

identified hazards is achieved. In order to provide appropriate opportunities for public input on guidance relating to nuclear safety rules, the policy provides that the Department will: (1) make such guidance documents developed by DOE readily available to the public when issued; (2) publish notice of their availability in the **Federal Register**; and (3) accept comments from the public concerning guidance documents.

- I. Implementation Guides
- II. Radiological Technical Standard
- III. DOELAP Technical Standards

### I. Implementation Guides

DOE is proposing to issue a set of draft revisions of implementation guides and three technical standards to implement part 835 as proposed to be amended. Thirteen of the draft guides are available through the DOE Directives System on the Internet at [www.explorer.doe.gov/](http://www.explorer.doe.gov/). These draft guides are also available through the Office of Worker Protection Programs and Hazards Management web site for part 835 at <http://tis-nt.doe.eh.gov/wpphm/835/835.htm>. The draft implementation guides are:

- DOE G 441.1-1 Radiation Protection Program
- DOE G 441.2-1 Occupational Radiation Protection ALARA Program
- DOE G 441.3-1 Internal Dosimetry
- DOE G 441.4-1 External Dosimetry
- DOE G 441.5-1 Radiation Generating Devices (RGDs)
- DOE G 441.6-1 Evaluation and Control of Fetal Exposures
- DOE G 441.7-1 Radiation Detection Instrumentation Calibration
- DOE G 441.8-1 Workplace Air Monitoring
- DOE G 441.9-1 Radioactive Contamination Control and Measurement
- DOE G 441.10-1 Posting and Labeling Implementation Guide
- DOE G 441.10-A Posting and Labeling Guide—Appendix
- DOE G 441.11-1 Occupational Radiation Protection Recordkeeping
- DOE G 441.12-1 Radiation Safety Training
- DOE G 441.13-1 Sealed Radioactive Source Accountability

### II. Radiological Control Standard

A draft radiological control technical standard is also available for comment. In support of the proposed amendment to part 835, DOE has converted the previous "Radiological Control Manual" (DOE/EH-0256T, April 1994) ("RadCon Manual") into a "Radiological Control Standard," DOE Technical Standards Program project number SAFT-0039. This draft document provides guidance

on acceptable approaches for implementing the overall radiation protection program for DOE activities involving ionizing radiation. For comparison purposes, this draft DOE standard should only be compared against the latest issue of the Radiological Control (RadCon) Manual, Revision 1, April 1994. A draft revised version of the April 1994 RadCon Manual was distributed for comment in mid-1995 through DOE's Directives System in conjunction with the review of the new DOE Order 470, but the revision was never issued as a final document due to the anticipated amendment of part 835. The new draft technical standard, SAFT-0039, is available on the Internet at <http://apollo.osti.gov/html/techstds/tsdrafts/tsdrafts.html>.

### III. DOELAP Technical Standards

DOELAP currently offers accreditations only for whole body personnel dosimetry programs. In the future, DOELAP plans to offer additional accreditation programs for bioassay laboratories and extremity dosimetry programs. Since the administrative aspects of all these programs are generic, DOELAP has begun consolidating this information into a single document, draft technical standard, "Department of Energy Laboratory Accreditation Program Administration," DOE Technical Standard Program project number SAFT-0062. This document proposes the accreditation process, including references to other DOELAP documents for the program specific performance criteria, on-site assessments, and granting of accreditation and exceptions to DOELAP. With the publication of American National Standards Institute Standard N13.30-1996, "Performance Criteria for Radiobiassay," the Department has incorporated the requirement into the proposed amendment of 10 CFR 835 for the accreditation of bioassay laboratories. The new DOELAP program is described in the draft technical standard, "Department of Energy Laboratory Accreditation Program for Radiobiassay," project number SAFT 0049. It is the intent that when this program is initiated, facilities will have a full accreditation cycle (3 years) in which to have their programs accredited. Both draft Standards have been distributed within the DOE community for formal comments.

Issued in Washington, DC, on March 31, 1997.

