

receipt of the loan documents by the credit union should occur within a reasonable time following acceptance of the loan.

The two commenters that responded to the question of whether a specific number of days should be substituted for the language requiring assignment of the contract "very soon" after it is signed by the member, opposed specific numbers. The commenters noted that using specific numbers could reduce flexibility and is not necessary. The NCUA Board agrees and will not use specific numbers.

Finally, the NCUA Board asked for comment on whether the types of loans that can be purchased from any source for purposes of creating pools for sale should be expanded to include auto and credit card loans. Five of the six commenters that responded supported the Board pursuing this option for FCUs. Those commenters noted that it would provide credit unions with an important asset and liability management tool for use as an alternative means of creating liquidity.

The one negative commenter did not see the need for a regulation permitting this practice, because there is no major secondary market for auto and credit card loans.

The NCUA Board is aware that there is a growing secondary market for auto and credit card loans and intends to look at whether this is appropriate for FCUs. Currently, the Financial Accounting Standards Board (FASB) is reviewing the accounting standards governing these transactions. Once FASB states its position and there is stability in this area, the NCUA Board will make a decision on whether to expand its regulations to permit FCUs to purchase nonmember auto and credit card loans for sale on the secondary market.

**Regulatory Procedures**

*Regulatory Flexibility Act*

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic effect any regulation may have on a substantial number of small credit unions, meaning those under \$1 million in assets. The NCUA Board has determined and certifies that the final rule will not have a significant economic impact on a substantial number of small credit unions. The reason for this determination is that it is highly unlikely that small credit unions would be engaged in pooling real estate loans for sale on the secondary market. Accordingly, the NCUA Board has determined that a

Regulatory Flexibility Analysis is not required.

*Executive Order 12612*

Executive Order 12612 requires NCUA to consider the effect of its actions on state interests. The final rule will only apply to federal credit unions. Section 741.8(b)(1) specifically exempts state chartered federally insured credit unions from § 701.23(b)(1)(iv). Section 701.23(b)(v) only applies to FCUs.

*Paperwork Reduction Act*

The final rule does not impose any additional paperwork requirements on FCUs.

*Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act, 5 U.S.C. 551. The Office of Management and Budget has reviewed this rule and determined that, for purposes of the Small Business Regulatory Enforcement Act Fairness Act of 1996, this is not a major rule.

**List of Subjects in 12 CFR Part 701**

Credit unions; Eligible obligations.

By the National Credit Union Administration Board on December 17, 1998.  
**Becky Baker,**  
*Secretary of the Board.*

Accordingly, NCUA amends 12 CFR part 701 as follows:

**PART 701—ORGANIZATION AND OPERATIONS OF FEDERALLY-INSURED CREDIT UNIONS**

1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789 and 1798. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Amend § 701.23 by adding a sentence to the end of paragraph (b)(1)(iv) and by revising paragraph (b)(3) to read as follows:

**§ 701.23 Purchase, sale and pledge of eligible obligations.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iv) \* \* \* A pool must include a substantial portion of the credit union's

members' loans and must be sold promptly.

\* \* \* \* \*

(3) The aggregate of the unpaid balance of eligible obligations purchased under paragraph (b) of this section cannot exceed 5% of the unimpaired capital and surplus of the purchaser. The following can be excluded in calculating this 5% limitation:

(i) Student loans purchased in accordance with paragraph (b)(1)(iii) of this section;

(ii) Real estate loans purchased in accordance with paragraph (b)(1)(iv) of this section;

(iii) Eligible obligations purchased in accordance with paragraph (b)(1)(i) of this section that are refinanced by the purchaser so that it is a loan it is empowered to grant; and

(iv) An indirect lending or indirect leasing arrangement that is classified as a loan and not the purchase of an eligible obligation because the federal credit union makes the final underwriting decision and the sales or lease contract is assigned to the federal credit union very soon after it is signed by the member and the dealer or leasing company.

\* \* \* \* \*

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BILLING CODE 7535-01-U

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**Office of Federal Housing Enterprise Oversight**

**12 CFR Part 1710**

RIN 2550-AA01

**Releasing Information**

**AGENCY:** Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Final rule.

**SUMMARY:** The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a final rule which sets forth the basic policies of OFHEO regarding disclosure of information it maintains and the procedures for obtaining access to such information by the public. The rule implements the Freedom of Information Act (FOIA) and establishes a schedule of fees, which will be charged for the processing of record requests under the FOIA. In addition, the rule sets forth procedures to be followed to request testimony or the production of documents in legal proceedings in which OFHEO is not a named party as

well as procedures for service of process upon OFHEO in any legal proceeding.

**EFFECTIVE DATE:** January 22, 1999.

**FOR FURTHER INFORMATION CONTACT:** Gary L. Norton, Deputy General Counsel, Christine C. Dion, Associate General Counsel, 1700 G Street NW., Fourth Floor, Washington, DC 20552, telephone (202) 414-3829 (not a toll-free number). The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act), established OFHEO as an independent office within the Department of Housing and Urban Development (HUD). OFHEO is responsible for ensuring the financial safety and soundness and the capital adequacy of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises).

In order to carry out its regulatory responsibilities, OFHEO is issuing this final rule governing the release of information to the public. The rule implements the FOIA by establishing procedures by which the public may inspect OFHEO records, request and obtain copies of materials, and appeal denials of such requests under the FOIA. This rule also includes a schedule of fees and procedures for determining when fees should be waived or reduced for FOIA requests in conformance with applicable guidelines of the Department of Justice (DOJ) and the Office of Management and Budget (OMB). The final rule also implements Executive Order 12600 by providing predisclosure notification procedures for confidential commercial or financial information. In addition, this final rule prescribes procedures for requesting access to records or testimony in legal proceedings in which OFHEO is not a named party. Also set forth in the final rule are procedures for effecting service upon OFHEO in any legal process, including service of process by litigants seeking access to OFHEO records.

OFHEO is aware of recent amendments to the FOIA resulting from the Electronic Freedom of Information Act Amendments of 1996 (1996 Act),<sup>1</sup> which was enacted to provide for public access to information in an electronic

format and for other purposes. OFHEO will implement the 1996 Act's amendments under separate rulemaking.

Comments on the proposed rule<sup>2</sup> were received from Fannie Mae and Freddie Mac. Those comments were carefully considered in developing this final rule and a discussion of the Enterprises' comments and OFHEO's response to those comments follows.

**II. Comments on the Proposed Releasing Information Rule**

*General Comments*

Most of the Enterprises' comments related to their request that the proposed rule be expanded to include provisions specifying how the agency will process a request for information which is not required to be disclosed under the FOIA because it is covered by an FOIA exemption. The Enterprises commented that the absence of such provisions would result in unnecessary burdens on OFHEO's staff by necessitating a case-by-case review of requests for nonpublic information, and would lead to uncertainty and unpredictability in the disclosure policy of future OFHEO administrations. The Enterprises also noted that regulations governing access to records subject to discretionary disclosure have been adopted by the other financial institution regulatory agencies<sup>3</sup> and that Congress intended OFHEO to act in a manner similar to those agencies.

OFHEO agrees with the Enterprises' comments that OFHEO's enabling statute contains several provisions demonstrating congressional intent that OFHEO consider the policies, rules, and procedures of the bank regulatory agencies in implementing its operational and regulatory authorities. In fact, it is the practice of OFHEO to carefully monitor the law applicable to the bank regulatory agencies as well as the rules and guidance of those agencies in order to more effectively carry out OFHEO's role as the Enterprises' safety and soundness regulator.

For instance, the proposed regulation included provisions governing requests for information in litigation in which OFHEO is not a party which are similar to regulations adopted by the bank regulators. These regulations are designed to ensure that appropriate limits are placed on examination and other confidential information that may be sought as evidence in such litigation. This final regulation contains the same provisions. However, OFHEO has

determined that, at this time, it is not appropriate or necessary to adopt regulations governing how the agency exercises its discretion in connection with other requests for information that are not subject to mandatory release under the FOIA.

The other regulators have adopted those regulations primarily because they receive numerous requests for certain categories of information, which they regularly disclose under their discretionary authority. Unlike the bank regulatory agencies, which have been in existence for many years, OFHEO has not experienced a large volume of requests by the public for nonpublic information. To date, each request that has been received has been reviewed and processed on a case-by-case basis under the FOIA. OFHEO believes that the existing procedures are appropriate and effective and do not pose an undue burden on the agency. OFHEO will, of course, monitor the volume and nature of information requests on an ongoing basis and propose appropriate amendments to the regulation if they are deemed necessary.

Fannie Mae expressed concern that a "gap" in the disclosure coverage in OFHEO's final rule could result in FOIA requesters asserting that HUD's rules, not OFHEO's, apply to such requests. Fannie Mae further commented that HUD's existing and future disclosure rules and policies may be inconsistent or conflict with OFHEO's disclosure policies and with the appropriate treatment of sensitive OFHEO supervisory records. Fannie Mae expressed concerns that the application of HUD's disclosure rules could result in the release of highly sensitive Enterprise information by HUD.

There is no "gap" in coverage. These regulations govern all OFHEO records and requests for those records. The 1992 Act established OFHEO as an independent office within HUD and expressly divided the regulatory responsibilities over the Enterprises—HUD was assigned programmatic oversight over the Enterprises' housing programs;<sup>4</sup> OFHEO was assigned supervision and enforcement of the financial safety and soundness of the Enterprises.<sup>5</sup> Congress granted the Director independent authority with respect to the capital adequacy and safety and soundness regulation of the Enterprises.<sup>6</sup> In addition, Congress granted the OFHEO Director broad

<sup>4</sup> Sections 1321-1349 (12 U.S.C. 4541-4589).

<sup>5</sup> Sections 1311-1319G (12 U.S.C. 4511-4526); sections 1361-1379B (12 U.S.C. 4611-4641).

<sup>6</sup> 1992 Act, section 1313(b)(1)-(8) (12 U.S.C. 4513(b)(1)-(8)).

<sup>2</sup> 60 FR 25162, May 11, 1995.

