at § 404.12, based on a denial of a request for expedited processing. EXIM will grant expeditious consideration to any such appeal. The appeal should be clearly marked “Appeal for Expedited Processing.”

§ 404.7 Release of records.

(a) *Foreseeable harm standard.* As required by the FOIA, EXIM will disclose material unless it reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law.

(b) *Segregable records.* Whenever it is determined that a portion of a record is exempt from disclosure, any reasonably segregable portion of the record will be provided to the requester after redaction of the exempt material.

§ 404.8 Responses to requests.

(a) *General.* To the extent practicable, EXIM will communicate with requesters having access to the internet electronically through email or web portal available at <https://www.exim.gov/about/foia>.

(b) *Acknowledgment of request.* EXIM must acknowledge all FOIA requests in writing and assign a request number for reference and tracking the status of the request online. EXIM must also include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their request.

(c) *Estimated dates of completion and interim responses.* Upon request, EXIM will provide an estimated date by which

EXIM expects to provide a response to the requester. If a request involves a voluminous amount of material or searches in multiple locations, EXIM may provide interim responses, releasing the records on a rolling basis.

(d) *Grant of request.* Once EXIM has made a determination to grant a request in whole or in part, it will notify the requester in writing. EXIM also will inform the requester of any fees charged under § 404.10 and will disclose the requested records to the requester promptly upon payment of any applicable fees. EXIM shall inform the requester that EXIM's FOIA Public Liaison is available to offer assistance.

(e) *Adverse determination.* EXIM will notify the requester in writing if it makes an adverse determination denying a request in any respect. Adverse determination or denials of request may include decisions that: the requested records are exempt in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested records do not exist, cannot be located or have been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing. Whenever EXIM makes an adverse determination, the denial notice will be signed by the Chief FOIA Officer or other appropriate executive or designee and include:

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

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under § 404.12(a) and a description of the requirements of § 404.12(a); and

(5) A statement notifying the requester of the assistance available from FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services (OGIS).

(f) *Markings on released documents.* Markings on released documents must

be clearly visible to the requester. Records disclosed in part will be marked to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption.

(g) *Use of record exclusions.* (1) In the event that EXIM identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), EXIM must confer with the Department of Justice (DOJ) Office of Information Policy (OIP) to obtain approval to apply the exclusion.

(2) When invoking an exclusion EXIM will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 404.9 Confidential commercial information.

(a) *Definitions.* As used in this section:

(1) *Confidential commercial information.* Trade secrets and commercial or financial information obtained by EXIM from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter.* Any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Submitter designation.* All submitters of confidential commercial information must use good faith efforts to designate, by appropriate markings, at the time of submission, any portion of their submissions that they consider to be exempt from disclosure under Exemption 4. This obligation continues after submission, such that a submitter should inform EXIM if it later identifies submitted information that was not marked or newly considers submitted information to be protected by Exemption 4.

(c) *Pre-disclosure notice to the submitter.* EXIM must provide prompt written notice to the submitter of information that is potentially confidential commercial information whenever records containing such information are requested under the FOIA if EXIM determines that it may be required to disclose the records and:

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

(2) EXIM has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet

determined whether the information is protected from disclosure.

(d) *Notice requirements.* The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, EXIM may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(e) *When notice is not required.* EXIM does not need to send the notice called for by paragraph (c) of this section if:

(1) EXIM determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, EXIM must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date, as specified in paragraph (g) of this section for disclosures made over a submitter's objection.

(f) *Opportunity to object to disclosure—(1) Timeline for a response.*

(i) A submitter located within the United States will have 10 working days from and including the date of the notification letter to respond to an EXIM notice sent under paragraph (c) of this section, unless another reasonable time period is specified in EXIM's notice.

(ii) A submitter located outside the United States will have 20 working days from and including the date of the notification letter to respond to an EXIM notice sent under paragraph (c) of this section, unless another reasonable time period is specified in EXIM's notice.

(iii) EXIM may extend the time for objection upon timely request from the submitter and for good cause shown.

(2) *Content of submitter's response.* (i) If a submitter has any objections to EXIM's disclosure of the information identified in the notice, the submitter should specify all grounds for EXIM to withhold the particular information under the FOIA.

