

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 792**

**RIN 3133-AD44**

**FREEDOM OF INFORMATION ACT REGULATION**

**AGENCY:** National Credit Union Administration (NCUA)

**ACTION:** Final rule.

**SUMMARY:** The NCUA Board (Board) is finalizing its interim final rule amending its Freedom of Information Act (FOIA) regulation. The FOIA Improvement Act of 2016 amended the FOIA and required agencies to review their FOIA regulations and issue certain amendments by December 27, 2016. The amendments included revised procedures for disclosing records under the FOIA, assessing fees, and notifying requestors of options for resolving disputes through the NCUA FOIA Public Liaison and the Office of Government Information Services (OGIS) within the National Archives and Records Administration. The interim final rule became effective on December 22, 2016.

This rulemaking finalizes the interim rule with minor edits for consistency and clarification.

**DATES:** This rule became effective on December 22, 2016.

**FOR FURTHER INFORMATION CONTACT:** Regina Metz, Senior Staff Attorney, or Linda Dent, Associate General Counsel, Administrative Law Section, Office of General Counsel, at 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On December 22, 2016, NCUA published an interim final rule<sup>1</sup> to revise its FOIA regulation at part 792, subpart A of the agency's regulations<sup>2</sup> in accordance with new requirements under the FOIA Improvement Act of 2016.<sup>3</sup> The interim final rule became effective on December 22, 2016. The NCUA accepted public comments, however, until January 23, 2017.

The interim final rule revised procedures for the disclosure of records, including procedures for engaging in dispute resolution through the FOIA Public Liaison and the

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<sup>1</sup> 81 FR 93792 (Dec 22, 2016).

<sup>2</sup> 12 CFR part 792.

<sup>3</sup> Pub. L. 114-185, 130 Stat. 538.

OGIS. The revisions were necessary to comply with amendments to the FOIA Improvement Act of 2016. NCUA is issuing this rulemaking to finalize the interim rule with minor wording changes for consistency and clarification.

## **II. Summary of Public Comments and Final Rule**

NCUA received two comments on the interim final rule. One was from a trade organization and one was from an institute. One comment was fully supportive of the Act, noting that the interim rule met all the technical statutory requirements. The comment, however, also urged the NCUA to exceed the requirements and continue to adopt a presumption of openness. NCUA's longstanding FOIA practices include a presumption of openness which will continue under the final rule.

In addition, the commenter believes the NCUA should post every FOIA response to its website. The FOIA and the interim final rule, in section 792.03(c), already provide that NCUA must post on its website records released in response to a FOIA request that are either: likely to be the subject of subsequent requests because of the nature of their subject matter; or records that have been requested three or more times. NCUA generally exceeds these requirements, posting on its FOIA page records requested more than once and considering each record requested for possible routine website posting. As every record requested, however, is not of interest to the general public, NCUA is adopting this section in the final rule without change.

The other commenter requested that NCUA revise its definition of “representative of the news media” in section 792.20 to be consistent with the FOIA at 5 U.S.C.

552(a)(4)(A)(ii) and also to consider additional technical matters. As a change to this definition and the other issue raised were not included in the interim final rule, NCUA will address this in an upcoming technical amendment rule. The final rule does contain minor changes to wording for consistency and clarification.

### **III. Regulatory Procedures**

#### **A. Paperwork Reduction Act**

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995,<sup>4</sup> the Board has reviewed the final rule and determined it does not contain or modify a collection of information subject to the PRA. The PRA applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden. For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. Information collected as part of an affidavit, oath, affirmation, certification, receipt, changes of address, consent, or acknowledgment, however, is not considered an information collection for purposes of the PRA.

This category is limited to those disclosures that require persons to provide or display only facts necessary to identify themselves. For example, they entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the

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<sup>4</sup> 44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1.

nature of the instrument. “Nature of the instrument” refers to a respondent’s request for materials, such as publications or other information from an agency. To facilitate such requests for information from an agency, an agency may ask requesters to describe the material or information sought in detail sufficient to describe the individual desires.

The final rule implements the FOIA Improvement Act of 2016 by amending the agency’s FOIA regulations. Because the only paperwork burden in this final rule relates to activities that are not considered to be information collections, NCUA has determined that this rule is exempt from the requirements of the PRA.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small credit unions (those under \$100 million in assets). This final rule does not impose any requirements on federally insured credit unions. Therefore, it will not have a significant economic impact on a substantial number of small credit unions and a regulatory flexibility analysis is not required. Because this final rule would affect few, if any, small entities, the Board certifies that the final rule will not have a significant economic impact on small entities.

#### C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental

federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The final rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. The Treasury and General Government Appropriations Act, 1999 - Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act of 1999.<sup>5</sup>

E. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where the Board issues a final rule as defined by Section 551 of the APA.

The Board submitted the rule to the Office of Management and Budget. It determined the rule is not a “major rule” within the meaning of the relevant sections of SBREFA.

**List of Subjects in 12 CFR Part 792**

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<sup>5</sup> Pub. L. 105-277, 112 Stat. 2681.

**Administrative practice and procedure, Credit unions, Freedom of Information, Information, Privacy, Records, System of records.**

By the National Credit Union Administration Board on June 22, 2017.

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Gerard Poliquin

Secretary of the Board

For the reasons stated above, the National Credit Union Administration amends 12 CFR part 792 as follows:

**PART 792 – REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT AND PRIVACY ACT, AND BY SUBPOENA; SECURITY PROCEDURES FOR CLASSIFIED INFORMATION**

1. Revise the authority citation for part 792 to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 552b; 12 U.S.C. 1752a(d), 1766, 1789, 1795f; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p.235; E.O. 13526, 75 FR 707, 2009 Comp. p.298.