<sup>3</sup> See, e.g., 12 CFR part 261 §§ 261.1-261.17

(Board of Governors of the Federal Reserve System).

<sup>1</sup> Pub. L. No. 104-231, 110 Stat. 3048.

authority to make such determinations, take such actions, and perform such functions as the Director determines are necessary regarding the management of OFHEO.<sup>7</sup> The Director's independent management authority is reinforced by the statutory provision prohibiting the Secretary of HUD from merging or consolidating OFHEO or any of its functions or responsibilities with any function or program administered by the Secretary.<sup>8</sup>

This final rule governing the release of OFHEO information is being promulgated under the Director's exclusive rulemaking authority. It affects the management of OFHEO, *i.e.*, OFHEO's disclosure policy, the testimony of employees, and access to OFHEO records. For this reason, OFHEO, not HUD, would decide whether or not to release OFHEO records. Records under OFHEO's control are not covered by HUD's general rules on information disclosure.

To date, FOIA requests involving OFHEO information or records, which have been received by HUD, are referred to OFHEO's FOIA Officer for response under OFHEO's disclosure rule and processing procedures. Conversely, OFHEO's FOIA Officer ensures that FOIA requests for HUD information or records are forwarded to HUD's FOIA Officer for response under HUD's disclosure rules.

Freddie Mac commented that the 1992 Act did not specifically delegate to OFHEO the function of public dissemination of information about the Enterprises. Accordingly, Freddie Mac stated that OFHEO generally should exercise its discretion concerning the release of information about the Enterprises in a manner whereby the Enterprises, not OFHEO, decide whether to release such information. Freddie Mac commented that, to the extent that such nonpublic information originates with the Enterprises, it is the Enterprise's property, not OFHEO's. Therefore, Freddie Mac believes that OFHEO's determination to release information should only be made after the Enterprises have had the opportunity to comment on the effect of any disclosure of such information to the public.

In response to this comment, OFHEO notes that OFHEO is subject to the legal requirements of the FOIA. Under the FOIA, all responsive records possessed by and within the control of OFHEO at the time such requests are made must be released, unless OFHEO determines not

to release them under an applicable exemption or the records are specifically excluded from FOIA's coverage. The nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure and generally are discretionary in nature. Under the FOIA, discretion to exercise any of the nine exemptions is confined to OFHEO, as the statute's implementing agency. Submitters of information are not authorized under the FOIA to invoke an exemption. However, under certain circumstances, OFHEO must notify and consider input from submitters prior to releasing records. As discussed below, exemption (b)(4) requires OFHEO to give submitters of confidential commercial or financial information an opportunity to object to the release of such information. However, even in those instances and subject to certain notice requirements, the FOIA requires OFHEO to make the final decision as to whether any information will be released.

Below is OFHEO's response to the Enterprises' comments on the specific sections as they appear in the proposed rule.

## Section Comments

### Subpart A—Information and Records Generally

#### Section 1710.1 General Rule

Stating that the lack of a definition for the term "information" may result in the disclosure of certain confidential information, Fannie Mae requested that the term be defined in the final rule.

Section 1710.1 restricts the disclosure of "any information in the possession of OFHEO that is confidential or otherwise of a nonpublic nature" including information of the Enterprises. The term "information" is not defined in the section or elsewhere in the proposed rule because OFHEO intended that the term be given its common meaning, *i.e.*, any knowledge derived from experience with a particular event or situation.<sup>9</sup> This meaning would impose a broad-based prohibition against the unauthorized disclosure of any nonpublic information that is obtained by, produced by, accessed by, or disclosed to an OFHEO employee in connection with his or her work experience with OFHEO. OFHEO believes that all information which has not become part of the body of public information, including, but not limited to, information regarding the Enterprises

or OFHEO, should be afforded maximum safeguards and that the common, all-encompassing meaning of "information" provides such safeguards. Accordingly, it has been determined that the final rule should not be revised to define the term "information." Rather, the term has been added to section 1710.7(a) in this final rule to make it clear that OFHEO intends that the prohibitions against unauthorized disclosure apply very broadly to all nonpublic OFHEO documents and information. Moreover, since Fannie Mae raised the issue of the use of the term "information," OFHEO carefully reviewed the proposed rule regarding other informational-type terms. For consistency, changes were made in the final rule to ensure that the term "record" is contained in provisions relating to FOIA requests. The term "document" is used in place of the terms "record" and "material" in all other provisions of the final rule relating to requests for OFHEO nonpublic information.

OFHEO agrees with the Enterprises' comments that, for purposes of clarification, the term "employee" should be defined in the final rule. To that end, OFHEO has defined the term.

Consistent with that definitional recommendation, OFHEO determined that it also would be beneficial to define certain other terms for purposes of the entire part 1710. The final rule contains a new subpart, which consolidates in one place various terms used throughout part 1710. Those general definitions are contained in subpart A of the final rule. Subparts A through E of the proposed rule are redesignated in the final rule as subparts B through F, respectively, and, sections 1710.1-.3 are renumbered as 1710.6-.8, respectively. Definitions that are specific to a particular subpart continue to be defined within that subpart in the final rule.

Additionally, to effect a more appropriate placement of its content, section 1710.41 of the proposed rule is renumbered as 1710.9 and is moved to subpart B in the final rule. The section enumerates final orders and agreements that OFHEO shall make available to the public.

### Subpart B—Availability of Records of OFHEO

#### Section 1710.11 Official Records of OFHEO

Fannie Mae commented that section 1710.11(d) provides that certain records exempt from FOIA disclosure may be released if "specifically authorized by the Director," without a requirement

<sup>7</sup> 1992 Act, section 1313(b)(9) (12 U.S.C. 4513(b)(9)).

<sup>8</sup> 42 U.S.C. 3534.

<sup>9</sup> See *Webster's II New Riverside University Dictionary* (1994). See *e.g.*, *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618 (1994) (when common words are not defined, they should be given common meaning).

that such authority be in writing. Fannie Mae noted that the proposed rule requires written authorization for release of examination reports, and official documents or information disclosure in third-party legal proceedings. Fannie Mae requested that section 1710.11(d) be revised to require specific Director authorization "in writing."

OFHEO has determined not to change section 1710.11(d) in the final rule. The requested change would require the Director to approve in writing any decision to disclose a document that is subject to discretionary release under the FOIA. While the FOIA Officer may consult generally with the Director, authority to approve in writing any decision to disclose such documents has been delegated by the Director to the FOIA Officer in accordance with the procedural requirements of the FOIA, Executive Order 12600, and OFHEO's internal information disclosure policy.

#### *Section 1710.18 Special Procedures for Business Information*

With respect to section 1710.18, addressing business information, Freddie Mac commented that OFHEO should adopt the simple rule that any submissions designated as confidential by a submitter, unless frivolous, should be covered by the notice and other protections of the rule. Freddie Mac stated that this simple rule is consistent with FOIA's Exemption 4. Freddie Mac objected to the "good faith" requirement found in sections 1710.18(c) and 1710.18(e)(1) of the proposed rule and requested that the requirement be deleted from the final rule. Freddie Mac argued that the undefined "good faith" requirement is in contravention of Executive Order 12600. Freddie Mac stated that, under the Executive order, notice and an opportunity to object to disclosure of information is required and an agency's opinion of a submitter's "good faith" is irrelevant. It further stated that the "good faith" standard is inconsistent with the definition of business information found at section 1710.18(b)(1) of the proposed regulation. Freddie Mac expressed concerns that the "good faith" requirement at section 1710.18(e)(1) would make the process by which OFHEO judges a submitter's designation as confidential business information too subjective. Moreover, it alleged that to allow OFHEO staff to make determination on the notice requirement would give it "dangerous power" and would not reflect respect for the fact that business information submitted to OFHEO is the property of the Enterprise and, therefore, any decision to disclose

such information should not be made without the views of the submitting Enterprise. Freddie Mac further commented that the provision found at section 1710.18(i)(4), which allows OFHEO to dispense with notice procedures if a designation is "obviously frivolous," makes the "good faith" requirement unnecessary since it gives OFHEO the ability to disclose when a confidential designation is unwarranted.

The "good faith" requirements for submitters of business information under section 1710.18, as proposed, simply reiterate the policy underlying Executive Order 12600 that submitters should not frivolously designate submissions as being protected from disclosure under Exemption 4. The good faith language conforms to that contained in the FOIA regulations of DOJ, which is the lead agency responsible for implementation of the FOIA. Moreover, it is consistent with FOIA regulations of other Federal agencies, such as the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Office of Personnel Management. OFHEO believes that the "good faith" requirement provides a workable standard and will not give rise to the concerns raised by Freddie Mac. Accordingly, OFHEO has retained the section's good faith requirements in the final rule.

Freddie Mac also commented that reports of examination and related materials should be treated the same way as business information. It requested that the same protections afforded to business information under Executive Order 12600 and proposed that section 1710.18 be extended to examination reports and related materials.

It is clear from the plain language of Executive Order 12600 that examination reports are not the type of "confidential commercial information" intended to be subject to its prenotification procedures. OFHEO is not aware of, and Freddie Mac did not identify, any problems that warrant extending the predisclosure notice requirements of this section beyond the scope of Executive Order 12600. Additionally, OFHEO notes that, while examination reports may contain confidential commercial information, the reports are OFHEO-produced and OFHEO-owned documents. OFHEO examination reports are exempt from disclosure under the FOIA by a specific exemption (5 U.S.C. 552(b)(8)). For these reasons, the prenotification requirements of section 1710.18 have not been revised in the final rule to include examination reports.

With respect to the prenotification requirements for business information, Fannie Mae requested that sections 1710.18(f) and (g)(2) of the proposed rule be revised to provide a submitter with a minimum period of 10 days in which to object to a request to disclose and to be advised of an agency's intent to disclose.

In drafting sections 1710.18(f) and (g), OFHEO sought to be consistent with the prenotification requirements applicable to FOIA requests for business information set forth in Executive Order 12600. Among other things, the Order provides a submitter of such information a "reasonable period of time" in which to object to disclosure of the information. The Order also requires that an agency give submitters notice of agency intent to disclose within a "reasonable number of days" prior to the specified disclosure date.

