IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED,
7361 Calhoun Place, Suite 310
Rockville, MD 20855,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
550 17th Street, NW
Washington, D.C. 20429,

Defendant.

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

AMENDED COMPLAINT

Coinbase, Inc., the largest digital-asset trading platform in the United States, retained Plaintiff History Associates Incorporated to submit a Freedom of Information Act ("FOIA") request seeking records from the Federal Deposit Insurance Corporation ("FDIC"). The FDIC denied that request. History Associates now files this amended complaint to compel the FDIC to cease its unlawful FOIA policies and practices.

INTRODUCTION

1. For several years, a wide array of federal financial regulators—including the Securities and Exchange Commission ("SEC"), the FDIC, and the Federal Reserve Board—have used every regulatory tool at their disposal to try to cripple the digital-asset industry. This FOIA lawsuit seeks to bring to light the FDIC's role in that unlawful scheme.

2. In October 2023, a report by the FDIC's own Office of Inspector General ("OIG") revealed that the FDIC had sent letters (the "Pause Letters") to an undisclosed number of supervised financial institutions asking them to pause crypto-related activities—indefinitely. The

OIG report criticized the Pause Letters as inconsistent with previous FDIC guidance on crypto-related activities, and it explained that the letters created a "risk that the FDIC would inadvertently limit financial institution innovation and growth in the crypto space."

3. But there was nothing inadvertent about it. The Pause Letters were part of a deliberate and concerted effort by the FDIC and other financial regulators to pressure financial institutions into cutting off digital-asset firms from the banking system.

4. This playbook was not new. More than a decade ago, under the leadership of the same Chair, the FDIC and other agencies attempted to bully banks into terminating their relationships with payday lenders. Termed "Operation Choke Point" by the regulators, their coordinated assault on a disfavored industry was halted only after a congressional investigation and a successful lawsuit.

5. The FDIC apparently did not learn its lesson. Together with other agencies, it mounted Operation Choke Point 2.0—a similar scheme designed to prevent banks from offering or engaging in digital-asset activities and to deprive the digital-asset industry of the banking services it needs (like all businesses) to operate in today's economy. The Pause Letters were a critical component of that campaign.

6. Operation Choke Point 2.0, like its predecessor, was unlawful. It is illegal for financial regulators to coerce regulated institutions in secret to cut ties with businesses the government disfavors—particularly those outside the regulators' jurisdiction. *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, 132 F. Supp. 3d 98 (D.D.C. 2015). Indeed, the Supreme Court recently confirmed unanimously that these kinds of regulatory pressure campaigns violate the most basic rights protected by the Constitution. *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316 (2024).

7. To try to pull back the curtain, Coinbase, Inc., the largest digital-asset trading platform in the United States, turned to FOIA—a statute designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation marks omitted).

8. Coinbase retained Plaintiff History Associates to submit a FOIA request seeking copies of the Pause Letters. But even though the OIG's report had already revealed the existence of the Pause Letters—and had even quoted from them—the FDIC refused to disclose even one word of a single letter, saying that even if the letters existed, they would be exempt from disclosure. The FDIC then doubled down after an administrative appeal. That refusal violated the FDIC's FOIA obligations, and History Associates brought this FOIA suit in June 2024 to compel disclosure of the Pause Letters.

9. The FDIC's conduct before and throughout this lawsuit, combined with the FDIC's responses to other FOIA requests submitted by History Associates and allegations from whistleblowers reported by a U.S. Senator, have raised serious concerns that FOIA violations are commonplace at the FDIC.

10. Despite this Court's direction to produce redacted versions of the Pause Letters to History Associates (along with its *Vaughn* index), the FDIC initially refused to do so. That refusal necessitated a further order from the Court reiterating its instruction that the FDIC produce redacted Pause Letters. Yet in response, the FDIC produced heavily redacted letters that the Court described as reflecting an apparent "lack of good-faith effort in making nuanced redactions" because the FDIC "cannot simply blanket redact everything that is not an article or preposition." December 12, 2024 Minute Order. Those concerns prompted still another Court order mandating that the agency "make more thoughtful redactions" and be prepared to defend each one. *Id.*

11. But even then, far from resolving those concerns, the FDIC's response only exacerbated them. The revised redacted letters the FDIC produced still appear to contain unlawful and unnecessary redactions. Moreover, the FDIC revealed that its original search (and production) was incomplete and somehow failed to uncover two letters altogether, which it belatedly produced without explaining how its original search missed them. Worse still, the FDIC disclosed that it had taken an implausibly narrow view of the scope of History Associates' request all along and never looked for any Pause Letters the FDIC sent to banks but did not previously provide to its OIG. And at the same time, whistleblower allegations recounted by a U.S. Senator asserted that the FDIC was destroying documents—allegations the FDIC declined to answer when questioned by History Associates and was unable to refute when questioned by the Court, in part based on the FDIC's admission that it never implemented a litigation hold for this case.

12. Ultimately, this Court agreed that the FDIC was wrong to narrowly interpret History Associates' request and ordered the FDIC to produce all of the Pause Letters. In response to that order, the FDIC finally disclosed numerous Pause Letters that it had not previously produced, along with other related documents. As the current Acting FDIC Chair explained in an accompanying press release, those documents revealed that banks seeking FDIC clearance to engage with crypto "were almost universally met with resistance, ranging from repeated requests for further information, to multi-month periods of silence … to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity." Press Release, *FDIC Releases Documents Related to Supervision of Crypto-Related Activities* (Feb. 5, 2025), https://tinyurl.com/3t7cmaa5. These actions, the Acting Chair explained, "sent the message to banks that it would be extraordinarily difficult—if not impossible—to move forward. As a result, the vast majority of banks simply stopped trying." *Id.*

13. Even after all this, the FDIC's production *still* might be incomplete. The agency has said that it is conducting an unexplained quality control review of its FOIA database, which might reveal additional documents.

14. The FDIC's most recent production underscores the extent of its prior recalcitrance and the vital importance of rigorous enforcement of FOIA. And History Associates' experience with other previously filed FOIA requests confirms that the FDIC's misconduct here is not a one off. Instead, the FDIC appears to employ a number of unlawful FOIA policies and practices designed to avoid its obligation to disclose governmental records to the public. History Associates brings this action to compel the FDIC to produce all documents responsive to History Associates' requests and to enjoin the FDIC's unlawful FOIA policies or practices.

PARTIES

15. Plaintiff History Associates Incorporated is a nationally recognized research and analysis consultancy with expertise in obtaining records through federal FOIA requests, state and local Freedom of Information Law requests, and other sunshine laws. Over the past two years, History Associates has filed fourteen FOIA requests to the FDIC on behalf of Coinbase seeking information related to digital assets. Nine of those requests remain pending.

16. Defendant the FDIC is an agency of the federal government within the meaning of FOIA, 5 U.S.C. § 552(f), and is in possession or control of the agency records sought here.

RELATED PARTIES

17. Coinbase, Inc. is the largest and only publicly traded digital-asset trading platform in the United States. It is also a leading provider of financial infrastructure and technology for the crypto economy.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

19. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B), which allows a FOIA suit to be brought in "the district court of the United States … in the District of Columbia." Venue is also proper under 28 U.S.C. § 1391(e) because the FDIC resides in the District of Columbia.

BACKGROUND

20. For the second time in a decade, the FDIC is using its supervisory authority to pressure financial institutions into denying financial services to industries the agency disfavors.

A. The FDIC And Other Regulators Implemented Operation Choke Point To Try To Shut Down Payday Lenders

21. Around the time Chair Gruenberg took office in 2011, the FDIC, in coordination with the Department of Justice and other federal financial regulators, began leveraging its supervisory authority over financial institutions to "get at payday lending" and other industries that the FDIC does not regulate. *See* Staff of H. Comm. on Oversight & Gov't Reform, 113th Cong., *Federal Deposit Insurance Corporation's Involvement in "Operation Choke Point,"* at 9 (Dec. 8, 2014) ("Staff Oversight FDIC Report"), https://tinyurl.com/yjsdb6fr. As a congressional staff report detailed, "senior policymakers in FDIC headquarters oppose[d] payday lending on personal grounds, and attempted to use FDIC's supervisory authority to prohibit the practice." *Id.* at 8.