2. In § 792.02, revise the introductory text and paragraph (d) to read as follows:

**§ 792.02 What records does NCUA make available to the public for inspection and copying?**

Except for records that are exempt from public disclosure under FOIA as amended (5 U.S.C. 552) or are promptly published and copies are available for purchase, NCUA routinely makes the following five types of records available for you to inspect and copy and in an electronic format:

\* \* \* \* \*

(d) Copies of all records, regardless of form or format, which have been released after March 31, 1997, in response to a FOIA request and which, because of the nature of their subject matter, NCUA determines have been or are likely to become the subject of subsequent requests; or records that have been requested three (3) or more times; and

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3. In § 792.03, revise the introductory text and paragraph (c) to read as follows:

**§ 792.03 How will I know which records to request?**



NCUA maintains current indices providing identifying information for the public for any matter referred to in § 792.02, issued, adopted, or promulgated after July 4, 1967. The listing of material in an index is for the convenience of possible users and does not constitute a determination that all of the items listed will be disclosed. NCUA has determined that publication of the indices is unnecessary and impractical. You may obtain copies of indices by making a request to the NCUA, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314-2387, Attn: FOIA Officer or as indicated on the NCUA Web site at [www.ncua.gov](http://www.ncua.gov). The indices are available for public inspection and copying, provided at their duplication cost, and in an electronic format. The indices are:

\* \* \* \* \*

(c) Popular FOIA Index: Records released in response to a FOIA request, that NCUA determines are likely to be the subject of subsequent requests because of the nature of their subject matter, or records that have been requested three (3) or more times. The Popular FOIA Index is available on the NCUA web site.

4. In § 792.10, revise paragraph (e) to read as follows:

**§ 792.10 What will NCUA do with my request?**

\* \* \* \* \*

(e) Upon a determination by the appropriate Information Center to comply with your initial request for records, the records will be made promptly available to you. NCUA will also advise you of the right to seek assistance from the FOIA Public Liaison. If we notify you of a denial of your request, we will include the reason for the denial. NCUA will also advise you of the right to utilize dispute resolution services offered by the FOIA Public Liaison and the Office of Government Information Services.

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5. In § 792.11, revise paragraph (a)(5) to read as follows:

**§ 792.11 What kinds of records are exempt from public disclosure?**

(a)\*\*\*

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with NCUA. This exemption preserves the existing freedom of NCUA officials and employees to engage in full and frank written or taped communications with each other and with officials and employees of other agencies. It includes, but is not limited to, inter-agency and intra-agency reports, memoranda, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within NCUA or in concert with other governmental agencies. In applying this exemption, the NCUA will not withhold records based on the deliberative process

privilege if the records were created 25 years or more before the date on which the records were requested.

6. In § 792.15, revise paragraph (b)(2) to read as follows:

**§ 792.15 How long will it take to process my request?**

\* \* \* \* \*

(b) \* \* \*

(2) Such alternative time period as mutually agreed by you and the Information Office, when NCUA notifies you that the request cannot be processed in the specified time limit. In such cases, NCUA will make available its FOIA Public Liaison and notify you of the right to seek dispute resolution services from the Office of Government Information Services.

7. In § 792.16, revise paragraph (c) to read as follows:

**§ 792.16 What unusual circumstances can delay NCUA's response?**

\* \* \* \* \*

(c) If NCUA sends you an extension notice, it will also advise you that you can either limit the scope of your request so that it can be processed within the statutory time limit or agree to an alternative time frame for processing your request. In such cases, NCUA

will make available its FOIA Public Liaison and notify you of the right to seek dispute resolution services from the Office of Government Information Services.

8. Revise § 792.17 to read as follows:

**§ 792.17 What can I do if the time limit passes and I still have not received a response?**

(a) If NCUA does not comply with the time limits under § 792.15, or as extended under § 792.16, you do not have to pay search fees; requesters qualifying for free search fees will not have to pay duplication fees. However, if NCUA has extended the time limits under § 792.16 and must review more than 5,000 pages to respond to the request, NCUA may charge you search fees (or for requesters qualifying for free search fees, duplication fees), if NCUA has discussed with you via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how you could effectively limit the scope of the request.

(b) You can seek assistance from the FOIA Public Liaison or dispute resolution services from the Office of Government Information Services. You also can file suit against NCUA because you will be deemed to have exhausted your administrative remedies if NCUA fails to comply with the time limit provisions of this subpart. If NCUA can show that exceptional circumstances exist and that it is exercising due diligence in responding to your request, the court may retain jurisdiction and allow NCUA to complete its review

of the records. You may have to pay search or duplication fees if a court has determined that exceptional circumstances exist and has extended the time limits for NCUA's response by a court order. In determining whether exceptional circumstances exist, the court may consider your refusal to modify the scope of your request or arrange an alternative time frame for processing after being given the opportunity to do so by NCUA, when it notifies you of the existence of unusual circumstances as set forth in § 792.16.

9. In § 792.28, revise the introductory text to read as follows:

**§ 792.28 What if I am not satisfied with the response I receive?**

If you are not satisfied with NCUA's response to your request, you can seek dispute resolution services from the FOIA Public Liaison and the Office of Government Information Services, and you can file an administrative appeal. Your appeal must be in writing and must be filed within 90 days from receipt of the initial determination (in cases of denials of the entire request or denials of a fee waiver or reduction), or from receipt of any records being made available pursuant to the initial determination (in cases of partial denials). In the response to your initial request, the Freedom of Information Act Officer or the Inspector General (or designee), will notify you that you may appeal any adverse determination to the Office of General Counsel. The General Counsel, or designee, as set forth in this paragraph, will:

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