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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 506, 510

[No. 95-100]

RIN 1550-AA66

Release of Unpublished Information

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing its final regulation pertaining to the release of unpublished OTS information. The rule is based upon the OTS's experience and practices developed during the last five years in responding to the large volume of requests by the public for unpublished OTS information.

The final rule describes the procedures that requesters must follow in requesting the release of unpublished information by document or testimony and the criteria on which the OTS will evaluate requests for unpublished information. The records covered include those created or obtained in connection with the OTS's performance of its statutory responsibilities, such as supervision, regulation, examination, and law enforcement duties.

EFFECTIVE DATE: July 1, 1995.

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SUPPLEMENTARY INFORMATION:

I. Background

The OTS is today issuing a final rule amending its current rule concerning the release of unpublished information.¹ The final rule includes requests for release of records that are exempt from disclosure under the Freedom of Information Act (FOIA), such as examination and related reports, information relating to the business operations and finances of individual savings associations, savings and loan holding companies, other affiliates, and their customers, and information compiled in connection with the OTS's enforcement investigations. It also includes requests for testimony. The testimony covered in the final rule includes requests for current and former OTS employees, officers, and agents (and for former employees, officers and agents of the OTS's predecessor, the Federal Home Loan Bank Board) to testify in judicial and administrative proceedings, including depositions and informal interviews, about information obtained in their official OTS capacities.

The final rule in no way affects the rights and procedures governing access to records that are required under the FOIA. Indeed, the final rule does not apply to requests for records under the FOIA; FOIA requests remain governed by Part 505 of the OTS's regulations and the Treasury Department's FOIA regulations. However, the final rule may permit the OTS to make records available that are exempt from disclosure under the FOIA.

The final rule provides that in considering requests for disclosure of unpublished information, the OTS must weigh carefully the need demonstrated by a member of the public for access to the OTS's records and testimony against the public interest in maintaining the confidentiality of the unpublished information. Among the factors the OTS will consider in weighing the public interest in confidentiality is the impact on the OTS's supervisory, examination, and enforcement responsibilities of

¹ The OTS's authority to govern the custody and use of its records and the testimony of its personnel derives from 12 U.S.C. 1462a, 1463(a) 1464 and 5 U.S.C. 301. In particular, section 1462a(b)(2) authorizes the Director of the OTS to prescribe such regulations as he may determine to be necessary for carrying out his responsibilities. Also, section 301 authorizes an agency head to prescribe regulations governing the conduct of its employees and the custody, use and preservation of its records.

releasing such information. The OTS will balance these and other appropriate considerations with a requester's interest and expressed need in obtaining such information.

While the vast majority of requests for unpublished records and testimony arise in the course of litigation to which the OTS is not a party, this final rule also provides for the evaluation of requests that arise in a non-litigation context. A non-litigation request must demonstrate as great a need for release of the information as that shown by a request made in the course of litigation.

In addition, the final rule, for the first time, authorizes savings associations to release their examination reports and related supervisory correspondence to their holding companies, and similarly authorizes holding companies to release their examination reports and related supervisory correspondence to their subsidiary savings associations. Also, reports and other information released under this rule remain the property of the OTS, regardless of where such reports or information are physically located.

The final rule also provides for the imposition of fees for searches for records, copying, certifications and witness fees and allowances.

A. Revisions to Existing Section 510.5

The final rule completely revises much of existing 12 CFR 510.5. In particular, the final rule adds detailed procedures for the public to follow in requesting release of unpublished OTS information and describes criteria on which the OTS will evaluate such requests. Also, as noted above, the final rule for the first time authorizes savings associations to release their examination reports and related supervisory correspondence to their parent holding companies, and similarly authorizes holding companies to release their examination reports and related supervisory correspondence to their subsidiary savings associations. The final rule also provides for reimbursement to the OTS for producing records and witnesses. A more detailed description, section by section, of the revisions made to current § 510.5 is contained below in "B. Description of the Proposal".

B. Description of the Proposal

On December 9, 1993, the OTS published in the **Federal Register** a

notice of proposed rulemaking describing amendments to its current § 510.5. 58 FR 64695 (December 9, 1993).² The public comment period closed on February 7, 1994. The proposal is described section by section below:

Section 510.5(a): Paragraph (a) identifies the types of requests covered under this rule. This paragraph provides that the rule applies to requests from the public for unpublished OTS information; the term "unpublished information" includes records and testimony. The covered records include those created or obtained in connection with the OTS's performance of its responsibilities such as its supervisory, regulatory, examination, and enforcement-related duties. The covered testimony includes that of present and former employees, officers, and agents for information obtained in their official OTS capacities. The paragraph states that this rule does not apply to records required to be released under the FOIA, nor does it apply to requests for information by other government agencies or requests for information that arise in proceedings in which the OTS is a party.

