

counterparty or by the counterparty to the credit union. In either case, the writing must be sent reasonably contemporaneously with the parties' agreement to enter into the specific QFC transaction. The writing need not be signed unless otherwise required by applicable non-insolvency law;

2. The credit union, by corporate action, was authorized under applicable non-insolvency law to enter into the QFC. A credit union will be deemed to have taken such corporate action if the counterparty has relied in good faith either on a resolution (or extract thereof) provided by the credit union's board of director's secretary or on a written representation (whether in a master agreement or otherwise) from an officer of the level of vice president or higher, as to the credit union's authority; and

3. The writing (or a copy thereof) evidencing the QFC and the evidence of authority must be maintained by the credit union in its official books and records. However, the counterparty may, by appropriate evidence (including the production of copies maintained by the counterparty) establish the existence of the writing and the evidence of authority.

The NCUA will apply the above criteria and the Act's requirements in a manner generally consistent with reasonable business trading practices in the QFC markets, in view of Congress's recognition in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) of the important role QFCs play in providing liquidity and portfolio and risk management to depository institutions. Without limiting the criteria set forth above, NCUA will look to the totality of the circumstances surrounding such transactions including the counterparty's good faith attempt to comply with all reasonable trading practices and requirements, any non-insolvency law requirements, and the requirements stated herein.

By the National Credit Union Administration Board on October 23, 2003.

**Becky Baker,**

*Secretary of the Board.*

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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 792

#### Freedom of Information Act; Implementation

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

**ACTION:** Direct final rule with request for comments.

**SUMMARY:** NCUA is amending its regulation implementing the Freedom of Information Act (FOIA) to reflect changes in its internal procedures for responding to FOIA requests and to provide the public with notice of the cut-off date used by the agency when searching for records responsive to FOIA requests.

**DATES:** *Effective Date:* This rule is effective December 29, 2003, without further action, unless adverse comment is received by December 1, 2003. If NCUA receives adverse comments, it will publish a timely withdrawal of the rule in the **Federal Register**.

**ADDRESSES:** Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. Fax comments to (703) 518-6319. E-mail comments to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Please send comments by one method only.

**FOR FURTHER INFORMATION CONTACT:**

Dianne M. Salva, Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:** NCUA is changing its FOIA regulation, which establishes agency procedures for requesting access to NCUA records, to provide for centralized processing of FOIA requests. Previously, the rule instructed the public to submit FOIA requests to one of nine offices where they believed the records were located. This de-centralized system required FOIA requesters, some of whom were not familiar with NCUA record keeping practices, to determine where NCUA stored records. Now, the rule provides for just two offices where the public can choose to direct their FOIA requests. If requesters seek records of the Office of Inspector General (OIG), they will submit a request to the OIG. If requesters seek any other type of NCUA record, they will submit a single request to the Central Office, which will search all relevant offices for the records.

The rule also instructs FOIA requesters who are interested in receiving their FOIA responses by electronic mail (e-mail) to include their e-mail address with their requests. This will enable NCUA to process FOIA requests more efficiently and provide more timely FOIA responses.

Finally, the rule provides the public with notice of NCUA's policy concerning the search cut-off date for records responsive to a FOIA request.

The U.S. Department of Justice (DOJ), which provides guidance to agencies throughout the federal government on FOIA compliance, recommends that agencies use the date they begin to search for responsive records as the cut-off beyond which no later records are considered within the scope of the request. *Freedom of Information Guide and Privacy Act Overview*, U.S. Department of Justice, May 2002, p. 47. Although in some cases, for administrative reasons, agencies may use another search cut-off date, such as the date of the request, recent case law establishes a general rule that agencies should include all records in existence as of the date the search begins. *Public Citizen v. U.S. Department of State*, 276 F. 3d 634 (D.C. Cir. 2002).

In determining what records are responsive to a FOIA request, NCUA has generally used the date it begins its search as a search cut-off date. The NCUA Board (the Board) finds that standard to be most reasonable. The Board also recognizes that in some cases there may be a good reason, such as administrative efficiency, for using a different search cut-off date. This rule, then, provides that NCUA will generally use the date it begins its search as the search cut-off date. If it uses another date, it will advise the FOIA requester.

Under the Administrative Procedures Act (APA), an agency need not comply with the notice and comment procedures for rulemaking when the rule involved is one of agency organization, procedure, or practice. 5 U.S.C. 553(b)(3)(A). These revisions to NCUA's FOIA regulation deal with internal agency practices and policies for receiving and processing FOIA requests. Accordingly, the Board finds that, under the APA, it is unnecessary to solicit public comment before making the rule effective. 5 U.S.C. 553(b)(3)(A). In an effort to provide the public with full opportunity to participate in this change to NCUA's rules, however, the Board has determined to publish this rule as a direct final rule and accept public comments for a period of 30 days prior to the effective date. The Board encourages interested parties to submit comments. If NCUA does not receive adverse comments, the rule becomes effective on the date noted above.

#### Regulatory Procedures

##### *Paperwork Reduction Act*

This regulation will impose no additional information collection, reporting or recordkeeping requirements.