



February 13, 2020

VIA ONLINE PORTAL

Frank Vance
Disclosure Office
Office of the Comptroller of the Currency
Washington, DC 20219
Via Online Portal

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Office of the Comptroller of the Currency (OCC), American Oversight makes the following request for records.

The Financial Stability Oversight Council (FSOC) has adopted significant changes to its monitoring of nonbank financial entities, also known as “shadow banks.”¹ New interpretive guidance directs the FSOC to take additional factors into account when applying systemically important financial institution (SIFI) designations and directs the Council to take an activities-based, rather than an entity-based, approach to regulation.² As such, it is significantly more difficult to apply the SIFI designation to nonbank financial entities.³ The measure is expected to result in a much more lenient form of supervision.⁴

Throughout the regulatory process, experts have expressed concerns about this shift.⁵ They note that it will become more difficult to apply SIFI designations because the label will carry additional stigma. Under recessionary conditions, the FSOC could hesitate to

¹ Victoria Guida & Katy O’Donnell, *Mnuchin Rebuked by Democrats Over Diminished Role of Financial Watchdog*, POLITICO (Dec. 5, 2019, 6:53 PM), <https://www.politico.com/news/2019/12/05/steven-mnuchin-fsoc-testimony-076702>.

² Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 249, 71,740-71,770 (Dec. 30, 2019) (revising 12 C.F.R. § 1310).

³ *Id.*

⁴ See Guida & O’Donnell, *supra* note 1.

⁵ See, e.g., Daniel Schwarcz, et al., *Comment of Legal Scholars on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, DIG. COMMONS @ BOSTON COLL. LAW SCH. (May 2019), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2245&context=lsfp>.



take decisive action, for fear of triggering a run.⁶ Because the FSOC has merely precatory authority over companies without this designation, it will be much less able to police threats posed by nonbank financial entities and the “shadow banking” industry writ large.⁷ As such, this measure has potentially significant consequences for the stability of the financial system.⁸

American Oversight seeks records to shed light on whether and to what extent this policy change was influenced by industry interests.

Requested Records

American Oversight requests that OCC produce the following records within twenty business days:

All email communications (including email messages with complete email chains, email attachments, calendar invitations, and calendar invitation attachments) sent by any of the officials specified in Column A, below, to any of the external individuals or entities specified in Column B, below, regarding regulation of nonbank financial companies.

Column A: OCC Officials	Column B: External Entities
1. Joseph Otting, Comptroller, and anyone communicating on his behalf, such as an executive or special assistant, or scheduler	1. Prudential Financial, including but not limited to anyone communicating with an email address ending in @prudential.com
2. Morris Morgan, Senior Deputy Comptroller	2. American International Group, including but not limited to anyone communicating with an email address ending in @aig.com
3. Jonathan Gould, Senior Deputy Comptroller	3. MetLife, including but not limited to anyone communicating with an email address ending in @metlife.com
4. Grovetta Gardineer, Senior Deputy Comptroller	4. GE Capital, including but not limited to anyone communicating with an email address ending in @gecapital.com
5. Grace Dailey, Former Senior Deputy Comptroller	
6. Maryann Kennedy, Senior Deputy Comptroller	
7. Michael Sullivan, Senior Deputy Comptroller	

⁶ See *id.* at 26.

⁷ See *id.* at 4.

⁸ See Gregg Gelzinis, *Strengthening the Regulation and Oversight of Shadow Banks*, CTR. FOR AM. PROGRESS (Jul. 2019), available at <https://www.americanprogress.org/issues/economy/reports/2019/07/18/471564/strengthening-regulation-oversight-shadow-banks/> (detailing the interconnectedness of shadow banks within the financial system).

	<ol style="list-style-type: none"> 5. Invariant, including but not limited to anyone communicating with an email address ending in @invariantgr.com 6. Cypress Advocacy, including but not limited to anyone communicating with an email address ending in @cypressgroupdc.com 7. Williams Group, including but not limited to anyone communicating with an email address ending in @thewilliamsgroupdc.com 8. Baker & Hostetler, including but not limited to anyone communicating with an email address ending in @bakerlaw.com 9. Ballard Partners, including but not limited to anyone communicating with an email address ending in @ballardfl.com and @ballardpartners.com 10. Porterfield, Fettig, & Sears, including but not limited to anyone communicating with an email address ending in @pfs-dc.com
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American Oversight believes that records containing the terms below are likely to be responsive records, and American Oversight requests that your agency, at a minimum, employ these search terms to identify responsive records:

1. “nonbank”
2. “shadow bank”
3. “systemically important financial institution”
4. SIFI
5. “Financial Stability Oversight Council”
6. FSOC
7. “Dodd-Frank”
8. “activities based”
9. “activities-based”
10. “entity-based”
11. “entity based”

In an effort to accommodate OCC and reduce the number of responsive records to be processed and produced, American Oversight has limited its request to emails sent by listed custodians. To be clear, however, American Oversight still requests

that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both an agency custodian's response to an email from a listed entity and the initial received message are responsive to this request and should be produced.

Please provide all responsive records from January 1, 2019, until the date of the search.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."⁹ The public has a significant interest in guarding stability of the financial system. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent regulations are influenced by the financial industry. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁰ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹¹

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ *See id.*

¹¹ American Oversight currently has approximately 15,000 page likes on Facebook and 101,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 10, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 10, 2020).

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹² Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department’s process for issuing such waivers;¹³ posting records received as part of American Oversight’s “Audit the Wall” project to gather and analyze information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁴ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁵ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹⁶ and posting records and analysis regarding the Department of Justice’s decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President’s political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁷

Accordingly, American Oversight qualifies for a fee waiver.

¹² *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹³ *DOJ Records Relating to Solicitor General Noel Francisco’s Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

¹⁴ *See generally Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹⁵ *Documents Reveal Ben Carson Jr.’s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁶ *Investigating the Trump Administration’s Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁷ *Sessions’ Letter Shows DOJ Acted on Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁹
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁰ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but

¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Hart Wood at foia@americanoversight.org or

202.873.1743. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight