

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 C.F.R. Part 792

RIN 3133-AD44

**REVISIONS FOR THE FREEDOM OF INFORMATION ACT AND PRIVACY
ACT REGULATIONS**

AGENCY: National Credit Union Administration

ACTION: Final Rule

SUMMARY: The NCUA Board is amending its Freedom of Information Act (FOIA) and Privacy Act regulations. The final rule reflects recent amendments to the FOIA addressing fee practices, time limits for complying with requests, and new reporting requirements. The changes to the Privacy Act provisions reflect the agency's efforts to clarify the procedures whereby individuals may obtain notification of whether an NCUA system of records contains information about the individual and how to access or amend a record.

DATES: This rule is effective [Insert date 30 days after published in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Linda K. Dent, Staff Attorney, Office of General Counsel, at (703) 518-6540.

SUPPLEMENTARY INFORMATION:

Background

On April 17, 2008, the NCUA Board requested comment on a proposed rule to update and clarify the procedures for requesting access to agency records and other rights and requirements under the FOIA and Privacy Act provisions of part 792. 73 FR 22,289 (April 25, 2008). In addition to incorporating the 2007 FOIA amendments into the rule, the proposed rule added definitions, revised terminology and otherwise clarified provisions implementing the Privacy Act. Technical corrections also were made to both sections.

Discussion

NCUA's policy is to review a third of its regulations periodically to "update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions." Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing Government Regulations. The proposed changes were the result of such a review. The changes also coincided with recent statutory amendments

to FOIA and NCUA's updating of its Systems of Records Notice under the Privacy Act, periodically published in the Federal Register.

Summary of Comments

The NCUA Board received two comments in general support of the proposed rule. In response to proposed language clarifying when a FOIA request is considered received, one commenter urged the agency to make reasonable efforts to promptly notify a requester when a request is incorrectly addressed or otherwise deficient; forward incorrectly addressed requests to the proper Information Center; or if possible, disregard deficiencies having no impact on the ability to process the response. The amended language simply explains what conditions must be met to start the clock for the statutory processing period. As a general practice, Information Center staff communicates with requesters to obtain missing information and to clarify requests to enable their timely processing. Similarly, FOIA requests sent to the wrong Information Center are forwarded to the correct Information Center.

The commenter also suggested a deceased individual's records should receive protection consistent with that of a living individual and suggested the agency require a requester to obtain approval from the decedent's estate before releasing any records. As explained in the Department of Justice's 2007 FOIA Guide, there is a "longstanding FOIA rule that death extinguishes one's privacy rights." USDOJ: OIP: Freedom of Information Act Guide, March 2007, page

566. Whether records pertaining to a deceased individual are actually released requires an evaluation of the privacy interests at issue in such a release, which may include surviving family members' right to personal privacy.

The other commenter questioned eliminating the ability to submit Privacy Act requests for records via telephone, believing the agency should facilitate all forms of electronic requests irrespective of how made. The proposed change does not eliminate a requester's ability to submit requests by facsimile or e-mail. The Board has added clarifying language to the procedures and requirements provisions to reflect this fact.

Regulatory Procedures

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board has determined the final rule does not contain a collection of information subject to the PRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under \$10 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.

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.

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, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

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 September 25, 2008.

Mary Rupp

Secretary of the Board

For the reasons stated in the preamble, the National Credit Union Administration amends 12 CFR part 792 as set forth below:

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

1. The authority citation for part 792 continues 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. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p.333.

2. In §792.03, revise the fourth sentence of the introductory text and the last sentence of paragraph (c) to read as follows:

§ 792.03 How will I know which records to request?

* * * 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. * * *

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(c) * * * The Popular FOIA Index is available on the NCUA web site.

3. In §792.04, revise paragraph (a) to read as follows:

§ 792.04 How can I obtain these records?

* * * * *

(a) You may obtain copies of the records referenced in §792.02 by obtaining the index referred to in §792.03 and following the ordering instructions it contains, or by making a written request to NCUA, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314– 3428, Attn: FOIA Officer or as indicated on the NCUA web site.

* * * * *

4. In §792.07, revise the first sentence of paragraph (a) and paragraph (b) to read as follows:

§ 792.07 Where do I send my request?

(a) You must send your written request to one of NCUA's Information Centers. * * *

(b) If you are seeking any NCUA record, other than those maintained by the Office of Inspector General, you should send your request to NCUA, Office of the General Counsel, 1775 Duke Street, Alexandria, Virginia 22314–3428, Attn: FOIA Officer or as indicated on the NCUA web site at www.ncua.gov.

