

FEDERAL RESERVE SYSTEM

12 CFR Part 219

[Regulation S; Docket No. R-1325]

Reimbursement for Providing Financial Records; Recordkeeping Requirements for Certain Financial Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final Rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has approved amendments to Subpart A of Regulation S, which implements the requirement under the Right to Financial Privacy Act (RFPA) that the Board establish the rates and conditions under which payment shall be made by a government authority to a financial institution for assembling or providing financial records pursuant to RFPA. These proposed amendments update the fees to be charged and takes account of recent advances in electronic document productions.

EFFECTIVE DATE: January 1, 2010.

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SUPPLEMENTARY INFORMATION:

Background

Section 1115 of the RFPA (12 U.S.C. § 3415) requires the Board to establish, by regulation, the rates and conditions under which payment is made by a Government authority to a financial institution for searching for, reproducing, or transporting data required or requested under the RFPA. Shortly after the RFPA was adopted, the Board issued Regulation S (12 CFR Part 219) to

implement this provision (44 FR 55812, September 28, 1979). These provisions were subsequently designated Subpart A of Regulation S. In June 1996, the Board revised Regulation S by updating the fees financial institutions could charge and streamlining the Subpart generally. (61 FR 29638, June 12, 1996).

Since the last revision, two significant changes have occurred that now require further amendments to Subpart A of Regulation S. First, increases in salary and benefits have caused the fees chargeable for reproducing financial records to become outdated. Furthermore, in recent years, the production of electronically stored information during investigations and in litigation has become increasingly common.¹ Many government agencies now prefer to receive information in digital formats, thereby easing handling and analysis. In addition, many agency document requests now require that information be submitted in electronic form.

Proposed Amendments

In response to these developments, the Board proposed in August 2008 issuing amendments designed to update the existing rates to be paid for personnel costs, to provide a reimbursement scheme that more accurately reflects the costs of producing electronically stored information in digital formats, and making minor clarifying changes (73 FR 47854, August 15, 2008).

Specifically, the proposed amendments substantially increased the labor rates, added a third job category for specialized computer support, included an automatic adjustment every five years for changes in labor rates, precluded reimbursement on a per-page basis for production of paper documents that had been stored electronically unless the requesting government agency sought production of paper documents, and replaced the \$5.00 “per diskette” charge with a \$5.00 fee for electronic transmissions, per request. The Federal Register Notice accompanying the proposed

¹ Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure*, § 2218 at 449 (2d ed. 2006).

amendments also sought comments on whether the existing fees for microfiche or microfilm-based productions should be eliminated as outmoded.

Summary and Analysis of the Comments

The Board received eleven comments on the proposed revisions, most of which were supportive of the Board's effort to update the regulation.

Personnel Labor Rates

Most of the comments strongly supported increasing the labor rates found in Subpart A. Four comments asserted that the new rates were too low, but none suggested an alternative benchmark for salary and benefits that would be more reliable than what is contained in the Occupational Employment Statistics ("OES") program maintained by the Bureau of Labor Statistics ("BLS"), which provided the basis for the labor wage rates in the proposed amendments.

None of the comments objected to the Board's mechanism for periodically updating the labor rates found in the regulation; however, three comments urged the Board to consider updating the rates more frequently than every five years, such as annually, bi-annually, or every three years. Under the proposed rule, the labor rates would be adjusted on April 1, 2012, and every five years thereafter. In May 2009, the BLS issued new data under the OES program, but the new data did not result in any changes to the personnel reimbursement rates set forth in the proposed amendments. The Board has modified the schedule in the final rule to provide for updated labor rates every three years, beginning September 30, 2012. The Board believes that a three-year schedule provides an appropriate balance between the convenience of having financial institutions and agencies using the same rates for an extended period of time against the benefit of relying on more recent wage data. The September 30 date is appropriate because the BLS data are typically

released in May, which will provide the Board with an adequate lead time to incorporate the recent data to into the reimbursement rate schedules and publicize these changes to the industry.

Three comments suggested adding language that would permit the Board to designate an equivalent source of wage data in the event the BLS substantially changes or eliminates the relevant job categories found in the OES program. The final rule accepts this suggestion so that a full rulemaking proceeding does not need to be initiated just to make a technical conforming change to the calculation of the labor rates.

Limitations on Per-Page Reimbursement for Paper Documents

One trade group raised several issues about the provision that would prevent financial institutions from being reimbursed on a per-page basis for paper copies of electronically stored documents, unless the government agency seeking the documents requested production of the information on paper. The trade group questioned whether the Board has the authority to limit reimbursement in this fashion. Section 1115 of the RFPA (12 U.S.C. § 3415) requires the Board to issue regulations “to establish the rates and *conditions*” for reimbursement of “such costs as are *reasonably necessary* and which have been *directly incurred* in searching for, reproducing or transporting the books, papers, records *or other data* required or requested...” (emphasis added). The Board interprets this statutory language not to require additional reimbursement to financial institutions for the creation of paper records when the information is stored in electronic form, paper documents are not required in order for the financial institution to comply with the government agency’s request, and reimbursement is available for personnel and certain out-of-pocket costs incurred while searching for, reproducing, and delivering the information to the requesting agency in digital form. In such a case, costs incurred for production of paper records are not reasonably necessary to comply with the government agency request.

