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## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Part 905

[No. 99-42]

RIN 3069-AA81

#### Availability of Unpublished Information

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is adding a new part to its regulations governing the availability of unpublished information. The rule describes the procedures a person or entity must follow when requesting unpublished Finance Board information either by document or by testimony of current or former Finance Board employees or agents and the practices and procedures the Finance Board will use in responding to such requests.

**DATES:** The interim final rule will become effective on August 13, 1999. The Finance Board will accept comments on the interim final rule in writing on or before October 12, 1999.

**ADDRESSES:** Send comments to Elaine L. Baker, Secretary to the Board, by electronic mail at [bakere@fhfb.gov](mailto:bakere@fhfb.gov), or by regular mail at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006. Comments will be available for public inspection at this address.

**FOR FURTHER INFORMATION CONTACT:** Janice A. Kaye, Attorney-Advisor, Office of General Counsel, by telephone at 202/408-2505, by electronic mail at [kayej@fhfb.gov](mailto:kayej@fhfb.gov), or by regular mail at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Finance Board, an independent agency in the Executive branch of the United States government, see 12 U.S.C. 1422a(a)(2), recently has received requests from attorneys representing private parties for access to information or documents acquired by Finance Board employees in their official capacity or in the course of performing official duties. The attorneys plan to use the information in connection with litigation in which neither the Finance Board nor the United States is a party. This type of information, referred to herein as "unpublished information," generally is not subject to release under the Freedom of Information Act (FOIA). See 5 U.S.C. 552. Because the Finance Board previously has not received requests for unpublished information, it has not established procedures for the efficient processing of such requests. In order to control the process and the use and disclosure of its unpublished information, the Finance Board has determined to adopt procedures that must be followed by persons or entities requesting unpublished Finance Board information, and practices and procedures the Finance Board will use in responding to such requests.

The so-called federal "housekeeping statute" authorizes an agency to issue regulations governing the conduct of agency employees and the custody, use, and preservation of agency records, papers, and property. See 5 U.S.C. 301. Pursuant to this authority, many federal agencies have issued regulations governing the circumstances and manner in which a current or former agency employee or agent, regulated entity, or other person or entity in possession of unpublished agency information must respond to demands for testimony or the production of documents. See, e.g., 12 CFR 1710.31-40 (Office of Federal Housing Enterprise Oversight); 12 CFR 510.5 (Office of Thrift Supervision). In addition, section 2B of the Federal Home Loan Bank Act (Bank Act) empowers the Finance Board to supervise the Federal Home Loan Banks (FHLBanks) and promulgate and enforce such regulations as are necessary to carry out the provisions of the Bank Act. See 12 U.S.C. 1422b(a)(1). Therefore, pursuant to the authority provided by section 2B of the Bank Act and the housekeeping statute, the Finance Board is adding a new part 905

to its regulations governing the availability of unpublished Finance Board information by document or by testimony of current or former Finance Board employees or agents. This new rule will ensure that requests for unpublished information include everything the Finance Board needs to make an objective decision regarding use and disclosure of the requested information. The rule also will enable the Finance Board to fairly and effectively consider and respond to such requests.

#### II. Analysis of the Interim Final Rule

The interim final rule adds a new part 905 to the Finance Board's regulations to be codified in Title 12 of the Code of Federal Regulations. A more detailed description of the provisions of part 905 follows.

##### A. Purposes and Scope

Section 905.2 sets out the purposes and scope of part 905, which governs the availability of unpublished Finance Board information either by document or by testimony of current or former Finance Board employees or agents. Under part 905, the term "unpublished information" means: (1) information and documents created or obtained by the Finance Board in connection with the performance of official duties, whether the information or documents are in the possession of the Finance Board, a current or former Finance Board employee or agent, a FHLBank, the Office of Finance, or the Financing Corporation (*i.e.*, a supervised entity), a FHLBank member, or some other person, entity, or government agency; and (2) information and documents created or obtained by, or information in the memory of, a current or former Finance Board employee or agent, which was acquired in the person's official capacity or in the course of performing official duties. Unpublished information does not include information or records the Finance Board must disclose under the FOIA, Privacy Act, or the Finance Board's implementing regulations. See 5 U.S.C. 552 and 552a; 12 CFR parts 904 and 909. It also does not include information or documents that were previously published or disclosed or are customarily furnished to the public in the course of the performance of official duties such as the annual report the

Finance Board submits to Congress pursuant to section 2B(d) of the Bank Act (12 U.S.C. 1422b(d)), press releases, Finance Board forms, and materials published in the **Federal Register**. The Finance Board expects that unpublished information will include confidential information that is privileged.