In order to codify OFHEO's prenotification practice, OFHEO specified in section 1710.18(g)(1) that it would provide notice to a submitter of its intent to disclose 10 business days before the specified disclosure date. To fulfill its obligation under the Order to also notify the requester, OFHEO stated in section 1710.18(g)(2) that OFHEO would forward to the requester of business information a copy of the notice to disclose at the same time that OFHEO forwards such notice to the business submitter.

For purposes of consistency, OFHEO has determined to revise section 1710.18 in the final rule to include the 10-day notice provision in subsection (f) relating to a submitter's opportunity to object to disclosure. For purposes of clarification, OFHEO has further determined to delete reference to submitters in section 1710.18(g)(2), as their inclusion would be redundant to coverage provided under subsection (g)(1). Subsection (e) has been modified to more fully correspond to the language of Executive Order 12600.

The title of section 1710.18 has been changed in this final rule from "Business Information" to "Special Procedures for Business Information" to more fully highlight the unique treatment afforded to such information under Executive Order 12600.

#### *Subpart C—Fees for Provision of Information*

##### *Section 1710.23 Fees To Be Charged—Categories of Requesters*

Commenting on section 1710.23(a) relating to fees charged FOIA requesters, Fannie Mae noted that the proposal states that OFHEO "will seek clarification" before assigning a fee

category if it reasonably doubts a use classification for purposes of charging a fee for record copying, or if the purpose is not clear from the request. Fannie Mae stated that this would obligate OFHEO to engage in inquiries that may be administratively burdensome; that requesters are in the best position to provide adequate information to avoid such expense. Fannie Mae requested that the section be revised to state that OFHEO "may place the requester in the commercial use category or may seek additional clarification."

The Freedom of Information Reform Act of 1986<sup>10</sup> specifically required OMB to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA. The uniform guidelines issued by OMB advise agencies to resolve doubtful or unclear requests to ensure that the appropriate use category is assigned to a requester for purposes of charging fees. Among other things, the guidelines note the need to distinguish between requesters whose use of information is for a use that furthers their business interests, as opposed to a use that in some way benefits the public. Section 1710.23(a), as proposed, follows OMB's guidelines. Accordingly, OFHEO has determined to adopt this section as proposed.

#### *Subpart D—Testimony and Production of Documents in Legal Proceedings in Which OFHEO Is Not a Named Party*

Stating that any harm to the Enterprises is the same whether sensitive information is made public under the FOIA or pursuant to legal process, Freddie Mac requested that the prenotification requirements for business information should also apply to any request for information under subpart D of the proposed rule. For the reasons noted earlier, OFHEO has determined not to extend its prenotification procedures beyond the scope of Executive Order 12600 in this final rule.

Freddie Mac stated that, prior to the production of the information, OFHEO should provide the Enterprises with the opportunity to comment on the scope of any protective order governing the release of sensitive, nonpublic commercial or examination materials directly relating to them. As noted earlier, OFHEO believes that the provisions of the proposed rule, including those contained in subpart D, adequately safeguard the confidentiality of OFHEO documents and information. However, OFHEO may solicit input from the Enterprises whenever it is

determined that such consultation would further complement those safeguards. Accordingly, the provisions of subpart D are being adopted as proposed.

### **SECTION-BY-SECTION ANALYSIS**

#### **I. General Definitions**

Subpart A of the final rule provides definitions of terms used throughout part 1710. Section 1710.1 explains the scope of subpart A. Section 1710.2 defines the common terms used throughout part 1710.

#### **II. Documents and Information Generally**

Subpart B of the final rule contains general provisions relating to disclosure of documents and information in the possession of OFHEO. Section 1710.6 sets forth procedures for disclosure of such materials. Section 1710.7 provides that the disclosure requirements of the FOIA and the final rule apply to all OFHEO documents and information. It also provides that if another statute sets specific procedure for disclosure, OFHEO will process a request in accordance with the procedures that apply to those specific documents. If a request is received for disclosure of a document to the public which is not required to be released under those provisions, OFHEO will consider the request under the FOIA and the provisions of this final rule.

Section 1710.7 describes the relationship between the FOIA and the Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, and explains that records that are available through an established distribution system should preferably be obtained through that system, rather than pursuant to the provisions of the FOIA.

Section 1710.8 of subpart B contains a general provision providing that reports of examinations prepared by OFHEO are the property of OFHEO and may only be disclosed in accordance with part 1710 or with the prior written consent of the Director. The section further provides that any unauthorized use or disclosure of such documents may be subject to penalties under Federal law. Section 1710.8 explains that the Director will make available to each Enterprise a copy of the examination report of that Enterprise and that the Enterprise may not disclose or use such reports except as expressly permitted by the Director. The section also explains that the Director has discretion to make the examination reports available for the confidential use of Government agencies responsible for

investigating and enforcing applicable laws.

As noted earlier, section 1710.41 of the proposed rule is renumbered as section 1710.9 in subpart B of this final rule. Section 1710.9 enumerates final orders and agreements that the Director is required to make available to the public. The section also has been modified to mirror those statutory requirements.

#### **III. Availability of OFHEO Records**

Subpart C implements the FOIA, 5 U.S.C. 552, and describes (1) OFHEO records available to the public, (2) OFHEO information exempt from disclosure, (3) OFHEO's record index, (4) request requirements, (5) response requirements, (6) response content, (7) appeal procedures, and (8) time limits for processing requests and appeals. Subpart C also contains OFHEO's procedures for responding to FOIA requests for confidential, commercial and financial information, *i.e.*, business information, provided to OFHEO.

Section 1710.11 describes OFHEO records that are available pursuant to 5 U.S.C. 552(a) for public inspection and copying at the offices of OFHEO. These records include any final orders and agreements made in adjudication of cases, which are enumerated in section 1710.9 of the final rule. Section 1710.11 also describes the categories of OFHEO records that are exempt from disclosure. These exemptions follow the exemptions provided in the FOIA.

Section 1710.12 sets forth the indexing requirements for records OFHEO maintains which are required to be indexed under 5 U.S.C. 552(a)(2). The section contains the Director's determination that, because of the lack of requests to date for records required to be indexed, such indexes do not need to be published quarterly.

Section 1710.13 contains rules of procedure for requesting records under the FOIA. Requests for OFHEO records should be in writing and addressed to the FOIA Officer. Each request should contain sufficient detail to allow the FOIA Officer to locate the record with a reasonable amount of effort. If a request is too broad or too vague to allow the record to be located with a reasonable amount of effort, OFHEO will assist the requester in revising the request as appropriate.

Procedures for OFHEO's response to FOIA requests are explained in sections 1710.14 and 1710.15. The FOIA Officer has been delegated the responsibility in section 1710.14 to grant or deny such requests and to determine fees. Paragraph (b) of section 1710.14 also provides that OFHEO will refer FOIA

<sup>10</sup>Pub. L. No. 99-570, 100 Stat. 3207.

requests for records that originated in another Government agency to that agency for response. In such cases, the requester will be notified of the referral. Paragraph (c) of section 1710.14 states that OFHEO will provide whatever records respond to a request, but will not create a new record in order to respond. Moreover, to mirror the FOIA's requirements, language has been added to the section in the final rule noting that OFHEO will make reasonable efforts to provide information in the format requested. Also, OFHEO will notify the requester if, regardless of format, no records are responsive to the request.

Section 1710.15 requires the FOIA Officer to notify a requester in writing of the determination to grant a request in whole or in part. The response must describe the manner in which the record will be disclosed and inform the requester of any fees that will be charged. Similarly, the FOIA Officer's determination to deny a request in whole or in part must be made in writing and signed by the FOIA Officer. Consistent with section 1710.15(b), any denial is to contain a brief statement describing the basis of the denial, including the FOIA exemption(s) that is relied upon. Moreover, the denial must state that the requester has a right to appeal and must explain OFHEO's appeal procedures.

OFHEO's appeal procedures are set forth in section 1710.16 of the final rule. Denials may be appealed to OFHEO's FOIA Appeals Officer within 30 days after receipt of a denial letter. Appeals must be in writing and must contain reasons for, or arguments in support of, disclosure. OFHEO will respond to appeals in writing and will specify the reason(s) for affirming any original denial. When a denial is reversed in whole or in part, the request for disclosure will be processed promptly. The decision on appeal is OFHEO's final action on a request. Requesters have a right to seek judicial review of the final action under 5 U.S.C. 552(a)(4).

Section 1710.17 of the final rule describes the time limits to which OFHEO will adhere in responding to initial requests and appeals of denials of requests. The response period for an initial request has been revised from 10 days to 20 days in this final rule to reflect statutory changes made by the 1996 Act. The section states that the time limits applicable to either initial requests or appeals of denials of requests may be extended up to a total of 10 days (excluding weekends and legal holidays) in unusual circumstances, *i.e.*, when the records are in a location other than the main office

of OFHEO, the request is for a large number of records, or OFHEO must consult with another agency or with various offices within OFHEO.

Section 1710.18 of the final rule contains OFHEO's procedures for disclosure of sensitive, business information provided to OFHEO. Generally, the section requires submitters of business information to designate those portions of their submissions they believe may be exempt from disclosure under Exemption 4 of the FOIA. If records so designated are subsequently requested under the FOIA, in most cases the submitter will have an opportunity to provide a written objection to disclosure. The written objection must demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential and why disclosure would cause competitive harm. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter. Information that is provided by a submitter for the purpose of objecting to disclosure may itself be subject to disclosure under the FOIA.

#### IV. Fees for Provision of Information

Subpart D of the final rule contains provisions relating to the fees which will be assessed for services rendered in responding to and processing requests for records under the FOIA. Fees are to be based on the type of service provided, *e.g.*, search, review, and duplication, as well as the category of person making the request, *e.g.*, commercial user, educational institution, and news media. Generally, commercial requesters will pay the full amount of permissible fees relating to record search, review, and duplication. Educational and noncommercial scientific institutions and the news media will pay only duplication costs, excluding charges for the first 100 pages. All other requesters will be assessed fees for search and duplication, except that the first 100 pages of duplication and the first 2 hours of search time will be furnished without charge. As a matter of policy, OFHEO will not charge fees for any individual request if the cost of collecting a fee would equal or exceed the fee itself.