Section 510.5(b): Paragraph (b) sets out the purpose of this regulation. The purpose of this rule is to provide an orderly mechanism for expeditiously processing requests for OTS's unpublished information while preserving the OTS's need to maintain confidentiality of certain information.

Section 510.5(c): Paragraph (c) describes the procedures that must be followed when making a request for unpublished OTS information. Paragraph (1) describes general procedures that apply to all requests by members of the public for unpublished information (i.e., records and testimony). It sets forth the types of information that must be contained in such requests, including a showing by the requester that the information sought is *highly relevant* to the purpose for which it is sought. In addition, the requester must demonstrate that the information requested is not available from another source. The requester must also demonstrate that the need for such information clearly outweighs the need to maintain the confidentiality of OTS unpublished information and the burden on the OTS in producing the information, such as the disruption to the OTS's supervisory and other responsibilities that is occasioned by reviewing a large volume of records and

loss to the OTS of the services of employees while they testify at depositions or hearings. This paragraph also requires a requester who seeks a response in less than 30 days to include an explanation of why the request was not submitted earlier and why the expedited handling of the request is necessary.

Paragraphs (2) and (3) set forth additional requirements for certain types of requests. Paragraph (2) pertains to requests for records. It requires that requesters of unpublished OTS records specifically list the types and categories of records sought and the relevant time period. Paragraph (3) describes special requirements for requests for testimony from OTS employees. This paragraph states that requests for testimony by OTS employees or former employees must specifically describe the substance of the testimony sought and show a compelling need for the testimony. Such requests shall also include a demonstration that the information sought is not available from any other source. This paragraph also prohibits OTS employees from testifying as expert witnesses for private parties, requests that litigants anticipate their need for OTS testimony in time for such testimony to be taken in deposition form, and states that the OTS shall specify the scope of any authorized testimony.

Paragraph (4) specifies that unpublished OTS information made available to savings associations, state and Federal agencies and requesters shall remain the property of the OTS and shall not be disclosed to any other party without OTS authorization. In addition, the paragraph authorizes a savings association to provide a copy of its examination report and related supervisory correspondence to parent holding companies. Similarly, a savings and loan holding company is authorized to provide a copy of its examination report and related supervisory correspondence to its subsidiary savings association(s) without further authorization from the OTS.

Paragraph (5) provides that requests for unpublished OTS information shall be sent to the OTS at 1700 G Street, NW., Washington, D.C. 20552, to the attention of the Corporate Secretary.

Section 510.5(d): Paragraph (d) describes the process by which the OTS will consider requests for unpublished information, both records and testimony, and the factors the OTS may consider in denying such requests.

Section 510.5(e): Paragraph (e) sets forth restrictions on the dissemination of unpublished OTS information. Paragraph (1) provides that except as

authorized by this regulation or as otherwise authorized by the Director or his delegate, no current or former OTS employee may disclose any unpublished OTS information to anyone other than an employee or agent of the OTS properly entitled to such information for the performance of their official duties.

Paragraph (2) requires any person with unpublished OTS information who is served with a subpoena, order, or other process requiring their attendance as a witness or for production of records, to advise the issuer of such notice of the substance of this regulation. In addition, this paragraph prohibits any person with unpublished OTS information from disclosure of such information in response to a subpoena without prior OTS authorization.

Paragraph (3) provides that if a person is required to appear in response to a subpoena or other legal process and is asked to disclose unpublished OTS information, that person shall decline to produce such information or give any testimony concerning such information. Upon receiving such a request or subpoena to testify, the individual is required to contact promptly the OTS Litigation Division.

Paragraph (4) specifies that the possession of unpublished OTS information by savings associations, their holding companies, and state and Federal agencies shall not waive any privilege the OTS might have to such information.

