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OVERSEAS PRIVATE INVESTMENT CORPORATION

22 CFR Part 713

[No. TOUHY-2013]

RIN 3420-AA02

Production of Nonpublic Records and Testimony of OPIC Employees in Legal Proceedings

AGENCY: Overseas Private Investment Corporation

ACTION: Notice of Proposed Rulemaking

SUMMARY: This rule proposes revisions to the Overseas Private Investment Corporation's ("OPIC") regulations governing the production of nonpublic testimony or records for court proceedings, commonly known as Touhy regulations after Touhy v. Ragen, 340 U.S. 462 (1951).

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket Number TOUHY-2013, by one of the following methods:

- E-mail: foia@opic.gov. Include docket number TOUHY-2013 in the subject line of the message.
- Mail: Nichole Cadiente, Administrative Counsel, Overseas Private Investment Corporation, 1100 New York Avenue, N.W., Washington, D.C. 20527. Include docket number TOUHY-2013 on both the envelope and the letter.

FOR FURTHER INFORMATION CONTACT: Nichole Cadiente, Administrative Counsel, (202)336-8400, or foia@opic.gov.

SUPPLEMENTARY INFORMATION: The amendment of Part 713 clarifies that the Touhy regulations must be complied with prior to the serving of a subpoena.

In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the head of OPIC has certified that this proposed rule, as promulgated, will not have a significant economic impact on a substantial number of small entities. The proposed rule amends regulations governing the procedures for a third party to request government records and testimony in litigation, and does not economically impact Federal Government relations with the private sector. Further, under these regulations, OPIC may only charge the actual cost for records, based upon FOIA regulations in Part 706, and the fees set by the court for witness testimony. OPIC is authorized to charge actual costs for its services based on 31 U.S.C. 9701.

Executive Order 12866

OPIC is exempted from the requirements of this Executive Order per the Office of Management and Budget's October 12, 1993 memorandum. Accordingly, OMB did not review this proposed rule. However this rule was generally composed with the principles stated in §1(b) of the Executive Order in mind.

Unfunded Mandates Reform Act of 1995 (2 U.S.C. 202-05)

This proposed rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.)

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United State based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 22 CFR Part 713

Administrative practice and procedure, Courts, Government Employees, Subpoenas.

For the reasons stated in the preamble the Overseas Private Investment Corporation proposes to amend 22 CFR Part 713 as follows:

PART 713 PRODUCTION OF NONPUBLIC RECORDS AND TESTIMONY OF OPIC EMPLOYEES IN
LEGAL PROCEEDINGS

1. The authority citation for part 713 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 702, 18 U.S.C. 207; 18 U.S.C. 641; 22 U.S.C. 2199(d); 28 U.S.C. 1821.

2. Revise § 713.2 to read as follows:

§ 713.2 When does this part apply?

This part applies if you want to obtain nonpublic records or testimony of an OPIC employee for a legal proceeding. It does not apply to records that OPIC is required to release, records which OPIC discretionarily releases under the Freedom of Information Act (FOIA), records that OPIC releases to federal or state investigatory agencies, records that OPIC is required to release pursuant to the Privacy Act, 5 U.S.C. 552a, or records that OPIC releases under any other applicable authority.

3. Revise §713.3 to read as follows:

§ 713.3 How do I request nonpublic records or testimony?

To request nonpublic records or the testimony of an OPIC employee, you must submit a written request as described in §713.4 of this part to the Vice-President/General Counsel of OPIC. If you serve a subpoena on OPIC or an OPIC employee before submitting a written request and receiving a final determination, OPIC will oppose the subpoena on the grounds that you failed to follow the requirements of this part.

4. Revise § 713.5 to read as follows:

§ 713.5 When should I make my request?

Submit your request at least 45 days before the date you need the records or testimony. If you want your request processed in a shorter time, you must explain why you could not submit the request earlier and why you need such expedited processing. OPIC retains full discretion to grant, deny, or propose a new completion date on any request for expedited processing. If you are requesting the testimony of an OPIC employee, OPIC expects you to anticipate your need for the testimony in sufficient time to obtain it by deposition. The Vice-President/General Counsel may well deny a request for testimony at a legal proceeding unless you explain why you could not have used deposition testimony instead. The Vice-President/General Counsel will determine the location of a deposition, taking into consideration OPIC's interest in minimizing the disruption for an OPIC employee's work schedule and the costs and convenience of other persons attending the deposition.

5. Revise the section heading of §713.10 to read as follows:

§ 713.10 Definitions.

Nichole Cadiante,

Administrative Counsel, Department of Legal Affairs

November 22, 2013

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