**Peter N. Brush,**

*Principal Deputy Assistant Secretary,  
Environment, Safety and Health.*

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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 792

#### Production of Nonpublic Records and Testimony of NCUA Employees in Legal Proceedings

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The NCUA proposes to amend its rules regarding subpoenas seeking nonpublic records or the testimony of NCUA employees. The proposed rule provides procedures, requirements and information on how the NCUA will handle these matters and expressly prohibits any disclosure or testimony except as provided by the proposed rule. The effect of the rule will be, among other benefits, to insure an efficient use of NCUA resources, promote uniformity in decisions, protect confidential information, and provide guidance to parties. The proposed rule will also amend the current rule regarding release of NCUA records that are exempt from disclosure under the Freedom of Information Act to conform with the procedures provided in this proposed rule.

**DATES:** Comments must be received on or before June 23, 1997.

**ADDRESSES:** Comments should be directed 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 [boardmail@ncua.gov](mailto:boardmail@ncua.gov). Please send comments by one method only.

**FOR FURTHER INFORMATION CONTACT:** Sheila Albin, Acting Associate General Counsel, or Allan Meltzer, Associate General Counsel, (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### Background

The NCUA receives numerous subpoenas and requests for NCUA employees to provide evidence in litigation. Typically, these subpoenas are for NCUA records that are not available to the public under the

Freedom of Information Act (FOIA). Also, we receive numerous subpoenas and requests for NCUA employees to appear as witnesses in litigation in conjunction with a request for nonpublic records or to provide testimony.

In recent years, the number of requests has averaged about two or three a month. Often, these subpoenas and requests relate to litigation involving federally-insured credit unions where there is some issue for which one or both of the parties want to use nonpublic records, such as NCUA examination reports, as evidence in the case. In addition, the parties want to have an NCUA employee, often an examiner, testify to establish the authenticity of the records or explain the information contained in the records. If we provide these records and an examiner appears as a witness, this will mean a significant disruption in the examiner's work schedule. In many cases, parties want to use the examiner as an expert witness on matters such as the financial condition of the credit union or other issues involving opinions. Our experience has been that, in many cases, the parties can deal with these issues through the testimony of other witnesses, including hiring their own independent, expert witness, and use the parties' own records.

The current regulatory provisions pertinent to these matters appear at two places in our regulations: regulations on subpoenas and those on FOIA. Our regulation relating to subpoenas is set out at 12 CFR 792.40–792.42. It states: where a subpoena is to be served; advises persons who receive a subpoena requesting nonpublic records to contact the Office of General Counsel; and prohibits production of records in response to a subpoena except as authorized by the Office of General Counsel. These regulations contain a cross-reference to our FOIA regulations that are set out at 12 CFR 792.1–792.7. The FOIA regulations contain a section dealing with the release of documents that are exempt from disclosure under FOIA. 12 CFR 792.4. Briefly summarized, this section provides that the NCUA may disclose records exempt under FOIA based on a written request where there is “good cause.” In addition, the section provides that the NCUA will impose conditions as necessary to protect the confidentiality of the records.

Current regulations fail to inform persons submitting a subpoena about the factors that the NCUA will consider in making its determination or what information it would be helpful for them to submit. The current regulations

address only subpoenas directed at the production of written information or records and not testimony or other statements from NCUA personnel such as affidavits or declarations. In addition, current regulations provide no information about when a request should be submitted, the time period for review, potential fees, or, if a request is granted, the restrictions that may be placed on the disclosure of records or the appearance of an NCUA employee as a witness. Finally, the fact that the current regulations are set out in two places is confusing.

The proposed rule addresses the aforementioned gaps in the current regulations. It is written in a question and answer format to promote clarity and uses simple terms. Briefly summarized, the proposed rule: prohibits disclosure of nonpublic records or testimony by NCUA employees unless there is compliance with the rule; lets the public know what information to submit and what factors the NCUA will consider; and identifies filing times, fees, and potential restrictions on disclosures or testimony. The proposed charges for witnesses are the same as those provided by the federal courts and the fees related to production of records are the same as those charged under FOIA.

A few simple definitions clarify that the proposed rule applies to a broad range of cases, not only matters before a court, and, also, applies to former as well as current NCUA employees. Former employees remain prohibited from testifying about specific matters for which they had responsibility during their active employment, unless permitted to testify as provided in the proposed rule. They would not, however, be barred from appearing on general matters or otherwise employing their expertise as, for example, expert witnesses.