Additionally, under the final rule, OFHEO may furnish records without charge or at a reduced charge where disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations

or activities of the Federal Government and is not primarily in the commercial interest of the requester. In making this determination, OFHEO will apply the six analytical factors set out by DOJ in its advisory memorandum on making FOIA fee waiver determinations. The memorandum, titled "New FOIA Fee Waiver Policy Guidance," was issued by the Assistant Attorney General for Legal Policy to the heads of all Federal agencies on April 2, 1987. The factors enumerated in the memorandum have been incorporated in section 1710.24.

Section 1710.25 contains a number of miscellaneous provisions concerning fees, including a requirement that requesters pay in advance fees likely to exceed \$250.00. However, advance payment may not be required in the case of a requester who has a history of prompt payment. This section also includes a provision permitting interest to be charged on fees over 30 days past due at the rate prescribed in 31 U.S.C. 3717 for an outstanding debt on a U.S. Government claim.

#### V. Testimony and Production of Documents in Legal Proceedings in Which OFHEO Is Not a Named Party

Subpart E prescribes the policies and procedures of OFHEO with respect to the testimony of official matters and production of official documents of OFHEO in legal proceedings in which OFHEO is not a named party. The subpart does not affect the rights and procedures governing public access to OFHEO documents pursuant to the FOIA or the Privacy Act.

Section 1710.31 sets forth the purpose of subpart E which is to (1) ensure the confidentiality of OFHEO documents and information, (2) maintain the impartial position of OFHEO in litigation in which OFHEO is not a named party, (3) conserve the time of employees for their official duties, and (4) enable the Director to determine when to authorize testimony and the release of documents in legal proceedings in which OFHEO is not a named party.

Section 1710.32 contains the definitions applicable to the subpart E. Section 1710.33 provides the general policy of OFHEO with respect to testimony and production of documents in any legal proceeding in which OFHEO is not a named party, *i.e.*, employees, including former employees, are prohibited from disclosing any information obtained in or resulting from their official capacities unless the Director determines in writing that disclosure would be in the best interest of OFHEO or in the public interest. Section 1710.33 further provides that,

prior to any authorized testimony or release of official documents, the requesting party must obtain a protective order from the court before which the action is pending to preserve the confidentiality of the testimony or documents subsequently produced.

Section 1710.34 describes the procedures to which OFHEO will adhere to enable the Director to determine whether to grant requests for testimony concerning official matters or disclosure of official documents. Section 1710.35 provides that the scope of permissible testimony by an employee is limited to that set forth in the written authorization granted that employee by the Director. The section addresses OFHEO employees' authority to give opinion testimony in any legal proceeding to which OFHEO is not a party. The section has been modified in this final rule to clarify that generally OFHEO employees do not give such testimony, but may do so if authorized by the Director.

Section 1710.36 describes the manner in which authorized testimony of employees will be made available. This section has been amended in this final rule to clarify that testimony will ordinarily be made available only through depositions or written interrogatories. A party requesting authorized testimony must serve a subpoena on the employee in accordance with applicable Federal or State rules of procedure, with a copy of the subpoena sent by registered mail to the General Counsel. Upon completion of an authorized deposition at OFHEO's office, a copy of the transcript of the testimony shall be furnished at the requesting party's expense to the General Counsel.

Section 1710.37 describes the manner in which official documents authorized for release by the Director will be produced. Certified or authenticated copies of OFHEO documents authorized by the Director to be released under subpart E will be provided upon request.

Section 1710.38 describes the fees charged for documents produced by OFHEO in connection with requests under subpart E. Unless waived or reduced, OFHEO will charge for searches for documents, duplication of documents, and certification or authentication of documents as detailed in the section.

Section 1710.39 provides that an employee served with a demand in a legal proceeding concerning OFHEO or the production of official OFHEO documents or information, must notify the General Counsel of such service. This notification will assist the General

Counsel in advising the Director as to whether the individual should be authorized to testify or the material requested should be made available. When authorization to testify or produce documents is not granted by the Director, the General Counsel shall provide the party issuing the demand or the court with a copy of the regulations contained in subpart E, and also shall advise the party or the court that the employee upon whom the demand has been made is prohibited from testifying or producing the documents without the Director's prior approval.

Section 1710.39 also provides that any employee who has official information that has not been approved for disclosure must respond to a legal process by attending at the time and place required. The individual shall respectfully decline to disclose the information on the basis of subpart E of the final rule. If a court orders disclosure contrary to the Director's instructions, the employee shall continue to decline to disclose the information and shall advise OFHEO of the order for such action as OFHEO may deem appropriate. Section 1710.39 advises that any determination under subpart E to comply or not to comply with any demand shall not constitute an assertion or waiver of privilege, lack of relevance, technical deficiencies, or any other ground for noncompliance. Moreover, it is noted that OFHEO reserves the right to oppose any demand on any legal ground independent of its determination under subpart E.

Section 1710.40 pertains to any person who is served with a request to release OFHEO records who is not an OFHEO employee or former employee. Such person may not disclose OFHEO records to any person without the Director's prior written consent. Moreover, any person served with a demand in a legal proceeding requiring that person to produce OFHEO documents or to testify with respect thereto, must (1) notify the General Counsel regarding the service, (2) object to production of such documents or information contained therein on the basis that the documents are the property of OFHEO and cannot be released without OFHEO's consent, and (3) note that the documents' production must be sought from OFHEO following procedures set forth in final sections 1710.34(b) and (c) and 1710.37(b) of subpart E of the final rule.

## **VI. Rules and Procedures for Service Upon OFHEO**

Section 1710.51 of subpart F provides that, with limited exceptions, any legal process on OFHEO must be issued and

served upon the General Counsel as well as any OFHEO personnel named in the caption of the documents. Service may be effected by either personal delivery or by registered or certified mail to the General Counsel at OFHEO's office.

## **Regulatory Impact**

### *Executive Order 12612, Federalism*

Executive Order 12612 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of Government. OFHEO has determined that this rule has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 12612.

### *Executive Order 12866, Regulatory Planning and Review*

This final rule has been reviewed by OMB pursuant to Executive Order 12866.

### *Executive Order 12988, Civil Justice Reform*

Executive Order 12988 sets forth guidelines to promote the just and efficient resolution of civil claims and to reduce the risk of litigation to the Federal Government. This final rule meets the applicable standards of sections 3(a) and (b) of Executive Order 12988.

### *Unfunded Mandates Reform Act of 1995*

This rule does not include a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year. Consequently, the rule does not warrant the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the

agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

OFHEO has considered the impact of the regulation under the Regulatory Flexibility Act. The General Counsel has certified that this final rule will not have significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, requires that regulations involving the collection of information receive clearance from OMB. This rule contains no such collection of information requiring OMB approval under the Paperwork Reduction Act. Consequently, no information has been submitted to OMB for review under the Paperwork Reduction Act.

#### **List of Subjects in 12 CFR Part 1710**

Administrative practice and procedure, Confidential business information, Freedom of information.

Accordingly, for the reasons set out in the preamble, part 1710 is added to chapter XVII of title 12 of the Code of Federal Regulations to read as follows:

### **PART 1710—RELEASING INFORMATION**

#### **Subpart A—General Definitions**

- Sec.  
1710.1 Scope.  
1710.2 General definitions.

#### **Subpart B—Documents and Information Generally**

- 1710.6 General rule.  
1710.7 Applicability.  
1710.8 OFHEO examination reports.  
1710.9 Orders and agreements available to the public.

#### **Subpart C—Availability of Records of OFHEO**

- 1710.11 Official records of OFHEO.  
1710.12 Index identifying information for the public.  
1710.13 Requests for records.  
1710.14 Response to requests.  
1710.15 Form and content of responses.  
1710.16 Appeals of denials.  
1710.17 Time limits.  
1710.18 Special procedures for business information.

#### **Subpart D—Fees for Provision of Information**

- 1710.21 Definitions.  
1710.22 Fees to be charged—general.  
1710.23 Fees to be charged—categories of requesters.  
1710.24 Limitations on charging fees.  
1710.25 Miscellaneous fee provisions.

#### **Subpart E—Testimony and Production of Documents in Legal Proceedings in Which OFHEO Is Not a Named Party**

- 1710.31 General purposes.  
1710.32 Definitions.  
1710.33 General policy.  
1710.34 Request for testimony or production of documents.  
1710.35 Scope of permissible testimony.  
1710.36 Manner in which testimony is given.  
1710.37 Manner in which documents will be produced.  
1710.38 Fees.  
1710.39 Responses to demands served on employees.  
1710.40 Responses to demands served on nonemployees.

#### **Subpart F—Rules and Procedures for Service Upon OFHEO**

- 1710.51 Service of process.  
**Authority:** 5 U.S.C. 301, 552; 12 U.S.C. 4513, 4522, 4526, 4639; E.O. 12600, 3 CFR, 1987 Comp., p. 235.

#### **Subpart A—General Definitions**

##### **§ 1710.1 Scope.**

Definitions in § 1710.2 relate to the meaning of terms used throughout part 1710.

##### **§ 1710.2 General definitions.**

For the purpose of this part:  
(a) *Appeals Officer* means the person designated by the Director to process appeals of denials of requests for OFHEO records under the FOIA.

(b) *Director* means the Director of OFHEO or his or her designee.  
(c) *Document* means any record or paper, including but not limited to a report, credit review, audit, examination, letter, telegram, memorandum, study, calendar and diary entry, log, graph, pamphlet, note, chart, tabulation, analysis, statistical or information accumulation, any record of meetings and conversations, film impression, magnetic tape, or any electronic media, disk, film, or mechanical reproduction that is generated, obtained, or adopted by OFHEO in connection with the conduct of its official business.

(d) *Employee* means any officer, former officer, employee, or former employee of OFHEO; any conservator appointed by OFHEO; or any agent or independent contractor acting on behalf of OFHEO, even though the appointment or contract has terminated.

(e) *FOIA* means the Freedom of Information Act.