Section 510.5(f): Paragraph (f) imposes requirements to protect the confidentiality of unpublished OTS information that is made available to requesters. Paragraph (1) provides that the release of records will normally be conditioned upon entry of an acceptable protective order by the court or administrative tribunal presiding in a particular case or, in non-litigated matters, upon execution of an acceptable confidentiality agreement. Paragraph (2) states that the OTS may condition its authorization of deposition testimony on an agreement of the parties that the transcript of the testimony shall remain confidential. This paragraph also requires the party who requested the testimony to furnish the OTS with a copy of the transcript of the testimony at its expense.

Section 510.5(g): Paragraph (g) sets forth procedures designed to limit the burden on the OTS in connection with releasing records. Paragraph (1) states that requesters who require authenticated records should request certified copies at least 30 days prior to the date the records are needed.

²The reader is also directed to the preamble discussion in the proposal for a more detailed discussion of the background of this regulation.

Paragraph (2) specifies the responsibility of litigants to share and safeguard OTS records. This paragraph provides that the party to whom records are released has the responsibility of notifying the other parties, providing them with copies of the records, retrieving any records from the court's file when they are no longer required, and returning such records to the OTS.

Section 510.5(h): Paragraph (h) sets forth the fees for records searches, records copying and records certification. Specifically, it provides that the fees charged to the requester of OTS records shall be the fees set forth in the Treasury Department regulations, 31 CFR 1.7. Paragraph (2) requires that witness fees and allowances will be paid by the requester of testimony of current OTS employees in accordance with 28 U.S.C. 1821.

II. Summary of Comments

A. General Summary

The OTS received a total of 20 letters of comment from 4 types of sources. Those who submitted comments included 14 savings associations; 5 trade associations; 1 co-operative savings bank; and 1 holding company (one thrift submitted its comment letter on behalf of itself and its parent holding company).

Generally, several commenters expressed concern that the proposed rule would have a "chilling effect" on the examination process. They asserted that the possibility that the OTS might subsequently release information provided in an examination may impede the free flow of information from a savings association to the OTS examiners. Some commenters expressed concern that the proposal was an impermissible expansion of the FOIA and urged that deviations from the FOIA requirements be considered cautiously. Also, five commenters supported the portion of the proposal permitting holding companies to release their examination reports to their thrifts and thrifts to release examination reports to their holding companies.

B. Specific Issues Discussion

1. Possible "Chilling Effect" on Examination Process

Several commenters speculated that this rule will be detrimental to the industry in that it will inhibit cooperation and candid communication between savings associations and the OTS examiners. Certain of these commenters stated that the examination process and the supervisory process would be adversely affected by this rule because institutions may attempt to

protect confidential information which could reasonably be expected to harm the institution if disclosed.

The commenters did not point to any particular situation where such problems have arisen. In fact, OTS has been following these practices for several years, and its experience indicates that the integrity of the examination process will not in any way be compromised by this rule. In hundreds of instances OTS has produced non-public information about institutions in response to demands made by litigants in law suits in which OTS is not a party ("third-party litigation"). In responding to such requests, OTS has developed a practice over a period of five years, which is incorporated into this regulation, that balances confidentiality concerns with the disclosure obligations in the Federal Rules of Civil Procedure. (Under the Federal Rules of Civil Procedure, a litigant is generally entitled to discover non-privileged relevant information.) Specifically, in responding to a request for release of non-public information, OTS considers the following three factors: (1) The relevance of the information, (2) the availability of the information from other sources and (3) whether the need for the information outweighs the need to keep it confidential and the burden on OTS. These criteria are set forth in the regulation issued today. Sec. 510.5(c)(1). Further, in keeping with existing practice, the regulation provides that if OTS grants a request for disclosure of non-public information, it will generally condition the release of the information on the entry of a confidentiality order or agreement that places limits on the extent to which the recipient may disclose the information. Sec. 510.5(f).

By selectively releasing information in third-party litigation only when these criteria are met, and by requiring that a confidentiality order or agreement be in place before non-public information is released, OTS has minimized any potential adverse consequence occasioned by the release of the information. As noted, following these procedures, OTS has disclosed non-public information in hundreds of cases in which it has received production demands under the Federal Rules of Civil Procedure, and it is not aware that this practice has had any adverse effect on the examination process.