The proposed rule solves some problems that have arisen in the past. It should eliminate or reduce eleventh hour requests. Also, by centralizing the service of subpoenas and the determination of the NCUA's response, it should eliminate attempts to serve subpoenas or present requests for disclosure of nonpublic records to field staff and regional offices. The procedures and criteria will ensure a more efficient use of NCUA resources, minimize the possibility of involving the NCUA in issues unrelated to its responsibilities, promote uniformity in responding to such requests and subpoenas and maintain the impartiality of NCUA between private litigants. The proposed rule will serve NCUA's interest in protecting sensitive,

confidential and privileged information and records generated by its supervisory and regulatory work.

The proposed rule is essentially procedural, not substantive. It does not create a right to obtain records or the testimony of an NCUA employee nor does it create any additional right or privilege not already available to NCUA to deny such a request. The NCUA is not making any waiver of its sovereign immunity. Failure to comply with the rule, however, is a basis for denying a request.

The NCUA is interested in receiving comments on the application of the proposed regulation to former as well as current employees, including its application to proceedings to which NCUA is a party, the exception from coverage for expert testimony by former employees, and any other factors that commenters believe the NCUA should consider in addition to those set out in § 792.46 in reaching a final determination.

#### Legal Authority

Numerous government agencies and departments, well over 60, have promulgated regulations governing the circumstances and manner in which an employee may respond to demands for testimony or production of documents. These regulations, issued under the authority of 5 U.S.C. 301, the so-called housekeeping statute, are separate from FOIA regulations. In addition, the NCUA has authority under the Federal Credit Union Act (Act) to issue “rules as it sees fit for the transaction of its business,” 12 U.S.C. 1752a(d), and regulations as are “necessary and appropriate to carry out the provisions” of the Act, 12 U.S.C. 1789(a)(10).

Section 301 of Title 5 expressly states that it does not provide a basis for withholding information or limiting the availability of records but authorizes the head of an executive agency to issue “regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use, and preservation of its records, papers, and property.” *Id.* These regulations are called Touhy regulations after a landmark Supreme Court case, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

The *Touhy* case was the first in a long line of cases that have upheld regulations restricting the right of private litigants to require testimony or production of documents from employees of federal agencies. In *Touhy*, the Supreme Court held that a Department of Justice (DOJ) official, acting on order of the Attorney General,

could not be held in contempt for declining to produce records in response to a subpoena. The Court reasoned that the variety of information contained in the files of any government agency and the possibilities of harm from unrestricted disclosure in court necessitate centralizing determinations as to whether to obey or challenge a subpoena. The Court stated that it was appropriate for the Attorney General to prescribe regulations for the preservation of DOJ records.

Federal circuit and district courts have consistently held that a person seeking testimony or records from an agency must comply with the agency's *Touhy* regulation prior to seeking judicial enforcement of a subpoena. *Colonial Savings and Loan Assoc. v. St. Paul Fire and Marine Ins. Co.*, 89 F.R.D. 481, 484 (D. Kan. 1980); *Marcoux v. Mid-States Livestock*, 66 F.R.D. 573, 575 n. 1 (W.D. Mo. 1975); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966).

Generally, courts cannot compel an agency employee who is the subject of a subpoena to testify or produce records in violation of the agency's *Touhy* regulation. *Touhy*, 340 U.S. at 467-70; *United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10th Cir. 1980). Courts have also upheld regulations that limit federal employees testifying about purely factual information. *Southeastern Pa. Transp. Auth. v. General Motors Corp.*, 103 F.R.D. 12 (E.D. Pa. 1984); *Kline v. Martin*, 345 F. Supp. 31 (E.D. Va. 1972). Consequently, a limited or conditional authorization to testify or produce records does not waive an employee's immunity from contempt or compulsion with regard to releasing records or testifying on unauthorized matters. *Swett v. Schenk*, 792 F.2d 1447, 1451-52 (9th Cir. 1986).