22. To that end, the FDIC issued both formal and informal regulatory guidance labeling as "high-risk merchants" payday lenders and other industries the agency disfavored, thereby pressuring banks not to do business with them. FDIC, Supervisor Insights, Managing Risks in Third-Party Payment Processor Relationships at 3, 11 (2011). The FDIC "provided no explanation

or warrant for the … 'high-risk'" designations. Staff of H. Comm. on Oversight & Gov't Reform, 113th Cong., *The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses?*, at 8 (May 29, 2014) ("Staff Oversight DOJ Report"), https://tinyurl.com/359t7y83.

23. The FDIC combined that guidance with threats to exercise its enforcement discretion unfavorably towards banks that continued to serve payday lenders and other targeted merchants. A former FDIC Chairman dubbed these actions an "attack on [the] market economy." Staff Oversight DOJ Report at 2 (quoting William Isaac, *Operation Choke Point: Way Out of Control*, Am. Banker (Mar. 21, 2014)).

24. These kinds of government coercion campaigns are unlawful, but they are unfortunately and predictably effective—particularly in the banking industry. The close regulatory supervision the government exercises over banks and the reputational damage that a bank suffers from a government investigation—let alone actual enforcement measures—give financial regulators enormous power to force banks to refrain from perfectly lawful conduct that regulators nevertheless want to eradicate for personal or political reasons.

25. In one recent case, for example, the head of the New York Department of Financial Services allegedly succeeded in pressuring financial institutions to stop doing business with a disfavored industry by merely sending letters "point[ing] to the 'social backlash' against" that industry and "encourag[ing]" "prompt actions" to manage the "reputational risks" of doing business with the industry. *Vullo*, 144 S. Ct. at 1324.

26. It is no surprise, then, that the original Operation Choke Point was effective. The government knew "that banks would be 'sensitive' to the risk of federal investigation," and thus

capitulate. Staff Oversight DOJ Report at 9. And that is exactly what happened: Banks big and small closed the accounts of payday lenders. *Id.* at 6.

27. The FDIC halted Operation Choke Point only reluctantly when brought to heel by the public, Congress, and litigation. In 2013, following public reporting on Operation Choke Point, Congress began investigating the program and the FDIC's involvement. Staff Oversight FDIC Report at 17. Using information obtained through the congressional oversight, the targeted industries eventually gathered enough evidence to file a lawsuit challenging Operation Choke Point as a violation of due process and the Administrative Procedure Act. *See Cmty. Fin. Servs. Ass'n*, 132 F. Supp. 3d at 105.

28. Only after the district court refused to dismiss the industry's lawsuit—and after a change in Administration—did the government settle the case and officially end Operation Choke Point.

B. The FDIC And Other Regulators Implement Operation Choke Point 2.0 To Try To Shutter The Digital-Asset Industry

29. Over the last few years, again under the leadership of then-Chair Gruenberg, the FDIC returned to its old ways. The FDIC again used informal guidance and pressure tactics, in coordination with other federal regulators, to coerce banks to choke off another industry—this time the digital-asset industry.

1. With Coinbase's Help, Digital Assets Have Grown Into A Transformative, Multi-Trillion-Dollar Industry

30. Digital assets (also known as "cryptocurrencies," "crypto assets," or "tokens") are computer code entries recorded on a blockchain. A blockchain generally is a public ledger that records digital-asset transactions on the Internet so that they can be viewed and verified by anyone with an Internet connection. A blockchain is typically decentralized, meaning in part that no single person or entity operates it.

31. Bitcoin was the first blockchain and digital asset, invented in 2008. Many other blockchains and digital assets, such as Ethereum, have been created since, with capabilities well beyond peer-to-peer transfers. For example, some digital assets serve as a medium for exchange on applications, function as a digital currency, or help secure digital networks.

32. Digital assets are now a mainstream part of global financial markets, with a market capitalization of around $2 trillion and hundreds of millions of users around the world.

33. Coinbase is the largest and only publicly traded digital-asset trading platform in the United States, serving millions of Americans. It was founded in 2012 to bring economic freedom worldwide by creating a more open, inclusive, and efficient financial system leveraging digital assets and blockchain technology. *See* Brian Armstrong, *Coinbase Is a Mission Focused Company*, Coinbase Blog (Sept. 27, 2020), https://bit.ly/4huLjR0.

34. Since its founding, Coinbase has been an industry leader in compliance and regulator engagement. Coinbase has been registered as a money-services business with the Financial Crimes Enforcement Network (FinCEN) since 2013; is a member of the federal Bank Secrecy Act Advisory Group; is licensed by the New York Department of Financial Services; and is authorized to transmit money in dozens of States. Coinbase is also a critical partner to law-enforcement agencies around the world, having trained thousands of law-enforcement agents and analysts in blockchain analytics and other cutting-edge investigative techniques.

2. The Federal Government Declares War On Crypto

35. Starting around 2022, federal financial regulators have taken concerted steps designed to cripple the digital-asset industry.

36. The SEC, for example, had for years taken the position that it had at most limited authority over digital assets. But starting in 2022, the agency asserted a sweeping and untenable view of its authority over digital assets. Despite repeated entreaties from regulated parties, the

SEC has refused to explain (through rulemaking or otherwise) which digital assets it now believes are subject to the securities laws or how digital-asset firms could possibly comply with its existing, inapt rules, which a Third Circuit judge indicated may violate due process. *See Coinbase, Inc. v. SEC*, 126 F.4th 175, 204-15 (3d Cir. 2025) (Bibas, J. concurring) ("The SEC repeatedly sues crypto companies for not complying with the law, yet it will not tell them how to comply. That caginess creates a serious constitutional problem.").

37. Instead, the agency has launched a scorched-earth enforcement campaign against digital-asset firms designed to run them into the ground.

38. Alongside the SEC's enforcement war, other federal financial regulators implemented an Operation Choke Point 2.0—a coordinated effort to cut off the digital-asset industry from the banking sector.

39. As before, the FDIC played a leading role in this sequel to Operation Choke Point. Along with other banking regulators, the FDIC issued a series of informal guidance documents describing the purported risks of banking the crypto industry. *See, e.g.*, FDIC, Financial Institution Letter 16-2022: Notification of Engaging in Crypto-Related Activities (Apr. 7, 2022); Federal Reserve, FDIC, & OCC, *Joint Statement on Crypto-Asset Risks to Banking Organizations* (Jan. 3, 2023), https://tinyurl.com/37a3vyst; Federal Reserve, FDIC, & OCC, *Joint Statement on Liquidity Risks to Banking Organizations Resulting from Crypto-Asset Market Vulnerabilities* (Feb. 23, 2023), https://tinyurl.com/36yve8b7. The FDIC also reportedly "told several banks to cap deposits from crypto companies." Veronica Irwin, *Regulators Are Limiting Banks Serving Crypto Clients. Does That Violate the Law?* Unchained (Oct. 8, 2024), https://tinyurl.com/mvefreaa.

40. The FDIC was not alone. In 2023, for example, the Federal Reserve issued guidance effectively prohibiting state member banks from holding digital assets on their own

accounts and from issuing crypto tokens. Federal Reserve, *Policy Statement on Section 9(13) of the Federal Reserve Act*, 88 Fed. Reg. 7848 (Feb. 7, 2023). And in 2022, the SEC issued Staff Accounting Bulletin No. 121 ("SAB 121"), 87 Fed. Reg. 21015 (Apr. 11, 2022), which makes it prohibitively expensive for financial institutions to hold digital assets on their balance sheets. In May 2024, bipartisan majorities of both Houses of Congress voted to overturn SAB 121 under the Congressional Review Act, but the President vetoed the legislation.

41. Just as in the first Operation Choke Point, moreover, the FDIC and others sent a clear message that they will exercise their supervisory and enforcement powers against banks that do business with digital-asset firms. In early 2023, for example, regulators abruptly shuttered Signature Bank—a solvent bank with significant digital-asset customers—and put it into FDIC receivership. The FDIC then required the buyer of Signature Bank to give up the bank's entire crypto business—a move that former Congressman Barney Frank, then a Signature Bank board member, said was meant "to send a message to get people away from crypto." Ed. Bd., *Barney Frank Was Right About Signature Bank*, Wall St. J. (Mar. 20, 2023), https://tinyurl.com/ywxdmrd4.