2. Freedom of Information Act Considerations

Six commenters expressed concern that the FOIA specifically exempts from disclosure certain records, such as OTS's examination reports, and that the

release of such records would be a "violation" of the FOIA. First, the FOIA does not prohibit the release of information; rather, it requires the disclosure of certain types of records and exempts from mandatory release other records. The FOIA gives the agency discretion to release information that it is not otherwise required to release under FOIA. Among the categories of records that are exempt from mandatory release are records related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.³ Thus, while the FOIA exempts these records from the mandatory disclosure requirements, it in no manner prevents the OTS from disclosing this information under the OTS's authority to govern the custody and the use of its records and the testimony of its personnel.⁴ The OTS will continue to exercise its authority to release such information in a prudent manner by applying the procedures set forth in the final rule and the relevant federal case law.

3. An Interagency Process Should be Established

The recommendation was made by some commenters that the OTS should work with the other banking agencies to establish interagency procedures to provide for consistent application of criteria governing release of unpublished information concerning financial institutions. One commenter stated that this is a matter for resolution under the auspices of the Federal Financial Institutions Examination Council (FFIEC), and recommended that the OTS refer the issues arising out of the proposal to the FFIEC.

The nature of requests, the volume of requests and the needs of the agency may vary from one federal agency to another. While the OTS agrees with the merits of developing a uniform set of procedures for responding to requests for unpublished information, the public interest would not be served by delaying the issuance of this rule while the prospect of developing uniform procedures on an interagency basis is explored. Because the existing rule does not describe many of the practices that OTS has developed over the last several years, it is preferable to amend the rule now so that the public is informed of the disclosure process OTS currently uses.

³ 5 U.S.C. 552(b)(8).

⁴ 12 U.S.C. 1462a; 5 U.S.C. 301.

4. Violation of the Right to Privacy

Three commenters asserted that the release of confidential information without the knowledge and consent of the savings association violates a general right to privacy of the thrift, its customers, and its personnel. The commenters identified no statutory basis for this assertion. In releasing unpublished OTS information, the OTS has observed and will continue to observe the requirements of the Privacy Act of 1974, 5 U.S.C. 552a, and the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*

5. Source of Information Should be Permitted to Comment

Three commenters suggested that the source or subject of the confidential information should be permitted to express its views regarding the release of unpublished information. The OTS has on occasion contacted the source of the information for its views on release of the information. However, in the vast majority of cases, the OTS has been able to evaluate the necessity to maintain the confidentiality of OTS information without consulting the subject or source of the OTS information. Therefore, a requirement that the OTS obtain the subject's or source's views in all instances would result in unnecessary delays in processing requests. For this reason, the OTS declines to include a provision requiring that the source's views be sought, but the OTS will retain, on a case-by-case basis, the practice of contacting the source of information for input when the circumstances and timing warrant.

6. Information Shared With Holding Company

Five commenters supported the new provision authorizing a savings association to provide a copy of its examination report and related supervisory correspondence to its parent holding company. The commenters also supported the provision whereby the holding company would similarly be authorized to provide a copy of its examination report and related supervisory correspondence to its subsidiary thrift. This information would enhance the ability of a holding company to assess its subsidiary thrift's operations and compliance with regulatory standards, and would permit the holding company to provide managerial or financial resources when needed. Similarly, a subsidiary thrift could use this information to address issues it may have with the holding company and to avoid potential conflicts of interest.

7. Increased Litigation and Increased Costs

Three commenters expressed concern that the final rule will lead to an increase in shareholder and other lawsuits against savings associations. Also, two commenters expressed concern that this rule would greatly increase the amount of OTS employee time and taxpayer money that would be expended in evaluating requests for information, as well as increase costs generally. The OTS does not agree with these concerns. The final rule simply codifies the OTS's existing practices in evaluating requests from the public for unpublished OTS information. The OTS's experience over the past five years has not shown that these practices resulted in increased litigation against savings associations or increased costs to the OTS. In fact, the final rule should help reduce costs by decreasing the amount of time that OTS personnel devote to answering questions from the public about the OTS's procedures for releasing non-public information. Unlike the current rule, the final rule specifies in detail the procedures that must be followed and the information that must be provided when the public requests unpublished OTS information.

III. Description of the Final Rule

The final rule does not differ materially from the proposal. Certain non-substantive changes have been made to section 510.5(a)(2) for clarification purposes. Section 510.5(a)(3) was changed to clarify that this rule does not apply to other government agencies except where specifically provided. Also, section 510.5(c)(4)(v) was changed to clarify that requesters who obtain unpublished OTS information may not disclose such information without the OTS's authorization.