* * * * *

5. In §792.08, revise the introductory text and revise paragraph (a) to read as follows:

§ 792.08 What must I include in my request?

Until an Information Center receives your FOIA request, it is not obligated to search for responsive records, meet time deadlines, or release any records. A request will not be considered received if it does not include all of the items in paragraphs (a) through (c) of this section.

(a) Your request must be in writing and include the words "FOIA REQUEST" on both the envelope and request letter. The request letter must also include your name, address and a telephone number where you can be reached during

normal business hours. If you would like us to respond to your FOIA request by electronic mail (e-mail), you should include your e-mail address.

* * * * *

6. In §792.10, revise the second sentence of paragraph (a), the last sentence of paragraph (b) and the second sentence of paragraph (e) to read as follows:

§ 792.10 What will NCUA do with my request?

(a) * * * The date of receipt for any request, including one that is addressed incorrectly or is forwarded to NCUA by another agency, is the earlier of the date the appropriate Information Center actually receives the request or 10 working days after either of NCUA’s Information Centers receives the request.

(b) * * * All other requests will be handled under normal processing procedures in the order they were received.

* * * * *

(e) * * * If we notify you of a denial of your request, we will include the reason for the denial.

* * * * *

7. In §792.11, revise paragraph (a)(6) by removing the first sentence and adding three sentences in its place to read as follows:

§ 792.11 What kind of records are exempt from public disclosure?

(a) * * *

(6) Personnel, medical, and similar files (including financial files) pertaining to another person, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy without the subject person's written consent or proof of death. Written consent consists of a written statement by the subject person, authorizing the release of the information to you, and including either the subject person's notarized signature or a declaration made under penalty of perjury that the statement is true and correct. Proof of death consists of evidence that the subject of your request is deceased -- such as a death certificate, a newspaper obituary, or some comparable proof of death. * * *

* * * * *

8. In §792.15, revise paragraph (a) to read as follows:

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

* * * * *

(a)(1) Where the running of such time is suspended while:

(i) The Information Center awaits additional information from the requester. A suspension of time for this purpose may occur only once during the processing period; and

(ii) The Information Center clarifies with the requester issues regarding the payment of fees pursuant to §792.26.

(2) The Information Center's receipt of the requester's response to the request for additional information or clarification ends the tolling period;

* * * * *

9. 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?

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. 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. 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.

10. In §792.18, revise the first sentence of paragraph (b) to read as follows:

§ 792.18 What if my request is urgent and I cannot wait for the records?

* * * * *

(b) In response to a request for expedited processing, the Information Center will notify you of the determination within ten working days of receipt of the request.

* * *

* * * * *

11. In §792.19, revise paragraph (c)(1) to read as follows:

§ 792.19 How does NCUA calculate the fees for processing my request?

* * * * *

(c) * * *

(1) The per-page fee for paper copy reproduction of a document is \$.10;

* * * * *

12. In §792.27, revise paragraphs (a)(1) through (a)(4) to read as follows:

§ 792.27 Can fees be reduced or waived?

* * * * *

(a) * * *

(1) Whether the subject of the requested records concerns identifiable operations or activities of the government, with a connection that is direct and clear;

(2) Whether the disclosable portions of the requested records are meaningfully informative about government operations and activities in order to be likely to contribute to an understanding of government operations or activities. Information already in the public domain, either in a duplicate or substantially identical form where nothing new would be added to the public's understanding, would not be meaningfully informative;

(3) Whether disclosure of the requested information will contribute to public understanding, meaning a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. Representatives of the news media are presumed to satisfy this consideration; and

(4) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The level of public understanding before disclosure must be enhanced by the disclosure to a significant extent.

* * * * *

13. In §792.28, revise the first and third sentences of paragraph (a), and paragraph (c), to read as follows:

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

* * * * *

(a) Make a determination with respect to any appeal within 20 working days after the receipt of such appeal. * * * Where you do not address your appeal to the General Counsel, the time limitations stated above will be computed from the date of receipt of the appeal by the General Counsel.

* * * * *

(c) Address your appeal to NCUA, Office of General Counsel – FOIA APPEAL, 1775 Duke Street, Alexandria, VA 22314-3428. The words “FOIA APPEAL” should appear on the envelope and in the letter. Failure to address an appeal properly may delay commencement of the time limitation stated in paragraph (a) of this section, to take account of the time reasonably required to forward the appeal to the Office of General Counsel.

14. Amend subpart E by removing the term “NCUA official” wherever it appears and adding in its place the term “system manager.”

15. In §792.53, add new paragraphs (g), (h) and (i) to read as follows:

§ 792.53 Definitions.

