

FEDERAL RESERVE BANK
OF NEW YORK

Circular No. 8644
September 28, 1979

NEW REGULATION S
Reimbursement to Financial Institutions for Assembling
or Providing Financial Records

*To All Member Banks, and Others Concerned,
in the Second Federal Reserve District:*

The Board of Governors of the Federal Reserve System has announced the adoption of rules under the Right to Financial Privacy Act of 1978 for reimbursing financial institutions that provide customers' financial records to the Federal government. The Board of Governors' new Regulation S is effective October 1, 1979. Following is the text of the Board's announcement:

The Act, and the Board's Regulation S implementing it, become effective October 1, 1979. The Board adopted Regulation S following consideration of comment received after publication of proposed rules in August. The Act^{1/} places restrictions on Federal government access to the financial records of individuals maintained by financial institutions by requiring that, with certain exceptions, Federal authorities seeking such information must follow prescribed procedures.

The Act also authorizes, with a number of exceptions, reimbursement to financial institutions for costs associated with providing such records and directs the Federal Reserve Board to establish regulatory rules for reimbursement.

Regulations S provides:

- Financial institutions are entitled to payment for the reasonably necessary costs directly incurred in assembling or providing required, requested or authorized customer financial records. The Federal financial supervisory agencies are exempt from the Act's restrictions in the exercise of their supervisory, regulatory or monetary functions.
- Only financial institutions are entitled to such reimbursement. This includes credit card issuers. Corporations and partnerships comprised of more than five individuals are not affected.
- The rate of reimbursement for personnel time is \$10 an hour or \$2.50 per quarter hour. Reimbursement is limited to the total amount of personnel time spent in locating, retrieving, reproducing, packaging and preparing documents or information for shipment at the request or requirement of the Federal government.
- The rate of reimbursement for reproduction costs is 15 cents a page.
- Reimbursement for transportation costs are limited to actual costs.

^{1/} Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978.

(Over)

The August proposal suggested that reimbursement for personnel costs be at a rate of \$5 an hour or fraction thereof, and that reproduction costs be reimbursed at 10 cents a page. These were the principal changes in the rules as adopted from those proposed. The Board also made a number of technical changes.

Regulation S notes exceptions to the reimbursement requirements of the Act as well as the requirements and exceptions to the requirements for the government to give financial institutions a Certificate of Compliance when personal records are supplied.

Enclosed—for member banks in this District—is a copy of the official notice containing the text of the new Regulation S. The notice will be published in the *Federal Register*, and the regulation will also be sent in pamphlet form to member banks and others concerned when available. Questions regarding the regulation may be directed to our Regulations Division (Tel. No. 212-791-5914).

THOMAS M. TIMLEN,
First Vice President.

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TITLE 12--BANKS AND BANKING

CHAPTER 11--FEDERAL RESERVE SYSTEM

SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

[12 C.F.R. Part 219]

[DOCKET NO. R-0243]

NOTICE OF FINAL RULEMAKING

REGULATION S

REIMBURSEMENT TO FINANCIAL INSTITUTIONS FOR
ASSEMBLING OR PROVIDING FINANCIAL RECORDS

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final regulation.

SUMMARY: The Board of Governors of the Federal Reserve System has adopted a new regulation required by section 1115 of the Right to Financial Privacy Act (12 U.S.C. § 3415) that provides rates and conditions for reimbursement of reasonably necessary costs, directly incurred by financial institutions in assembling or providing customer financial records to a federal government authority.

DATE: This regulation is effective October 1, 1979.

FOR FURTHER INFORMATION, CONTACT: MaryEllen A. Brown, Senior Counsel, Legal Division, Board of Governors of the Federal Reserve System, Washington, D.C. 20551 (202/452-3608).

SUPPLEMENTARY INFORMATION: On August 8, 1979, the Board of Governors of the Federal Reserve System proposed a regulation (to be known as Regulation S) for reimbursement of reasonably necessary costs directly incurred by financial institutions, to search for, reproduce, and transport financial records sought by a federal authority, and invited public comments on this proposal (44 Fed. Reg. 46475). Comments were invited particularly about how the reimbursement should be set and how it could be permitted to vary over time.

