
DEPARTMENT OF THE TREASURY**Office of the Comptroller of the
Currency****12 CFR Part 4****[Docket No. 99-07]****RIN 1557-AB65****Organization and Functions,
Availability and Release of Information,
Contracting Outreach Program****AGENCY:** Office of the Comptroller of the
Currency, Treasury.**ACTION:** Final rule.

SUMMARY: The Office of the Comptroller
of the Currency (OCC) is amending its
disclosure regulation. Among other
things, the amendment clarifies that the
OCC may make non-public OCC
information available to a supervised
entity and to other persons, as the
Comptroller, in his sole discretion, may

deem necessary or appropriate, without a request for records or testimony.

DATES: The final rule is effective on June 1, 1999

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SUPPLEMENTARY INFORMATION:

Background

The OCC is amending subpart C of 12 CFR Part 4 which governs the release of non-public OCC information. Part 4 currently requires a person seeking non-public OCC information to submit a request in writing to the OCC. The current rule does not include a procedure for the release of non-public OCC information to supervised entities and other persons without a specific request for the information.

The OCC has authority to prescribe rules governing the release of agency records and information under its grant of statutory authority to promulgate substantive regulations to carry out the responsibilities of the office, 12 U.S.C. 93a, as well as under statutes that contemplate the sharing of information with other agencies and persons. See, e.g., 12 U.S.C. 481; 12 U.S.C. 1867; 12 U.S.C. 1820(d)(6).

On November 10, 1998, the OCC requested comment on an interim rule amending part 4. 63 FR 62927. The OCC made three independent changes to part 4 in the interim rule. First, the interim rule added a new section that clarifies the OCC's existing authority to make non-public OCC information available to a supervised entity and to other persons, that in the sole discretion of the Comptroller may be necessary or appropriate, without a specific request by a third party. The term "supervised entity" is defined in the interim rule to include a national bank, a subsidiary of a national bank, or a federal branch or agency of a foreign bank licensed by the OCC.

Second, the OCC amended the definition of non-public OCC information. Section 4.32 defines non-public OCC information as information, confidential or otherwise, that the OCC is not required to release under the Freedom of Information Act (FOIA) (5 U.S.C. 552) or that the OCC has not yet published or made available under 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders. Section 4.32 provides an illustrative list of the types of

information that qualify as non-public OCC information, including OCC records contained in, or related to, examination and operating or condition reports concerning national banks and their subsidiaries and affiliates. The interim rule amended the definition of non-public OCC information to include a Suspicious Activity Report (SAR) filed by the OCC or a supervised entity under 12 CFR 21.11. While the OCC has always taken the position that SARs are non-public information, the OCC proposed this change to enhance the ability of banks and the OCC to protect SARs from being disclosed when SARs are sought by private litigants.

Third, the OCC emphasized in the interim rule that non-public OCC information remains the property of the OCC even after it is disclosed and may not be disclosed to others except as authorized by the OCC. The interim rule clarified that current and former OCC employees and agents are prohibited from disclosing or permitting the disclosure of any non-public OCC information to anyone other than an employee or agent of the OCC who needs the information for the performance of OCC duties. Current and former OCC employees and agents who are subpoenaed or otherwise requested to provide OCC information must notify the OCC immediately under procedures set forth in § 4.37(a)(2).

Finally, the OCC made conforming changes to the purpose and scope provisions at § 4.31 of Subpart C to reflect the substantive changes to the other sections amended.

Description of Comments Received

The OCC received two comments on the interim rule: one from a national bank and another from a bank trade association. The bank trade association supported the interim rule as published. The bank objected to the rule on several grounds. After careful consideration of the comments received, the OCC is adopting the interim rule with some clarifying changes.

The Disclosure of Non-Public OCC Information Without a Request

One commenter raised concerns that the new section authorizing disclosure of confidential information (§ 4.36) violates provisions of the Right to Financial Privacy Act (RFPA) (12 U.S.C. 3401-22) and the Community Reinvestment Act (CRA) (12 U.S.C. 2906).