* * * * *

(g) “Notice of Systems of Records” means the annual notice published by NCUA in the Federal Register informing the public of the existence and character of the systems of records it maintains. The Notice of Systems of Records also is available on NCUA’s website at www.ncua.gov.

(h) “System manager” means the NCUA official responsible for the maintenance, collection, use or distribution of information contained in a system of records.

The system manager for each system of records is provided in the Federal Register publication of NCUA’s annual systems of records notice.

(i) “Working day” means Monday through Friday excluding legal public holidays.

16. Revise §792.54 to read as follows:

§ 792.54 Procedures for requests pertaining to individual records in a system of records.

(a) Individuals desiring to know if a system of records contains records pertaining to them, and individuals requesting access to records in a system of records pertaining to them should submit a written request to the appropriate system manager as identified in the Notice of Systems of Records. An individual who does not have access to the Federal Register and who is unable to determine the appropriate system manager to whom to submit a request may submit a request to the Privacy Officer, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, in which case the request will be referred to the appropriate system manager.

(b) Individuals requesting notification of, or access to, records should include the words “PRIVACY ACT REQUEST” on both the letter and, as appropriate, the envelope, cover document or subject line; describe the record sought; the approximate dates covered by the record; and, the systems of record in which

records are thought to be included. Individuals must also meet the identification requirements in §792.55.

17. In §792.55, revise paragraphs (a)(1) through (a)(3) and (c) to read as follows:

§ 792.55 Times, places, and requirements for identification of individuals making requests and identification of records requested.

(a) * * *

(1) Individuals appearing in person, if not personally known to the system manager responding to the request, must present a single document bearing a photograph (such as a passport or identification badge) or two items of identification which do not bear a photograph but do bear both a name and address (such as a driver's license or voter registration card);

(2) Individuals submitting requests by mail or written electronic form, such as facsimile or e-mail, may establish identity by a signature, address, date of birth, employee identification number if any, and one other identifier such as a photocopy of driver's license or other document. If inadequate identifying information is provided, the system manager responding to the request may require further identifying information before any notification or responsive disclosure.

(3) Individuals appearing in person or submitting requests by mail or written electronic form, who cannot provide the required documentation or identification,

may provide an unsworn declaration subscribed to as true under penalty of perjury.

* * * * *

(c) A record may be disclosed to a representative of an individual to whom the record pertains provided the system manager receives written authorization from the individual who is the subject of the record.

* * * * *

18. In §792.57, revise paragraph (b) to read as follows:

§ 792.57 Special procedures: Information furnished by other agencies; medical records.

* * * * *

(b) Medical records may be disclosed on request to the individuals to whom they pertain unless disclosing the medical information directly to the requesting individual could have an adverse effect on the individual. Where medical information is potentially adverse to the requesting individual, the system manager responsible may advise the requesting individual that the medical records will be transmitted only to a physician designated in writing by the individual.

19. In §792.58, revise paragraph (a) and the second sentence of paragraph (b) to read as follows:

§ 792.58 Requests for correction or amendment to a record; administrative review of requests.

(a) An individual may request amendment of a record concerning that individual by submitting a written request, either in person or by mail, to the system manager identified in the Notice of Systems of Records. The words “PRIVACY ACT – REQUEST TO AMEND RECORD” should be written on the letter and the envelope. The request must describe the system of records containing the record sought to be amended, indicate the particular record involved, the nature of the correction sought, and the justification for the correction or amendment.

An individual who does not have access to NCUA’s Notice of Systems of Records, and to whom the appropriate address is otherwise unavailable, may submit a request to the Privacy Act Officer, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia, 22314–3428, in which case the request will then be referred to the appropriate system manager. The date of receipt of the request will be determined as of the date of receipt by the system manager.

(b) * * * The appropriate system manager will promptly (under normal circumstances, not later than 30 working days after receipt of the request) advise the individual that the record will be amended or corrected, or inform the individual of rejection of the request to amend the record, the reason for the rejection, and the procedures established by §792.59 for the individual to request a review of that rejection.

20. In §792.59, revise the second sentence of paragraph (a) and the first two sentences of paragraph (c) to read as follows:

§ 792.59 Appeal of initial determination.

(a) * * * Appeals must be addressed to the Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428 with the words “PRIVACY ACT – APPEAL” written on the letter and the envelope.* * *

* * * * *

(c) If an appeal under this section is denied in whole or in part, an individual may file a statement of disagreement concisely stating the reason(s) for disagreeing with the denial for amendment or correction, and clearly identifying each part of any record that is disputed. The statement must be sent within 30 working days of the date of receipt of the notice of General Counsel’s refusal to authorize amendment or correction, to the General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.* * *

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21. In §792.60, revise paragraph (j) read as follows:

§ 792.60 Disclosure of record to person other than the individual to whom it pertains.