Certain minor changes have been made to section 510.5(c)(2)(ii) in response to a comment that was submitted. As proposed, that subsection provided that if a party to a lawsuit has a claim of privilege regarding the information in OTS records and the records are in the possession of that party, the OTS may respond to the request by authorizing the party to release the records pursuant to an appropriate confidentiality order rather than by releasing the records directly to the requesting party, so that the party possessing the records may argue the issue of privilege in the appropriate court. In the final rule, the term "another party to the lawsuit" has been changed to "person" in order to clarify that a person (*e.g.*, an individual,

corporation, partnership) may assert a privilege for non-public OTS records in its possession or control if it receives a subpoena for such information in litigation in which it is not a party. The final rule also clarifies that the privilege may be asserted by the person who has either possession or control of the records, rather than just possession of the records.

Section 510.5(c)(5) was also changed to specify that requests submitted under this regulation should be sent to the attention of the Corporate Secretary.

Section 510.5(d)(4), which describes the grounds for denying requests, was modified to include two criteria that are identified in section 510.5(c), the section that explains the issues that must be addressed in a request for unpublished OTS information. The additional criteria for denying a request are (1) the need for the information does not clearly outweigh the need to maintain the confidentiality of the information, and (2) the requester has not shown a compelling need for the testimony. While these criteria are implicit in the grounds for denial that appeared in the proposed rule and that have been retained in the final rule (*i.e.*, that OTS may deny requests that are overly burdensome or contrary to the public interest), OTS is explicitly including these criteria in the interests of completeness.

Readers are referred to the preamble⁵ in the proposal for additional discussion of provisions that have not been revised in the final rule.

IV. Paperwork Reduction Act

The reporting requirements contained in this final rule have been submitted for review and approved by the Office of Management and Budget, in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) under control number 1550-0081. Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503, with copies to the Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552.

The reporting requirements in this final rule are found in 12 CFR 510.5(c)-(g). The information is needed by the OTS to provide a more efficient mechanism for expeditiously processing requests for unpublished information.

V. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601), it is certified that this

⁵ 58 FR 64695 (December 9, 1993).

regulation will not have a significant economic impact on a substantial number of small savings associations, small service corporations, or other small entities. This regulation simply sets forth the procedures utilized by the OTS in its handling of requests for unpublished OTS information and imposes fees in connection with such requests. Accordingly, a regulatory flexibility analysis is not required.

VI. Executive Order 12866

The OTS has determined that this regulation does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

List of Subjects

12 CFR Part 506

Reporting and recordkeeping requirements.

12 CFR Part 510

Administrative practice and procedure.

Accordingly, the Office of Thrift Supervision hereby amends parts 506 and 510, subchapter A, chapter V, title 12 of the Code of Federal Regulations as set forth below.

SUBCHAPTER A—ORGANIZATION AND PROCEDURES

PART 506—INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 506 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. Section 506.1 is amended by adding in numerical order one new entry to the table in paragraph (b) to read as follows:

§ 506.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

12 CFR part or section where identified and described	Current OMB control No.
* * * * *	*
510.5(c) through (g)	1550-0081
* * * * *	*

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

3. The authority citation for part 510 is revised to read as follows:

Authority: 5 U.S.C. 301; 12 U.S.C. 1462a, 1463, 1464.

4. Section 510.5 is revised to read as follows:

§ 510.5 Release of unpublished OTS information.

(a) *Scope.* (1) This section applies to requests by the public for unpublished OTS information, such as requests for records or testimony from parties to lawsuits in which the OTS is not a party.

(2) Unpublished OTS information includes records created or obtained in connection with the OTS's performance of its responsibilities, such as records concerning supervision, regulation, and examination of savings associations, their holding companies, and affiliates, and records compiled in connection with the OTS's enforcement responsibilities. Unpublished OTS information also includes information that current and former employees, officers, and agents obtained in their official capacities. Examples of unpublished information include:

(i) Information in the memory of a current or former employee, officer, or agent of the OTS (or the Federal Home Loan Bank Board, the predecessor agency of the OTS), by testimony or informal interview, that was acquired in the course of performing official duties or because of the employee's, officer's or agent's official status;

(ii) Reports of examination, supervisory correspondence, internal agency memoranda and investigatory files compiled in connection with an investigation, whether such records are in the possession of the OTS or some other individual or entity; and

(iii) Unpublished OTS records obtained by or in the possession of third parties, including other government agencies.

