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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Interpretive Letter #972**  
**September 2003**  
**12 CFR 4.31**

August 12, 2003

Thomas R. Dyer, Esq.  
Wyatt Tarrant & Combs, LLP  
1715 Aaron Brenner Drive, Suite 800  
Memphis, Tennessee 38120-4367

Subject: Union Planters Bank, N.A. v. Continental Casualty, No. 02-2332-GV (W.D. Tenn.)

Dear Mr. Dyer:

This acknowledges your telephone calls and your August 8 letter informing us, as required by OCC regulations, 12 C.F.R. § 4.37(b)(3), that defendants in the above referenced litigation have filed a Motion to use certain confidential and privileged OCC documents stemming from an OCC examination of Union Planters Bank, N.A., Memphis, Tennessee. Your letter indicates that Union Planters inadvertently produced these documents to defendants, and the bank has requested their return. The documents contain the subjective analysis and recommendations of OCC examiners.

For the reasons below, the OCC, as the bank's federal regulator, is concerned about the defendants' Motion and the bank's inadvertent production, and we ask you to convey our concerns to the court.

**First**, examination reports prepared by OCC examiners on national banks are confidential in that they are expressly exempt from the mandatory disclosure provisions of the Freedom of Information Act by virtue of 5 U.S.C. § 552(b)(8). These reports are also privileged under the bank examination privilege. As explained in detail in In Re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630 (D.C. Cir. 1992), the success of the OCC's regulation of banks is highly dependent on a candid flow of information between the bank and the OCC, and "These conditions simply could not be met as well if communications between the bank and its regulators were not privileged." 967 F.2d at 633-634. See also In re Bankers Trust Co., 61 F.3d 465, 471 (6<sup>th</sup> Cir. 1995) ("Thus, the privilege is designed to promote the effective functioning of an agency by allowing the agency and the regulated banks the opportunity to be forthright in all communications"). The bank examination privilege belongs to the OCC, First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994), and the OCC has not waived the privilege in the above referenced litigation.

**Second**, although the bank is in lawful possession of the OCC examination report and other supervisory communications, the bank is barred by federal law from producing these documents without the OCC's approval. 12 C.F.R. § 4.37(b)(1). Bank supervisory materials are "non-public OCC information" and "the property of the Comptroller," and are "loaned to the bank . . . for its confidential use only." 12 C.F.R. § 4.32(b)(2). The OCC has not given Union Planters Bank permission to produce this material to others, and the OCC has not authorized any party to this litigation to use these confidential documents.

**Third**, the defendants have not exhausted their administrative remedies with the OCC. For private litigants like defendants here, the OCC and the other federal bank regulatory agencies (Federal Reserve Board, FDIC and Office of Thrift Supervision) have promulgated regulations allowing a party to apply to the agency for access to non-public information. See 12 C.F.R. § 4.31 *et seq.* Here, the proper course of action is for defendants to exhaust their administrative remedies by seeking the OCC's approval under 12 C.F.R. § 4.31 to use the documents. To do this, defendants should write the OCC's Director of Litigation at the address in 12 C.F.R. § 4.34(a) and make the showings required by 12 C.F.R. § 4.33 (especially, showings as to relevance, availability of alternative evidence, and need). The OCC will then render a final agency decision that a federal court may review if called upon to do so. Indeed, this procedure is codified in OCC regulations:

Without OCC approval, no person, national bank or other entity, including one in lawful possession of non-public OCC information under paragraph (b)(2) of this section, may disclose information covered by this subpart in any manner, except: (A) After the requester has sought the information from the OCC pursuant to the procedures set forth in this subpart; and (B) As ordered by a Federal court in a judicial proceeding in which the OCC has had the opportunity to appear and oppose discovery.

12 C.F.R. § 4.37(b)(1). Since this procedure is available, the federal courts have required private litigants to use it in order to exhaust their administrative remedies.<sup>1</sup>

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<sup>1</sup> *Raffa v. Wachovia Corp.*, 242 F.Supp.2d 1223 (M.D. Fla. 2002) (directing plaintiff shareholders to use OCC's administrative procedures for access to non-public OCC information); *American Sav. Bank v. PaineWebber*, 210 F.R.D. 721, 722 (D. Hawaii 2001) (stating with reference to OTS regulations that "Courts, in construing regulations which control the release of official information, have held that such information should not be compelled to be produced in violation of these regulations"); *In Re First Chicago Shareholder Securities Litigation*, Civ. No. 00 C 67 (N.D. Ill. Nov. 20, 2001) (denying motion to compel bank to produce OCC examination reports while the OCC considers an administrative request); *U.S. v. Amico*, 2003 WL 1145426 (W.D.N.Y. Jan. 3, 2003) (quashing subpoena for OCC documents and directing defendant to exhaust administrative remedies); *Nat'l Union Fire Ins. Co. v. Midland Bancorp, Inc.*, 159 F.R.D. 562, 571-72 (D. Kan. 1994) ("When federal agencies promulgate official regulations, setting forth procedures to obtain information otherwise exempt from disclosure, the party seeking it may obtain it, if at all, only after following those procedures"); *Golden Pacific Bancorp v. FDIC*, 1999 U.S. Dist. LEXIS 20303, 1999 WL 1332312 (D.N.J.

Two decisions in the case of *Raffa v. Wachovia Corp.*, *supra*, which involved a national bank's attempt to retrieve an inadvertently produced OCC examination report, support this result. In the first decision, the court ordered the party in possession of the OCC information to submit an administrative request to the OCC to use the information. 242 F. Supp. 2d 1223, 1225 (M.D. Fla. 2002). The party did so, the OCC denied the request in a final agency decision, the party sought review in the same court, and the court upheld the OCC's decision. *Raffa v. Wachovia Corp.*, 2003 WL 21517778 (M.D. Fla. May 15, 2003). This is the process envisioned in 12 C.F.R. § 4.37(b)(1) and endorsed by the federal courts, and defendants should follow it here.

I appreciate your conveying our concerns to the court. If the court schedules oral argument on the defendants' Motion, please inform me or Ford Barrett, Assistant Director of our Litigation Division, at 202-874-5280, so that the OCC may be represented.

Sincerely,

/s/ *Raymond Natter*

Raymond Natter  
Deputy Chief Counsel

cc: Joe Dycus, Esq.  
Assistant U. S. Attorney

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Nov. 10, 1999) (quashing subpoena for OCC employee's testimony for failure to exhaust administrative remedies); *Frick v. Austin Bank, N.A.*, 1999 U.S. Dist. LEXIS 11493 (E.D. Tex. June 25, 1999) (directing party to use the OCC's administrative process); *In re Adelbert A. Thompson*, No. 98-11253 (Bankr. D. Vt. Apr. 26, 1999) (denying motion for Rule 2004 examination and directing debtor to submit administrative request for examination report to the OCC).