As background information, the Right to Financial Privacy Act of 1978 (the "Act") restricts federal government access to individual customers' financial records maintained by financial institutions, and requires that, with certain exceptions, federal authorities seeking

disclosure of these records must follow prescribed procedures. Access to or disclosure of these financial records must generally be pursuant to one of the following procedures authorized by the Act: (1) valid written customer authorization; (2) administrative summons or subpoena; (3) valid search warrant; (4) judicial subpoena; or (5) formal written request. However, emergency access is also authorized in certain situations, as is access pursuant to a grand jury subpoena or for Secret Service or foreign intelligence activities. The Act also restricts transfer of financial information obtained under the Act from one federal agency to another.

The Act does not cover financial records of corporations or of partnerships comprised of more than five individuals.

Except where access is sought pursuant to a search warrant or a grand jury subpoena, or in an emergency, or for Secret Service or foreign intelligence purposes, the bank customer is also given advance notice of his or her rights to challenge the federal government's access, and advice about how to effectuate these challenge rights.

A financial institution is also generally prohibited from releasing a customer's financial records until the federal agency seeking the records certifies in writing to the financial institution that it has fully complied with the Act.

Various exceptions to the Act's requirements are provided, including one that exempts the Board and other federal financial supervisory agencies from these restrictions in the exercise of their supervisory, regulatory, or monetary functions.

Civil penalties, injunctive relief, and employee disciplinary proceedings are authorized as remedies for violations of the Act.

The comment period for proposed Regulation S was announced as closing September 10, 1979. Because of recent delays in mail deliveries, this period was extended informally to the close of business September 12, 1979. A total of 108 letters of comment concerning the proposed regulation were received by that deadline. The Board considered the proposed regulation in light of the comments received and, in several instances, changed the proposal in response to comments received. Aspects of the final regulation that differ significantly from the proposed regulation are summarized below:

Rate of reimbursement for search and processing time is increased to \$10 per hour per person, computed on the basis of \$2.50 per quarter hour, limited to the total amount of personnel time spent in locating, retrieving, reproducing, packaging, and preparing for shipment documents or information required or requested by the government authority.

Reimbursement for reproduction of documents is increased to \$0.15 per page.

The response to the Board's particular request about a variable rate elicited 28 favorable comments out of the 108 total responses. An additional 11 comments suggested periodic or annual review of the rates set. Another 3 comments suggested a sliding scale, a form of variable rate, to vary with the time limit and scope of the work required. Thus, in all, some 42 comments favored either periodic review of rates or some form of a variable rate.

Certain technical changes were also made in this final regulation.

Financial institutions are reminded to keep an accurate record of personnel time, computer costs, number of reproductions made, and transportation costs, by each request, and to include on the itemized bill or invoice the name of the customer to whom it relates. After a financial institution receives a Certificate of Compliance with the Act from the government authority seeking access to financial records, the financial institution may then submit an itemized bill or invoice to that federal authority. If the financial institution does not receive a Certificate of Compliance because the federal agency has withdrawn its request for disclosure or a customer has revoked his or her authorization, or because a customer has successfully challenged disclosure to the federal agency, the financial institution may submit an itemized bill or invoice for reasonably necessary costs directly incurred in assembling financial records prior to the time that the federal agency notifies it that its request is withdrawn or defeated.

Financial institutions are also reminded that the statute provides eleven types of exceptions from cost reimbursement which are incorporated into this regulation. Reimbursement for financial records sought pursuant to any of these exceptions is, accordingly, also excepted from this regulation.

Financial institutions should also be aware that just as the Act provides certain exceptions to its reimbursement requirement, it also provides exceptions to the Certificate of Compliance requirement. Thus, financial institutions will not receive a Certificate of Compliance when financial records are sought by a financial supervisory agency (12 U.S.C. § 3413(b); or for federal litigation (12 U.S.C. § 3413(e)); or for agency adjudicative proceedings (12 U.S.C. § 3413(f); or pursuant to a grand jury subpoena or court order (12 U.S.C. § 3413(i)); or by the Secret Service or for foreign intelligence activities (12 U.S.C. § 3414(a)).

Regulation S does not address the issue of internal procedures for federal agencies because this issue is expected to be resolved by agencies' internal audit procedures. Comments were received urging that agencies provide a uniform time limit for the submission of invoices and for prompt payment of invoices; and that agencies seek to develop and utilize a uniform invoice for payment. However, the Board regards it as beyond the scope of its responsibility to prescribe detailed internal procedures for other federal agencies to follow, except where such procedures have been developed through common agreement with and by other federal agencies.