(f) *FOIA Officer* means the person designated to process requests for OFHEO records under the FOIA.

(g) *Official* means concerning the authorized business of OFHEO.

(h) *OFHEO* means the Office of Federal Housing Enterprise Oversight.

(i) *Person* means any individual, or any agency, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein, but does not include OFHEO or any employee.

(j) *Record* means any document which is created or obtained by OFHEO and which is under OFHEO control at the time of an FOIA request.

(k) *Requester* means any person seeking access to OFHEO records under the FOIA.

#### **Subpart B—Documents and Information Generally**

##### **§ 1710.6 General rule.**

Except as authorized by this part or as otherwise necessary in performing official duties, no employee shall in any manner disclose or permit disclosure of any document or information in the possession of OFHEO that is confidential or otherwise of a nonpublic nature, including that regarding OFHEO or the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises).

##### **§ 1710.7 Applicability.**

(a) *General.* The FOIA and the regulations in this part apply to all OFHEO documents and information. However, if another law sets specific procedure for disclosure, OFHEO will process a request in accordance with the procedures that apply to those specific documents. If a request is received for disclosure of a document to the public which is not required to be released under those provisions, OFHEO will consider the request under the FOIA and the regulations in this part.

(b) *The relationship between the FOIA and the Privacy Act of 1974.* The Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records as defined in the Privacy Act. Requests from individuals for records about themselves which are contained in an OFHEO system of records will be processed under the provisions of the Privacy Act as well as the FOIA. OFHEO will not deny access by a first party to a record under the FOIA or the Privacy Act unless the record is not available to that individual under both the Privacy Act and the FOIA.

(c) *Records available through routine distribution procedures.* When the record requested includes material published and offered for sale, e.g., by

the Superintendent of Documents or the Government Printing Office, or which is available to the public through an established distribution system (such as that of the National Technical Information Service of the Department of Commerce), OFHEO will first refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, OFHEO will process the request under the FOIA.

#### § 1710.8 OFHEO examination reports.

(a) *General.* Reports of examinations prepared by OFHEO may be disclosed only in accordance with this part or with the prior written consent of the Director. No person, agency, or authority, or director, officer, employee, or agent thereof, shall disclose any such report or information contained therein in any manner except as authorized in accordance with this subpart. The report of examination is the property of OFHEO and any unauthorized use or disclosure of such report may be subject to the penalties provided in 18 U.S.C. 641.

(b) *Enterprises.* The Director makes available to each Enterprise a copy of OFHEO's report of examination of such Enterprise. The report of examination is the property of OFHEO and is provided to the Enterprise for its confidential use only. Under no circumstance shall the Enterprise or any director, officer, employee, or agent thereof, make public or disclose in any manner the report of examination or any portion of the contents thereof to any person or organization not officially connected with the Enterprise as director, officer, employee, attorney, auditor, or independent auditor. Any other disclosure or use of this report except as expressly permitted by the Director may be subject to the penalties of 18 U.S.C. 641.

(c) *Government agencies.* The Director may make available reports of examination for the confidential use of Federal agencies responsible for investigating or enforcing applicable Federal laws.

#### § 1710.9 Orders and agreements available to the public.

(a) *General.* OFHEO shall make the following documents available to the public:

(1) Any written agreement or other written statement for which a violation may be redressed by the Director or any modification to or termination thereof, unless the Director, in the Director's discretion, determines that public disclosure would be contrary to the public interest.

(2) Any order that is issued with respect to any administrative enforcement proceeding initiated by the Director under 12 U.S.C. 4631 through 4641 that has become final in accordance with 12 U.S.C. 4633 and 12 U.S.C. 4634.

(3) Any modification to or termination of any final order made public pursuant to this section.

(b) *Delay of public disclosure under exceptional circumstances.* If the Director makes a determination in writing that the public disclosure of any final order pursuant to paragraph (a) of this section would seriously threaten the financial health or security of the Enterprise, the Director may delay the public disclosure of such order for a reasonable time.

(c) *Documents filed under seal in public enforcement hearings.* The Director may file any document or part thereof under seal in any hearing commenced by the Director if the Director determines in writing that disclosure thereof would be contrary to the public interest.

(d) *Retention of documents.* The Director shall keep and maintain a record, for not less than 6 years, of all documents described in paragraph (a) of this section and all enforcement agreements and other supervisory actions and supporting documents issued with respect to or in connection with any enforcement proceedings initiated by the Director under 12 U.S.C. 4631 through 4641.

(e) *Disclosure to Congress.* This section may not be construed to authorize the withholding of any information from, or to prohibit the disclosure of any information to, the Congress or any committee or subcommittee thereof.

#### Subpart C—Availability of Records of OFHEO

##### § 1710.11 Official records of OFHEO.

(a) OFHEO shall, upon a written request for records which reasonably describes the information or records and is made in accordance with the provisions of this subpart, make the records available as promptly as practicable to any person for inspection and/or copying, except as provided in paragraph (d) of this section.

(b) *Records available.* OFHEO records which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying are maintained at OFHEO's offices located at 1700 G Street, NW., Fourth Floor, Washington, DC 20552. The records include—

(1) Any final opinions, as well as orders made in adjudication of cases as

set forth in § 1710.9 of subpart B of this part;

(2) Any statements of policy and interpretation that have been adopted by OFHEO and are not published in the **Federal Register**;

(3) Any administrative staff manuals and instructions to staff that affect a member of the public, and which are not exempt from disclosure under 5 U.S.C. 552(b); and

(4) Any current indexes providing identifying information for the public as to any matter which OFHEO has issued, OFHEO has adopted or promulgated, and is required by 5 U.S.C. 552(a)(2) to be made available or published.

(c) *Copying.* The cost of copying information available in the offices of OFHEO shall be imposed on a requester in accordance with the provisions of subpart D of this part.

(d) *Records not available.* Except as otherwise provided in this part, or as may be specifically authorized by the Director, the following information and records, or portions thereof, are not available to the public:

(1) Any record, or portion thereof, which is—

(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and

(ii) Is in fact properly classified pursuant to such Executive order.

(2) Any record, or portion thereof, related solely to the internal personnel rules and practices of OFHEO.

(3) Any record, or portion thereof, which is specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Any matter that is a trade secret or that constitutes commercial or financial information obtained from a person and that is privileged or confidential.

(5) Any matter contained in inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with OFHEO.

(6) Any information contained in personnel and medical files and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Any records or information compiled for law enforcement purposes, but only to the extent that the

production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution or an Enterprise regulated and examined by OFHEO which furnished information on a confidential basis, and, in the case of a record of information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Any matter that is contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of OFHEO.

(9) Any geological and geophysical information and data, including maps, concerning wells.

(e) Even if an exemption described in paragraph (d) of this section may be reasonably applicable to a requested record, or portion thereof, OFHEO may elect under the circumstances of any particular request not to apply the exemption to such requested record, or portion thereof. The fact that the exemption is not applied by OFHEO to any requested record, or portion thereof, has no precedential significance as to the application or nonapplication of the exemption to any other requested record, or portion thereof, no matter when the request is received.

(f) Any reasonably segregable portion of a record shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subpart.

(g) To the extent necessary to prevent an invasion of personal privacy, the Director may delete identifying details from a record described in paragraph (b) of this section. In each case of such deletion, the justification will be clearly explained in writing.

(h) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

#### § 1710.12 Index identifying information for the public.

(a) OFHEO will maintain and make available for public inspection and copying a current index of materials available at the office of OFHEO which are required to be indexed under 5 U.S.C 552(a)(2).

(b) Because of the lack of requests to date for material required to be indexed, the Director has determined that it is unnecessary and impracticable to publish quarterly, or more frequently, and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). However, OFHEO will provide a copy of such indexes to a member of the public upon request, at a cost not to exceed the direct cost of duplication and mailing, if sending records by other than ordinary mail.

#### § 1710.13 Requests for records.

(a) *Addressing requests.* Requests for records in the possession of OFHEO shall be made in writing. The envelope and the request both should be clearly marked "FOIA Request" and addressed to: FOIA Officer, Office of Federal Housing Enterprise Oversight, 1700 G Street NW., Fourth Floor, Washington, DC 20552. A request improperly addressed will be deemed not to have been received for purposes of the 20-day time period set forth in paragraph (a) of § 1710.17 of this subpart until it is received, or would have been received with the exercise of due diligence, by the FOIA Officer. Records requested in conformance with this subpart and which are not exempt records may be obtained in person or by mail as specified in the request. Records to be obtained in person will be available for inspection or copying during business hours on a regular business day in the office of OFHEO.

(b) *Description of records.* Each request must reasonably describe the desired records in sufficient detail to enable OFHEO personnel to locate the records with a reasonable amount of effort. A request for a specific category of records will be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of OFHEO operations.

(1) Whenever possible, a request should include specific information

about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(2) If the FOIA Officer determines that a request does not reasonably describe the records sought, he or she will either advise the requester what additional information is needed to locate the record or otherwise state why the request is insufficient. The FOIA Officer will also extend to the requester an opportunity to confer with OFHEO personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

#### § 1710.14 Responses to requests.

(a) *Response to initial request.* The FOIA Officer of OFHEO is authorized to grant or deny any request for a record and to determine appropriate fees.

(b) *Referral to another agency.* When a requester seeks records that originated in another Federal Government agency, OFHEO will refer the request to the other agency for response. If OFHEO refers the request to another agency, it will notify the requester of the referral. A request for any records classified by some other agency will be referred to that agency for response.

(c) *Creating records.* If a person seeks information from OFHEO in a format that does not currently exist, OFHEO will make reasonable efforts to provide the information in the format requested. OFHEO will not create a new record of information to satisfy a request.

(d) *No responsive record.* If no records are responsive to the request, the FOIA Officer will so notify the requester in writing.

#### § 1710.15 Form and content of responses.

(a) *Form of notice granting a request.* After the FOIA Officer has granted a request in whole or in part, the requester will be notified in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record with the response or at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection may not unreasonably disrupt the operation of OFHEO. The response letter will also inform the requester of any fees to be charged in accordance with the provisions of subpart D of this part.