C. The FDIC Issues "Pause Letters" To Supervised Financial Institutions

42. The FDIC's Pause Letters were a critical component of Operation Choke Point 2.0.

43. In October 2023, the FDIC's Office of Inspector General issued a report revealing that, between March 2022 and May 2023, the FDIC sent supervised financial institutions letters asking them to cease all crypto-related activities. OIG, *FDIC Strategies Related to Crypto-Asset Risks* (Oct. 2023) ("OIG Report"), https://tinyurl.com/3kudyyxn.

44. Quoting directly from the Pause Letters, the report stated that the letters instructed institutions to "pause all crypto asset-related activities" and to "not proceed with planned activities,

pending FDIC supervisory feedback." OIG Report at 11-12. The Pause Letters also requested information about the banks' crypto-related activities. *Id.* at 5.

45. Although in earlier guidance the FDIC had promised to review banks' crypto-related activities in a timely manner, the agency issued the Pause Letters without a clear timeframe for reviewing the banks' crypto-related activities or allowing banks to un-pause their crypto-related activities. *See* OIG Report at 4, 11-13. The OIG report states that, as of August 2023, only a subset of the institutions that received a Pause Letter had received any feedback on their crypto-related activities. *Id.* And there is no indication that the FDIC has taken any steps to allow any banks to resume crypto-related activities.

46. The OIG report criticized the FDIC for creating "uncertainty in the [supervisory] process," which "creates risk that the FDIC will be viewed as not being supportive of financial institutions participating in crypto activities." OIG Report at 13. That view, the report explained, "leads to risk that the FDIC would inadvertently limit financial institution innovation and growth in the crypto space." *Id.*

47. Halting the innovation and growth of crypto was in fact the whole point. The Pause Letters weren't a good-faith effort to supervise the crypto-related activities of financial institutions. They were a transparent effort to stop those activities altogether—part and parcel of the FDIC's and other regulators' scheme to cut off digital-asset firms from necessary banking services.

48. Like the first Operation Choke Point, the Pause Letters and the rest of Operation Choke Point 2.0 were an unlawful scheme of government coercion. *See Cmty. Fin. Servs. Ass'n*, 132 F. Supp. 3d at 124; *Vullo*, 144 S. Ct. at 1322. Yet they had their intended effect. Digital-asset firms "have run into widespread banking problems in recent years." Angel Au-Yeung, *Majority of Crypto Hedge Funds Report Facing Banking Issues in Recent Years* (Dec. 20, 2024),

https://tinyurl.com/5t4kaxe7. According to one recent report, "[o]ut of 160 crypto hedge funds, *three-quarters* reported issues with basic banking services over the past three years." *Id.* (emphasis added). For example, citing "changes in the regulatory environment," Metropolitan Commercial Bank announced in January 2023 that it was closing its digital-asset business. Press Release, *Metropolitan Bank Holding Corp. to Exit Crypto-Asset Related Vertical* (Jan. 9, 2023), https://tinyurl.com/mv5beu52. Before it was shut down, Signature Bank began "paring back its relationships with crypto depositors." Rachel Louise Ensign & David Benoit, *Banks Are Breaking Up with Crypto During Regulatory Crackdown*, Wall St. J. (Feb. 16, 2023), https://tinyurl.com/bdzkmwbk. And banks "that kept their distance from crypto are trying even harder to stay away, closing accounts and shunning customers with potential connections to the industry." *Id.*

D. FOIA Requires Disclosure Of Government Records

49. "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam). To try to shine a light on the FDIC's unlawful conduct, Coinbase turned to FOIA.

50. Congress enacted FOIA "to open agency action to the light of public scrutiny," *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989), and to "ensure an informed citizenry, vital to the functioning of a democratic society," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA ensures the transparency and accountability "needed" to "hold the governors accountable to the governed." *John Doe Agency*, 493 U.S. at 152.

51. To that end, unless one of nine limited exemptions applies, FOIA requires that federal agencies release information to the public on request. 5 U.S.C. § 552(a)(3)(A).

52. Even if a record falls within a FOIA exemption, the agency still must disclose it unless "the agency reasonably foresees that disclosure would harm an interest protected by [the]

exemption." 5 U.S.C. § 552(a)(8)(A)(i). Moreover, when only portions of a record are exempt, the agency is required to "take reasonable steps necessary to segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii); *see also id.* § 552(b).

53. Within 20 business days of an agency's receipt of a FOIA request, the agency must "determine … whether to comply" with the request. 5 U.S.C. § 552(a)(6)(A)(i). The agency must "immediately notify" the requester of "such determination and the reasons therefor," as well as "the right … to appeal to the head of the agency" any "adverse determination." *Id.* If an agency determines that it will comply with the request, it must "promptly" release responsive, non-exempt records to the requestor. *Id.* § 552(a)(6)(C)(i).

54. When an agency violates FOIA, federal courts have the power and obligation to correct the agency's unlawful action—and to ensure the accountability and transparency demanded by Congress. They do so by reviewing the agency's decision de novo and "order[ing] the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). This judicial review makes FOIA more than empty parchment: It empowers and directs courts to hold agencies to Congress's mandate and to protect the "public right to secure such information from … unwilling official hands." *John Doe Agency*, 493 U.S. at 151.

E. History Associates Requests Copies Of The Pause Letters, But The FDIC Unlawfully Denies History Associates' FOIA Request

55. Coinbase engaged Plaintiff History Associates, a nationally recognized expert in obtaining records through federal FOIA requests, to submit a series of requests designed to uncover Operation Chokepoint 2.0, including a request for copies of the Pause Letters.

56. On November 8, 2023, History Associates submitted a FOIA request to the FDIC seeking "[c]opies of all 'pause letters' described in the OIG report."

57. On January 22, 2024, the FDIC denied History Associates' FOIA request. The FDIC provided only a conclusory explanation. It stated that the information requested, "if it exists and could be located," would fall under Exemption 4, which applies to "trade secrets, or confidential or privileged commercial or financial information obtained from a person," and Exemption 8, which applies to "information contained in, or related to, the examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC in its regulation or supervision of financial institutions." *See* 5 U.S.C. § 552(b)(4), (8).

58. The FDIC further asserted, without any explanation, that "it is reasonably foreseeable that disclosure would harm an interest protected by" a FOIA exemption.

59. Consistent with the FDIC's FOIA regulations, History Associates administratively appealed the FDIC's denial on March 25, 2024.

60. History Associates explained that the FDIC's conclusory invocations of Exemptions 4 and 8 fell far short of meeting the agency's burden of establishing with "reasonable specificity" that the requirements of the claimed exemptions were met. *Prison Legal News v. Samuels*, 787 F.3d 1142, 1147 (D.C. Cir. 2015).

61. Among other problems, History Associates explained that no harm would follow from disclosing the Pause Letters. Disclosing the Pause Letters with appropriate redactions would neither reveal confidential information nor impair the FDIC's relationship with the banks it regulates. And to the extent the Pause Letters contained any bank-specific information, appropriate redactions would eliminate any harm.

62. The FDIC denied History Associates' appeal on May 8, 2024. Apparently recognizing that Exemption 4 does not apply, the FDIC asserted only that the Pause Letters were "part of the examination and supervision of … banks by the FDIC," and thus fell under

Exemption 8. The FDIC further asserted that, because in its view the Pause Letters were a "type of record[]" that "would be exempt," there was no need for the FDIC to make any attempt to segregate exempt from non-exempt portions of the Pause Letters.

63. Finally, the FDIC maintained that disclosing the letters would "necessarily reveal information about the particular banks that the letters were sent to and would intrude into the heart of the communications between financial institutions and their regulator." The FDIC did not explain why it could not eliminate any such harm through appropriate redactions.

64. Through its thinly reasoned and unlawful denial of History Associates' FOIA request, the FDIC has stonewalled Coinbase's efforts to shine a light on Operation Choke Point 2.0 and financial regulators' attempts to cut off digital-asset firms from the banking sector.

65. After exhausting its administrative remedies, History Associates filed a timely suit to compel the FDIC to comply with its FOIA obligations in June 2024.