This regulation is issued pursuant to 5 U.S.C. § 553, 12 CFR § 262.2 and in accordance with the Board's Statement of Policy Regarding Expanded Rulemaking Procedures (44 Fed. Reg. 3957). Since the regulation will reduce cost burdens to financial institutions by reimbursing them for searching for and reproducing customers' financial records as required or requested by the federal government or as authorized by the customer, and in view of the fact that the regulation must be adopted by October 1, 1979, expedited rulemaking procedures were followed in issuing this regulation, in accordance with the Board's Policy Statement. Since the Right to Financial Privacy Act requires the Board to establish, by regulation, the rates and conditions of cost reimbursement, nonregulatory alternatives were not considered during planning of these regulations.

Under the authority of section 1115 of the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3415, the Board amends Title 12 of the Code of Federal Regulations by adding a new Part 219 (to be known as Regulation S) to read as follows:

REGULATION S

PART 219--REIMBURSEMENT TO FINANCIAL INSTITUTIONS FOR ASSEMBLING OR PROVIDING FINANCIAL RECORDS

Sec.

- 219.1 Authority, Purpose and Scope
- 219.2 Definitions
- 219.3 Cost Reimbursement
- 219.4 Exceptions
- 219.5 Conditions for Payment
- 219.6 Payment Procedures
- 219.7 Effective Date

§ 219.1 AUTHORITY, PURPOSE AND SCOPE

This Part is issued by the Board of Governors of the Federal Reserve System under section 1115 of the Right to Financial Privacy Act of 1978 (the "Act") (12 U.S.C. § 3415). It establishes the rates and conditions for reimbursement of reasonably necessary costs directly incurred by financial institutions in assembling or providing customer financial records to a government authority.

§ 219.2 DEFINITIONS

For the purposes of this Part, the following definitions shall apply:

(a) "Financial institution" means any office of a bank, savings bank, card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any state or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) "Financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

(c) "Government authority" means any agency or department of the United States, or any officer, employee or agent thereof.

(d) "Person" means an individual or a partnership of five or fewer individuals.

(e) "Customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name. "Customer" does not include corporations or partnerships comprised of more than five persons.

(f) "Directly incurred costs" means costs incurred solely and necessarily as a consequence of searching for, reproducing or transporting books, papers, records, or other data, in order to comply with legal process or a formal written request or a customer's authorization to produce a customer's financial records. The term does not include any allocation of fixed costs (overhead, equipment, depreciation, etc.). 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.

§ 219.3 COST REIMBURSEMENT

Except as hereinafter provided, a government authority requiring or requesting access to financial records pertaining to a customer shall pay to the financial institution that assembles or provides the financial records a fee for reimbursement of reasonably necessary costs which have been directly incurred according to the following schedule:

(a) Search and processing costs. (1) Reimbursement of search and processing costs shall be the total amount of personnel direct time

incurred in locating and retrieving, reproducing, packaging and preparing financial records for shipment.

(2) The rate for search and processing costs is \$10 per hour per person, computed on the basis of \$2.50 per quarter hour or fraction thereof, and is limited to the total amount of personnel time spent in locating and retrieving documents or information or reproducing or packaging and preparing documents for shipment where required or requested by a government authority. Specific salaries of such persons shall not be included in search costs. In addition, search and processing costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search and processing costs may include 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; however, personnel time for computer search may be paid for only at the rate specified in this paragraph.

(b) Reproduction costs. (1) Reimbursement for reproduction costs shall be for costs incurred in making copies of documents required or requested.

(2) The rate for reproduction costs for making copies of required or requested documents is 15 cents for each page, including copies produced by reader/printer reproduction processes. Photographs, films, and other materials are reimbursed at actual cost.

(c) Transportation costs. Reimbursement for transportation costs shall be for (1) necessary costs, directly incurred, to transport personnel to locate and retrieve the information required or requested; and (2) necessary costs, directly incurred solely by the need to convey the required or requested material to the place of examination.