The rule covers former as well as current employees to allow the Finance Board to control the release of unpublished information a former employee possesses or information a former employee recalls regarding matters that remain confidential. It is not intended to restrict a former employee but rather to permit the Finance Board an opportunity to consult with the former employee and parties wishing to use the employee's testimony in advance of testimony being given in order to protect the confidentiality of unpublished information by prohibiting or limiting testimony as appropriate. Since the rule prohibits the release only of unpublished information the former employee acquired in an official capacity or in the course of performing official duties, it does not bar a former employee from appearing on general matters or otherwise employing his or her knowledge or expertise as, for example, an expert witness.

The purposes of the rule are to provide an orderly mechanism for expeditiously processing requests for unpublished information. The rule will conserve the time of employees for official duties and ensure that the Finance Board can deploy its resources in the most efficient manner while preserving the Finance Board's need to maintain the confidentiality of certain information. The rule also is intended to allow the Finance Board to remain impartial among private litigants. The rule does not, and may not be relied upon to create any substantive or procedural right or benefit enforceable against the Finance Board.

The Finance Board expects the majority of requests for unpublished information to arise in the course of a legal proceeding, such as an administrative, civil, or criminal proceeding, including a grand jury or discovery proceeding, in which neither the Finance Board nor the United States is a party. However, because requests also arise in a non-litigation context, the scope of the interim final rule is broad—it applies to *any* request for or disclosure of unpublished information by document or testimony. The rule is not intended to and will not apply to requests for unpublished information in connection with a legal proceeding in which the Finance Board or the United States is a party or requests for

information or records the Finance Board must disclose under the FOIA or the Privacy Act. See 5 U.S.C. 552 and 552a. The interim final rule does not affect the rights and procedures governing access to records under the FOIA or the Privacy Act, which the Finance Board will continue to process under part 904 or 909 of the Finance Board's regulations, respectively. See 12 CFR parts 904 and 909. However, the interim final rule may permit the Finance Board to disclose documents that are exempt from disclosure under the FOIA.

#### *B. Prohibition on Unauthorized Use and Disclosure of Unpublished Information*

The Finance Board considers all unpublished information to be confidential. Thus, use or disclosure of unpublished information without the express authorization of the Finance Board is prohibited. Section 905.3 of the interim final rule makes clear that unpublished information in the possession or control of any person, supervised entity, FHLBank member, government agency, or other entity remains the property of the Finance Board. No person or entity may use or disclose unpublished information, even information lawfully in their possession or control, without Finance Board authorization. A person or entity that uses or discloses unpublished information without authorization may be subject to criminal penalties. See 18 U.S.C. 641. In addition, current Finance Board, FHLBank, or Office of Finance employees may be subject to administrative or disciplinary proceedings. See, e.g., 12 U.S.C. 1422b(a)(2) and (b)(1).

#### *C. Requests for Unpublished Information*

Section 905.4 sets forth the procedure for making requests for unpublished information. The Finance Board only will consider complete written requests that include a detailed description of the basis for the request. Every request must demonstrate that the requested information is highly relevant to the purpose for which it is sought and is not available from any other source. The requester also must show that the need for the information clearly outweighs the need to maintain its confidentiality and the burden on the Finance Board to produce it. If a requester seeks a response in less than 60 days, the request must explain why it was not submitted earlier and why it should be expedited. At its discretion, the Finance Board may seek additional information from the requester, parties to the matter at issue, or other sources of information.

In addition to the basic requirements discussed above, a request for the production of documents must adequately describe the record or records sought by type and date. A request for the testimony of current or former Finance Board employees or agents also must set forth the intended use of the testimony, a summary of the scope of the testimony requested, and a showing that no document or the testimony of other non-Finance Board persons, including retained experts, could be provided and used in lieu of the testimony. In order to limit the time an employee or agent spends providing authorized testimony, the rule requires a requester to notify all other parties to the matter at issue of the request for testimony and permits another party to join in the request or submit its own request if the scope of the testimony sought is different.

If a request is made in connection with a legal proceeding, the requester must include detailed information about the legal proceeding. The Finance Board generally will not consider a request arising out of a legal proceeding unless the legal proceeding is already filed.