Section 4.36 does not authorize the OCC to disclose information in a manner that would violate the requirements of other federal laws, including the RFPA or CRA. Rather, this

section is intended solely to clarify that the OCC has the discretionary authority to make disclosures, in the exercise of its supervisory responsibilities, that are not prohibited by other applicable statutes without waiting for a specific request. This amendment does not reflect a change in the OCC's long-standing policy and practice to respect the confidentiality of supervisory information. Thus, the OCC will continue to release non-public OCC information without a request only in rare cases after consideration of all circumstances. The exercise of discretion to disclose information under this new section will be limited to a few senior OCC officials, in line with an appropriate delegation of authority.

To address the commenter's concern, however, the OCC is adding a new paragraph to § 4.36 on the OCC's policy regarding the release of non-public OCC information. This paragraph restates the OCC policy that non-public OCC information is confidential and privileged and that the OCC, accordingly, will not normally disclose this information to third parties.

This approach also ensures greater consistency with the Federal Reserve Board's (FRB) regulation regarding discretionary disclosures. The FRB disclosure regulation authorizes the FRB to share confidential supervisory information with supervised financial institutions and, from time to time, to authorize other disclosures of confidential information as necessary. 12 CFR 261.20. The FRB regulation also states that it is the FRB's policy that confidential supervisory information is confidential and privileged and that the FRB, accordingly, will not normally disclose this information to the public. 12 CFR 261.22(a). In addition, the OCC may continue to impose conditions and limitations on the disclosure of information through the entry of a protective order or a written agreement of confidentiality, as provided for under the old rule.

As noted in the interim rule, in some circumstances, the safety and soundness or financial stability of national banks may be affected unless the OCC discloses non-public information to supervised entities or certain other persons without a request. For example, the OCC's ability to help national banks attain Year 2000 readiness depends, in part, on the OCC's ability to share information concerning third parties with supervised entities and other persons. In this case, "other persons" may include self-regulatory organizations or state banks with whom the OCC seeks to share information.

Definition of Non-Public OCC Information (SARs)

The interim rule also amended the definition of non-public OCC information in § 4.32 to include a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11. One commenter, viewing this change in the context of the amendment previously described, raised concerns that this change could chill the cooperation between banks and the OCC and may subject banks to greater liability should the OCC begin to publicly disclose SARs. This is not the case. The OCC added SARs to the list of non-public OCC information to protect the confidentiality of SARs further, particularly in litigation, not to make them more easily disclosable. The amendment clarifies that SARs, which are sensitive and confidential documents, are not subject to disclosure requests under FOIA and are subject to the procedures for the release of non-public OCC information under part 4. The OCC is committed to protecting the confidentiality of SARs, and the amendment does not alter this long-standing policy. Accordingly, the OCC adopts this provision without modification.

Effective Date

Section 553 of the Administrative Procedure Act permits an agency, for good cause, to issue a rule to be effective in less than 30 days from its publication date. 5 U.S.C. 553(d). Likewise, section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI), Pub. L. 103-325, authorizes a banking agency to issue a rule to be effective before the first day of the calendar quarter that begins on or after the date on which the regulations are published in final form if the agency finds good cause for an earlier effective date. 12 U.S.C. 4802(b)(1).

The OCC finds good cause for making this final rule effective upon publication in the **Federal Register**. Like the interim rule, this final rule allows the OCC to disclose non-public OCC information to supervised entities and other persons in certain enforcement contexts requiring immediate action where a request for the information may not be forthcoming or may be delayed. The OCC's ability to help national banks attain Year 2000 readiness in the short time remaining also depends, in part, on the OCC's ability to provide information rapidly concerning third parties to supervised entities and other persons without a