Agencies may also restrict the testimony of former employees. *Fowkes v. Dravo Corporation*, 5 F.R.D. 51 (E.D. Pa. 1945). In the *Fowkes* case, a former employee and a current employee of the Treasury Department refused to testify or produce documents pursuant to subpoenas because they were instructed not to do so by the Deputy Commissioner of Internal Revenue. Because the employees obtained the information while in their official positions, disclosure could not be permitted unless in accordance with a Treasury regulation and a Treasury Department circular. The court upheld the Treasury Department's refusal to allow the testimony, at least until the procedures in the Department circular were followed. The court based its decision on the nature of the information. Thus, it is generally

understood that, as long as a former employee acquired the information in an official capacity, persons seeking his or her testimony are still required to comply with an agency regulation limiting disclosure or testimony. As noted previously, the proposed rule will not bar former NCUA employees from serving as expert witnesses, however, former NCUA employees are prohibited from testifying about specific matters for which they had responsibility during their employment unless permission is granted pursuant to the regulation.

With respect to the cost of processing and responding to requests for records and testimony, an agency may prescribe regulations establishing the charge for a service or thing of value provided by the agency. 31 U.S.C. 9701.

### Regulatory Procedures

#### Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small credit unions, meaning those under \$1 million in assets. The NCUA Board has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions. The reasons for this determination are that the copying and witness fees to be charged to persons and entities submitting requests under the regulation are not large and will not create a financial burden. The proposed rule will not create any significant demand for legal, accounting, or consulting expenditures. Accordingly, the NCUA Board has determined that a Regulatory Flexibility Analysis is not required.

#### Paperwork Reduction Act

The NCUA has determined that the requirement that a person must submit a written request containing the information identified in § 792.43 in order to obtain nonpublic records or the testimony of an NCUA employee constitutes a collection of information under the Paperwork Reduction Act. NCUA is submitting a copy of this proposed rule to the Office of Management and Budget (OMB) for its review.

It is NCUA's view that the time spent in preparing a written request will ensure the fair and efficient processing of such requests. In addition, the information and analysis is related to the need for the evidence and, given that the written request arises in the context of a legal proceeding, this is

work that will most likely already have been undertaken by the requester as part of the preparation of the case.

The NCUA estimates that it will take an average of two or three hours to prepare the written request. The NCUA currently receives two or three requests per month so the total annual reporting burden is estimated to be no more than 72 hours.

The Paperwork Reduction Act of 1995 and OMB regulations require that the public be provided an opportunity to comment on information collection requirements, including an agency's estimate of the burden of the collection of information. The NCUA Board invites comment on: (1) whether the collection of the information is necessary for the proper performance of the functions of the NCUA; (2) the accuracy of the NCUA's estimate of the burden of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collection of information. Send comments to: OMB Reports Management Branch, New Executive Office Building, Room 10202, Washington, DC 20503. Attn: Alexander T. Hunt. Please send NCUA a copy of any comments you submit to OMB. NCUA will publish a notice in the **Federal Register** once OMB action is taken on the submitted request.

OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of the proposed rule in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the NCUA Board on the proposed rule.

#### Executive Order 12612

The NCUA Board has determined that this proposed rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

#### List of Subjects in 12 CFR Part 792

Administrative practice and procedure, Credit unions, Confidential business information, Freedom of Information Act, Government employees, Reporting and recordkeeping requirements, Subpoenas.

By the National Credit Union Administration Board on April 16, 1997.

**Becky Baker,**  
*Secretary of the Board.*

For the reasons set forth in the preamble, NCUA proposes to amend 12 CFR part 792 as set forth below:

#### **PART 792—[AMENDED]**

1. The authority citation for part 792 is revised 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. Amend § 792.4 to remove paragraph (b)(3) and revise paragraph (a) to read as follows:

#### **§ 792.4 Release of exempt records.**

(a) *Prohibition against disclosure.* Except as provided in paragraph (b) of this section and subpart C of this part, no officer, employee, or agent of NCUA or of any federally-insured credit union shall disclose or permit the disclosure of any exempt records of the Agency to any person other than those NCUA or credit union officers, employees, or agents properly entitled to such information for the performance of their official duties.

\* \* \* \* \*

3. Revise subpart C of part 792 to read as follows:

#### **Subpart C—Production of Nonpublic Records and Testimony of NCUA Employees in Legal Proceedings**

Sec.

- 792.40 What does this subpart prohibit?
- 792.41 When does this subpart apply?
- 792.42 How do I request nonpublic records or testimony?
- 792.43 What must my written request contain?
- 792.44 When should I make a request?
- 792.45 Where do I send my request?
- 792.46 What will the NCUA do with my request?
- 792.47 If my request is granted, what fees apply?
- 792.48 If my request is granted, what restrictions may apply?
- 792.49 Definitions.