#### *D. Consideration of Requests*

Section 905.5(a) makes clear that a decision concerning the availability of unpublished information is at the sole discretion of the Finance Board. Absent exigent or unusual circumstances, the Finance Board will determine whether to grant a request for unpublished information in whole or in part within 60 days of receipt. The factors the Finance Board may consider in making a determination include, but are not limited to, the following:

- Whether and how the requested information is relevant to the purpose for which it is sought.
- Whether information reasonably suited to the requester's needs other than the requested information is available from another source.
- Whether the requested information is privileged.
- If the request is in connection with a legal proceeding, whether the proceeding has been filed.
- The burden placed on the Finance Board to respond to the request.
- Whether production of the information would be contrary to the public interest.
- Whether the need for the information clearly outweighs the need to maintain the confidentiality of the information.

The Finance Board may respond to a request by authorizing a person or entity in lawful possession or control of unpublished information to disclose the

information to a requester pursuant to an appropriate confidentiality order. This is intended to allow the person or entity in possession or control to assert its own claim of privilege or to argue that the information is not relevant or otherwise protected from disclosure.

The Finance Board generally will notify a FHLBank, FHLBank member, the Office of Finance, or Financing Corporation that it is the subject of a request. The Finance Board will not provide notice if it determines, in its sole discretion, that the notice would advantage or prejudice any of the parties to the matter at issue.

#### *E. Duty of Persons and Entities With Access to Unpublished Information*

Under section 905.6(a), a person or entity must immediately notify the Finance Board's Office of General Counsel of any request or legal process seeking the use or disclosure of unpublished information. Unless the Finance Board has authorized in writing disclosure of the requested information, the person or entity must decline to disclose the information. Section 905.6(b) requires a current or former Finance Board employee or agent or a supervised entity that must respond to a subpoena, order, or other legal process, to decline to disclose the requested information, citing this part as authority. The rule permits a non-Finance Board person or entity to disclose unpublished information only after the requester has sought the information from the Finance Board under this part and a Federal court in a judicial proceeding in which the Finance Board or the Department of Justice has had the opportunity to appear, has ordered disclosure.

If disclosure is not authorized, the Finance Board will provide a copy of part 905 to the requester and advise the requester or the court or other body that issued the legal process, that the Finance Board has prohibited disclosure. The Finance Board or the Department of Justice may intervene in the matter at issue, attempt to have the compulsory process withdrawn, or register other appropriate objections.

#### *F. Available Information*

Sections 905.7 and 905.8 prescribe limits on the scope of permissible document disclosure or testimony and the manner in which documents or testimony authorized for disclosure will be made available. The scope of permissible document disclosure or testimony is limited to that set forth in the written authorization granted by the Finance Board. The Finance Board may act to ensure that the scope of

information provided is consistent with the written authorization, for instance, by reviewing copies of the documents provided to the requester or a transcript of deposition testimony. Upon request, the Finance Board will provide certified or authenticated copies of documents authorized to be disclosed. A party that wants to question a witness beyond the authorized scope must submit a request for expanded authorization to the Finance Board. The Finance Board will attempt to render decisions on such requests in an expedited manner. The Finance Board generally will not authorize a current employee or agent to provide expert or opinion testimony for a private party.

When the Finance Board has authorized testimony, it generally will make the witness available only through written interrogatories or deposition. Absent unusual circumstances, authorized deposition testimony will take place at the Finance Board's offices at a time convenient for the employee. All costs associated with the appearance must be borne by the requester, including provision of a copy of the transcript of the deposition at the request of the Office of General Counsel. The Finance Board will not authorize trial or hearing testimony unless the requester shows that properly developed deposition testimony could not be used or would not be adequate at the trial or hearing. If the authorized testimony is in connection with a legal proceeding, the requester must cause a subpoena to be served on the employee in accordance with applicable rules of procedure, with a copy by registered or certified mail to the Office of General Counsel.

The Finance Board's authorization to provide unpublished information may include restrictions on the use and disclosure of the information. With regard to testimony, the Finance Board may condition its authorization on an agreement of the parties to appropriate limitations, such as an agreement to keep the transcript of a deposition under seal or to make the transcript available only to the parties, the court or other body, or the jury. The Finance Board may condition a decision to disclose unpublished information by document on entry of a protective order satisfactory to the Finance Board, by the court or other body presiding in a legal proceeding or, in non-adversarial matters, on a written agreement of confidentiality that limits access of third parties to the unpublished information. In a legal proceeding in which a protective order already has been entered, the Finance Board may condition a decision to disclose

unpublished information upon the inclusion of additional or amended provisions in the protective order. Upon request or on its own initiative, the Finance Board may authorize use of a deposition transcript or the disclosed documents in another legal proceeding or non-adversarial matter.