(3) This section does not apply to:

(i) Requests for records or testimony in proceedings in which the OTS is a party;

(ii) Requests for information by other government agencies, except when specifically provided; and

(iii) Requests for records that are required to be disclosed under the Freedom of Information Act, *see* 5 U.S.C. 552, and 31 CFR 1.1-1.6.

(b) *Purpose.* The purposes of this section are:

(1) To afford an orderly mechanism for the OTS to expeditiously process requests for unpublished OTS information and, where appropriate, for the OTS to assert evidentiary privileges in litigation;

(2) To balance the need for confidentiality of unpublished OTS information with the private party's interest in obtaining disclosure of that information;

(3) To ensure that the time of OTS employees is utilized in the most

efficient manner consistent with the OTS's statutory mission;

(4) To prevent undue burdens on the OTS;

(5) To limit the expenditure of the OTS's funds for private purposes; and

(6) To maintain the impartiality of the OTS among private litigants.

(c) *Procedure.*—(1) *Requests for records and testimony in general.* A request for unpublished OTS information must be in writing, furnish the caption of the lawsuit if the request arises in the course of litigation, and support the requester's claim that the information sought is highly relevant to the purpose for which it is sought. In demonstrating that the information is highly relevant, the requester must explain in detail how the requested OTS information relates to the issues in the case or the matter.

(i) For requests arising in lawsuits, the submission also must include:

(A) A copy of the complaint or equivalent document in the case and any other pleadings necessary to show relevance;

(B) A description of any prior decisions or pending motions in the case that may bear on the asserted relevance of the information being sought from the OTS; and

(C) The names, addresses and phone numbers of counsel to all other parties in the case.

(ii) In all instances, in addition to demonstrating that the information sought is highly relevant to the purpose for which it is sought, the requester must:

(A) Demonstrate that the information sought is not available from any other source; and

(B) Demonstrate that the need for the information clearly outweighs the need to maintain the confidentiality of the OTS information and the burden on the OTS to produce the information.

(iii) If a request seeks a response in fewer than 30 days, it must include an explanation of why the requester was unable to submit the request earlier and why expediting the request is required.

(2) *Additional provisions relating to requests for records.* In addition to the requirements of paragraph (c)(1) of this section, the provisions in paragraphs (c)(2)(i) and (c)(2)(ii) of this section apply to requests for disclosure of records.

(i) A request for records must list the categories of records sought and describe the specific information sought, including the relevant time period.

(ii) When the OTS believes that another person has a claim of privilege regarding the information in the records

and the records are in the possession or control of that person, such as reports prepared by a savings association's attorneys that are shared with the OTS, the OTS may respond to the request by authorizing that person to release the records pursuant to an appropriate confidentiality order rather than by the OTS releasing the records directly to the requesting party. This will enable the person possessing or controlling the records to argue any issues of privilege to the appropriate court.

(3) *Additional provisions relating to requests for testimony from OTS employees.* In addition to the requirements of paragraph (c)(1) of this section, the provisions in paragraphs (c)(3)(i) through (c)(3)(iv) of this section apply to requests that current or former OTS employees be authorized to give testimony.

(i) The request must specifically describe the substance of the testimony sought and show a compelling need for the testimony. A showing of compelling need should include a demonstration that the requested information is not available from any other source, such as the books and records of other persons or entities, OTS records that have been or might be released, or the testimony of other non-OTS persons, including retained experts.

(ii) OTS employees will not be authorized to provide expert or opinion testimony for private parties.

(iii) The OTS expects litigants to anticipate their need for OTS testimony in sufficient time to request and obtain that testimony in deposition form. A request for testimony at a trial or hearing may not be granted unless the requester shows that properly developed deposition testimony could not be used or would not be adequate at the trial or hearing.

(iv) The OTS shall specify the scope of any authorized testimony and may take steps to ensure that the scope of testimony taken adheres to the scope authorized. Parties to the case who did not join in the request and who wish to question the witness beyond the authorized scope should request expanded authorization pursuant to this regulation. The OTS will attempt to render decisions on such requests in an expedited manner.

(4) *Information available to savings associations, holding companies, state and Federal agencies and requesters.* (i) The regular report of examination of a savings association, savings and loan holding company, or other affiliate of a savings association is made available by the appropriate Regional Office to the entity examined.

