UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Case No. 1:24-cv-1857-ACR

RESPONSE TO DEFENDANT FDIC'S PRE-MOTION NOTICE AND REQUEST FOR CONFERENCE

Pursuant to this Court's Standing Order, Plaintiff History Associates Incorporated ("History Associates") submits the following response to Defendant Federal Deposit Insurance Corporation's ("FDIC") Pre-Motion Notice and Request for Conference (ECF 16).

As both the FDIC's pre-motion notice and History Associates' notice of its cross-motion (ECF 17) reflect, the parties agree on the scope of the disputed issues and that cross-motions for summary judgment provide the right procedural framework for resolving them. The parties simply disagree as a legal matter about the proper interpretation of the Freedom of Information Act ("FOIA") and its application to the Pause Letters. The parties have three principal disputes.

First, the parties disagree on whether FOIA Exemption 8 applies to the Pause Letters at all. *Compare* ECF 16, at 3, *with* ECF 17, at 3-4. History Associates maintains that Exemption 8, like all FOIA Exemptions, must be "given a narrow compass" consistent with FOIA's overarching purpose of promoting disclosure, *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), and that by its plain terms Exemption 8 does not cover the Pause Letters. By all accounts, the Pause Letters conveyed a top-down, programmatic FDIC directive to cut off crypto companies from

banking services, *see* ECF 17, at 2 (FDIC acknowledging that Pause Letters direct banks to "pause from proceeding with planned activities or expanding existing crypto-related activities")—not the content of or information related to any FDIC "examination, operating, or condition report[]" regarding any particular financial institution it regulates, 5 U.S.C. § 552(b)(8). The FDIC, in contrast, asserts that Exemption 8—unlike other FOIA exemptions—should be read expansively to shield even these top-down agency directives. ECF 17, at 3-4. The parties' disagreement thus centers on the proper reading of Exemption 8. After resolving that issue of statutory interpretation, the Court can determine whether Exemption 8 applies to the Pause Letters based on the FDIC's affidavits and *Vaughn* Index and *in camera* review of the documents. Both the correct interpretation of Exemption 8 and its application here are properly resolved on summary judgment.*

Second, the parties disagree on whether, even if Exemption 8 applies to portions of the Pause Letters, the FDIC must segregate and disclose *non*-exempt portions. *Compare* ECF 16, at 4, with ECF 17, at 4. History Associates maintains that the Pause Letters likely contain non-exempt portions that must be disclosed. For example, any formulaic portions of the Pause Letters sent to multiple banks would not be covered by Exemption 8 and must be disclosed. *Cf.* ECF 17, at 4. And, at minimum, the portions of the Pause Letters quoted in the OIG Report must be produced, because "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). The FDIC, however, asserts that there are *no* non-exempt portions, taking the position that Exemption 8 reaches "all of the information in the 'pause letters.'" ECF 17, at 4. This disputed issue thus likewise centers on the correct interpretation of Exemption 8 and its application here—questions that are appropriately resolved on cross-motions for summary judgment.

* The FDIC reports that there are fewer than 100 documents, ECF 14 ¶ 6, and History Associates understands each copy of the letter to be mostly identical to the others, ECF 1 ¶ 39.

Third, the parties dispute whether, even if Exemption 8 reaches everything in the Pause Letters, the FDIC still must disclose them under the 2016 FOIA amendments because it has failed to identify harm disclosure would cause. *Compare* ECF 16, at 3-4, *with* ECF 17, at 4. History Associates maintains that the FDIC has identified no such harm beyond generic, conclusory recitals. ECF 1, ¶¶ 58, 70-71. The FDIC asserts that disclosure would harm financial institutions that received Pause Letters by revealing their business information and harm regulators by "invading" their relationship with those institutions. ECF 17, at 3-4. But it has never explained how such harm could result from disclosing formulaic directives sent by the FDIC as part of an effort to debank the crypto industry or why any harm cannot be fully addressed by redacting bank-specific information.

Although they disagree on the merits of these issues, the parties agree that cross-motions for summary judgment are the appropriate way to resolve them. The FDIC should file the initial motion because it "bears the burden of proving" that Exemption 8 applies, that no non-exempt portions can be segregated, and that disclosure would cause harm. *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 55 (D.D.C. 2014). History Associates would then file a cross-motion because, if the FDIC fails to meet its burden, History Associates will be entitled to judgment and (among other relief) to an order requiring production of the Pause Letters by a date certain. ECF 1, at 16.

Date: September 11, 2024

Respectfully submitted,

/s/ Jonathan C. Bond

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