#### **Subpart C—Production of Nonpublic Records and Testimony of NCUA Employees in Legal Proceedings**

##### **§ 792.40 What does this subpart prohibit?**

This subpart prohibits the release of nonpublic records or the appearance of an NCUA employee to testify in legal proceedings except as provided in this subpart. Any person possessing nonpublic records may release them or permit their disclosure only as provided in this subpart.

(a) *Duty of NCUA employees.* (1) If an NCUA employee is served with a subpoena requiring him or her to appear as a witness or produce records, the employee must promptly notify the Office of General Counsel. The General Counsel has the authority to instruct NCUA employees to refuse appearing as a witness or to withhold nonpublic records. The General Counsel may let an NCUA employee provide testimony, including expert or opinion testimony, if the General Counsel determines that the need for the testimony clearly outweighs contrary considerations.

(2) If a court or other appropriate authority orders or demands expert or opinion testimony or testimony beyond authorized subjects contrary to the General Counsel's instructions, an NCUA employee must immediately notify the General Counsel of the order and respectfully decline to comply. An NCUA employee must decline to answer questions on the grounds that this subpart forbids such disclosure and should produce a copy of this subpart, request an opportunity to consult with the Office of General Counsel, and explain that providing such testimony without approval may expose him or her to disciplinary or other adverse action.

(b) *Duty of persons who are not NCUA employees.* (1) If you are not an NCUA employee but have custody of nonpublic records and are served with a subpoena requiring you to appear as a witness or produce records, you must promptly notify the NCUA about the subpoena. Also, you must notify the issuing court or authority and the person or entity for whom the subpoena was issued of the contents of this subpart. Notice to the NCUA is made by sending a copy of the subpoena to the General Counsel of the NCUA, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314-3428. After receiving notice, the NCUA may advise the issuing court or authority and the person or entity for whom the subpoena was issued that this subpart applies and, in addition, may intervene, attempt to have the subpoena quashed or withdrawn, or register appropriate objections.

(2) After notifying the Office of General Counsel, you should respond to a subpoena by appearing at the time and place stated in the subpoena. Unless authorized by the General Counsel, you should decline to produce any records or give any testimony, basing your refusal on this subpart. If the issuing court or authority orders the disclosure of records or orders you to testify, you should continue to decline to produce

records or testify and should advise the Office of General Counsel.

(c) *Penalties.* Anyone who discloses nonpublic records or gives testimony related to those records, except as expressly authorized by the NCUA or as ordered by a federal court after NCUA has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Also, former NCUA employees, in addition to the prohibition contained in this subpart, are subject to the restrictions and penalties of 18 U.S.C. 207.

##### **§ 792.41 When does this subpart apply?**

This subpart applies if you want to obtain nonpublic records or testimony of a NCUA employee for legal proceedings. It doesn't apply to records that the NCUA is required to release under the Freedom of Information Act (FOIA), records which the NCUA releases to federal or state investigatory agencies under § 792.4(b)(2), or the Privacy Act, 5 U.S.C. 552a.

##### **§ 792.42 How do I request nonpublic records or testimony?**

(a) To request nonpublic records or the testimony of an NCUA employee, you must submit a written request to the General Counsel of the NCUA. If you serve a subpoena on the NCUA or an NCUA employee before submitting a written request and receiving a final determination, the NCUA will oppose the subpoena on the grounds that you failed to follow the requirements of this subpart. You may serve a subpoena as long as it is accompanied by a written request that complies with this subpart.

(b) To request nonpublic records that are part of the records of the Office of the Inspector General or the testimony of an NCUA employee on matters within the knowledge of the NCUA employee as a result of his or her employment with the Office of the Inspector General, you must submit a written request to the Office of the Inspector General. Your request will be handled in accordance with the provisions of this subpart except that the Inspector General will be responsible for those determinations that would otherwise be made by the General Counsel.

##### **§ 792.43 What must my written request contain?**

Your written request for records or testimony must include:

- (a) The caption of the legal proceeding, docket number, and name of the court or other authority involved.
- (b) A copy of the complaint or equivalent document setting forth the

assertions in the case and any other pleading or document necessary to show relevance.