§ 219.4 EXCEPTIONS

A financial institution is not entitled to reimbursement under the Act for costs incurred in assembling or providing the following financial records or information:

(a) Security interests, bankruptcy claims, debt collection. Any financial records provided as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial institution itself or in its role as a fiduciary.

(b) Government loan programs. Financial records provided in connection with a government authority's consideration or administration of assistance to a customer in the form of a government loan, loan guaranty, or loan insurance program; or as an incident to processing

an application for assistance to a customer in the form of a government loan, loan guaranty, or loan insurance agreement; or as an incident to processing a default on, or administering, a government-guaranteed or insured loan, as necessary to permit a responsible government authority to carry out its responsibilities under the loan, loan guaranty, or loan insurance agreement.

(c) Nonidentifiable information. Financial records that are not identified with or identifiable as being derived from the financial records of a particular customer.

(d) Financial supervisory agencies. Financial records disclosed to a financial supervisory agency in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

(e) Internal Revenue summons. Financial records disclosed in accordance with procedures authorized by the Internal Revenue Code.

(f) Federally required reports. Financial records required to be reported in accordance with any federal statute or rule promulgated thereunder (such as the Bank Secrecy Act).

(g) Government civil or criminal litigation. Financial records sought by a government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the government authority and the customer are parties.

(h) Administrative agency subpoenas. Financial records sought by a government authority pursuant to an administrative subpoena issued by an administrative law judge in an adjudicatory proceeding subject to section 554 of Title 5, United States Code, and to which the government authority and the customer are parties.

(i) Identity of accounts in limited circumstances. Financial information sought by a government authority, in accordance with the Right to Financial Privacy Act procedures and for a legitimate law enforcement inquiry, and limited only to the name, address, account number and type of account of any customer or ascertainable group of customers associated (1) with a financial transaction or class of financial transactions, or (2) with a foreign country or subdivision thereof in the case of a government authority exercising financial controls over foreign accounts in the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)); the International Emergency Economic Powers Act (Title II, Public Law 95-223); or section 5 of the United Nations Participation Act (22 U.S.C. 287(c)).

(j) Investigation of a financial institution or its noncustomers. Financial records sought by a government authority in connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records or at a legal entity which is not a customer.

(k) General Accounting Office requests. Financial records sought by the General Accounting Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority.

(l) Securities and Exchange Commission requests. Until November 10, 1980, financial records sought by the Securities and Exchange Commission.

§ 219.5 CONDITIONS FOR PAYMENT

(a) Limitations. Payment for reasonably necessary, directly incurred costs to financial institutions shall be limited to material required or requested.

(b) Separate consideration of component costs. Payment shall be made only for costs that are both directly incurred and reasonably necessary. In determining whether costs are reasonably necessary, search and processing, reproduction, and transportation costs shall be considered separately.

(c) Compliance with legal process, request, or authorization. No payment shall be made until the financial institution satisfactorily complies with the legal process or formal written request, or customer authorization, except that in the case where the legal process or formal written request is withdrawn, or the customer authorization is revoked, or where the customer successfully challenges access by or disclosure to a government authority, the financial institution shall be reimbursed for reasonably necessary costs directly incurred in assembling financial records required or requested to be produced prior to the time that the government authority notifies the institution that the legal process or request is withdrawn or defeated, or that the customer has revoked his or her authorization.

(d) Itemized bill or invoice. No payment shall be made unless the financial institution submits an itemized bill or invoice showing specific details concerning the search and processing, reproduction, and transportation costs.

§ 219.6 PAYMENT PROCEDURES

(a) Notice to submit invoice. Promptly following a government authority's service of legal process or request, the government authority shall notify the financial institution that an itemized bill or invoice must be submitted for payment and shall furnish an office address for this purpose.

(b) Special notice. If a government authority withdraws the legal process or formal written request, or if the customer revokes his or her authorization, or if the legal process or request has been successfully challenged by the customer, the government authority shall promptly notify the financial institution of these facts, and shall also notify the financial institution that the itemized bill or invoice must be submitted for payment of costs incurred prior to the time that the financial institution receives this notice.

§ 219.7 EFFECTIVE DATE

This regulation shall become effective October 1, 1979.

By order of the Board of Governors, effective October 1, 1979.

(Signed) Theodore E. Allison

Theodore E. Allison
Secretary of the Board

[SEAL]