F. The FDIC Stonewalls History Associates' FOIA Request During This Litigation

66. In the more than six months since History Associates filed its initial complaint in this case, the FDIC has continued to delay and obfuscate.

67. After the FDIC filed its answer to History Associates' complaint, the parties filed pre-motion notices and responses, and the Court held a pre-motion conference on September 18. At the hearing, the Court ordered the FDIC to produce a "Vaughn index declaration" within 30 days and further directed that, in preparing the index, the FDIC "go through the [pause] letters … and determine whether any part of the letter can be sent over with the rest of it redacted" "along with the declaration." ECF 25-1, at 9:7-8, 10:5, 14-18. The Court stated that, if History Associates was "not satisfied" with the FDIC's production, the Court would review in camera a "random

sample" of letters to determine whether "there are redactions that could have been made such that some of the letters should go to [History Associates]." ECF 25-1, at 9:11-15, 10:11-13.

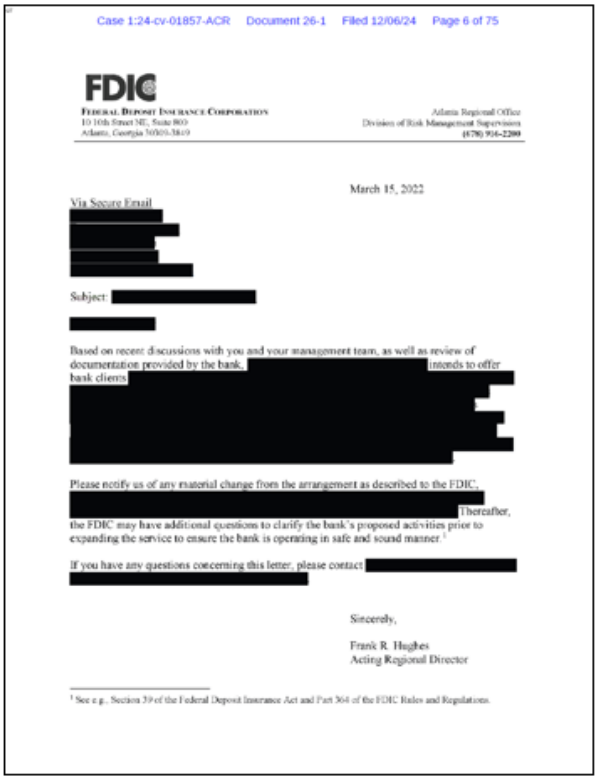
68. The FDIC failed to comply with the Court's instructions. By October 28 it had produced a *Vaughn* index but refused to produce any of the pause letters (redacted or otherwise). After attempting unsuccessfully to resolve the issue with the FDIC, History Associates was forced to seek intervention from this Court to enforce its prior order. This Court granted that request, ordering the FDIC to produce the redacted Pause Letters by November 22 "[p]ursuant to the Court's instructions at the September 18, 2024" hearing. November 4, 2024 Minute Order.

69. On November 22, the FDIC produced 23 highly redacted letters. ECF 26-1, at 2-75. The FDIC indiscriminately redacted entire paragraphs and even *pages* of some letters. *See, e.g.*, *id.* at 45-48 (letter #16); *id.* at 52-57 (letter #18). And the FDIC redacted information that, as later came to light, ran zero risk of identifying a recipient bank or interfering with the FDIC's supervisory relationships. *See, e.g.*, ECF 27-2, at 43 (revised letter #15 revealing that prior version of the letter redacted "the ability to buy, sell, and hold bitcoin through the Bank's online banking website"). Unsatisfied with these redactions, History Associates requested in camera review of a subset of the pause letters.

70. On December 12, following its in camera review of four of the pause letters, this Court issued a minute order expressing "concern[] with what appears to be FDICs lack of good-faith effort in making nuanced redactions." December 12, 2024 Minute Order. The FDIC, the Court said, "cannot simply blanket redact everything that is not an article or preposition." *Id.* The Court ordered the FDIC to "re-review the documents, make more thoughtful redactions, and provide the new redactions to Plaintiff by January 3, 2025." *Id.* And the Court further instructed

that the FDIC "should be prepared to defend each new redaction in an ex parte discussion with the Judge." *Id.*

71. On January 3, the FDIC produced revised redacted versions of the Pause Letters to History Associates. The letters in that production contained far fewer redactions, confirming the inadequacy of the agency's prior production.



FDIC

FEDERAL DEPOSIT INSURANCE CORPORATION
10 10th Street NE, Suite 800
Atlanta, Georgia 30309-3849

Atlanta Regional Office
Division of Risk Management Supervision
(678) 916-2200

March 15, 2022

Via Secure Email
[redacted]

Subject: [redacted]

[redacted]

Based on recent discussions with you and your management team, as well as review of documentation provided by the bank, [redacted] intends to offer bank clients [redacted]

Please notify us of any material change from the arrangement as described to the FDIC, [redacted] Thereafter, the FDIC may have additional questions to clarify the bank's proposed activities prior to expanding the service to ensure the bank is operating in safe and sound manner.[1]

If you have any questions concerning this letter, please contact [redacted]

Sincerely,

Frank R. Hughes
Acting Regional Director

[1] See e.g., Section 39 of the Federal Deposit Insurance Act and Part 364 of the FDIC Rules and Regulations.

FDIC

FEDERAL DEPOSIT INSURANCE CORPORATION
10 10th Street NE, Suite 800
Atlanta, Georgia 30309-3849

Atlanta Regional Office
Division of Risk Management Supervision
(678) 916-2200

March 15, 2022

Via Secure Email
[redacted]
President
[redacted]

Subject: [redacted]ternal Blockchain

Dear [redacted]

Based on recent discussions with you and your management team, as well as review of documentation provided by the bank, our understanding is that [redacted] intends to offer bank clients an internal blockchain-based, real-time payments service provided by [redacted] You indicate that [redacted] is intended to enable real-time payments by tokenizing U.S. dollar deposits. The platform, as presented, is a closed-loop payments system that would involve the movement of tokens between existing [redacted] customers. Under this platform, all transactions and activities would remain within the bank, and no transactions would involve outside parties. We further understand that the bank has entered into a two-year agreement with [redacted] to provide this service.

Please notify us of any material change from the arrangement as described to the FDIC, including, but not limited to, expanding the service to include any clients, transactions or activities outside of the bank, such as through [redacted] Thereafter, the FDIC may have additional questions to clarify the bank's proposed activities prior to expanding the service to ensure the bank is operating in safe and sound manner.[1]

If you have any questions concerning this letter, please contact Case Manager [redacted] at [redacted] or by telephone at [redacted]

Sincerely,

Frank R. Hughes
Acting Regional Director

[1] See e.g., Section 39 of the Federal Deposit Insurance Act and Part 364 of the FDIC Rules and Regulations.

72. Even still, the FDIC's revised redactions (once again) appeared to violate FOIA and this Court's orders. Most of the letters still appear to redact information that is either not protected by Exemption 8 or whose disclosure would be harmless (including the identities of third-party digital-asset firms that the banks were proposing to partner with and the names of public blockchains that the banks were seeking to use).

73. Even more troubling than the FDIC's continued apparent failure to make appropriate redactions, however, its latest production brought to light serious problems with the adequacy of its searches for Pause Letters.

74. First, the revised production contains 25 Pause Letters—two more than the FDIC's initial production. According to the FDIC, the agency found the two additional Pause Letters after conducting a "second search" in response to a question from History Associates seeking clarification on whether any Pause Letters were sent after October 21, 2022—the date of the last letter in the initial production and six months before the end of the period the OIG report described in which the FDIC sent Pause Letters. ECF 27-3, at 10. The FDIC did not explain, however, why its original search had failed to uncover these two Pause Letters or even how its first and second searches differed in scope or methodology, let alone provide any assurance that its latest search was comprehensive as FOIA requires.