(c) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought.

(d) A statement as to how the need for the information outweighs the need to maintain the confidentiality of the information and outweighs the burden on the NCUA to produce the records or provide testimony.

(e) A statement indicating that the information sought is not available from another source, such as a credit union's own books and records, other persons or entities, or the testimony of someone other than an NCUA employee, for example, retained experts.

(f) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the records or testimony you want.

(g) The name, address, and telephone number of counsel to each party in the case.

(h) An estimate of the amount of time you anticipate that you and other parties will need with each NCUA employee for interviews, depositions, or testifying.

#### **§ 792.44 When should I make a request?**

You should submit your request at least 45 days before the date that you need the records or testimony. If you want to have your request processed in less time, you must explain why you couldn't submit the request earlier and why you need expedited processing. If you are requesting the testimony of an NCUA employee, the NCUA expects you to anticipate your need for the testimony in sufficient time to obtain it by a deposition. The General Counsel may deny a request for testimony at a legal proceeding unless you explain why you could not use deposition testimony. The General Counsel will determine the location of a deposition taking into consideration the NCUA's interest in minimizing the disruption for an NCUA employee's work schedule and the costs and convenience of other persons attending the deposition.

#### **§ 792.45 Where do I send my request?**

You must send your request or subpoena for records or testimony to the attention of the General Counsel for the NCUA, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314-3428. You must send your request or subpoena for records or testimony from the Office of the Inspector General to the attention of the NCUA Inspector General, 1775 Duke

Street, Alexandria, Virginia 22314-3428.

#### **§ 792.46 What will the NCUA do with my request?**

(a) *Factors the NCUA will consider.* The NCUA may consider various factors in reviewing a request for nonpublic records or testimony of NCUA employees, including:

(1) Whether disclosure would assist or hinder the NCUA in performing its statutory duties or use NCUA resources unreasonably, including whether responding to the request will interfere with NCUA employees' ability to do their work.

(2) Whether disclosure is necessary to prevent the perpetration of a fraud or other injustice in the matter or if you can get the records or testimony you want from sources other than the NCUA.

(3) Whether the request is unduly burdensome.

(4) Whether disclosure would violate a statute, executive order, or regulation, for example, the Privacy Act, 5 U.S.C. 552a.

(5) Whether disclosure would reveal confidential, sensitive or privileged information, trade secrets or similar, confidential commercial or financial information, or would otherwise be inappropriate for release and, if so, whether a confidentiality agreement or protective order as provided in § 792.48(a) can adequately limit the disclosure.

(6) Whether the disclosure would interfere with law enforcement proceedings, compromise constitutional rights, or hamper NCUA research or investigatory activities.

(7) Whether the disclosure could result in NCUA appearing to favor one litigant over another.

(8) Any other factors the NCUA determines to be relevant to the interests of the NCUA.

(b) *Review of your request.* The NCUA will process your request in the order it is received. The NCUA will try to respond to your request within 45 days, but this may vary depending on the scope of your request.

(c) *Final determination.* The General Counsel makes the final determination on requests for nonpublic records or NCUA employee testimony. All final determinations are in the sole discretion of the General Counsel. The General Counsel will notify you and the court or other authority of the final determination of your request. In considering your request, the General Counsel may contact you to inform you of the requirements of this subpart, ask that the request or subpoena be

modified or withdrawn, or may try to resolve the request or subpoena informally without issuing a final determination. You may seek judicial review of the final determination under the Administrative Procedure Act, 5 U.S.C. 702.

#### **§ 792.47 If my request is granted, what fees apply?**

(a) *Generally.* You must pay any fees associated with complying with your request, including copying fees for records and witness fees for testimony. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the fees.

(b) *Fees for records.* You must pay all fees for searching, reviewing and duplicating records produced in response to your request. The fees will be the same as those charged by the NCUA under its Freedom of Information Act regulations, § 792.5.

(c) *Witness fees.* You must pay the fees, expenses, and allowances prescribed by the court's rules for attendance by a witness. If no such fees are prescribed, the local federal district court rule concerning witness fees, for the federal district court closest to where the witness appears, will apply. For testimony by current NCUA employees, you must pay witness fees, allowances, and expenses to the General Counsel by check made payable to the "National Credit Union Administration" within 30 days from receipt of NCUA's billing statement. For the testimony of a former NCUA employee, you must pay witness fees, allowances, and expenses directly to the former employee, in accordance with 28 U.S.C. 1821 or other applicable statutes.

