

SUPPORTING STATEMENT
For a Collection of Information by the National Credit Union Administration
Production of Non-public Records and Testimony
of Employees in Legal Proceedings (Touhy Request)
OMB Number 3133-0146

A. JUSTIFICATION

1. Circumstances Necessitating the Collection of Information

12 CFR Part 792, Subpart C, requires anyone requesting NCUA non-public records for use in legal proceedings, or the testimony of NCUA personnel in legal proceedings to provide NCUA with information regarding the requester's grounds for the request. This process is also known as a "Touhy Request" (see U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951)). The information collected will help the NCUA decide whether to release non-public records or permit employees to testify in legal proceedings.

NCUA regulations also require an entity or person in possession of NCUA records to notify the NCUA upon receipt of a subpoena for those records. The NCUA requires this notice to protect its records and, when necessary, intervene in litigation or file an objection to the disclosure of its confidential information in the appropriate court or tribunal. Case law establishes the NCUA's entitlement to receive this notice.

The following is a discussion of the NCUA's basis in statutory and case law for maintaining and, in certain, appropriate circumstances, releasing NCUA non-public records for use in legal proceedings and authorizing testimony of NCUA personnel, and for prescribing its regulatory procedures.

The NCUA maintains the non-public nature of certain information pursuant to the bank examination exemption of the Freedom of Information Act (FOIA) [5 U.S.C. 522 (b)(8)]; judicial interpretation of the bank examination privilege (see Schreiber v. Society for Savings Bancorp, Inc., 11 F.3d 217 (D.C. Cir. 1993); In Re: Subpoena Served Upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System, 967 F.2d 630 (D.C. Cir. 1992) (discussing the bank examination privilege, which is analogous to the examination exemption under FOIA); and other agency privileges, such as the deliberative process and attorney-client privileges.

Accordingly, and pursuant to 5 U.S.C. 301, the NCUA has established procedures, in 12 CFR Part 792, Subpart C, for the production of non-public NCUA records for use in legal proceedings and testimony of NCUA personnel in legal proceedings. See Moore v. Armour Pharmaceutical Co., 927 F.2d 1194 (11th Cir. 1991). In addition, the regulation ensures that the NCUA will receive notice of requests and subpoenas for non-public NCUA information in possession of third parties as was considered "advisable if not

necessary” by the United States Court of Appeals for the Sixth Circuit in In re Bankers Trust, 61 F.3d 465, 470 (6th Cir. 1995).

2. Purpose and Use of the Information Collection

The NCUA will use the information to process requests for non-public records and testimony and to determine if sufficient grounds exist for NCUA to release the requested records or authorize the requested testimony.

3. Consideration Given to Information Technology

NCUA interprets the governing regulation, 12 CFR 792.45, as permitting the use of email to submit Touhy requests, provided they are properly addressed to the General Counsel or to the Inspector General and received by the respective office within NCUA.

4. Duplication

This information collection does not duplicate any other information already collected.

5. Reducing Burden on Small Entities

The requirement to file a request and the information required in such a request do not vary by the size of the entity making the request. All of the required information is necessary for the NCUA to make a determination whether to provide the requested information or testimony.

6. Consequences of Not Conducting Collection

The information required by the regulation is necessary for NCUA to make informed decisions regarding the release of non-public information or authorizing the requested testimony. In the absence of this information such decisions would run the risk of being made arbitrarily and without full consideration of the potential harm from such disclosures.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

None – the collection is consistent with the guidelines.

8. Consultations Outside the Agency

Notice of the proposed information collection and request for public comment was published in the Federal Register with a 60-day comment period on August 1, 2016 at 81 FR 50564. No public comments were received.

9. Payment or Gifts.

NCUA will not provide any payment or gift to respondents.

10. Confidentiality

There are no assurances of confidentiality other than those provided by law.

11. Questions of a Sensitive Nature

There are no questions of a sensitive nature.

12. Burden of Information Collection

The NCUA estimates that it will take an average of two hours to prepare a written request. The NCUA currently receives less than twenty requests per year so the total annual burden is estimated to be no more than 40 hours. Assuming a loaded wage rate of \$75 per hour, we estimate the total burden to respondents to be less than \$3,000 per year.

13. Capital, Startup, and Operation and Maintenance Costs

None – requests will only be submitted by parties engaged in litigation. It is anticipated that requestors will not need to make recurring requests. For that reason, requestors should not incur capital, startup or operation and maintenance costs.

14. Cost to the Federal Government

Each request received results in a review by NCUA of whether it appropriate to produce the information requested. Documents must be located, reproduced and shared. In some cases in person testimony is required. We conservatively estimate that this takes eight hours per request – 160 hours annually. This results in an estimated annual cost to the Federal Government of \$12,800.

15. Reason for Change in Burden

This is an extension, without change, to a previously approved collection.

16. Information Collection Planned for Statistical Purposes

There are no plans to publish results.

17. Display of OMB Expiration Date

There are no traditional collection instruments associated with this collection of information (e.g. forms). The OMB control number and expiration date associated with this PRA submission will be displayed on the Federal government's electronic PRA docket at www.reginfo.gov.

18. Exceptions to Certification

This collection complies with the requirements in 5 CFR 1320.9.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not involve statistical methods.