(b) *Form of notice denying a request.* When the FOIA Officer denies a request in whole or in part, he or she will so notify the requester in writing. The response will be signed by the FOIA Officer and will include—

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the FOIA Officer has relied upon in denying the request; and

(3) A statement that the denial may be appealed under § 1710.16 of this subpart and a description of the requirements of that section.

#### § 1710.16 Appeals of denials.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to: FOIA Appeals Officer, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

(b) *Letter of appeal.* The appeal must be in writing and must be sent within 30 days of receipt of the denial letter. An appeal should include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments advanced in support of disclosure of the requested record. Both the envelope and the letter of appeal must be clearly marked "FOIA Appeal." An appeal improperly addressed shall be deemed not to have been received for purposes of the 20-day time period set forth in paragraph (b) of § 1710.17 until it is received, or would have been received with the exercise of due diligence, by the Appeals Officer.

(c) *Action on appeal.* The disposition of an appeal will be in writing and will constitute the final action of OFHEO on a request. A decision affirming in whole or in part the denial of a request will include a brief statement of the reason or reasons for affirmance, including each FOIA exemption relied on. If the denial of a request is reversed in whole or in part on appeal, the request will be processed promptly in accordance with the decision on appeal.

(d) *Judicial review.* If the denial of the request for records is upheld in whole or in part, or, if a determination on the appeal has not been mailed at the end of the 20-day period or the last extension thereof, the requester is deemed to have exhausted his or her administrative remedies, giving rise to a right of judicial review under 5 U.S.C. 552(a)(4).

#### § 1710.17 Time limits.

(a) *Initial request.* Following receipt of a request for records, the FOIA Officer will determine whether to comply with the request and will notify the requester in writing of his or her determination within 20 days (excluding Saturdays,

Sundays, and legal holidays) after receipt of the request.

(b) *Appeal.* A written determination on an appeal submitted in accordance with § 1710.16 of this subpart will be issued within 20 days (excluding Saturdays, Sundays, and legal holidays) after receipt of the appeal. When a determination cannot be mailed within the applicable time limit, the appeal will nevertheless be processed. In such case, upon the expiration of the time limit, the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be mailed, and of that person's right to seek judicial review. The requester may be asked to forego judicial review until determination of the appeal.

(c) *Extension of time limits.* The time limits specified in either paragraph (a) or (b) of this section may be extended in unusual circumstances up to a total of 10 days (excluding Saturdays, Sundays, and legal holidays) after written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be made. As used in this paragraph, *unusual circumstances* means that there is a need to—

(1) Search for and collect the requested records from facilities that are separate from the office processing the request;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request, or consult with various offices within OFHEO that have a substantial interest in the records requested.

#### § 1710.18 Special procedures for business information.

(a) *In general.* Business information provided to OFHEO by a business submitter shall not be disclosed pursuant to an FOIA request except in accordance with this section.

(b) *Definitions.* For the purpose of this section, the following definitions shall apply:

(1) *Business information* means trade secrets or other commercial or financial information, provided to OFHEO by a submitter, which arguably is protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Business submitter* means any person or entity which provides business information, directly or

indirectly, to OFHEO and who has a proprietary interest in the information.

(c) *Designation of business information.* Submitters of business information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Any such designation will expire 10 years after the records were submitted to the Government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(d) *Predisclosure notification.* (1) Except as is provided for in paragraph (i) of this section, the FOIA Officer shall, to the extent permitted by law, provide a submitter with prompt written notice of an FOIA request or administrative appeal encompassing its business information whenever required under paragraph (e) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(2) Whenever the FOIA Officer provides a business submitter with the notice set forth in paragraph (e)(1) of this section, the FOIA Officer shall notify the requester that the request includes information that may arguably be exempt from disclosure under 5 U.S.C. 552(b)(4) and that the person or entity who submitted the information to OFHEO has been given the opportunity to comment on the proposed disclosure of information.

(e) *When notice is required.* OFHEO shall provide a business submitter with notice of a request whenever—

(1) The business submitter has in good faith designated the information as business information deemed protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) OFHEO has reason to believe that the request seeks business information the disclosure of which may result in substantial commercial or financial injury to the business submitter.

(f) *Opportunity to object to disclosure.* Through the notice described in paragraph (d) of this section, OFHEO shall, to the extent permitted by law, afford a business submitter at least 10 days (excluding Saturdays, Sundays, and legal holidays) within which it can provide OFHEO with a detailed written statement of any objection to disclosure. Such statement shall demonstrate why the information is contended to be a trade secret or commercial or financial

information that is privileged or confidential and why disclosure would cause competitive harm. Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* (1) The FOIA Officer shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the FOIA Officer decides to disclose business information over the objection of a business submitter, the FOIA Officer shall forward to the business submitter a written notice at least 10 days (excluding Saturdays, Sundays, and legal holidays) before the date of disclosure containing—

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained,

(ii) A description of the business information to be disclosed, and

(iii) A specified disclosure date.

(2) Such notice of intent to disclose likewise shall be forwarded to the requester at least 10 days (excluding Saturdays, Sundays, and legal holidays) prior to the specified disclosure date.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the FOIA Officer shall promptly notify the business submitter of such action.

(i) *Exceptions to predisclosure notification.* The requirements of this section shall not apply if—

(1) The FOIA Officer determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such a case, the FOIA Officer will provide the submitter with written notice of any final decision to disclose business information within a reasonable number of days prior to a specified disclosure date.

#### Subpart D—Fees for Provision of Information

##### § 1710.21 Definitions.

For the purpose of this subpart, the following definitions shall apply:

(a) *Commercial use request* means a request for information that is from, or on behalf of, a requester seeking that information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made. To determine whether a request is properly classified as a commercial use request, OFHEO shall determine the purpose for which the requested records shall be used. If OFHEO has reasonable cause to doubt the purpose specified in the request for which a requester will use the records sought, or where the purpose is not clear from the request itself, OFHEO shall seek additional clarification before assigning the request to a specified category.

(b) *Direct costs* means the expenditures actually incurred by OFHEO in searching for and reproducing records to respond to a request for information. In the case of a commercial use request, the term also means those expenditures OFHEO actually incurs in reviewing records to respond to the request. The direct cost shall include the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplication equipment. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(c) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(d) *Noncommercial scientific institution* refers to an institution that is not operated on a commercial, trade, or profit basis and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(e) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances in which the periodicals can qualify as disseminators of "news") who make their products

available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve, e.g., electronic dissemination of newspapers through telecommunication services, such alternative media, would be included in this category.

"Freelance" journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by the organization. A publication contract would be the clearest proof that a journalist is working for a news organization, but OFHEO may look to the requester's past publication record to determine whether a journalist is working for a news organization.

(f) *Reproduce and reproduction* means the process of making a copy of a record necessary to respond to a request for information. Such copies take the form of paper copy, microfilm, audio-visual materials, or machine readable documentation, e.g., magnetic tape or disk. The copy provided shall be in a form that is reasonably usable by requesters.

(g) *Review* means the process of examining records located in response to a request for information to determine whether any portion of any record located is permitted to be withheld. It also includes processing any records for disclosure, e.g., doing all that is necessary to prepare the records for release. The term "review" does not include the time spent resolving general legal or policy issues regarding the application of exemptions. OFHEO shall only charge fees for reviewing records in response to a commercial use request.

(h) The term *search* includes all time spent looking for material that is responsive to a request for information, including page-by-page or line-by-line identification of material within records. The term "search" includes the extraction of information from a computer using existing programming. Searching for materials shall be done in the most efficient and least expensive manner so as to minimize the costs of OFHEO and the requester. For example, a line-by-line search for responsive material should not be performed when merely reproducing an entire document would be less expensive and the faster method of complying with the request for information. A "search" for material that is responsive to a request should be distinguished from a "review" of material to determine whether the material is exempt from disclosure.

**§ 1710.22 Fees to be charged—general.**

(a) *Policy.* Generally, the fees charged for requests for records pursuant to 5 U.S.C. 552 shall cover the full allowable direct costs of searching for, reproducing, and reviewing records that are responsive to a request for information. Fees shall be assessed according to the schedule contained in paragraph (b) of this section and the category of requesters described in § 1710.23 of this subpart for services rendered by OFHEO staff in responding to, and processing requests for, records under this part. Fees assessed will be paid by check or money order payable to the Office of Federal Housing Enterprise Oversight.

(b) *Types of charges.* The types of charges that may be assessed in connection with the production of records in response to an FOIA request are as follows:

(1) *Searches.* (i) *Manual searches for records.* Whenever feasible, OFHEO will charge at the salary rate(s), *i.e.*, basic pay plus 16 percent, of the employee(s) making the search. Charges for search time will be billed by 15-minute segments.

(ii) *Computer searches for records.* Requesters will be charged at the actual direct costs of conducting a search using existing programming. These direct costs will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records and the operator/programmer salary, *i.e.*, basic pay plus 16 percent, apportionable to the search. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the prevailing levels of costs to OFHEO for the type and amount of such supplies of materials that are used. Nothing in this paragraph shall be construed to entitle any person or entity, as of right, to any services in connection with computerized records, other than services to which such person or entity may be entitled under the provisions of this subpart. OFHEO will not alter or develop programming to conduct a search.

(iii) *Unproductive searches.* OFHEO will charge search fees even if no records are found which are responsive to the request or if the records found are exempt from disclosure.

(2) *Duplication.* Records will be reproduced at a rate of \$.15 per page. For copies prepared by computer, such as tapes or printouts, the requester shall be charged the actual cost, including operator time, of production of the tape or printout. For other methods of

reproduction, the actual direct costs of reproducing the record(s) shall be charged.

(3) *Review.* Only requesters who are seeking records for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for initial review, *i.e.*, the review undertaken the first time OFHEO analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review are properly assessable.

(4) *Other services and materials.* Where OFHEO elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending records by special methods, the actual direct costs of providing the service or materials will be charged.