If the documents or testimony are disclosed in connection with a legal proceeding, the requester is responsible for promptly notifying all other parties to the legal proceeding of the disclosure, and, after entry of a protective order, providing copies of the documents or testimony to the other parties that are signatories and subject to the protective order. At the conclusion of the legal proceeding, the requester must retrieve the documents or testimony from the court or other body's file as soon as they are no longer required and certify to the Finance Board that every party covered by the protective order has destroyed the unpublished information.

#### *G. Fees*

Section 905.9 of the interim final rule concerns the assessment and collection of fees. The Finance Board generally will assess a fee for the actual costs of searching, copying, authenticating, or certifying unpublished information it authorizes for use or disclosure. The Finance Board will assess fees in the same manner it assesses fees for providing FOIA services under 12 CFR 904.9. The Office of Resource Management is responsible for billing and collecting the fees. The Finance Board generally will bill the requester upon completion of the production but, in certain instances, may require a requester to remit payment prior to providing the requested information. A requester promptly must pay the assessed fees by delivering a check or money order made payable to the "Federal Housing Finance Board" to the Office of Resource Management, located at the Federal Housing Finance Board's offices at 1777 F Street, N.W., Washington, D.C. 20006.

A requester also is responsible for paying witness fees and mileage computed in accordance with 28 U.S.C. 1821 upon completion of a testimonial appearance. If the witness is a current Finance Board employee or agent or a former employee or agent still in the employ of the United States, the requester promptly must remit the witness fees to the Office of Resource Management. If the witness is a former employee or agent that is not currently employed by the federal government, the requester promptly must remit the witness fees directly to the witness.

### III. Notice and Public Participation

The Finance Board is promulgating this procedural rule as an interim final rule in order to fairly and effectively handle pending and anticipated requests for unpublished information. However, because this type of rulemaking generally requires notice and receipt of public comment, the Finance Board will accept written comments on the interim final rule on or before October 12, 1999.

### IV. Effective Date

For the reasons stated in part III above, the Finance Board for good cause finds that the interim final rule should become effective on August 13, 1999. See 5 U.S.C. 553(d)(3).

### V. Regulatory Flexibility Act

The Finance Board is adopting part 905 in the form of an interim final rule and not as a proposed rule. Therefore, the provisions of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2) and 603(a).

### VI. Paperwork Reduction Act

The interim final rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995. See 44 U.S.C. 3501 *et seq.* Consequently, the Finance Board has not submitted any information to the Office of Management and Budget for review.

### List of Subjects in 12 CFR Part 905

Confidential business information, Federal home loan banks, Freedom of information, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Finance Board hereby adds 12 CFR part 905 to read as follows:

#### PART 905—AVAILABILITY OF UNPUBLISHED INFORMATION

Sec.

- 905.1 Definitions.
- 905.2 Purposes and scope.
- 905.3 Prohibition on unauthorized use and disclosure of unpublished information.
- 905.4 Requests for unpublished information by document or testimony.
- 905.5 Consideration of requests.
- 905.6 Persons and entities with access to unpublished information.
- 905.7 Availability of unpublished information by testimony.
- 905.8 Availability of unpublished information by document.
- 905.9 Fees.

**Authority:** 5 U.S.C. 301; 12 U.S.C. 1422b(a)(1).

#### § 905.1 Definitions.

For purposes of this part:

(a) *Finance Board* means the agency established as the Federal Housing Finance Board.

(b) *Legal proceeding* means any administrative, civil, or criminal proceeding, including a grand jury or discovery proceeding, in which neither the Finance Board nor the United States is a party.

(c) *Unpublished information* means information and documents created or obtained by the Finance Board in connection with the performance of official duties, whether the information or documents are in the possession of the Finance Board, a current or former Finance Board employee or agent, a supervised entity, a Federal Home Loan Bank member, government agency, or some other person or entity; and information and documents created or obtained by, or in the memory of, a current or former Finance Board employee or agent, that was acquired in the person's official capacity or in the course of performing official duties. It does not include information or documents the Finance Board must disclose under the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), or the Finance Board's implementing regulations (12 CFR parts 904 and 909, respectively). It also does not include information or documents that were previously published or disclosed or are customarily furnished to the public in the course of the performance of official duties such as the annual report the Finance Board submits to Congress pursuant to section 2B(d) of the Federal Home Loan Bank Act (12 U.S.C. 1422b(d)), press releases, Finance Board forms, and materials published in the **Federal Register**.

(d) *Supervised entity* means a Federal Home Loan Bank, the Office of Finance, and the Financing Corporation.