75. Second, the FDIC revealed for the first time, in the course of disclosing its second search, that it had adopted an untenable misreading of the scope of History Associates' FOIA request from the start. As noted above, History Associates sought "[c]opies of all 'pause letters' described in the OIG report." When transmitting the revised Pause Letters to History Associates, however, the FDIC cryptically stated that the 25 produced letters were "all the letters *shared with* the OIG and thereby responsive to" History Associates' FOIA request. ECF 27-3, at 10. The FDIC confirmed in later correspondence and in a status report that it had adopted that narrow construction of the request all along. *See* ECF 27-3, at 2; ECF 28, at 2-4.

76. History Associates' FOIA request contained no such limitation. That request sought copies of any Pause Letters "described in" the OIG report, whether or not the agency provided every letter to the OIG. The OIG's report describes the "pause letters" as documents

issued by the FDIC that "asked that the institutions pause from proceeding with planned activities or expanding existing activities and provide additional information." By the terms of History Associates' FOIA request, the FDIC should have searched for "'all pause letters'" meeting that "descr[iption]," irrespective of whether any particular letters were provided to the OIG.

77. Indeed, History Associates had no way of knowing whether there were Pause Letters the FDIC had not furnished to the OIG, and no reason to expect that possibility. Only the FDIC could know whether it had withheld any Pause Letters from the OIG. And the FDIC's "shared with" gloss on the request is implausible; no rational FOIA requester seeking to unearth evidence of an agency's publicly reported effort to cut off an entire industry from access to banking services would exclude from its request Pause Letters that the agency withheld from its own watchdog.

78. The FDIC never informed History Associates when processing its FOIA request or at any point until January 15, 2025—and only after repeated requests from History Associates—that it had so construed the request's scope. Nor did the FDIC seek clarification from History Associates about whether its request encompassed Pause Letters not provided to the OIG but that fall within the OIG report's description. The agency chose to stand on its undisclosed, jaundiced reading of History Associates' request—bypassing the kind of cooperative clarification of FOIA requests in which other agencies often engage.

79. The agency's never-before-articulated description of the letters it produced—those "*shared with* the OIG"—prompted History Associates to inquire directly whether any Pause Letters of the kind "described in" the OIG report were *not* shared with the OIG (and thus omitted from the FDIC's search and production). In response, the FDIC revealed that it did not know

because it admittedly had never searched for Pause Letters beyond those it shared with the OIG. And the agency insisted that it had no obligation to do so.

80. The agency later insisted that it had "reasonably interpreted" History Associates' original FOIA request as seeking only letters shared with the OIG, and that any other documents are outside the scope of the request. Specifically, in a strained, post-hoc attempt to justify that interpretation, the FDIC argued that the OIG report defines the term "pause letters" to encompass only those letters that the FDIC sent banks between March 2022 and May 2023 (which apparently are the only letters the agency shared with the OIG). ECF 28 at 3. But the OIG report nowhere mechanically defines "pause letters" in that way. Instead, the report variously uses the term "pause letters" as shorthand for letters "asking [banks] to pause, or not expand, planned or ongoing crypto-related activities"—sometimes without any accompanying date-range or number-of-recipients limitation. *See* OIG Report at 8, 11.

G. Whistleblowers Allege Document Destruction At The FDIC

81. At the same time the FDIC was stonewalling History Associates, U.S. Senator Cynthia Lummis sent a letter to the then-FDIC Chair stating that she had been informed by FDIC "whistleblowers" that "destruction of materials is occurring with respect to the digital asset activities of your agency"; that "staff access to these materials is being closely monitored by management to prevent them from being supplied to the Senate before they can be destroyed"; and "that certain staff have been threatened with legal action to prevent them from speaking out." *Letter from Sen. Cynthia M. Lummis to Hon. Marty Gruenberg* (Jan. 16, 2025), https://bit.ly/40Cglkb ("Senator Lummis Letter").

82. Senator Lummis directed the Chair to "cease and desist destruction of all materials and end all retaliatory actions immediately" and to "preserve all existing materials, including documents, communications, electronic information and metadata, relating to the FDIC's digital

asset activities since January 1, 2022." Senator Lummis Letter. Senator Lummis emphasized that "[t]his is illegal and unacceptable." *Id.*

H. This Court Instructs The FDIC To Produce All Pause Letters And Allows History Associates To Investigate Unlawful FDIC FOIA Policies Or Practices

83. History Associates raised these issues with the Court in a status report and informed the Court that it intended to move for leave to file an amended complaint to assert FOIA policy-or-practice claims. *See* ECF 27, at 2, 6. The Court held a hearing on these topics on January 22.

84. At the start of that hearing, the Court asked the FDIC to "explain … why [it] took the position [it] did with respect to the interpretation of the FOIA request, which was pretty obvious on its face not limited as [the FDIC] limited it?" Exhibit A, at 2:18-21. The FDIC responded by "request[ing] that the Court stay the case for three weeks." *Id.* at 3:7-8. The Court declined to stay the case and asked the FDIC "[w]ho took the incredibly narrow illogical view of [History Associates'] FOIA request." *Id.* at 3:16-17, 3:22. The FDIC was unable to answer. *Id.* at 3:23-25.

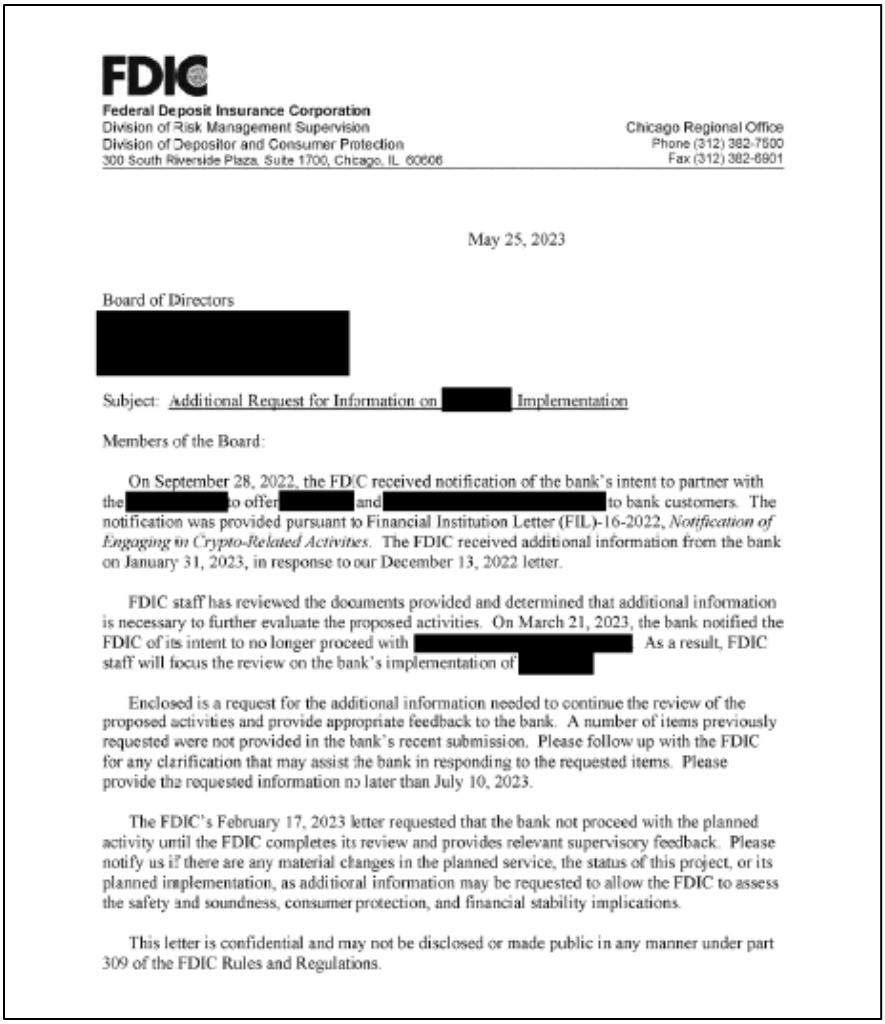
85. The Court then asked the FDIC whether "any documents whatsoever, emails, texts, hard copies, soft copies, anything sent by carrier pigeon [had] been destroyed since the issuance of the FOIA request" on November 8, 2023. Exhibit A, at 4:16-19. The FDIC could neither confirm nor substantiate that nothing had been destroyed. *See id.* at 4:24-5:1. The Court asked "[w]hen … th[e] litigation hold [was] put in place" in this case. *Id.* at 5:14-15. The FDIC admitted that it never put a litigation hold in place—not even after History Associates filed suit. *Id.* at 5:22-24. The FDIC could not explain why it did not institute a litigation hold, and the agency admitted that it did not even undertake any investigation to determine why there was no litigation hold. *Id.* at 6:20-22.