**§ 1710.23 Fees to be charged—categories of requesters.**

(a) *Fees for various requester categories.* Paragraphs (b) through (e) of this section state, for each category of requester, the types of fees generally charged by OFHEO. However, for each of these categories, the fees may be limited, waived or reduced in accordance with the provisions set forth in paragraph (c) of § 1710.24. If OFHEO has reasonable cause to doubt the purpose specified in the request for which a requester will use the records sought, or where the purpose is not clear from the request itself, OFHEO will seek clarification before assigning the request a specific category.

(b) *Commercial use requester.* OFHEO shall charge fees for records requested by persons or entities making a commercial use request in an amount that equals the full direct costs for searching for, reviewing for release, and reproducing the records sought. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of records. In accordance with § 1710.22, commercial use requesters may be charged the costs of searching for and reviewing records even if there is ultimately no disclosure of records.

(c) *Educational and noncommercial scientific institutions.* OFHEO shall charge fees for records requested by, or on behalf of, educational institutions and noncommercial scientific

institutions in an amount which equals the cost of reproducing the records responsive to the request, excluding the cost of reproducing the first 100 pages. No search fee shall be charged with respect to requests by educational and noncommercial scientific institutions. For a request to be included in this category, requesters must show that the request being made is authorized by and under the auspices of a qualifying institution, and that the records are not sought for commercial use but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a noncommercial scientific institution).

(d) *News media.* OFHEO shall charge fees for records requested by representatives of the news media in an amount which equals the cost of reproducing the records responsive to the request, excluding the costs of reproducing the first 100 pages. No search fee shall be charged with respect to requests by representatives of the news media. For a request to be included in this category, the requester must qualify as a representative of the news media and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use.

(e) *All other requesters.* OFHEO shall charge fees for records requested by persons or entities that are not classified in any of the categories listed in paragraphs (b), (c), or (d) of this section in an amount that equals the full reasonable direct cost of searching for and reproducing records that are responsive to the request, excluding the first 2 hours of search time and the cost of reproducing the first 100 pages of records. In accordance with § 1710.22, requesters in this category may be charged the cost of searching for records even if there is ultimately no disclosure of records, excluding the first 2 hours of search time.

(f) For purposes of the exceptions contained in this section on assessment of fees, the word "pages" refers to paper copies of 8½ × 11 or 11 × 14. Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or a computer disk containing the equivalent of 100 pages of computer printout meets the terms of the exception.

(g) For purposes of paragraph (e) of this section, the term "search time" has as its basis, manual search. To apply this term to searches made by computer, OFHEO will determine the hourly cost

of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of 2 hours of the salary plus 16 percent of the person performing the search, *i.e.*, the operator, OFHEO will begin assessing charges for the computer.

#### § 1710.24 Limitations on charging fees.

(a) *In general.* Except for requesters seeking records for a commercial use as described in paragraph (b) of § 1710.23, OFHEO will provide, without charge, the first 100 pages of duplication and the first 2 hours of search time, or their cost equivalent.

(b) *No fee charged.* OFHEO will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs of receiving and recording a requester's remittance and of processing the fee.

(c) *Waiver or reduction of fees.* OFHEO may grant a waiver or reduction of fees if OFHEO determines that the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government, and the disclosure of the information is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees will be considered on a case-by-case basis.

(1) The following factors will be considered by OFHEO in determining whether a waiver or reduction of fees is in the public interest:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the Government."* The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those Government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of Government operations or activities.* The disclosable

portions of the requested records must be meaningfully informative on specific Government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information that is already in the public domain, in either a duplicative or substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution to an understanding of the subject by the general public: Whether disclosure of the requested information will contribute to the "public understanding."* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications, *e.g.*, expertise in the subject area and ability and intention to convey information to the general public, will be considered.

(iv) *The significance of the contribution in public understanding: Whether the disclosure is likely to "significantly enhance" the public understanding of Government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. The FOIA Officer shall not make a separate value judgment as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the Government, is "important" enough to be made public.

(2) In order to determine whether the second fee waiver requirement is met, *i.e.*, that disclosure of the requested information is not primarily in the commercial interest of the requester, OFHEO shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester, or any person on whose behalf the requester may be acting, has a commercial interest that would be furthered by the requested disclosure.* In assessing the magnitude of identified commercial interests, consideration will be given to the effect that the information disclosed would have on those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide

information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is warranted only where, once the "public interest" standard set out in paragraph (c)(1) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. OFHEO will ordinarily presume that, where a news media requester has satisfied the public interest standard, the public interest will be serviced primarily by disclosure to that requester. Disclosure to requesters who compile and market Federal Government information for direct economic return will not be presumed to primarily serve the "public interest."

(3) Where only a portion of the requested record satisfies the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(4) A request for a waiver or reduction of fees must accompany the request for disclosure of records and should include—

(i) A clear statement of the requester's interest in the records;

(ii) The proposed use of the records and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from release of the requested records; and

(iv) If specialized use of the documents is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(5) A requester may appeal the denial of a request for a waiver or reduction of fees in accordance with the provisions of § 1710.16.

#### § 1710.25 Miscellaneous fee provisions.

(a) *Notice of anticipated fees in excess of \$25.00.* Where OFHEO determines or estimates that the fees chargeable will amount to more than \$25.00, OFHEO shall promptly notify the requester of the actual or estimated amount of fees or such portion thereof that can be readily estimated, unless the requester has indicated his or her willingness to pay fees as high as those anticipated. Where a requester has been notified that the actual or estimated fees may exceed \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total

fee. A notice to the requester pursuant to this paragraph will include the opportunity to confer with OFHEO personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(b) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a record or records, solely in order to avoid the payment of fees. When OFHEO reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, OFHEO may aggregate such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred. OFHEO will presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. Where requests are separated by a longer period, OFHEO shall aggregate them only where there exists a solid basis for determining that such aggregation is warranted, *e.g.*, where the requests involve clearly related matters. Multiple requests regarding unrelated matters will not be aggregated.

(c) *Advance payment of fees.* (1) OFHEO does not require an advance payment before work is commenced or continued, unless—

(i) OFHEO estimates or determines that the fees are likely to exceed \$250.00. If it appears that the fees will exceed \$250.00, OFHEO will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees. In the case of requesters with no history of payment, OFHEO may require an advance payment of fees in an amount up to the full estimated charge that will be incurred; or

(ii) The requester has previously failed to pay a fee in a timely fashion, *i.e.*, within 30 days of the date of a billing. In such cases, OFHEO may require the requester to pay the full amount owed plus any applicable interest, as provided in paragraph (d) of this section, or demonstrate that the fee owed has been paid, prior to processing any further record request. Under these circumstances, OFHEO may require the requester to make an advance payment of the full amount of the fees anticipated before processing a new request or finishing processing of a pending request from that requester.

(2) A request for an advance deposit shall include an offer to the requester to confer with identified OFHEO

personnel to attempt to reformulate the request in a manner which will meet the needs of the requester at a lower cost.

(3) When OFHEO requests an advance payment of fees, the administrative time limits described in 5 U.S.C. 552(a)(6) begin only after OFHEO has received the advance payment.

(d) *Interest.* OFHEO may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Once a fee payment has been received by OFHEO, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of the billing.

#### **Subpart E—Testimony and Production of Documents in Legal Proceedings in Which OFHEO Is Not a Named Party**

##### **§ 1710.31 General purposes.**

The purposes of this subpart are to maintain the confidentiality of official documents and information of OFHEO, conserve the time of employees for their official duties, maintain the impartial position of OFHEO in litigation in which OFHEO is not a named party, and enable the Director to determine when to authorize testimony and to produce documents in legal proceedings in which OFHEO is not a named party. This subpart sets forth the procedures to be followed with respect to testimony concerning official matters and production of official documents of OFHEO in legal proceedings in which OFHEO is not a named party. This subpart in no way affects the rights and procedures governing public access to official documents pursuant to the FOIA or the Privacy Act.

##### **§ 1710.32 Definitions.**

For the purpose of this subpart:

(a) *Court* means any entity conducting a legal proceeding.

(b) *Demand* means any order, subpoena, or other legal process for testimony or documents.

(c) *Legal proceeding* means any administrative, civil, or criminal proceeding, including a discovery proceeding therein, before a court of law, administrative board or commission, hearing officer, or other body in which OFHEO is not a named party or in which OFHEO has not instituted the administrative investigation or administrative hearing.

(d) *OFHEO Counsel* means the General Counsel or his or her designee, a Department of Justice attorney, or counsel authorized by OFHEO to act on behalf of OFHEO or an employee.

##### **§ 1710.33 General policy.**

It is the policy of OFHEO that in any legal proceeding in which OFHEO is not a named party, no employee shall, in response to a demand, produce any documents contained in the files of OFHEO, or disclose any information relating to, or based upon, documents contained in the files of OFHEO, or disclose or produce any documents acquired as part of the performance of that employee's official duties or because of that employee's official status. Under appropriate circumstances, the Director may grant exceptions in writing to this policy when the Director determines that the testimony of employees or disclosure of official documents would be in the best interest of OFHEO or in the public interest. Prior to any authorized testimony or release of official documents, the requesting party shall obtain a protective order from the court before which the action is pending to preserve the confidentiality of the testimony or documents subsequently produced. The protective order shall be in a form satisfactory to OFHEO.

##### **§ 1710.34 Request for testimony or production of documents.**

(a) No employee shall give testimony concerning official matters or produce any official documents in any legal proceeding to which OFHEO is not a named party without the prior written authorization of the Director.

(b) If testimony by an employee concerning official matters or the production of official documents is desired, the requesting party, or his or her attorney, shall submit a letter to the Director setting forth the title of the case, the forum, the requesting party's interest in the case, a summary of the issues in the litigation, the reasons for the request, and a showing that the desired testimony, documents, or information are not reasonably available from any other source. If an appearance or testimony is requested, the letter shall also set forth the intended use of the testimony, a general summary of the scope of the testimony requested, and a showing that no document could be provided and used in lieu of the testimony or other appearance requested.

(c) The General Counsel is authorized to consult with the requesting party or his or her attorney to refine and limit the request so that compliance is less burdensome, or obtain information necessary to make the determination described in § 1710.33 of this subpart. Failure of the requesting party, or his or her attorney, to cooperate in good faith with the General Counsel to enable the

Director to make an informed determination under this subpart may serve as the basis for a determination not to comply with the request.