#### § 905.2 Purpose and scope.

(a) *Purpose.* The purposes of this part are to:

- (1) Maintain the confidentiality and control the dissemination of unpublished information;
- (2) Conserve the time of employees for official duties and ensure that Finance Board resources are used in the most efficient manner;
- (3) Maintain the Finance Board's impartiality among private litigants; and
- (4) Establish an orderly mechanism for the Finance Board to process expeditiously and respond appropriately to requests for unpublished information.

(b) *Scope.* (1) This part applies to a request for and use and disclosure of unpublished information, including a

request for unpublished information by document or testimony arising out of a legal proceeding in which neither the Finance Board nor the United States is a party. It does not apply to a request for unpublished information in a legal proceeding in which the Finance Board or the United States is a party or a request for information or records the Finance Board must disclose under the Freedom of Information Act, Privacy Act, or the Finance Board's implementing regulations.

(2) This part does not, and may not be relied upon to create any substantive or procedural right or benefit enforceable against the Finance Board.

#### § 905.3 Prohibition on unauthorized use and disclosure of unpublished information.

(a) *In general.* Possession or control by any person, supervised entity, Federal Home Loan Bank member, government agency, or other entity of unpublished information does not constitute a waiver by the Finance Board of any privilege or its right to control, supervise, or impose limitations on, the subsequent use and disclosure of the information.

(b) *Current and former employees and agents.* Except as authorized by this part or otherwise by the Finance Board, no current or former Finance Board employee or agent may disclose or permit the disclosure in any manner of any unpublished information to anyone other than a Finance Board employee or agent for use in the performance of official duties.

(c) *Other persons or entities possessing unpublished information.* (1) Except as authorized in writing by the Finance Board, no person, supervised entity, Federal Home Loan Bank member, government agency, or other entity in possession or control of unpublished information may disclose or permit the use or disclosure of such information in any manner or for any purpose.

(2) All unpublished information made available under this part remains the property of the Finance Board and may not be used or disclosed for any purpose other than that authorized under this part without the prior written permission of the Finance Board.

(3) Reports of examination, supervisory correspondence, and other unpublished information lawfully in the possession of a supervised entity, Federal Home Loan Bank member, or government agency remains the property of the Finance Board and may not be used or disclosed for any purpose other than that authorized under this part without the prior written permission of the Finance Board.

(4) Any person or entity that discloses or uses unpublished information except as expressly authorized under this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current Finance Board, Federal Home Loan Bank, or Office of Finance employee also may be subject to administrative or disciplinary proceedings.

(d) *Exception for supervised entities and Federal Home Loan Bank members.* When necessary or appropriate for business purposes, a supervised entity, Federal Home Loan Bank member, or any director, officer, employee, or agent thereof, may disclose unpublished information, including information contained in, or related to, supervisory correspondence or reports of examination, to a person or entity officially connected with the supervised entity or Federal Home Loan Bank member as officer, director, employee, attorney, agent, auditor, or independent auditor. A supervised entity, Federal Home Loan Bank member, or a director, officer, employee, or agent thereof, also may disclose unpublished information to a consultant under this paragraph if the consultant is under a written contract to provide services to the supervised entity or Federal Home Loan Bank member and the consultant has agreed in writing:

(1) To abide by the prohibition on the disclosure of unpublished information contained in this section; and

(2) That it will not use the unpublished information for any purposes other than those stated in its contract to provide services to the supervised entity or Federal Home Loan Bank member.

(e) *Government agencies.* The Finance Board may make reports of examination, supervisory correspondence, and other unpublished information available to another federal agency or a state agency for use where necessary in the performance of the agency's official duties. As used in this paragraph, the term agency does not include a grand jury.

#### § 905.4 Requests for unpublished information by document or testimony.

(a) *Form of requests.* A request for unpublished information must be submitted to the Finance Board in writing and include a detailed description of the basis for the request. At a minimum, the request must demonstrate that:

(1) The requested information is highly relevant to the purpose for which it is sought;

(2) The requested information is not available from any other source;

(3) The need for the information clearly outweighs the need to maintain its confidentiality; and

(4) The need for the information clearly outweighs the burden on the Finance Board to produce it.

(b) *Requests for documents.* If the request is for unpublished information by document, the request must include the elements in paragraph (a) of this section and also must adequately describe the record or records sought by type and date.

(c) *Requests for testimony.* (1) If the request is for unpublished information by testimony, the request must include the elements in paragraph (a) of this section and also must set forth the intended use of the testimony, a summary of the scope of the testimony requested, and a showing that no document or the testimony of other non-Finance Board persons, including retained experts, could be provided and used in lieu of the testimony.