(ii) In order to rely on Exemption 4 as a basis for EXIM withholding any of the information as confidential commercial information, the submitter must provide

a specific and detailed written explanation of why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. A submitter invoking Exemption 4 in its response should consider including or addressing the following:

(A) Why the information qualifies as a trade secret or is privileged; or

(B) Why the information is confidential commercial or financial information.

(iii) A submitter who fails to respond within the time period specified will be considered to have no objection to disclosure of the information. EXIM will not consider any information received after this time period.

(iv) Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA and should be appropriately marked if confidential.

(g) *Notices to the requester.* EXIM will notify the requester in writing whenever EXIM provides a submitter the opportunity to object to disclosure of records pursuant to paragraph (b) of this section; whenever EXIM notifies the submitter of EXIM's intent to disclose information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

(h) *Consideration of a submitter's response.* EXIM must consider a submitter's timely response prior to making its disclosure decision, including all objections and specific grounds for nondisclosure under the FOIA.

(i) *Notice of intent to disclose.* Whenever EXIM decides to disclose information over the objection of a submitter, EXIM must notify the submitter, in writing, of EXIM's determination. EXIM must include in this notice:

(1) The reasons for the disclosure decision, including a response to each of the submitter's disclosure objections; and

(2) A description of the information to be disclosed or copies of the records as EXIM intends to release them; and

(3) A specified disclosure date, which must provide the submitter a reasonable time after the notice to file suit to prevent the disclosure. This time period will be at least 10 working days from EXIM's transmission of the notice of intent to disclose.

(j) *Appeals by requesters.* In response to a requester's administrative appeal of a withholding under Exemption 4, EXIM will comply with the provisions of this section before disclosing any such information.

(k) *Notice of requester's FOIA lawsuit.* EXIM must promptly notify the submitter whenever a requester brings suit against EXIM seeking to compel the disclosure of confidential commercial information.

(l) *Publicly available information.* EXIM may, upon request or on its own initiative, publicly disclose the information contained at *exim.data.gov*, listed at § 404.2, including the parties to transactions for which EXIM approves support, the amount of such support, the identity of any primary participants involved, a general description of the related U.S. exports, and the country to which such exports are destined.

§ 404.10 Schedule of fees.

(a) *In general.* EXIM will charge fees to recover the full allowable direct costs it incurs in processing requests under the FOIA in accordance with the provisions of this section and OMB Guidelines. OMB Guidelines are accessible at <https://www.justice.gov/oip/foia-resources>. Requesters may seek a fee waiver. EXIM will consider requests for fee waiver in accordance with the requirements in § 404.11. To resolve any fee issues that arise under this section, EXIM may contact a requester for additional information. EXIM will attempt to conduct searches in the most efficient manner to minimize costs. EXIM ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or another method EXIM determines.

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

(1) *Commercial use request.* A request for a use or purpose that furthers the commercial, trade or profit interest of the requester, which can include furthering those interests through litigation.

(2) *Direct costs.* Expenditures EXIM incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in response to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, including locality pay adjustment, plus 16 percent of that rate to cover benefits), fees associated with the return of records stored offsite, the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication.* Is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) *Educational institution.* Any school that operates a program of scholarly research. A requester in the fee category in this paragraph (b)(4) must show that the request is made in connection with his or her role at the education institution. EXIM may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(i) *Example 1.* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

(ii) *Example 2.* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

(iii) *Example 3.* A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Non-commercial scientific institution.* An institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) of this section for purposes of a "commercial use request," and is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in the fee category in this paragraph (b)(5) must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for commercial use. EXIM will advise requesters of their placement in this category.

(6) *Representative of the news media.* Any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience. 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 include television or radio stations that broadcast "news" to the

public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however EXIM can also consider a requester’s past publication record in making this determination. EXIM will advise requesters of their placement in the fee category in this paragraph (b)(6).

(7) *Review.* The process of examining a record in response to a request to determine whether any portion is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by confidential commercial information submitter under § 404.9, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search.* The process of looking for, identifying, and collecting records responsive to a request. For fee purposes, this refers to all time spent looking for materials that is responsive to a request. Searches may be conducted manually or by electronic means. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Categories of requesters.* Fees will be assessed depending on the category of the requester. The specific schedule of fees for each requester category is prescribed as follows:

(1) *Commercial use requesters.* EXIM will charge the full costs for search, review, and duplication.