86. The Court ordered the FDIC to produce any remaining Pause Letters by February 7. *See* Exhibit A, at 24:21-22; Jan. 22, 2025 Minute Order. It also granted History Associates' request for leave to amend its complaint to bring policy-or-practice claims. Exhibit A, at 11:1; Jan. 22, 2025 Minute Order. And the Court suggested that a deposition of the FDIC under Rule 30(b)(6) may be appropriate and invited History Associates to move for leave to conduct such a deposition. Exhibit A, at 20:15-17, 21:20-22, 25:8-9.

I. The FDIC's Most Recent Production Reveals Additional Pause Letters And Still May Be Incomplete

87. On February 5, the FDIC produced, and published in its FOIA reading room, "additional correspondence with the 24 banks that received 'pause letters,'" as well as "correspondence and other records with additional institutions beyond those 24 banks involving crypto-related activity." *See* FDIC Records—Correspondence Related to Crypto-Related Activities (Feb. 5, 2025), https://bit.ly/4hu1Vsi ("Feb. 5 Production"). On February 7, the FDIC notified this Court that it considered that publication to fulfill the agency's obligation under this Court's order. *See* ECF 32.

88. This partially redacted production includes numerous additional Pause Letters the FDIC had not previously produced directing that banks suspend various kinds of crypto activities—showing that the FDIC's initial, narrow reading of History Associates' request led to it withholding records responsive to the request. For example:



FDIC

Federal Deposit Insurance Corporation
Division of Risk Management Supervision
Division of Depositor and Consumer Protection
300 South Riverside Plaza, Suite 1700, Chicago, IL 60606

Chicago Regional Office
Phone (312) 382-7500
Fax (312) 382-6901

May 25, 2023

Board of Directors
[redacted]

Subject: Additional Request for Information on [redacted] Implementation

Members of the Board:

On September 28, 2022, the FDIC received notification of the bank's intent to partner with the [redacted] to offer [redacted] and [redacted] to bank customers. The notification was provided pursuant to Financial Institution Letter (FIL)-16-2022, *Notification of Engaging in Crypto-Related Activities*. The FDIC received additional information from the bank on January 31, 2023, in response to our December 13, 2022 letter.

FDIC staff has reviewed the documents provided and determined that additional information is necessary to further evaluate the proposed activities. On March 21, 2023, the bank notified the FDIC of its intent to no longer proceed with [redacted] As a result, FDIC staff will focus the review on the bank's implementation of [redacted]

Enclosed is a request for the additional information needed to continue the review of the proposed activities and provide appropriate feedback to the bank. A number of items previously requested were not provided in the bank's recent submission. Please follow up with the FDIC for any clarification that may assist the bank in responding to the requested items. Please provide the requested information no later than July 10, 2023.

The FDIC's February 17, 2023 letter requested that the bank not proceed with the planned activity until the FDIC completes its review and provides relevant supervisory feedback. Please notify us if there are any material changes in the planned service, the status of this project, or its planned implementation, as additional information may be requested to allow the FDIC to assess the safety and soundness, consumer protection, and financial stability implications.

This letter is confidential and may not be disclosed or made public in any manner under part 309 of the FDIC Rules and Regulations.

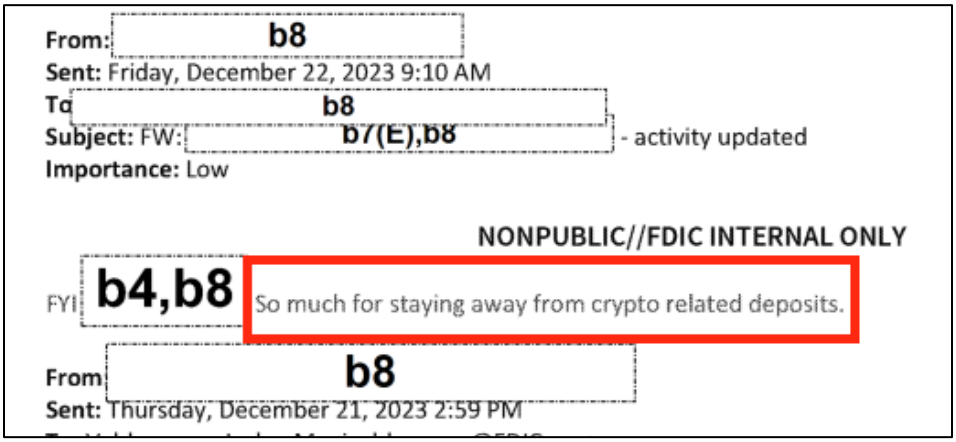
Feb. 5 Production at 37.

89. The production shows that the Pause Letters had their intended effect. As the Acting FDIC Chair explained in a press release accompanying the production:

> The documents that we are releasing today show that requests from these banks were almost universally met with resistance, ranging from repeated requests for further information, to multi-month periods of silence as institutions waited for responses, to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity. Both individually and collectively, these and other actions sent the message to banks that it would be extraordinarily difficult—if not impossible—to move forward. As a result, the vast majority of banks simply stopped trying.

90. The production also demonstrates that the Pause Letters were only the first step in the FDIC's regulatory pressure campaign to discourage banks from innovating in the crypto space.

When banks answered the FDIC's first set of questions, they were often met with either a second set of questions or a regulatory visitation. Ultimately, many banks got the message and canceled their planned crypto activities. One bank, for example, after receiving a Pause Letter and then being subject to a visitation by the FDIC, terminated its crypto activities while the visitation findings were being finalized. *See, e.g.*, Feb. 5 Production at 29-30. Other documents in the FDIC's production show that the FDIC discouraged banks from providing even traditional banking services to crypto clients:


From: b8
Sent: Friday, December 22, 2023 9:10 AM
To: b8
Subject: FW: b7(E),b8 - activity updated
Importance: Low

NONPUBLIC//FDIC INTERNAL ONLY

FYI b4,b8 So much for staying away from crypto related deposits.

From: b8
Sent: Thursday, December 21, 2023 2:59 PM

Feb. 5 Production at 654; *see also, e.g.*, Feb. 5 Production at 503 (FDIC Case Manager: "the bar for being a suspicious activity is low, and that it can be reasonably assumed that many of these [crypto company] deposits would be suspicious in nature").

91. Though the FDIC's most recent production is more extensive than its first, its search still appears wanting in certain respects. Among other things, the FDIC has admitted that even now it does not know whether even this latest production is complete. The FDIC's notice indicates that its database contains 9,000 documents that are not currently searchable, and thus would not turn up in the FDIC's full-text searches. ECF 32, at 3-4. It does not explain why that is the case, how long such issues have existed, or why the FDIC did not bring this issue to the Court's or History Associates' attention until the agency made its production. Nor does the notice

explain why the agency did not conduct a manual review of these records, or why it did not search collaboration platforms such as Microsoft Teams. And the FDIC still has not represented to this Court that it has implemented a litigation hold. *See* ECF 32.

J. History Associates' Experience, Combined With Whistleblower Allegations, Reveal Apparent Unlawful FOIA Policies Or Practices At The FDIC

92. The FDIC's cumulative conduct in responding to History Associates' FOIA request—including its initial complete withholding of the Pause Letters, its failure to produce redacted letters to History Associates despite this Court's direction, its lack of good-faith effort in making its original redactions (as its revised redactions confirm), the failure of its original search to uncover two additional Pause Letters, its unilateral and illogical narrowing of History Associates' request, its most recent suggestion that there may still be more responsive documents, and its failure to implement a litigation hold—raises serious concerns that there are fundamental breakdowns in the FDIC's FOIA processes. Considered along with History Associates' experience filing other FOIA requests with the FDIC and the public whistleblower allegations with which Senator Lummis confronted the FDIC, the FDIC's treatment of the Pause Letters appears to be the product of several unlawful FOIA policies or practices that the FDIC employs to avoid fulfilling its FOIA obligations.