* * * * *

(j) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accountability Office;

* * * * *

22. In §792.61, revise the first sentence of paragraph (a) to read as follows:

§ 792.61 Accounting for disclosures.

(a) Each system manager identified in the “Notice of Systems of Records” must establish a system of accounting for all disclosures of information or records under the Privacy Act made outside NCUA.* * *

* * * * *

23. In §792.63, revise paragraphs (a), (b)(1), and (b)(4), to read as follows:

§ 792.63 Collection of information from individuals: information forms.

(a) The system manager for each system of records is responsible for reviewing all forms developed and used to collect information from or about individuals for incorporation into the system of records.

(b) * * *

(1) To ensure that no information concerning religion, political beliefs or activities, association memberships (other than those required for a professional license), or the exercise of other First Amendment rights is required to be disclosed unless such requirement of disclosure is expressly authorized by statute or by the

individual about whom the record is maintained, or unless pertinent to and within the scope of any authorized law enforcement activity;

* * * * *

(4) To ensure that the form or accompanying statement clearly indicates to the individual the effects on him or her, if any, of refusing to provide some or all of the requested information; and

* * * * *

24. In §792.66, revise paragraphs (a) and (b)(2), add four new sentences to the end of paragraph (b)(3), and add four new sentences to the end of paragraph (b)(4) to read as follows:

§ 792.66 Exemptions.

(a) NCUA maintains several systems of records that are exempted from some provisions of the Privacy Act. The system number and name, description of records contained in the system, exempted provisions and reasons for exemption are as follows:

(b) * * *

(2) System NCUA–8, entitled, “Investigative Reports Involving Any Crime or Suspicious Activity Against a Credit Union, NCUA,” consists of investigatory or enforcement records about individuals suspected of involvement in violations of laws or regulations, whether criminal or administrative. These records are maintained in an overall context of general investigative information concerning

crimes against credit unions. To the extent that individually identifiable information is maintained for purposes of protecting the security of any investigations by appropriate law enforcement authorities and promoting the successful prosecution of all actual criminal activity, the records in this system are exempted, pursuant to section k(2) of the Privacy Act (5 U.S.C. 552a (k)(2)), from sections (c)(3), (d), (e)(1), (e)(2), (e)(4)(G), (e)(4)(H), (f), and (g) The records in this system are also exempted pursuant to section (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), from sections (c)(3), (d), (e)(1), (e)(2), (e)(4)(G), (e)(4)(H), (f), and (g). Where possible, information that would identify a confidential source will be extracted or summarized in a manner that protects the source and the summary or extract will be provided to the requesting individual.

(3) * * * NCUA need not make an accounting of previous disclosures of a record in this system of records available to its subject, and NCUA need not grant access to any records in this system of records by their subject. Further, whenever individuals request records about themselves and maintained in this system of records, the NCUA will advise the individuals only that no records available to them pursuant to the Privacy Act of 1974 have been identified. However, if review of the record reveals that the information contained therein has been used or is being used to deny the individuals any right, privilege or benefit for which they are eligible or to which they would otherwise be entitled under federal law, the individuals will be advised of the existence of the information and will be provided the information, except to the extent disclosure would identify a confidential source. Where possible, information which would

identify a confidential source will be extracted or summarized in a manner which protects the source and the summary or extract will be provided to the requesting individual.

(4) * * * NCUA need not make an accounting of previous disclosures of a record in this system of records available to its subject, and NCUA need not grant access to any records in this system of records by their subject. Further, whenever individuals request records about themselves and maintained in this system of records, the NCUA will advise the individuals only that no records available to them pursuant to the Privacy Act of 1974 have been identified. However, if review of the record reveals that the information contained therein has been used or is being used to deny the individuals any right, privilege or benefit for which they are eligible or to which they would otherwise be entitled under federal law, the individuals will be advised of the existence of the information and will be provided the information, except to the extent disclosure would identify a confidential source. Where possible, information that would identify a confidential source will be extracted or summarized in a manner which protects the source and the summary or extract will be provided to the requesting individual.

* * * * *

25. In §792.69, revise paragraph (a) to read as follows:

§ 792.69 Training and employee standards of conduct with regard to privacy.

(a) The Director of the Office of Human Resources, with advice from the Senior Privacy Act Officer, is responsible for training NCUA employees in the obligations imposed by the Privacy Act and this subpart.

* * * * *