**§ 1710.35 Scope of permissible testimony.**

(a) The scope of permissible testimony by an employee is limited to that set forth in the written authorization granted that employee by the Director.

(b) Employees are not authorized to give opinion testimony, except as authorized by the Director. OFHEO, as the regulatory agency charged with the responsibility of examining, supervising, and regulating the financial safety and soundness and capital adequacy of the Enterprises under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. 4501 *et seq.*, relies on the ability of its employees to gather full and complete information in order to carry out its statutory responsibilities. The use of employees to give opinion testimony would hamper OFHEO's ability to carry out its statutory responsibilities and would cause a serious administrative burden on OFHEO's staff.

**§ 1710.36 Manner in which testimony is given.**

(a) Authorized testimony of employees ordinarily will be made available only through depositions or written interrogatories.

(b) Where, in response to a request, the Director determines that circumstances warrant authorizing testimony by an employee, the requesting party shall cause a subpoena to be served on the employee in accordance with applicable Federal or State rules of procedure, with a copy of the subpoena sent by registered or certified mail to the General Counsel.

(c) Normally, authorized depositions will be taken at OFHEO's office, at a time arranged with the employee that is reasonably fixed to avoid substantial interference with the performance of the employee's duties.

(d) Upon completion of the deposition of an employee, a copy of the transcript of the testimony shall be furnished, at the expense of the party requesting the deposition, to the General Counsel for OFHEO's files.

**§ 1710.37 Manner in which documents will be produced.**

(a) An employee's authorization to produce official documents is limited to the authority granted that employee by the Director.

(b) Certified or authenticated copies of official OFHEO documents authorized

by the Director to be released under this subpart will be provided upon request.

**§ 1710.38 Fees.**

Unless waived or reduced, the following fees shall be charged for documents produced by OFHEO in connection with requests subject to this subpart:

(a) *Searches for documents.* OFHEO will charge at the salary rates(s), *i.e.*, basic pay plus 16 percent, of the employee(s) making the search. Charges for search time will be billed by 15 minute segments.

(b) *Copying of documents.* The standard copying charge for documents in paper copy is \$.15 per page. When responsive information is provided in a format other than paper copy, such as in the form of computer tapes and disks, OFHEO will assess the direct costs of the tape, disk, or whatever medium is used to produce the information, as well as any related reproduction costs. Normally, only one copy will be provided. Additional copies will be provided only upon a showing of demonstrated need.

(c) *Certification or authentication of documents.* OFHEO will charge \$3.00 for each certification or authentication of documents.

(d) *Computer searches.* Services of personnel in the nature of a computer search shall be charged at rates prescribed in paragraph (a) of this section. A charge shall be made for the computer time involved, based upon the prevailing level of costs to OFHEO and upon the particular types of computer and associated equipment and the amount of time that such equipment is utilized. A charge shall also be made for any substantial amount of special supplies or documents used to contain, present, or make available the output of computers, based upon prevailing levels of costs to OFHEO and upon the type and amount of such supplies or documents that are used.

(e) *Other costs.* When other services and documents not specifically identified in this section are requested and provided, their actual cost to OFHEO shall be charged.

(f) *Payments of fees.* A bill will be forwarded to the requesting party upon completion of the production. Payment shall be made by check or money order payable to the Office of Federal Housing Enterprise Oversight.

**§ 1710.39 Responses to demands served on employees.**

(a) *Advice by employee served.* Any employee who is served with a demand in a legal proceeding requiring his or her personal attendance as a witness or

requiring the production of documents or information in any proceeding, shall immediately notify the General Counsel of such service, of the testimony and documents described in the demand, and of all relevant facts which may be of assistance to the General Counsel in determining whether the individual in question should be authorized to testify or the documents requested should be made available.

(b) When authorization to testify or to produce documents has not been granted by the Director, OFHEO Counsel shall provide the party issuing the demand or the court with a copy of the regulations contained in this subpart and shall inform the party issuing the demand or the court that the employee upon whom the demand has been made is prohibited from testifying or producing documents without the prior approval of the Director.

(c) *Appearance by employee served.* Unless OFHEO has authorized disclosure of the information requested, any employee who has OFHEO information that may not be disclosed and who is required to respond to a subpoena or other legal process, shall attend at the time and place required and respectfully decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this subpart. If the court nevertheless orders the disclosure of the information or the giving of testimony irrespective of instructions from the Director not to produce the documents or disclose the information sought, the employee upon whom the demand has been made shall continue to decline respectfully to disclose the information and shall report promptly the facts to OFHEO for such action as OFHEO may deem appropriate.

(d) A determination under this subpart to comply or not to comply with any demand shall not constitute an assertion or waiver of privilege, lack of relevance, technical deficiencies, or any other ground for noncompliance. OFHEO reserves the right to oppose any demand on any legal ground independent of its determination under this subpart.

**§ 1710.40 Responses to demands served on nonemployees.**

(a) OFHEO reports of examinations, or any documents related thereto, are the property of OFHEO and are not to be disclosed to any person without the Director's prior written consent.

(b) If any person who has possession of an OFHEO report of examination, or any documents related thereto, is served with a demand in a legal proceeding directing that person to produce such

OFHEO documents or to testify with respect thereto, such person shall immediately notify the General Counsel of such service, of the testimony and described documents in the demand, and of all relevant facts. Such person shall also object to the production of such documents or information contained therein on the basis that the documents are the property of OFHEO and cannot be released without OFHEO's consent and that their production must be sought from OFHEO following the procedures set forth in § 1710.33, paragraphs (b) and (c) of § 1710.34, and paragraph (b) of § 1710.37 of this subpart.

#### Subpart F—Rules and Procedures for Service Upon OFHEO

##### § 1710.51 Service of process.

(a) Except as otherwise provided by OFHEO regulations, the Federal Rules of Civil Procedure, or order of a court with jurisdiction over OFHEO, any legal process served on OFHEO, including a legal process served on OFHEO demanding access to its records under the FOIA, shall be duly issued and served upon the General Counsel and any OFHEO personnel named in the caption of the documents.

(b) Service of process upon the General Counsel may be effected by personally delivering a copy of the documents to the General Counsel or by sending a copy of the documents to the General Counsel by registered or certified mail, postage prepaid, to the Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

Dated: December 17, 1998.

**Mark Kinsey,**

*Acting Director, Office of Federal Housing Enterprise Oversight.*

[FR Doc. 98-33943 Filed 12-22-98; 8:45 am]

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 284

[Docket No. RM96-1-012]

#### Standards for Business Practices of Interstate Natural Gas Pipelines

Issued December 17, 1998.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule; order establishing implementation date for OBA regulations.

**SUMMARY:** The Federal Energy Regulatory Commission is establishing April 1, 1999, as the date by which pipelines are required to comply with the regulations requiring pipelines to enter into operational balancing agreements with interconnecting interstate and intrastate pipelines. (18 CFR § 284.10(c)(2)(i)). These regulations were adopted in Order No. 587-G. (63 FR 20072).

**DATES:** Pipelines must comply with 18 CFR § 284.10(c)(2)(i) by April 1, 1999.

**ADDRESSES:** Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:**

Michael Goldenberg, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 208-2294

Marvin Rosenberg, Office of Economic Policy, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 208-1283

Kay Morice, Office of Pipeline Regulation, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 208-0507

**SUPPLEMENTARY INFORMATION:** In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426. The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via Internet through FERC's Homepage (<http://www.ferc.fed.us>) using the CIPS Link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing 202-208-1397, if dialing locally, or 1-800-856-3920, if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. User assistance is available at 202-208-2474 or by E-mail to [CipsMaster@FERC.fed.us](mailto:CipsMaster@FERC.fed.us).

This document is also available through the Commission's Records and

Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Homepage using the RIMS link or the Energy Information Online icon. User assistance is available at 202-208-2222, or by E-mail to [RimsMaster@FERC.fed.us](mailto:RimsMaster@FERC.fed.us).

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc., is located in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

In Order No. 587-G,<sup>1</sup> the Commission adopted a regulation (284.10(c)(2)(i))<sup>2</sup> requiring each interstate pipeline to enter into operational balancing agreements (OBAs) at points of interconnection between its system and the system of another interstate or intrastate pipeline. In Order No. 587-G, the Commission deferred implementation of this regulation until the Gas Industry Standards Board (GISB) had an opportunity to develop standards related to OBAs and imbalance trading. The Commission also stated that the pipelines would have three months from the date on which final OBA regulations are adopted to conclude OBA agreements with interconnecting interstate and intrastate pipelines.<sup>3</sup>

On November 9, 1998, GISB filed with the Commission a report on its standards development progress. GISB reports that its Executive Committee approved a model OBA on July 16, 1998,<sup>4</sup> and that its OBA standards are completed.<sup>5</sup>

<sup>1</sup> Standards for Business Practices of Interstate Natural Gas Pipelines, Order No. 587-G, 63 FR 20072 (Apr. 23, 1998), III FERC Stats. & Regs. Regulations Preambles ¶ 31,062 (Apr. 16, 1998), *on reh'g*, Order No. 587-I, 63 FR 53565 (Oct. 6, 1998), III FERC Stats. & Regs. Regulations Preambles ¶ 31,067 (Sep. 29, 1998).

<sup>2</sup> 18 CFR § 284.10(c)(2)(i).

<sup>3</sup> Order No. 587-G 63 FR at 20080, III FERC Stats. & Regs. Regulations Preambles ¶ 31,062 at 30,676.

<sup>4</sup> In Order No. 587-G, the Commission found that pipelines did not have to adopt a standard OBA if its terms are inapplicable to their situation, although a standard OBA would provide a benchmark in the event of disputes over OBA provisions. Order No. 587-G, 63 FR at 20081, III FERC Stats. & Regs. Regulations Preambles ¶ 31,062 at 30,676-77.

<sup>5</sup> GISB's November 9, 1998 filing, Docket No. RM96-1-010, at Appendix 5.