The trade group that opposed the conditions on per-page reimbursement for paper copies also asserted that some financial institutions will need to devote resources to converting their electronic information to usable formats in order to comply with a government document request, and that such conversion may be complex or costly, but not be reimbursed. The Board believes that some such costs are likely to be incurred in any event because an increasing proportion of document requests (governmental and nongovernmental) now require that information be provided in electronic formats. *See* Fed. R. Civ. Proc. 45(d)(1)(B)(electronically stored information must be produced in format specified, or, if not specified, in the form in which it is ordinarily maintained or in a reasonably usable form). Moreover, Regulation S permits institutions to receive reimbursement, “[i]f itemized separately [for] the actual cost of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies.” 12 C.F.R. § 219.4(b)(2). Accordingly, such conversion costs are reimbursable according to the terms of the regulation. Finally, under the terms of the amended regulation, a government agency may agree to accept paper copies in lieu of an electronic production, and the financial institution will be reimbursed on a per-page basis.

The trade group and a financial institution also expressed concern that production of customer information in electronic form could raise privacy issues and the possibility of data breaches, as well as evidentiary issues in subsequent proceedings. While privacy protection is a significant issue, financial institutions generally are required to have policies and procedures to safeguard customer data under other laws. The Board also notes that production of customer information in paper form is among the least secure media, without password protection or encryption. As discussed below, the amended regulation also provides that financial institutions may be reimbursed for the actual cost of storage media, which may include encryption

technologies. Financial institutions may also be reimbursed for delivery costs, which may include reasonable measures taken to insure against a data breach, such as the use of registered mail or courier services as required. Additional concerns about customer privacy and safeguards against data breaches may be addressed by the requesting government agency and the financial institution producing the information. Similarly, any issues about authentication of electronic data as opposed to paper documents may be addressed between the requesting agency and the financial institution. A government agency that is concerned about authentication of electronically produced information may request production in paper form, which entitles the financial institution to reimbursement on a per-page basis.

Alternatively, the trade group requested that the implementation of the amended rule be delayed for a year to enable financial institutions to revamp their systems to produce documents electronically. The Board has determined that January 1, 2010, should be the effective date. This effective date is more than a year after the amended rule was first proposed. Financial institution reimbursements for personnel costs will significantly increase as a result of the amendments, which are likely to offset in whole or in part any reduction in reimbursement amounts attributable to the inability to charge on a per-page basis for paper documents.

Proposed \$5.00 Fee for “Electronic Productions, per request”

Several comments indicated that there was ambiguity concerning the proposed \$5.00 reimbursement for “Electronic Productions, per request.” This reimbursement provision was designed to replace the \$5.00 “per diskette” charge in the existing regulation, because diskettes are no longer widely used, having been replaced by other storage media. The comments also noted that there was ambiguity as to whether “per request” meant each account requested by an agency, each customer whose information was being sought, or each production of electronic information. One

commenter also noted that some storage media (such as encrypted flash storage devices or “memory sticks”) cost more than \$5.00.

In response to these comments and to eliminate any ambiguity, the Board is revising the provision and eliminating the \$5.00 fixed fee for electronic transmissions. In the final version, the schedule in Appendix A specifically contemplates reimbursement for the actual acquisition price to the financial institution of the storage medium (CD, flash storage device, etc.) used to transmit the data. No fixed reimbursement will be available for transmittal made by electronic mail (“e-mail”), because it does not appear to be practical to quantify the costs directly incurred (if any) for making e-mail transmissions. Financial institutions may be reimbursed, however, for the personnel costs and other identified costs incurred related to making e-mail transmissions. Whether transmission of customer data by e-mail is acceptable on information security and evidentiary grounds is a matter between the requesting government agency and the financial institution.

Reimbursement for Microfiche and Microfilm Productions

Three comments urged the Board to keep the provisions regarding microfilm and microfiche duplication. Apparently, although use of these media is declining, a significant number of financial institutions continue to maintain records in these formats. Accordingly, the final rule will continue to allow financial institutions to charge \$0.25 (per frame) for photocopying microfiche and \$.50 (per microfiche) for duplicating microfiche.

Fees for Delivery and Transportation Costs

Two commenters requested that the regulation set out that costs for delivery of the information be reimbursable, such as postage, or courier costs. Reimbursement for these items is already covered by the existing regulation, 12 C.F.R. § 219.3(d). However, in light of the

comments, the Board is clarifying the language of section 219.3(d) to make explicit that it includes reimbursement for reasonable delivery-related costs.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. 5 U.S.C. § 603(a). The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b).

Pursuant to section 605(b), the Board certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The rule implements the reimbursement requirement under the RFPA and will benefit small institutions as a result of the increases in the reimbursement schedule for personnel costs associated with the requirement to assemble and reproduce financial records. The impact on institutions of converting their electronic information to a usable format, at the request of a government agency, would be positive because institutions may be reimbursed for personnel costs in searching for and processing a request for information that is stored electronically, including the personnel time directly incurred in converting the information to a format that the government agency requires. There are no new reporting, recordkeeping, or other compliance requirements associated with this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule.