93. *First*, the FDIC appears to have a policy or practice of making blanket assertions that requested records are categorically subject to Exemption 8 in their entirety and so completely immune to disclosure—sometimes going so far as to refuse to confirm whether the records exist. Through that policy or practice, the FDIC systematically avoids its obligations under FOIA to search for and review records for segregable information. *See* 5 U.S.C. § 552(a)(8)(A).

94. For example, in response to History Associates' request for the Pause Letters, the FDIC asserted that, "[b]y its very nature, the information that [History Associates] requested, if it

exists and could be located, would be … information … exempt from disclosure under" Exemption 8. Exhibit B. And on administrative appeal, the FDIC confirmed that "the decision to withhold was based upon a determination that the type of records being requested would be exempt, rather than making exemption determinations on a document-by-document basis." Exhibit C. And as History Associates has now shown, the FDIC was refusing to disclose segregable portions of the letters that plainly could have and should have been disclosed with modest redactions.

95. The FDIC made a similar determination for a separate request filed by History Associates. In November 2023, History Associates requested copies of the FDIC's Crypto Asset Working Group meeting minutes. Exhibit D. The FDIC responded that the meeting minutes were "withheld in full under FOIA Exemptions (b)(5) and (b)(8)" with no further explanation. Exhibit E, at 4. Upon History Associates' administrative appeal of that decision, the FDIC remanded the request to the FOIA officer, but did not give the FOIA officer any instructions about how to apply those exemptions on remand. Exhibit F.

96. *Second*, the FDIC appears to have a policy or practice of narrowly construing FOIA requests to the point of misreading them, contrary to its statutory "duty to construe a FOIA request liberally." *Nation Mag., Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

97. As discussed, the FDIC unreasonably construed History Associates' request for "[c]opies of all 'pause letters' described in" the OIG report, as a request only for copies of the Pause Letters *shared with* the OIG in preparing its report. *See* ECF 27-3, at 2; *supra* at 19-20. This Court described that as a "narrow illogical view" of History Associates' request. Exhibit A, at 3:16-17. And for good reason: History Associates request was directed at learning the content

of the Pause Letters, not the scope of the OIG's review. Beyond illogical, the FDIC's narrow interpretation of the request was unknowable. History Associates could not know how many Pause Letters existed, and but for the FDIC's late-breaking and cryptic description of its production, its narrow interpretation may have never been known. And as the FDIC's latest production reveals, that narrow interpretation had real bite: It resulted in the withholding of additional Pause Letters, which the FDIC has only now produced—together with voluminous additional internal and external correspondence revealing its efforts to cut off crypto from access to banking.

98. The same sort of undisclosed and unknowable misinterpretation appears likely to have infected at least some of History Associates' other requests. For example, in response to History Associates' separate FOIA request for documents concerning a crypto-related blog post published by the White House National Economic Council in January 2023, the FDIC unilaterally "interpreted the search to be for documents and communication with the FDIC Board of Directors and/or FDIC Staff who would be reasonable custodians of the requested documents." Exhibit G. But the FDIC never explained who those custodians were, leaving History Associates with no way to evaluate whether the FDIC's sua sponte narrowing of History Associates' request was reasonable. On the basis of its preferred version of History Associates' request, the FDIC asserted that there "were no records responsive to [the] request." *Id.*

99. *Third*, the FDIC appears to have a policy or practice of failing to search for all records within the FDIC's custody or control, as required under FOIA. *See, e.g.*, *McGehee v. C.I.A.*, 697 F.2d 1095, 1110 (D.C. Cir. 1983) (agency must "release documents that are in the agency's 'custody' or 'control'"); *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020) (agency must make "a good faith effort to conduct a search for the requested records, using

methods which can be reasonably expected to produce the information requested") (quotation marks omitted).

100. History Associates' experience again illustrates such failures. With respect to its Pause-Letters request, the FDIC initially produced only 23 letters in response to this Court's order. But when pressed by History Associates about whether that represented the full universe of Pause Letters, the agency conducted a "second search" and found two additional Pause Letters—without explaining how or why the first search had missed those letters or even how the two searches differed in scope or methodology. ECF 27-3, at 10. And even the FDIC's most recent production may not be comprehensive until the agency completes an unexplained "quality control review" of its FOIA database. Exhibit H.

101. Moreover, in response to other digital-asset-related requests filed by History Associates, the FDIC has produced zero documents from any collaboration platforms (such as Microsoft Teams), and an implausibly low number of documents overall. For example, History Associates requested documents relating to a February 2023 joint statement issued by the FDIC and other bank regulators titled "Joint Statement on Liquidity Risks to Banking Organizations Resulting from Crypto-Asset Market Vulnerabilities." Exhibit I. Although this was an important FDIC policy statement, the FDIC identified only 28 pages of records (and withheld most of them). *See* Exhibit J.* Similarly, the FDIC denied additional requests submitted by History Associates on the ground that it found *no* records relating to a highly publicized Federal Reserve policy statement and National Economic Council blog post on similar issues. Exhibits G, K.

* The FDIC recently granted History Associates' administrative appeal regarding those withholdings.

102. *Fourth*, the FDIC appears to have a policy or practice of failing to take necessary steps to ensure that records responsive to FOIA requests are properly preserved, including implementing litigation holds when a FOIA suit is brought. *See U.S. ex rel Miller v. Holzmann*, 2007 WL 781941, at *2 n.2 (D.D.C. Mar. 12, 2007) (explaining that failure to implement a litigation hold following a FOIA suit is "negligent conduct" that "should be deemed sanctionable"); *see also Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (agency may not "intentionally transfer[] or destroy[] a document after it has been requested under FOIA").

103. During the January 22 hearing, when asked about the allegations of document destruction, the FDIC could muster only a cursory denial based on its purported "document retention practices" and informal conversations with unspecified staff in the FDIC's "bank supervision section," rather than any investigation into what actually took place here. Exhibit A at 4:25, 7:1-11. The FDIC also admitted that it did not implement a litigation hold after History Associates filed its FOIA request or even after History Associates filed this FOIA lawsuit, creating a serious risk that responsive documents could be or have been inadvertently or intentionally destroyed. At a minimum, the FDIC's failure to implement a litigation hold may make it impossible to determine definitively whether any records were destroyed. *Id.* at 6:3-6 (Court observing that "serious sanctions" may be appropriate either if "any documents were destroyed, or if we can't figure out whether any documents were destroyed").

104. And the risk of destruction is acute here. As discussed, a recent letter sent by Senator Cynthia Lummis to the then-FDIC chair alleges that "destruction of materials is occurring with respect to the digital asset activities of your agency." *See supra* at ¶ 81. The FDIC has been aware of these allegations for weeks. Yet the FDIC to date has been unable to represent, in

response to direct questions from History Associates and the Court, that no documents related to History Associates' FOIA request in this case (let alone History Associates' other pending FOIA requests) have been destroyed.

105. Even the notice accompanying the FDIC's most recent production does not deny that responsive records have been lost or destroyed. *See* ECF 32. Instead, just as at the January 22 hearing, the FDIC simply asserts that the database it searched has a "record retention schedule"—*i.e.*, a policy that has "some exceptions" the agency does not identify but asserts (without explanation) are "not relevant here." *Id.* at 2. That is little better than the FDIC's generic invocation at the January 22 hearing of its unspecified "robust document retention practices." Exhibit A at 4:25. And it provides cold comfort absent any investigation to ascertain whether the agency complied with those practices here.

COUNT I

Violation of FOIA, 5 U.S.C. § 552
(Unlawful Search for and Withholding of Pause Letters)

106. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

107. The FDIC is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1).

108. The Pause Letters are a record within the meaning of 5 U.S.C. § 552(f)(2).

109. FOIA demands an adequate search for records. "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Inst. for Just. v. IRS*, 941 F.3d 567, 569-70 (D.C. Cir. 2019) (internal citations and quotations removed).

110. On information and belief, the FDIC has conducted an inadequate search for the Pause Letters in response to History Associates' FOIA request and the Court's order by, among other things, failing to use appropriate search terms and search all relevant databases.