(2) *Educational, non-commercial scientific institution, and representatives of the news media requesters.* When the records are not sought for commercial use, EXIM will charge only for the cost of duplication

in excess of 100 pages and no fee will be charged for search or review.

(3) *All other requesters.* For requesters who are not covered by paragraphs (c)(1) and (2) of this section, EXIM will charge for the cost of search and duplication, except that the first 100 pages of duplication (or the cost equivalent of other media) and two hours of search time will be furnished without charge.

(d) *Search and review fees.* Subject to the restrictions in paragraph (i) of this section and in accordance with the applicable requester categories in paragraph (c) of this section, EXIM will charge the following fees for search and review, based on:

(1) *Clerical.* Hourly rate—\$33.00.

(2) *Professional.* Hourly rate—\$57.00

(3) *Direct cost.* Hourly rate—based upon the salary of the employee performing (base salary, including locality pay adjustment, and 16 percent for benefits). May also include fees for the return of records stored offsite, the cost of operating computers and other electronic equipment.

(4) *Quarter-hour period.* No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(5) *No fee.* No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.

(e) *Search.* (1) Subject to the restrictions in paragraph (i) of this section EXIM will charge search fees.

(2) EXIM may properly charge for time spent searching even if EXIM does not locate any responsive records or if EXIM determines that the records are entirely exempt from disclosure.

(3) EXIM will charge the direct cost associated with conducting any search that requires the creation of a new computer program to locate the requested records. EXIM must notify the requester of the cost associated with creating such a program, and the requester must agree to pay the associated cost before the costs may be incurred.

(4) For requests that require the retrieval of records stored by EXIM at a records storage facility, including a Federal records center operated by the National Archives and Records Administration (NARA), EXIM will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(f) *Duplication.* EXIM will charge duplication fees to all requesters, subject to the restrictions of paragraph (b) of this section. EXIM must honor a

requester’s preference for receiving a record in a particular form or format where EXIM can readily produce it in the form or format requested. Where photocopies are supplied, EXIM will provide one copy per request at the cost of \$.10 per page. For copies of records produced on disk or other media, EXIM will charge the direct cost of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester’s preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, EXIM will charge the direct costs. EXIM may also offer the requester the opportunity to alter the request in order to reduce duplication costs.

(g) *Review.* EXIM will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.*, the review conducted by EXIM to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with EXIM’s re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (e) of this section.

(h) *Special services charges.* Complying with requests for special services such as those listed in this paragraph (h) is entirely at the discretion of EXIM. EXIM will recover the full costs of providing such services to the extent that it elects to provide them.

(1) *Certifications.* EXIM will charge \$25.00 to certify the authenticity of any EXIM record or any copy of such record.

(2) *Special shipping.* EXIM may ship by special means (*e.g.*, express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. EXIM will not charge for ordinary packaging and mailing.

(i) *Restrictions on charging fees.* (1) When EXIM determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2) If EXIM fails to comply with the FOIA's time limits in which to respond to a request:

(i) It will not charge search fees, or, in the instance of request from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as follows in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If EXIM has determined that unusual circumstances, as defined by the FOIA, apply and EXIM provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

(iii) If EXIM has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, EXIM may charge search fees, or in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. EXIM must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and EXIM must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance 5 U.S.C. 552(a)(6)(B)(ii). If the exception in this paragraph (d)(2)(iii) is satisfied, EXIM may charge all applicable fees incurred in the processing of the request.

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

(j) *Notice of anticipated fees in excess of \$25.00.* (1) When EXIM determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, EXIM must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fees can be estimated readily, EXIM will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If EXIM notifies the requester that the actual or estimated fees are in excess

of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay actual or estimated total fees, or designates some amount of fees the requester is willing to pay, or in the case of a non-commercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. EXIM will not accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but EXIM estimates that the total fee will exceed that amount, EXIM will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. EXIM will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of notifications.

(4) EXIM's FOIA Public Liaison or another FOIA professional is available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(k) *Charging interest.* EXIM 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 by 31 U.S.C. 3717 and will accrue from the billing date until payment is received by EXIM. EXIM 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.

(l) *Aggregating requests for fee purposes.* When EXIM reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, EXIM may aggregate those requests and charge accordingly. EXIM may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, EXIM will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple

requests involving unrelated matters cannot be aggregated.