request. The OCC's ability to carry out its mission to ensure national banks' safety and soundness, in certain circumstances, may be impaired unless it can make disclosures, as authorized by this final rule, promptly after acquiring the information in question. For these reasons, the OCC concludes that a delayed effective date is impracticable and would be contrary to the public interest. 5 U.S.C. 553(d).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rule for which an agency is not required to publish a notice of proposed rulemaking. 5 U.S.C. 603. In issuing the interim rule, the OCC concluded, for good cause, that it is not required to publish a notice of proposed rulemaking. Accordingly, it issued the interim rule without prior notice and comment to be effective immediately. Since the RFA does not apply to a rule for which an agency is not required to publish a notice of proposed rulemaking, the OCC also concludes that the RFA does not require an initial regulatory flexibility analysis of this final rule. Nonetheless, since this final rule imposes no new requirements on any national bank, the OCC finds that this final rule does not have a significant economic impact on a substantial number of small entities or create any additional burden on small entities.

OCC Executive Order 12866 Statement

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act (UMA) of 1995, Public Law 104-4, applies only when an agency is required to promulgate a general notice of proposed rulemaking or a final rule for which a general notice of proposed rulemaking was published. 2 U.S.C. 1532. The OCC did not publish a general notice of proposed rulemaking when it, for good cause, issued the interim rule with an immediate effective date. Accordingly, the UMA does not require an unfunded mandates act analysis of this final rule.

Nonetheless, since this final rule prescribes no mandate of any kind, the OCC finds that the final rule will not result in expenditure by State, local, and tribal governments, or by the private sector, of more than \$100 million in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 4

Freedom of information, National banks, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set out in the preamble, part 4 of chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 4—ORGANIZATIONS AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM

Accordingly, the interim rule amending 12 CFR part 4 which was published at 63 FR 62927 on November 10, 1998, is adopted as a final rule with the following changes:

§ 4.31 [Amended]

1. In § 4.31(b)(3) the term “§ 4.36(c)” is removed and the term “§ 4.37(c)” is added in its place.

2. Section 4.32 is amended by revising paragraph (b)(1)(vii) to read as follows:

§ 4.32 Definitions.

* * * * *

(b) * * *

(1) * * *

(vii) A Suspicious Activity Report filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11; and

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§ 4.34 [Amended]

3. In § 4.34, in paragraph (a), the term “§ 4.38(d)” is removed and the term “§ 4.39(d)” is added in its place and the term “§ 4.36” is removed and the term “§ 4.37” is added in its place, in paragraph (c) introductory text the term “§ 4.36(c)” is removed and the term “§ 4.37(c)” is added in its place, and in paragraphs (c)(1) and (c)(2) the term “Washington, DC office” is removed and the term “Washington office” is added in its place.

4. In § 4.36, paragraph (a) is revised, paragraphs (b) and (c) are redesignated as paragraphs (c) and (d), respectively, a new paragraph (b) is added, and the heading of paragraph (c) is revised to read as follows:

§ 4.36 Disclosure of non-public OCC information.

(a) *Discretionary disclosure of non-public OCC information.* The OCC may make non-public OCC information available to a supervised entity and to other persons, that in the sole discretion of the Comptroller may be necessary or

appropriate, without a request for records or testimony.

(b) *OCC policy*. It is the OCC's policy regarding non-public OCC information that such information is confidential and privileged. Accordingly, the OCC will not normally disclose this information to third parties.

(c) *Conditions and limitations*. * * *

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5. In § 4.37, paragraph (a)(1) is revised and in paragraphs (a)(2)(i) and (ii) the term "Washington, DC office" is removed and the term "Washington office" is added in its place, to read as follows:

§ 4.37 Persons and entities with access to OCC information; prohibition on dissemination.

(a) * * *

(1) Generally. Except as authorized by this subpart or otherwise by the OCC, no current or former OCC employee or agent may, in any manner, disclose or permit the disclosure of any non-public OCC information to anyone other than an employee or agent of the Comptroller for use in the performance of OCC duties.

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Appendix A to Subpart C—[Amended]

6. In Appendix A to Subpart C, section II, paragraph 7, the term "12 CFR 4.38(b)" is removed and the term "12 CFR 4.39(c)" is added in its place.

Dated: May 20, 1999.

John D. Hawke, Jr.,

Comptroller of the Currency.

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