(2) Upon submitting a request to the Finance Board for unpublished information by testimony, the requester must notify all other parties to the matter at issue of the request.

(3) After receipt of a request for unpublished information by testimony but before the requested testimony occurs, a party to the matter at issue who did not join in the request and who wishes to question the witness beyond the scope of the testimony sought by the request, must timely submit its own request for unpublished information pursuant to this part.

(d) *Requests in connection with legal proceedings.* If the request for unpublished information arises out of a legal proceeding, the Finance Board generally will require that the legal proceeding already be filed before it will consider the request. In addition to the elements in paragraph (a) of this section, requests in connection with legal proceedings must include the caption and docket number of the case; the forum; the name, address, phone number, and electronic mail address, if available, of counsel to all other parties to the legal proceeding; the requester's interest in the case; a summary of the issues in litigation; and the reasons for the request, including the relevance of the unpublished information and how the requested information will contribute substantially to the resolution of one or more specifically identified issues in the legal proceeding.

(e) *Expedited requests.* If a requester seeks a response in less than 60 days, the request must explain why the request was not submitted earlier and why the Finance Board should expedite the request.

(f) *Where to submit requests.* Send requests for unpublished information to the Office of General Counsel, Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006.

(g) *Additional information.* (1) *From the requester.* The Office of General Counsel may consult with the requester to refine and limit the scope of the request to make compliance less burdensome or to obtain information necessary to make an informed determination on the request. A requester's failure to cooperate in good faith with the Office of General Counsel may serve as the basis for a determination not to grant the request.

(2) *From others.* The Office of General Counsel may inquire into the facts and circumstances underlying a request for unpublished information and rely on sources of information other than the requester, including other parties to the matter at issue.

#### § 905.5 Consideration of requests.

(a) *Discretion.* Each decision concerning the availability of unpublished information is at the sole discretion of the Finance Board based on a weighing of all appropriate factors. The decision is a final agency action that exhausts administrative remedies for disclosure of the information.

(b) *Time to respond.* The Finance Board generally will respond in writing to a request for unpublished information within 60 days of receipt absent exigent or unusual circumstances and dependent upon the scope and completeness of the request.

(c) *Factors the Finance Board may consider.* The factors the Finance Board may consider in making a determination regarding the availability of unpublished information include:

(1) Whether and how the requested information is relevant to the purpose for which it is sought;

(2) Whether information reasonably suited to the requester's needs other than the requested information is available from another source;

(3) Whether the requested information is privileged;

(4) If the request is in connection with a legal proceeding, whether the proceeding has been filed;

(5) The burden placed on the Finance Board to respond to the request;

(6) Whether production of the information would be contrary to the public interest; and

(7) Whether the need for the information clearly outweighs the need to maintain the confidentiality of the information.

(d) *Disclosure of unpublished information by others.* When a person or

entity other than the Finance Board has a claim of privilege regarding unpublished information and the information is in the possession or control of that person or entity, the Finance Board, at its sole discretion, may respond to a request for the information by authorizing the person or entity to disclose the information to the requester pursuant to an appropriate confidentiality order. Finance Board authorization to disclose information under this paragraph does not preclude the person or entity in possession of the unpublished information from asserting its own privilege, arguing that the information is not relevant, or asserting any other argument to protect the information from disclosure.

(e) *Notice to supervised entities and Federal Home Loan Bank members.* The Finance Board generally will notify a supervised entity or Federal Home Loan Bank member that it is the subject of a request, unless the Finance Board, in its sole discretion, determines that to do so would advantage or prejudice any of the parties to the matter at issue.

**§ 905.6 Persons and entities with access to unpublished information.**

(a) *Notice to Finance Board.* Any person, including a current or former Finance Board employee or agent, or any entity, including a supervised entity, Federal Home Loan Bank member, or government agency that receives a request for, or is served with a subpoena, order, or other legal process to disclose unpublished information by document or testimony, must immediately notify the Office of General Counsel.

(b) *Response of person or entity served with request.* Unless the Finance Board has authorized in writing disclosure of the requested information:

(1) A current or former Finance Board employee or agent or a supervised entity that must respond to a subpoena, order, or other legal process, must decline to disclose the requested information, citing this part as authority.

(2) A non-Finance Board person or entity may not disclose unpublished information unless:

(i) The requester has sought the information from the Finance Board under this part; and (ii) After the Finance Board or the Department of Justice has had the opportunity to appear and oppose disclosure, a Federal court has ordered the person or entity to disclose the information.