(m) *Advance payments.* (1) For requests other than those described in paragraph (n)(2) or (3) of this section, EXIM cannot require the requester to make an advance payment before work is commenced or continues on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to the request) is not an advance payment.

(2) When EXIM determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. EXIM may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, EXIM may require that the requester pay the full amount due, plus any applicable interest on that prior request, and EXIM may require that the requester make an advance payment of the full amount of any anticipated fee before EXIM begins to process a new request or continues to process a pending request or any pending appeal. Where EXIM has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which EXIM requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of EXIM's fee determination, the request will be closed.

(n) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, EXIM must inform the requester of the contact information for that program.

§ 404.11 Fee waivers or reductions.

(a) *General.* Requesters may seek a waiver of fees by submitting a written request demonstrating how disclosure of the requested information is in the

public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(b) *Form of request for fee waiver.* EXIM must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (b)(1) through (3) of this section are satisfied:

(1) Disclosure of the requester information would shed light on the operations or activities of the Government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information is likely to contribute to the public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about Government operations or activities. The disclosure of information that already is in the public domain, in either the same or substantially identical for, would not be meaningfully informative if nothing new would be added to the public understanding.

(ii) 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 as well as the requester's ability and intention to effectively convey information to the public must be considered.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, EXIM will consider the following criteria:

(i) EXIM must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest EXIM must determine whether that is the primary interest furthered by the request.

(4) A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) of this section

are satisfied and any commercial interest is not the primary interest furthered by the request. EXIM ordinarily will presume that when a news media requester has satisfied paragraphs (b)(1) and (2), the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees under this section, a waiver must be granted for those records.

(6) Requests for a waiver or reduction of fees should be made when the request is first submitted to EXIM and should address the criteria referenced in paragraphs (b)(1) through (5) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

(7) In all cases, the requester has the burden of presenting sufficient evidence or information to justify the fee waiver or reduction. The requester may use the procedures set forth in § 404.12 to appeal a denial of a fee waiver request.

§ 404.12 Administrative appeals.

(a) *General requirements for making an appeal.* A requester may appeal any adverse determination to the EXIM's Assistant General Counsel for Administrative Law and Board Support. Requesters can submit appeals by mail or via email at FOIA.Appeals@exim.gov in accordance with the following requirements: Appeals must be made in writing and contain the appellant's contact information, such as return address, email, or telephone number. To be timely it must be postmarked, or in the case of electronic submissions, transmitted within 90 calendar days after the date of the final response. The appeal should clearly identify the EXIM determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The Assistant General Counsel for Administrative Law and Board Support or designee will act on behalf of EXIM's

Chief FOIA officer on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of litigation.

(3) On receipt of any appeal involving classified information, EXIM must take appropriate action to ensure compliance with applicable classification laws.

(c) *Decisions on appeals.* A decision that upholds an agency's determination, in whole or in part, must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services (OGIS) of National Archives and Records Administration as a non-exclusive alternative to litigation. If EXIM's initial determination is remanded or modified on appeal, EXIM will notify the requester of that determination in writing. EXIM will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If EXIM agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of an adverse determination, a requester generally must submit a timely administrative appeal.

§ 404.13 Preservation of records.

EXIM will preserve all correspondence pertaining to the request that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. EXIM will not dispose or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 404.14 [Amended]

■ 5. Amend newly redesignated § 404.14 in paragraph (b) by removing "§ 404.13" and adding "§ 404.15" in its place.

§ 404.16 [Amended]

■ 6. Amend newly redesignated § 404.16 as follows:

- a. In paragraph (a), removing “§ 404.12(e)” and adding “§ 404.14(e)” in its place; and
- b. In paragraph (c) introductory text, removing “§ 404.16(d)” and adding “§ 404.18(d)” in its place.

§ 404.17 [Amended]

- 7. Amend newly redesignated § 404.17 in paragraph (b)(2)(iii) by removing “§ 404.17” and adding “§ 404.19” in its place.

§ 404.19 [Amended]

- 8. Amend newly redesignated § 404.19 in paragraph (a) introductory text by removing “§ 404.12(e)” and adding “§ 404.14(e)” in its place.

