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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 792

RIN 3133-AD44

REVISIONS TO THE FREEDOM OF INFORMATION ACT REGULATION

AGENCY: National Credit Union Administration (NCUA)

ACTION: Interim final rule with request for comments.

SUMMARY: The NCUA Board (Board) is revising its Freedom of Information Act (FOIA) regulation. The FOIA Improvement Act of 2016 amended the FOIA and requires agencies to review their FOIA regulations and issue certain specified amendments by December 27, 2016. Specifically, the regulatory amendments include new 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.

DATES: This interim final rule is effective [insert date of publication in the FEDERAL REGISTER]. Comments must be received on or before [insert date 30 days from date of publication in the FEDERAL REGISTER].

ADDRESSES:

You may submit comments by any of the following methods (Please send comments by one method only):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web site: <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.
- Email: Address to regcomments@ncua.gov. Include “[Your name] Comments on “Revisions to the Freedom of Information Act Regulation” in the email subject line.
- Fax: (703) 518-6319. Use the subject line described above for email.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public Inspection: All public comments are available on the agency's Web site at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in

NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an email to OGCMail@ncua.gov.

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, VA 22314, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Legal Background and Regulatory Changes

NCUA publishes its FOIA regulations at part 792, subpart A of the agency's regulations.¹ NCUA's current FOIA regulations address: 1) types of agency records; 2) their availability or exemption from release; 3) procedures for requesting access to records; 4) processing times; 5) fees; 6) appeals; and 7) handling of FOIA requests involving confidential commercial information.

The FOIA Improvement Act of 2016² (Act) was signed into law by the President on June 30, 2016. The Act consists of several amendments to the FOIA affecting FOIA administration. The Act requires the Board to review NCUA's FOIA regulations and

¹ 12 CFR part 792.

² Pub. L. 114-185, 130 Stat. 538.

revise procedures for the disclosure of records, including procedures for engaging in dispute resolution through the FOIA Public Liaison and the OGIS.

Specifically, the Act requires that NCUA must make available to the public “in an electronic format” certain information that it previously only had to make available for copying. The Act amends FOIA exemption 5 to provide that “the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” In addition, the Act prohibits NCUA from charging certain fees to FOIA requesters if it does not respond to them within 20 business days, unless it provides timely notice that unusual circumstances apply, in which case it can take up to 10 extra days, or more if there are more than 5,000 pages necessary to respond to the request. However, the Act permits NCUA to charge certain fees to FOIA requesters if a court has determined exceptional circumstances exist. Furthermore, the Act requires that NCUA must include in its written FOIA responses the right of requesters to seek assistance from the NCUA FOIA Public Liaison. Moreover, for adverse determinations, the requester will have the right to appeal the initial decision for 90 days (previously 30 days); and the right to seek dispute resolution services from the NCUA FOIA Public Liaison or the OGIS. Accordingly, the Board is making the above required regulatory changes to the FOIA regulation.

II. Regulatory Procedures

A. Interim Final Rule under the Administrative Procedure Act (APA)

The Board finds that notice-and-comment rulemaking in this instance would be impracticable and unnecessary under the APA because of: (1) the nature of the legislative directive for federal agencies to issue regulations; (2) the procedural nature of the Act which affords federal agencies limited discretion in promulgating their rules; and (3) the statutory deadlines imposed by Congress for issuing this regulation. In these circumstances, the Board finds good cause to issue an interim final rule without issuing a notice of proposed rulemaking.

Accordingly, this interim final rule is issued without prior notice. However, the Board invites comments on all aspects of the interim final rule. The interim final rule will become effective immediately upon publication in the Federal Register. The Board will review and consider all comments before issuing a final rule.

B. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995,³ the Board has reviewed the interim final rule and determined it does not contain or modify a collection of information subject to the PRA.

C. 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 interim final rule does not impose any requirements on federally insured credit unions. Therefore, it will not have a significant

³ 44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1.

economic impact on a substantial number of small credit unions and a regulatory flexibility analysis is not required. Because this interim final rule would affect few, if any, small entities, the Board certifies that the interim final rule will not have a significant economic impact on small entities.

D. 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 interim 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 interim final rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

NCUA has determined that this interim final rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act of 1999.⁴

F. Small Business Regulatory Enforcement Fairness Act

⁴ Pub. L. 105-277, 112 Stat. 2681.

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 has submitted this interim final rule to the Office of Management and Budget for it to determine whether it is a “major rule” within the meaning of the relevant sections of SBREFA.

List of Subjects in 12 CFR Part 792

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

By the National Credit Union Administration Board on December 15, 2016.

Gerald S. 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

* * * * *

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. 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 the requester 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 the requester 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)***

(1)***

(2)***

(3)***

(4)***

(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) * * *

(1) * * *

(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 the requester 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 the requester of the right to seek dispute resolution services from the Office of Government Information Services.

8. In §792.17, revise the section to read as follows:

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

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 more than 5,000 pages are necessary 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.

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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