(c) *Finance Board response.* If the Finance Board does not authorize in writing disclosure of the requested information, the Finance Board will provide a copy of this part to the person

or entity at whose instance the process was issued and advise that person or entity or the court or other body that the Finance Board has prohibited disclosure of the information under this part. The Finance Board or the Department of Justice may intervene in the matter at issue, attempt to have the compulsory process withdrawn, or register other appropriate objections.

**§ 905.7 Availability of unpublished information by testimony.**

(a) *Scope.* (1) The scope of permissible testimony is limited to that set forth in the written authorization granted by the Finance Board. The Finance Board may act to ensure that the scope of testimony provided is consistent with the written authorization.

(2) A party to the matter at issue that did not join in a request for unpublished information who wishes to question a witness beyond the authorized scope must request expanded authorization under this part. The Finance Board will attempt to render decisions on such requests in an expedited manner.

(3) The Finance Board generally will not authorize a current employee or agent to provide expert or opinion testimony for a private party.

(b) *Manner in which testimony is given.* (1) The Finance Board ordinarily will make the authorized testimony of a former or current employee or agent available only through written interrogatories or deposition. The Finance Board will not authorize testimony at a trial or hearing unless the requester shows that properly developed deposition testimony could not be used or would be inadequate at the trial or hearing.

(2) If the Finance Board has authorized testimony in connection with a legal proceeding, the requester must cause a subpoena to be served on the employee in accordance with applicable rules of procedure, with a copy by registered or certified mail to the Office of General Counsel.

(3) If the authorized testimony is through deposition, the deposition ordinarily will take place at the Finance Board's offices at a time that will avoid substantial interference with the performance of the employee's official duties.

(4) The requester is responsible for all costs associated with an employee's appearance, including provision of a copy of a transcript of the deposition at the request of the Office of General Counsel. The person whose deposition was transcribed does not waive his or her right to review the transcript and note errors.

(c) *Restrictions on use and disclosure.* The Finance Board may condition its authorization of deposition testimony on an agreement of the parties to appropriate limitations, such as an agreement to keep the transcript of the testimony under seal or to make the transcript available only to the parties, the court or other body, or the jury. Upon request made pursuant to this part or on its own initiative, the Finance Board may authorize use of a deposition transcript in another legal proceeding or non-adversarial matter.

(d) *Responsibility of litigants.* If the testimony is disclosed in connection with a legal proceeding, the requester is responsible for:

(1) Promptly notifying all other parties to the legal proceeding of the disclosure, and, after entry of a protective order, providing copies of the testimony to the other parties who are signatories and subject to the protective order; and

(2) At the conclusion of the legal proceeding, retrieving the testimony from the court or other body's file as soon as it is no longer required and certifying to the Finance Board that every party covered by the protective order has destroyed the unpublished information.

**§ 905.8 Availability of unpublished information by document.**

(a) *Scope.* The scope of permissible document disclosure is limited to that set forth in the written authorization granted by the Finance Board. The Finance Board may act to ensure that the scope of documents provided is consistent with the written authorization.

(b) *Restrictions on use and disclosure.* The Finance Board may condition a decision to disclose unpublished information by document on entry of a protective order satisfactory to the Finance Board by the court or other body presiding in a legal proceeding or, in non-adversarial matters, on a written agreement of confidentiality that limits access of third parties to the unpublished information. In a legal proceeding in which a protective order already has been entered, the Finance Board may condition a decision to disclose unpublished information upon inclusion of additional or amended provisions in the protective order. Upon request made pursuant to this part or on its own initiative, the Finance Board may authorize use of the documents in another legal proceeding or non-adversarial matter.

(c) *Responsibility of litigants.* If the documents are disclosed in connection

with a legal proceeding, the requester is responsible for:

(1) Promptly notifying all other parties to the legal proceeding of the disclosure, and, after entry of a protective order, providing copies of the documents to the other parties that are signatories and subject to the protective order; and

(2) At the conclusion of the legal proceeding, retrieving the documents from the court or other body's file as soon as they are no longer required and certifying to the Finance Board that every party covered by the protective order has destroyed the unpublished information.

(d) *Certification or authentication.* If the Finance Board has authorized disclosure of unpublished information by document, it will provide certified or authenticated copies of the document upon request.