§ 404.20 [Amended]

- 9. Amend newly redesignated § 404.20 as follows:
 - a. In paragraph (a), removing “§ 404.12(e)” and “§ 404.14(d) and (e)” and adding “§ 404.14(e)” and “§ 404.16(d) and (e)” in their places, respectively.
 - b. In paragraphs (c) introductory text and (e), removing “§ 404.12(e)” and adding “§ 404.14(e)” in its place.

§ 404.21 [Amended]

- 10. Amend newly redesignated § 404.21 in paragraph (b) by removing “§ 404.14(d) and (e)” and “§ 404.12(e)” and adding “§ 404.16(d) and (e)” and “§ 404.14(e)” in their places, respectively.

§ 404.35 [Amended]

- 11. Amend newly redesignated § 404.35 by removing “§ 404.32” and adding “§ 404.34” in its place.

Joyce B. Stone,

Assistant Corporate Secretary.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1022

The Fair Credit Reporting Act's Limited Preemption of State Laws

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interpretive rule.

SUMMARY: States play an important role in the regulation of consumer reporting. State laws that are not “inconsistent” with the Fair Credit Reporting Act (FCRA) are generally not preempted by that statute. The FCRA also expressly preempts certain categories of State laws. This interpretive rule clarifies that

FCRA's express preemption provisions have a narrow and targeted scope. States therefore retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens. For example, if a State law were to forbid consumer reporting agencies from including information about medical debt, evictions, arrest records, or rental arrears in a consumer report (or from including such information for a certain period of time), such a law would generally not be preempted. Likewise, if a State law were to prohibit furnishers from furnishing such information to consumer reporting agencies, such a law would also not generally be preempted. Similarly, if a State law required that a consumer reporting agency provide information required by the FCRA at the consumer's requests in languages other than English, such a law would generally not be preempted.

DATES: This interpretive rule is effective on July 11, 2022.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

The Fair Credit Reporting Act (FCRA)—which was enacted in 1970 and has since been amended several times—was intended by Congress to “ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). The FCRA “imposes a host of requirements concerning the creation and use of consumer reports.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 335 (2016). Among other things, the statute sets forth the permissible uses of consumer reports, establishes limits for information included in consumer reports, and creates a process for consumers to dispute information in their credit files.

In the Consumer Financial Protection Act of 2010, Congress granted the Consumer Financial Protection Bureau general rulemaking authority over the FCRA (except for certain provisions that are administered by other Federal agencies).¹ The Bureau also has

authority to enforce the FCRA, along with other Federal regulators.²

States also play an important role in the regulation of consumer reporting. The FCRA itself grants States the authority to enforce the statute.³ Additionally, in the wake of Congress's enactment of the FCRA, many States passed their own versions of the statute. States have continued to enact legislation regulating the conduct of consumer reporting agencies, furnishers, and users of consumer reports. In some cases, State legislation provides protections to consumers that go above and beyond the requirements of the FCRA.

These State statutes exist alongside the FCRA, which says that—subject to certain exceptions—it “does not annul, alter, affect, or exempt any person subject to [the FCRA] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.”⁴ In other words, State laws that are not “inconsistent” with the FCRA—including State laws that are more protective of consumers than the FCRA—are generally not preempted.

The FCRA also expressly preempts certain categories of State laws. As relevant here, 15 U.S.C. 1681t(b) says that “[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under” certain sections or subsections of the FCRA:

- subsection (c) or (e) of section 1681b, relating to the prescreening of consumer reports;
- section 1681i, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, [with an exception for laws in effect on September 30, 1996];
- subsections (a) and (b) of section 1681m, relating to the duties of a person

U.S.C. 1681s(e)(1). The CFPA did not, however, transfer to the Bureau rulemaking authority for 15 U.S.C. 1681m(e) (“Red Flag Guidelines and Regulations Required”) and 15 U.S.C. 1681w (“Disposal of Records”).

² 15 U.S.C. 1681s(b).

³ 15 U.S.C. 1681(c).

⁴ 15 U.S.C. 1681t(a); see also *Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004) (“The FCRA makes clear that it is not intended to occupy the entire regulatory field with regard to consumer reports.”).

¹ The Bureau is generally authorized to issue regulations as “necessary or appropriate to administer and carry out the purposes and objectives of [the FCRA], and to prevent evasions thereof or to facilitate compliance therewith.” 15