(ii) A subsidiary savings association of a savings and loan holding company may reproduce and furnish a copy of its report of examination and related supervisory correspondence of the savings association to its parent holding company(ies) without prior approval of the OTS. A savings and loan holding company may reproduce and furnish a copy of its report of examination and related supervisory correspondence to another affiliated savings and loan holding company that controls the same savings association or its subsidiary savings association(s) without prior approval of the OTS. This paragraph does not require such disclosure by a parent savings and loan holding company or subsidiary savings association.

(iii) Reports of examination and other information relating to state-chartered savings associations and affiliates are made available, upon request, by the OTS to the state governmental authority having general supervision of such state-chartered savings associations.

(iv) Reports of examination and other information may be made available by the OTS to other agencies of the United States, a state agency, or to the Federal Home Loan Banks, for use where necessary in the performance of their official duties.

(v) All reports or other information made available to savings associations, holding companies, affiliates, other governmental agencies or requesters shall remain the property of the OTS and, except as permitted by this section or otherwise by the Director or his delegate, no person, company, agency, or authority to whom the information is made available, or any officer, director, employee or agent thereof, shall disclose any such information except published statistical material that would not disclose the identity of any individual or corporation.

(5) *Where to submit requests.* In all matters covered by this section, notification of the issuance of subpoenas or compulsory process and requests for records or testimony covered by this section must be sent to the OTS at 1700 G Street NW., Washington, DC 20552, to the attention of the Corporate Secretary, and should be labelled "Request for Release of Unpublished Information Under Section 510.5." Requesters may furnish copies of the request or subpoenas simultaneously to the appropriate OTS Regional Office, but the furnishing of such copies does not constitute service on the OTS.

(d) *Consideration of requests—(1) In general.* The OTS will generally process requests in the order in which they are

received. The OTS will endeavor to respond to requests within 30 days, but this may vary depending on the scope and precision of the request. The OTS will weigh requests for processing in less than 30 days against the burden to the OTS of expedited processing and the unfairness to other parties whose pending requests may be delayed.

(2) *Consultation with requester.* The OTS may consult with the requester to:

(i) Refine and limit the scope of the request so as to reduce the burden and expense on the OTS; or

(ii) Obtain additional information necessary for the OTS to make an informed determination on the request. To the extent necessary to reach an informed determination on the request, the OTS may inquire into the circumstances of the underlying matter and rely on sources of information beyond the requester, including other interested parties.

(3) *Final determinations.* Final determinations on requests will be made by the Director or his delegate. All such determinations are the sole discretion of the Director or his delegate. Requesters will be notified in writing of the disposition of the request.

(4) *Denial of requests.* (i) The OTS may deny requests for records or testimony that seek information that the OTS deems to be:

(A) Not highly relevant;

(B) Privileged;

(C) Available from other sources; or

(D) Information that should not be disclosed for reasons that warrant restriction of discovery under the Federal Rules of Civil Procedure (28 U.S.C. appendix).

(ii) The OTS may also deny a records or testimony request when it considers production of the information to be overly burdensome or contrary to the public interest, or where OTS determines that the need for the information does not clearly outweigh the need to maintain the confidentiality of the information, or where the requester seeks testimony and has not shown a compelling need for the testimony.

(5) *Confidentiality Orders and Agreements.* As is set forth in paragraph (f) of this section, the OTS may condition release of information on the entry by the relevant tribunal of an order satisfactory to the OTS or, in a non-litigated matter, the execution of a confidentiality agreement that limits access of third parties to the unpublished OTS information. It shall be the duty of the requesting party to obtain such an order or to execute a confidentiality agreement.

(e) *Parties with access to OTS information; restriction on dissemination*—(1) *Current and former employees*. Except as authorized by this section or as otherwise authorized by the Director or his delegate, no current or former employee, officer or agent of the OTS or a predecessor agency shall disclose or permit the disclosure of any unpublished information of the OTS to anyone (other than an employee, officer or agent of the OTS properly entitled to such information for the performance of their official duties), whether by giving out or furnishing such information or a copy thereof or by allowing any person to inspect, examine, or copy such information or copy thereof, or otherwise.

