

October 24, 2011

Ms. Leigh Anne Terry  
Senior Administrator  
Callahan & Associates  
1001 Connecticut Avenue, NW  
Suite 1001  
Washington, D.C. 20036

Re: 2011 – APP – 0009; FOIA Appeal dated September 23, 2011

Dear Ms. Terry:

On February 16, 2011, we received your Freedom of Information Act (FOIA) request. Your request sought information pertaining to a \$10 billion sale of securities conducted by NCUA and described in an agency press release dated October 13, 2010. You requested ten information items, in security-level detail, relating to the sale. You also sought the names of NCUA staff personnel having primary responsibility for overseeing the sale.

On March 9, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, provided an interim response to you, indicating that the scope of the request necessitated more time to locate and review responsive records. On August 25, 2011, Ms. Dent responded to your request, granting it in part and denying it in part. Attached to her response was information concerning three of the ten items you identified in your request. Her response explained that NCUA currently had no records that were responsive, in security-level detail, to three other items you identified, and no responsive records at all to two others. Her letter provided direct answers to two other items, and also identified the NCUA employee with primary responsibility for overseeing the transaction.

By letter dated September 23, 2011, you wrote to us seeking "clarification" concerning some of the information that was provided to you in Ms. Dent's August 25 letter. You indicated you were unsure whether your request should be characterized as an appeal or an additional FOIA request.

In conducting our appellate level review of this issue, we have determined that the agency does currently have records that are responsive to items 3, 4 and 6 of your initial request. These records are in the control of our Asset Management and Assistance Center, located in Austin, Texas. We estimate that it will take fourteen days to develop and produce these records in a format that would be useful to you, and that our costs in doing so will be approximately \$615. Since this estimate is greater than the dollar figure you identified in your appeal, we ask that you confirm back to us your interest in having us conduct this work before we commission it to be done.

To the extent that your letter asks questions about the transaction that was the subject of your original request or seeks elaboration or clarification about materials provided to you in response to your original request, it is not in the form of a proper FOIA request or a proper appeal. FOIA specifies that agencies are required to comply with any "request for records" that "reasonably describes such records." 5 U.S.C. §552(a)(3)(A). Courts have generally held that FOIA does not require agencies to answer questions posed as FOIA requests, nor does it require them to respond to requests by creating records. *Zemansky v. EPA*, 767 F. 2d 569, 574 (9<sup>th</sup> Cir. 1985); *DiViaio v. Kelley*, 571 F. 2d 538, 542-43 (10<sup>th</sup> Cir. 1978). Except in one respect, discussed below, your request does not identify or request particular records to be produced. Accordingly, your appeal is denied. However, even though the request is not in proper form pursuant to FOIA, we are providing you with the following information as an accommodation.<sup>1</sup>

NCUA retained Barclays Capital, Inc. (Barclays) to act as our agent for purposes of selling approximately \$10 billion of liquid securities around the time the corporate resolution plan was announced. This is the same firm that managed the agency's underwriting and sale of NCUA Guaranteed Notes (NGNs). These particular securities were sold outright and never became part of the NGN program. NCUA used Barclays as an agent intermediary to mask its identity as a seller, thereby preserving our anonymity and helping assure that market bidders would not view the transactions as distressed sales. This enabled more effective price competition and in turn more optimal prices. Although Barclays was the nominal purchaser of the securities, it was simultaneously selling the securities to market participants through a competitive bid situation for a contractual fee. Final sales prices were authorized by NCUA and it paid Barclays a commission of \$9.875 million; no other parties received any portion of that fee. The NCUA Board approved the contract to retain Barclays for the outright sale of securities and delegated authority to appropriate senior staff members to implement it, with Larry Fazio having primary management responsibility for the overall corporate resolution project. NCUA made the selection of which securities to include in the sale collaboratively, with input from Barclays as well as various agency personnel.

In addition, your letter does contain an element that is in the form of a proper FOIA request. You have asked for a copy of any written materials that may exist evidencing

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<sup>1</sup> Extensive materials relating to NCUA's Corporate System Resolution program, of which this securities sale was a part, are also available on our website, [www.NCUA.gov](http://www.NCUA.gov).

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approval of actions taken by then Deputy Executive Director Larry Fazio in connection with the sale of securities by officials senior to him within the agency. By copy hereof to Linda Dent, I am directing that she consider and respond to that request as appropriate under FOIA.

Pursuant to 5 U.S.C. §552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,  
/S/

Lara K. Rodriguez  
Deputy General Counsel

cc: Linda Dent, Staff Attorney

GC/RPK:bhs

11-FOI-00084; 2011-APP-0009