

information. Generally, these are termed Touhy regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following instructions of his or her supervisor regarding the disclosure that were issued pursuant to agency regulations. As such, an agency's Touhy regulations are the instructions agency employees are to follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

Treasury's Touhy regulations are codified in sections 1.8 through 1.12 of title 31 of the Code of Federal Regulations. These regulations provide that employees of the Departmental Offices of the Department of the Treasury may not disclose documents or information in response to a demand or other order of a court or any other authority without first being authorized to do so. The purpose of these regulations is to conserve valuable agency resources, protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government information and decision making processes.

This interim final rule revises the regulations to prescribe the factors Treasury officials should consider when deciding whether to allow disclosure of documents and information and which officials may make these decisions. This rule also makes a number of clarifying and technical amendments to the current regulations.

II. Analysis of the Interim Final Rule

Section 1.8 Scope

This section is amended to exclude references to the United States Savings Bonds Division and the United States Secret Service. The Savings Bond Division is currently a part of the Bureau of the Public Debt and the Secret Service will become a component of the Department of Homeland Security on March 1, 2003. This section also is amended to make clear that all offices and bureaus of the Department are covered by this subpart, except to the extent that the bureaus enact their own regulations governing the subject matter of a provision of this subpart.

Section 1.11 Testimony or the Production of Records in a Court or Other Proceeding

This section sets forth the policies and procedures of the Department regarding the testimony of employees as

witnesses in legal proceedings and the production or disclosure of Treasury documents for use in legal proceedings.

Paragraph (a) describes the applicability of section 1.11. It specifies that section 1.11 does not apply (1) to an employee's testimony regarding matters that are unrelated to the official business of the Department and (2) to access to records pursuant to the Freedom of Information Act, the Privacy Act, or the Trade Secrets Act. Paragraph (a) also clarifies that the procedures of section 1.11 only provide guidance for the internal operations of the Department and do not create any rights or benefits enforceable at law by a party against the United States.

Paragraph (b) defines various terms used in section 1.11.

Paragraph (c) sets forth the general policy of the Department concerning requests that employees testify or provide documents or other information in litigation. This policy provides that employees may not respond to a demand, produce any documents, provide testimony regarding any information relating to, or based upon Department documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties or official status, without the prior authorization of the General Counsel or the appropriate agency counsel.

Paragraph (d) sets forth procedures applicable to requests for testimony or the production of documents. Paragraph (d)(1) provides that requests directed at the Department for testimony by an employee of the Departmental Offices or for the production of documents are to be directed to the General Counsel of the Department. Requests for testimony by an employee of a Treasury office or bureau are to be directed to the Chief or Legal Counsel of the office or bureau.

Paragraph (d)(2) provides that subpoenas or other requests for testimony or the production of documents directed at a Department employee be served in accordance with the Federal Rules of Civil or Criminal Procedure, or applicable State procedure.

Paragraph (d)(3) provides that any request for testimony or the production of documents in litigation in which neither the Department nor the United States is a party be supported by an affidavit setting forth the nature of the litigation, describing the nature of the testimony and/or documents sought, and explaining why the testimony and/or documents are desired.

Paragraph (d)(4) provides that employees may not give testimony or produce documents in connection with

legal proceedings without the approval of agency counsel.

Paragraph (e) sets forth the factors to be considered by agency counsel when reviewing requests for testimony or records. These factors include (1) the burden on government resources, (2) applicable privileges, and (3) the potential release of classified documents. The factors enumerated in paragraph (e) are not exclusive and other relevant factors may be considered in appropriate circumstances.

Paragraph (f) provides that requests for employees to provide expert testimony shall be denied except in cases of exceptional need and when the matter is not adverse to the interests of the Department. This provision is designed to ensure that the Department's resources are not consumed by repeated requests for employee expert testimony. This provision also allows former employees who hire themselves out as experts in the subject area in which they worked while with the government to provide testimony, as long as the testimony involves only the employee's general expertise.

Paragraph (g) sets forth procedures to be followed by an employee when agency counsel determines that it is not appropriate to comply with a request for testimony or the production of documents.

Section 1.12 Regulations Not Applicable to Official Request

This section currently provides that subpart B does not apply to official requests made by other government agencies or officials, unless it appears that granting a request would be in violation of law or inimical to the public interest. The interim final rule clarifies that agency counsel should be consulted if an employee has any doubt concerning the applicability of this section to a particular request.

III. Procedural Requirements

Because this rule relates to agency management and personnel, and because it merely amends Treasury's existing regulations to more closely parallel similar regulations adopted by other Federal agencies, it is not subject to notice and public procedure pursuant to 5 U.S.C. 553(a)(2) and (b)(B). For the same reasons, a delayed effective date is not required pursuant to 5 U.S.C. 553(a)(2) and (d)(3). Nevertheless, the Department will consider any public comments on this interim final rule before issuing a final rule.

Because no notice of proposed rulemaking is required, the provisions