

National Credit Union Administration
SUPPORTING STATEMENT

Production of Non-public Records and Testimony of Employees in Legal Proceedings
(Touhy Request), 12 CFR Part 792 Subpart C
OMB Number 3133-0146

A. JUSTIFICATION

1. Circumstances that make the collection of information necessary.

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 collection to process requests for non-public records and testimony of NCUA personnel, and to determine if sufficient grounds exist for NCUA to release the requested records or authorize the requested testimony.

3. Use of 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 of Information.

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

5. Efforts to reduce 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. Efforts to consult with persons outside the agency.

A 60-day notice was published in the *Federal Register* on July 29, 2019 at 82 FR 36625, soliciting comments from the public. No public comments were received in response to this notice.

9. Payment or gifts to respondents.

There is no intent by NCUA to provide payment or gifts for information collected.

10. Assurance of confidentiality.

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

11. Questions of a sensitive nature.

No questions of a sensitive nature are asked. Personally Identifiable Information (PII) is not collected.

12. Burden of Information Collection

The NCUA estimates that it takes an average of four hours to prepare a written request. The NCUA currently receives approximately twenty requests per year so the total annual burden is estimated to be no more than 80 hours.

No. of Respondents	No. of Responses per Respondent (Frequency)	Total Annual Response	Hours per Response	Total Annual Burden
20	1	20	4	80

Based on a wage rate of \$100 per hour, the total cost to respondents is \$8,000.

13. Capital startup or ongoing 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. Annualized costs to Federal government.

Each request received results in a review by NCUA of whether it's 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. Changes 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.