(d) *Certification of records.* The NCUA may authenticate or certify records to facilitate their use as evidence. If you require authenticated records, you must request certified copies at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of \$5.00 per document.

(e) *Waiver of fees.* A waiver or reduction of any fees in connection with the testimony, production, or certification or authentication of records may be granted in the discretion of the General Counsel. Waivers will not be granted routinely. If you request a waiver, your request for records or testimony must state the reasons why a waiver should be granted.

**§ 792.48 If my request is granted, what restrictions apply?**

(a) *Records.* The General Counsel may impose conditions or restrictions on the release of nonpublic records, including a requirement that you obtain a protective order or execute a confidentiality agreement with the other parties in the legal proceeding that limits access to and any further disclosure of the nonpublic records. The terms of a confidentiality agreement or protective order must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the NCUA may condition the release of nonpublic records on an amendment to the existing protective order or confidentiality agreement.

(b) *Testimony.* The General Counsel may impose conditions or restrictions on the testimony of NCUA employees, including, for example, limiting the areas of testimony or requiring you and the other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which you requested the testimony. The General Counsel may also require you to provide a copy of the transcript of the testimony to the NCUA at your expense.

**§ 792.49 Definitions.**

*Legal proceedings* means any matter before any federal, state or foreign administrative or judicial authority, including courts, agencies, commissions, boards or other tribunals, involving such proceedings as lawsuits, licensing matters, hearings, trials, discovery, investigations, mediation or arbitration. When the NCUA is a party to a legal proceeding, it will be subject to the applicable rules of civil procedure governing production of documents and witnesses, however, this subpart will still apply to the testimony of former NCUA employees.

*NCUA employee* means current and former officials, members of the Board, officers, directors, employees and agents of the National Credit Union Administration, including contract employees and consultants and their employees. This definition does not include persons who are no longer employed by the NCUA and are retained or hired as expert witnesses or agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment.

*Nonpublic records* means any NCUA records that are exempt from disclosure under § 792.3, the NCUA regulations

implementing the provisions of the Freedom of Information Act. For example, this means records created in connection with NCUA's examination and supervision of insured credit unions, including examination reports, internal memoranda, and correspondence, and, also, records created in connection with NCUA's enforcement and investigatory responsibilities.

*Subpoena* means any order, subpoena for records or other tangible things or for testimony, summons, notice or legal process issued in a legal proceeding.

*Testimony* means any written or oral statements made by an individual in connection with a legal proceeding including personal appearances in court or at depositions, interviews in person or by telephone, responses to written interrogatories or other written statements such as reports, declarations, affidavits, or certifications or any response involving more than the delivery of records.

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**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 96-NM-270-AD]

RIN 2120-AA64

**Airworthiness Directives; McDonnell Douglas Model DC-9-80 Series Airplanes Equipped With Heath Tecna Aerospace Extended Spacial Concept Interior III Installed in Accordance With Supplemental Type Certificate SA4744NM**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain McDonnell Douglas DC-9-80 series airplanes. This proposal would require an inspection to detect discrepancies of electrical plugs and receptacles of the sidewall lighting system in the passenger cabin, and to verify that the ends of all pins and sockets are even and that they are seated and locked into place. The proposed AD also would require replacement of any discrepant part with a new part, and modification of the electrical wiring and connectors of the sidewall lighting system in the passenger cabin. This

proposal is prompted by reports of failures of the electrical connectors in the sidewall fluorescent lighting, which resulted in smoke or lighting interruption in the passenger cabin. The actions specified by the proposed AD are intended to prevent failures of the electrical connectors, which could result in poor socket/pin contact, excessive heat, electrical arcing, and consequently, connector burn through and smoke in the passenger cabin.

**DATES:** Comments must be received by June 2, 1997.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 96-NM-270-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Hexcel Interiors (formerly Heath Tecna Aerospace), 3225 Woburn Street, Bellingham, Washington 98226. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:**

Stephen Oshiro, Aerospace Engineer, Systems and Equipment Branch, ANM-130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (206) 227-2793; fax (206) 227-1181.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this