(2) *Duty of person served*. If any person, whether or not a current or former employee, officer or agent of the OTS, has information of the OTS that may not be disclosed under the regulations of the OTS or other applicable law, and in connection therewith is served with a subpoena, order, or other process requiring personal attendance as a witness or production of records or information in any proceeding, that person shall promptly advise the OTS of such service or request for information. Upon such notice the OTS will take appropriate action to advise the court or tribunal that issued the process and the attorney for the party at whose instance the process was issued, if known, of the substance of this section. Such notice to the OTS shall be made by contacting the Litigation Division, Office of Chief Counsel, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552. As provided in paragraph (e)(3) of this section, a person so served with process may not disclose OTS information without OTS authorization. To obtain OTS authorization, a request must be sent to the OTS in Washington, DC, in accordance with paragraph (c) of this section.

(3) *Appearance by person served*. Except as the OTS has authorized disclosure of the relevant information, or except as authorized by law, any person who has information of the OTS that may not be disclosed under this section and is required to respond to a subpoena or other legal process shall attend at the time and place therein mentioned and respectfully decline to produce such records or give any testimony with respect thereto, basing such refusal on this part. If, notwithstanding, the court or other body orders the disclosure of such records or the giving of such testimony, the person having such information of the OTS shall continue respectfully to decline to

produce such information and shall promptly advise the Litigation Division of the Chief Counsel's Office, Office of Thrift Supervision. Upon such notice the OTS will take appropriate action to advise the court or tribunal which issued the order, of the substance of this section.

(4) *Non-waiver of privilege*. The possession by any entity or individual described in paragraph (c)(4) of this section of OTS records covered by this section shall not waive any privilege of the OTS or the OTS's right to supervise the further dissemination of these records.

(f) *Orders and agreements protecting the confidentiality of unpublished OTS information*—(1) *Records*. Unless otherwise permitted by the OTS, release of records authorized pursuant to this section will be conditioned by the OTS upon entry of an acceptable protective order by the court or administrative tribunal presiding in the particular case, or, in non-litigated matters, upon execution of an acceptable confidentiality agreement. In cases where protective orders have already been entered, the OTS reserves the right to condition approval for release of information upon the inclusion of additional or amended provisions.

(2) *Testimony*. The OTS may condition its authorization of deposition testimony on an agreement of the parties that the transcript of the testimony will be kept under seal, or will be made available only to the parties, the court and the jury, except to the extent that the OTS may allow use of the transcript in related litigation. The party who requested the testimony shall, at its expense, furnish to the OTS a copy of the transcript of testimony of the OTS employee or former employee.

(g) *Limitation of burden on the OTS in connection with released records*—(1) *Authentication for use as evidence*. The OTS will authenticate released records to facilitate their use as evidence. Requesters who require authenticated records should request certified copies at least 30 days prior to the date they will be needed. The request should be sent to the OTS Public Disclosure Branch and shall identify the records, giving the office or record depository where they are located (if known) and include copies of the records and payment of the certification fee.

(2) *Responsibility of litigants to share released records*. The party who has sought and obtained OTS records has the responsibility of:

(i) Notifying other parties to the case of the release and, after entry of a protective order, providing copies of the

records to the other parties who are subject to the protective order; and

(ii) Retrieving any records from the court's file as soon as the records are no longer required by the court and returning them to the OTS. Where a party may be involved in related litigation, the OTS may, upon a request made to it pursuant to this section, authorize such party to transfer the records for use in that related case.

(h) *Fees*—(1) *Fees for records searches, copying and certifications*. Requesters shall be charged fees in accordance with Treasury Department regulations, 31 CFR 1.7. With certain exceptions, the regulations in 31 CFR 1.7 provide for recovery of the full direct costs of searching, reviewing, certifying and duplicating the records sought. An estimate of the statement of charges will be sent to requesters, and fees shall be remitted by check payable to the OTS prior to release of the requested records. Where it deems appropriate, the OTS may contract with commercial copying concerns to copy the records, with the cost billed to the requester.

(2) *Witness fees and allowances*. (i) Litigants whose requests for testimony of current OTS employees are approved shall, upon completion of the testimonial appearance, promptly tender a check payable to the OTS for witness fees and allowances in accordance with 28 U.S.C. 1821.

(ii) All litigants whose requests for testimony of former OTS employees are approved, shall also promptly tender witness fees and allowances to the witness in accordance with 28 U.S.C. 1821.

Dated: May 22, 1995.

By the Office of Thrift Supervision.

Jonathan L. Fiechter,

Acting Director.

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12 CFR Part 509

[No. 95-102]

RIN 1550-AA80

Rules of Practice and Procedure in Adjudicatory Proceedings

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its Rules