111. FOIA also demands the production of non-exempt records. FOIA was designed "to open agency action to the light of public scrutiny." *Tax Analysts*, 492 U.S. at 142 (quotation marks omitted). Its purpose is "to provide for open disclosure of public information, and it has long been understood to create a strong presumption in favor of disclosure." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (citations and quotation marks omitted).

112. Even if a FOIA exemption applies, FOIA requires an agency to produce any "reasonably segregable," non-exempt portion of responsive records through appropriate redactions. 5 U.S.C. § 552(b). In addition, even if a record is entirely protected by an exemption, an agency must release the record if doing so "would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 105-06 (D.D.C. 2019) (quotation marks omitted); 5 U.S.C. § 552(a)(8)(A). The agency bears the burden of justifying any redactions it makes to responsive records. *Inst. for Just. v. IRS*, 547 F. Supp. 3d 1, 5 (D.D.C. 2021); *see also* December 12, 2024 Minute Order (FDIC "should be prepared to defend each new redaction").

113. The FDIC initially withheld the Pause Letters in full (and unlawfully) based on FOIA Exemption 8. Although the FDIC has since produced redacted versions of the Pause Letters as well as redacted versions of related documents, the agency continues to redact certain information in the Pause Letters that must be disclosed under FOIA because it is either segregable, non-exempt information or would not reasonably harm any interest protected by Exemption 8.

114. Among other things, the Pause Letters the FDIC has produced appear to unlawfully redact the identities of third-party digital-asset firms that the banks were proposing to partner with, the names of public blockchains that the banks were seeking to use, and information that was unredacted in a prior production by the agency. Disclosing that information would neither identify any of the recipient banks nor impair the FDIC's supervisory relationship with any bank.

115. History Associates has exhausted its administrative remedies by appealing the FDIC's adverse determination. 5 U.S.C. § 552(a)(6)(A)(ii).

116. By failing to release the Pause Letters, the FDIC has violated FOIA. 5 U.S.C. § 552(a)(3)(A).

COUNT II

Violation of FOIA, 5 U.S.C. § 552
(Unlawful FOIA Policies or Practices)

117. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

118. "FOIA authorizes a court not only to 'order the production of any agency records improperly withheld,' but also to 'enjoin the agency from withholding agency records.'" *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 777 (D.C. Cir. 2018) (quoting 5 U.S.C. § 552(a)(4)(B)). Thus, even if an agency ultimately produces the documents sought by a FOIA requester, courts retain equitable authority to enjoin a "formal or informal" agency "policy or practice" that violates FOIA and "will impair the party's lawful access to information in the future." *Id.* (quoting *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)).

119. Based on History Associates' experience and the public whistleblower allegations, *see supra* ¶ 92-105, the FDIC appears to have multiple policies or practices that violate FOIA's requirements and that have harmed and will continue to harm History Associates.

120. First, on information and belief, the FDIC has an unlawful policy or practice of applying a "categorical approach" when it asserts that records are exempt from disclosure under Exemption 8, 5 U.S.C. § 552(b)(8). Such an approach, if it were ever lawful, violates the FOIA Improvement Act of 2016, which requires agencies to "take reasonable steps necessary to segregate and release nonexempt information," and to disclose information, even if exempt, when doing so would not "harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i)(I), (ii)(I)-(II). Those requirements prohibit the FDIC from asserting that a class of documents categorically can be withheld under Exemption 8. The FDIC's policy or practice of applying a categorical approach and otherwise unlawfully withholding records under Exemption 8 thus violates FOIA.

121. Second, on information and belief, the FDIC has an unlawful policy or practice of construing FOIA requests narrowly. FOIA requires agencies to construe requests "liberally." *National Magazine*, 71 F.3d at 890; *see also PETA v. Nat'l Institutes of Health, Dep't of Health & Hum. Servs.*, 745 F.3d 535, 540 (D.C. Cir. 2014); *Inst. for Just.*, 941 F.3d at 572. A FOIA requester need only "reasonably describe[e]" the documents sought. 5 U.S.C. § 552(a)(3)(A). When "an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth." *Truitt v. Dep't of State*, 897 F.2d 540, 544 (D.C. Cir. 1990). The FDIC's policy or practice of construing FOIA requests narrowly violates those requirements.

122. Third, on information and belief, the FDIC regularly fails to conduct a search reasonably calculated to uncover all responsive records within the agency's possession or control. In responding to a FOIA request, an agency must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Inst. for Just.*, 941 F.3d at

569-70 (internal citations and quotations removed); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (same). An agency must search for all documents that are in the agency's "custody" or "control." *McGehee v. C.I.A.*, 697 F.2d 1095, 1110 (D.C. Cir. 1983). It "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). But the FDIC does not, on information and belief, comply with that obligation because it does not search all of its relevant databases and does not use searches designed to reveal and produce all responsive records.

123. Fourth, on information and belief, the FDIC fails to take the steps necessary to ensure that records responsive to FOIA requests are properly preserved, including implementing litigation holds when a FOIA suit is brought. An agency has a duty to implement a litigation hold once it reasonably anticipates litigation. *Holzmann*, 2007 WL 781941, at *2 n.2. In addition, an agency may not "intentionally transfer[] or destroy[] a document after it has been requested under FOIA." *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009); *see also Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000). The FDIC unlawfully fails to implement the litigation holds—even where, as here, a FOIA lawsuit is not just reasonably foreseeable but has actually materialized. And that is all the more troubling in light of the FDIC's apparent practice of destroying documents it wishes to conceal. *See* Senator Lummis Letter.

124. History Associates has been harmed by each of the FDIC's unlawful FOIA policies or practices and will continue to be harmed in the future unless the FDIC is compelled to comply fully with FOIA's procedural requirements. *See, e.g.*, *Cause of Action Inst. v. United States Dep't of Just.*, 999 F.3d 696, 703 (D.C. Cir. 2021). History Associates "will suffer continuing injury from this allegedly unlawful policy" because "its business depends on continually requesting and

receiving documents that the policy permits the [FDIC] to withhold." *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012). In addition, History Associates has pending and soon-to-be-submitted FOIA requests with FDIC that are likely to be subject to the FDIC's unlawful policies or practices. *See, e.g.*, *Tipograph v. Dep't of Just.*, 146 F. Supp. 3d 169, 176 (D.D.C. 2015).

125. This Court should exercise the equitable authority FOIA provides to keep the FDIC accountable to FOIA and to ensure that History Associates suffers no further harm as a result of any unlawful FDIC FOIA policies or practices.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court award the following relief:

a. Declare that the FDIC failed to conduct an adequate search under FOIA for the Pause Letters;

b. Order the FDIC to comply with FOIA by conducting searches reasonably calculated to uncover all Pause Letters by a date certain;

c. Declare that the FDIC violated FOIA by redacting information in the Pause Letters that is not subject to Exemption 8 and/or or would not impair any interest protected by Exemption 8;

d. Order the FDIC to unredact information in the Pause Letters already produced, as well as any additional Pause Letters ultimately produced after a complete search, that is reasonably segregable and/or or would not impair any interest protected by Exemption 8;

e. Declare that the FDIC violated FOIA by having unlawful policies or practices of: (a) asserting that records are categorically exempt under Exemption 8; (b) giving FOIA requests improperly narrow constructions; (c) failing to conduct adequate searches reasonably calculated to uncover all records requested; and (d) unlawfully failing to take the steps necessary to ensure that records responsive to FOIA requests are properly preserved;

f. Enjoin the FDIC from continuing its unlawful policies or practices of: (a) asserting that records are categorically exempt under Exemption 8; (b) giving FOIA requests improperly narrow constructions; (c) failing to conduct adequate searches reasonably calculated to uncover all records requested; and

(d) unlawfully failing to take the steps necessary to ensure that records responsive to FOIA requests are properly preserved;

g. Retain jurisdiction over this case to ensure the FDIC's timely compliance with this Court's orders;

h. Award History Associates its costs and attorneys' fees incurred in this action in accordance with 5 U.S.C. § 552(a)(4)(E);

i. Order a special counsel investigation of the FDIC's conduct regarding the Pause Letters and the FDIC's unlawful policies or practices challenged here, under 5 U.S.C. § 552(a)(4)(F); and,

j. Grant such other relief as this Court may deem just and proper.

Date: February 10, 2025

Respectfully submitted,

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