List of Subjects in 12 CFR Part 219

Banks, banking, Currency, Federal Reserve System, Foreign banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set out in the preamble, 12 CFR Part 219 is to be amended as set forth below.

PART 219--REIMBURSEMENT FOR PROVIDING FINANCIAL RECORDS; RECORDKEEPING REQUIREMENTS FOR CERTAIN FINANCIAL RECORDS (REGULATION S)

1. The authority citation for part 219 continues to read as follows:

Authority: 12 U.S.C. § 3415.

2. Subpart A is amended by revising § 219.3 and § 219.5 to read as follows:

§ 219.3 Cost Reimbursement

(a) Fees payable. Except as provided in § 219.4, a government authority seeking access to financial records pertaining to a customer, by written request, through: (1) a court order, (2) a subpoena issued pursuant to the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, or (3) other agency administrative procedures, including administrative subpoenas, voluntary requests, or other process shall reimburse the financial institution for reasonably necessary costs directly incurred in searching for, reproducing or transporting books, papers, records, or other data as set forth in this section. The reimbursement schedule for a financial institution is set forth in Appendix A to this section. If a financial institution has financial records that are stored at an independent storage facility that charges a fee to search for, reproduce, or transport particular records requested, these costs are considered to be directly incurred by the financial institution and may be included in the reimbursement.

(b) * * *

(2) If itemized separately, search and processing costs may include the actual cost of extracting electronically stored records, based on computer time and necessary supplies; however, personnel time for computer searches may be paid for at the rates set for computer support specialist, specified in Appendix A to this section, but only when compliance with the request for information requires that the financial institution use programming or other higher level technical services of a computer support specialist in order to reproduce electronically stored information in the format requested by the government authority.

(3) Rates for Search and Processing in Appendix A shall be recalculated as follows on October 1, 2012, and on October 1 of each subsequent three-year period utilizing Bureau of Labor Statistics (“BLS”) data or equivalent data (as so designated by the Board) by replacing the existing hourly rates with the sum of:

(i) Base Labor rate recalculation – Using the most recently available wage data from the Occupational Employment Statistics program (<http://www.bls.gov/oes/home.htm>) for the BLS industry category “Credit Intermediation and Related Activities” (NAICS Code Number 522000) (or successor category):

(A) [Clerical/Technical category] the average of the median hourly rates for the “Information and Records Clerk” and “Computer Operator” job categories (SOC Code Number 43-4199 and 43-9011) (or any successor job categories);

(B) [Manager/Supervisor category] the median hourly rate for the “first-line supervisors/ managers of office” job category (SOC Code Number 43-1011) (or successor category), and

(C) [Computer Support Specialist category] the median hourly rate for the “computer support specialist” job category (SOC Code Number 15-1041) (or successor category); plus

(ii) Benefits Adjustment – an amount for each hourly rate category that is equal to the product of:

(A) The hourly rates set forth in paragraph (b)(3)(i) of this section, and

(B) The most recently available “percent of total compensation” represented by “total benefits” for the “Credit Intermediation and Related Activities” industry category (private sector) set out in the Employment Cost Trends section of the National Compensation Survey (<http://data.bls.gov/PDQ/outside.jsp?survey=cm>); and

(iii) If the recalculated rates for Search and Processing (including the Base labor rate and the benefits adjustment) are not a multiple of \$1, the recalculated rates shall be rounded up to the next multiple of \$1.

(c) Reproduction costs. The reimbursement rates for reproduction costs for requested information are set forth in Appendix A to this section, subject to the Conditions for Payment set forth in section 219.5 of this part. Copies of photographs, films and other materials not listed in Appendix A to this section are reimbursed at actual cost.

(d) Transportation or delivery costs. Reimbursement for transportation or delivery costs shall be for the reasonably necessary costs directly incurred to transport personnel to locate and retrieve the requested information, and to deliver such material to the place of examination.

Appendix A to §219.3--Reimbursement Schedule

Reproduction:

Photocopy, per page \$0.25

Paper copies of microfiche, per frame \$0.25
 Duplicate Microfiche, per microfiche. \$0.50
 Storage media Actual cost

Search and Processing:

Clerical/Technical, hourly rate \$22.00
 Computer Support Specialist, hourly rate \$30.00
 Manager/Supervisory, hourly rate \$30.00

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§ 219.5 Conditions for payment.

(a) Direct costs. Payment shall be made only for costs that are both directly incurred and reasonably necessary to provide requested material. Search and processing, reproduction, and transportation or delivery costs shall be considered separately when determining whether the costs are reasonably necessary. Photocopying or microfiche charges are reasonably necessary only if the institution has reproduced financial records that were not stored electronically (i.e., where the information requested was stored only on paper or in microfiche), or where the government authority making the request has specifically asked for printed copies of electronically stored records.

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By order of the Board of Governors of the Federal Reserve System, September 23, 2009.

Jennifer S. Johnson (signed)
 Jennifer J. Johnson,
 Secretary of the Board.