#### § 905.9 Fees.

(a) *Fees for records search, copying, and certification.* Unless waived or reduced, a requester must pay a fee to the Finance Board for the costs of searching, copying, authenticating, or certifying unpublished information in accordance with 12 CFR 904.9. The Office of Resource Management generally will bill a requester upon completion of the production, but, in certain instances, may require a requester to remit payment prior to providing the requested information. To pay fees assessed under this section, a requester must deliver to the Office of Resource Management, located at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006, a check or money order made payable to the "Federal Housing Finance Board."

(b) *Witness fees and mileage.* (1) *Current Finance Board or federal employees.* If the Finance Board authorizes disclosure of unpublished information by testimony of a current Finance Board employee or agent or a former Finance Board employee or agent who is still in the employ of the United States, upon completion of the testimonial appearance the requester must remit promptly to the Office of Resource Management payment for witness fees and mileage computed in accordance with 28 U.S.C. 1821.

(2) *Former employees or agents.* If the Finance Board authorizes disclosure of unpublished information by testimony of a former Finance Board employee or agent who is not currently employed by the United States, upon completion of the testimonial appearance the requester must remit promptly to the witness any witness fees or mileage due in accordance with 28 U.S.C. 1821.

Dated: August 6, 1999.

By the Board of Directors of the Federal Housing Finance Board.

**Bruce A. Morrison,**  
*Chairperson.*

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 120

#### Liquidation of Collateral And Sale of Commercial Loans

**AGENCY:** Small Business Administration.  
**ACTION:** Final rule.

**SUMMARY:** With this rule, SBA amends its regulation regarding the liquidation and sale of loans. As part of a government-wide initiative, federal credit agencies are being directed by the Office of Management and Budget (OMB) to sell their loan portfolios. Initially, SBA intends to sell its portfolio of direct and purchased loans made under the authorities of the 7(a) and 501, 502, 503, and 504 programs. This will include both secured and unsecured loans in performing and non-performing status. The loans will be sold to qualified bidders by means of competitive procedures at publicly advertised sales. Bidder qualifications will be set for each sale in accordance with the terms and conditions of each sale. SBA also intends to sell its disaster home loans and disaster business loans, but will publish separate regulations regarding these sales.

**DATES:** This rule is effective August 13, 1999.

**FOR FURTHER INFORMATION CONTACT:** Richard Blewett, 202-205-4202.

**SUPPLEMENTARY INFORMATION:** SBA promulgates, without change, a rule which it proposed on June 29, 1999 (64 FR 34745). SBA received no comments to the proposed rule.

13 CFR 120.540 sets forth SBA's policy for the liquidation of collateral and the sale of commercial loans. SBA amends and expands this rule to include the sale of direct and purchased loans in asset sales. Pub. L. 104-134, the "Debt Collection Improvement Act of 1996," enacted on April 26, 1996, provides that, "the head of an executive \* \* \* agency may sell, subject to section 504(b) of the Federal Credit Reform Act of 1990 and using competitive procedures, any non-tax debt owed to the United States that is delinquent for more than 90 days." 31 U.S.C. 3711(i)(1).

The Small Business Act, 15 U.S.C. 634(b)(2), provides in pertinent part that

"(The Administrator) may sell at public or private sale \* \* \* in (her) discretion any evidence of debt \* \* \* personal property, or security \* \* \*" It further provides, in 15 U.S.C. 634(b)(7) that the Administrator may "take any and all actions \* \* \* when [she] determines such actions are necessary or desirable in \* \* \* liquidating or otherwise dealing with or realizing on loans \* \* \*"

Pursuant to this statutory authority, SBA is establishing an Asset Sales Program to sell portions of its direct and participation loan portfolios. Under the new regulation, SBA may sell its direct and participation loans in bulk through competitive procedures at publicly advertised sales.

#### Compliance With Executive Orders 12612, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this final rule is not a significant rule within the meaning of Executive Order 12866, since it is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the U.S. economy.

SBA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

SBA certifies that this final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

For purposes of Executive Order 12612, SBA certifies that this final rule has no federalism implications warranting preparation of a Federalism Assessment. For purposes of Executive Order 12988, SBA certifies that this final rule is drafted, to the extent practicable, to accord with the standards set forth in paragraph 2 of that Order.

#### List of Subjects in 13 CFR Part 120

Loan programs—business.

For the reasons stated in the preamble, the Small Business Administration amends 13 CFR part 120 as follows:

#### PART 120—BUSINESS LOANS

1. The authority citation for part 120 continues to read as follows:

**Authority:** 15 U.S.C. 634 (b)(6) and 636(a) and (h).

2. In § 120.540, revise the section heading, add paragraph (b)(4), and revise paragraph (d) to read as follows: