



**America's
Credit Unions**

June 24, 2024

Ms. Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

RE: Advance Notice of Proposed Rulemaking – Records Preservation Program and Appendices—Record Retention Guidelines; Catastrophic Act Preparedness Guidelines (Docket ID NCUA–2024–0026)

Dear Ms. Conyers-Ausbrooks:

On behalf of America's Credit Unions, I am writing in response to the National Credit Union Administration's (NCUA) advance notice of proposed rulemaking (ANPR) on the records preservation program requirements included in Part 749 of the NCUA's regulations.¹ America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their over 140 million members nationwide.

Through this ANPR, the NCUA is soliciting feedback on how the agency can improve and update its records preservation program regulations and guidance. We appreciate the Board's effort to pursue this rulemaking, which was developed, in part, through recent feedback from America's Credit Unions' Small Credit Union Committee. This is a great example of how the industry and the agency can work together on relatively straightforward, non-controversial regulatory modernization to reduce the compliance burden on credit unions, allowing them to focus on serving members. We urge the Board to continue collaboration with the industry to identify and ultimately resolve long-standing compliance concerns. This can be achieved, in part, through the agency's recently announced voluntary review under the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) aimed at identifying outdated, unnecessary, or unduly burdensome regulations.²

Overall, as detailed below, credit unions' biggest frustration with the existing records preservation program requirements is the lack of detail on retention periods, as well as the suggestion in the guidance to retain certain items permanently. Updating the existing regulations to address these general issues will go a long way in clarifying regulatory expectations under Part 749.

¹ 89 Fed. Reg. 31,117 (Apr. 24, 2024).

² 89 Fed. Reg. 45,602 (May 23, 2024).

Current Records Preservation Program Requirements

Part 749 requires all federally insured credit unions to maintain a records preservation program to identify, store, and reconstruct vital records in the event that a credit union's records are destroyed. The vital records preservation program must be in writing and contain certain procedures for maintaining duplicate vital records at an offsite vital records center.³

Section 749.2 details the vital records preservation program, which generally appears to be workable for most credit unions. The requirement to establish a program that includes procedures for maintaining duplicate vital records at a vital records center is appropriate, including the specific requirements pertaining to the vital records center provided in section 749.3. Further, we agree with the flexibility regarding the format of vital and other records, as described in sections 749.4 and 749.5. However, as described below, we do have suggestions regarding the definition of "vital records" in section 749.1, as well as recommendations to update the records retention requirements in Appendix A.

Definition of "Vital Records"

Given the purpose of Part 749, an accurate definition of "vital records" is critical to effectively ensure a credit union is capable of resuming operations following an event causing the destruction of records. As discussed below, the current definition of "vital records" is reasonable, provided the retention period for the required records is limited to the most recent period (*e.g.*, the close of the most recent business day for members' loan balances).

"Vital records" include only a few documents, including a list of share, deposit, and loan balances for each member's account, financial reports, a list of the credit union's accounts at financial institutions (as well as insurance policies and investments), and emergency contact information.⁴

Overall, we do not have any significant concerns with the existing definition of "vital records." We believe each of the items listed are necessary to allow the credit union to resume operations in the event records are destroyed. Further, the volume of items identified as "vital records" is reasonable. For example, limiting the list of share, deposit, and loan balances for each member's account to the close of *the most recent business day*—as currently required—is manageable.

In addition to the items currently included, we ask the NCUA to solicit feedback in the forthcoming notice of proposed rulemaking on Part 749 regarding whether certain critical third-party vendor contracts should be considered "vital." It is important that any such requirement pertaining to vendor contracts be limited to current contracts, not previous iterations or those no longer in effect.

³ 12 CFR 749.2 and 749.3.

⁴ 12 CFR 749.1.

To be clear, we believe the requirement to maintain each of the items currently considered to be “vital” should be limited to the most recent/current information—as noted above. America’s Credit Unions does not agree with an approach requiring permanent retention of these records on an ongoing basis.

Formats and Methods of Record Storage

The ANPR expressly seeks feedback on the various formats and methods credit unions use to store records, including the pros and cons associated with each. Credit unions utilize a variety of formats to store “vital records,” including:

- Microfiche;
- Green bar paper;
- Paper; and
- Digital (in various file types, including machine readable (*e.g.*, .CSV), searchable (*e.g.*, .PDF), and image only (*e.g.*, .JPEG)).

Though not unique to “vital records,” credit unions encounter a number of challenges in storing records. Particularly for smaller credit unions, the cost associated with records is often seen as a major impediment. The cost is not limited to storage only; there are a number of ancillary expenses, such as: secure transportation, retrieval, format conversion, obtaining and maintaining tools to access/read various formats, and record destruction.

Specifically, in response to the NCUA’s inquiry regarding the pros and cons of various storage methods we offer the following:

- Physical storage:
 - Pros: tangible, easy regulatory compliance, and offline access.
 - Cons: space requirements, vulnerable to damage (*e.g.*, fire or flooding), vulnerable to theft, limited accessibility, lack of built-in auditing capabilities, documents must be manually filed, purging requires manual review, and high cost.
- Electronic/digital storage:
 - Pros: space efficiency, automatic filing possible, accessibility (including sharing), and backup and recovery.
 - Cons: cybersecurity risks, technical issues, regulatory compliance challenges, conversion cost, and ongoing storage cost.
- Cloud computing storage:
 - Pros: scalable, collaborative, disaster recovery options, and accessible.
 - Cons: dependency on third-party providers, data sovereignty concerns, cost (can be—but not always—excessively expensive), cybersecurity risks, and accessibility constraints (*i.e.*, requires internet connection).

Appendix A – Records Retention Guidelines

Unlike the requirements addressed elsewhere in Part 749, Appendix A provides guidelines for record retention. Specifically, Appendix A states that the “NCUA does not regulate in this area, but as an aid to credit unions it is publishing this appendix of suggested guidelines for record retention.”⁵ As addressed in greater detail below, it is important that the regulatory text of Part 749 describe in explicit detail the difference between guidance and regulatory requirements with regard to records preservation.

Appendix A suggests that the following “official records of the credit union” be retained permanently:

- 1) Charter, bylaws, and amendments; and
- 2) Certificates or licenses to operate under programs of various government agencies, such as a certificate to act as issuing agent for the sale of U.S. savings bonds.

We believe the existing requirement to permanently retain the “official records” described above is appropriate. These items are of such importance to the existence and continuing ability to operate that it is critical the credit union always maintain secure access to these documents. Further, given the list above is limited to only a handful of items, storage, whether physical or digital, is not problematic. Lastly, while we do not necessarily advocate that credit unions be required to permanently retain additional items, we ask the NCUA to address any retention requirements for legal documents associated with a merger, as addressed below.

In addition to the items described above, Appendix A also suggests that the following “key operational records” be retained permanently: minutes of meetings of the membership, board of directors, credit committee, and supervisory committee; a single copy of each financial report (Form 5300/5310) and Credit Union Profile report (Form 4501) as submitted to the NCUA at the end of each quarter; a single copy of each supervisory committee comprehensive annual audit report and attachments; supervisory committee records of account verification; applications for membership and joint share account agreements; journal and cash record; general ledger; copies of the periodic statements of members, or the individual share and loan ledger; bank reconciliements; and listing of records destroyed.

Unlike the “official records” addressed above, we do not agree with the guidance that these “key operational records” be retained permanently, as provided in current Appendix A. Generally speaking, permanent retention of financial records creates a host of challenges, while providing few, if any, clear benefits. There are obvious costs and resource expenditures necessary to retain records permanently; this is particularly problematic for credit unions that have existed for 50, 75, or even 100 or more years. These challenges are compounded for credit unions that have experienced one or multiple mergers over the years. Another significant concern relates to

⁵ 12 CFR 749, Appendix A, § A.

document production as the result of a legal subpoena for various records. The ability to destroy records after a set, relatively short number of years minimizes risks in this area. Depending on the circumstances, if a credit union has a policy and practice of destroying documents after seven years, for example, that credit union may be protected from producing such records in response to a subpoena request.

Thus, we urge the NCUA to update the guidance to suggest “key operational records” be retained for a single retention period—or multiple periods based on the particular record if the agency believes that to be more appropriate. We understand there are state law considerations in determining an appropriate period to retain certain documents. However, a retention period of seven years might be appropriate for most, if not all, of the “key operational records” listed above. One clarification regarding a single retention period is for *Applications for membership and joint share account agreements*, which could be retained for seven years after the account has been closed and/or any judgements or outstanding loans have been satisfied.

Given the ongoing consolidation in the industry, including through mergers, it would be helpful for the agency to clarify the retention requirements for “key operational records” and other records associated with a merger, including those records associated with the merged credit union. While the legal paperwork regarding a merger, including the original charter of the merged credit union—should be retained permanently, other merger-related documents should be subject to the retention periods addressed in the guidance in Appendix A. The NCUA should explicitly address record retention requirements related to credit union mergers.

In addition to guidance on records to permanently retain, Appendix A includes information on the procedures a credit union should follow when destroying records. Specifically, it states that the “credit union should prepare an index of any records destroyed and retain the index permanently. Destruction of records should ordinarily be carried out by at least two persons whose signatures, attesting to the fact that records were actually destroyed, should be affixed to the listing.”⁶ This section appears outdated, given that it does not consider automated processes for record destruction, which are becoming more common than manual processes. As such, this section should be updated to include guidelines for both physical and automated destruction of digital records.

Further, the following terms should be updated and clarified:

- “Journal and cash record” needs clarification on whether it pertains to the credit union or its members. In addition, it is unclear exactly what documents this is referring to (*e.g.*, member account histories, purchase of cash to/from a third-party provider, or vault/drawer cash histories).
- “General ledger” should be updated and revised to provide clarification on exactly what is required.

⁶ 12 CFR 749, Appendix A, § C.

Appendix B – Catastrophic Act Preparedness Guidelines

Appendix B provides guidance on developing a program to prepare for a catastrophic act. The guidance includes several suggested elements of the program, all of which are reasonable and likely to be helpful in preparing for a catastrophic act. Importantly, the catastrophic act preparedness guidelines are included in the appendix as *guidance*. Given the range in asset size and complexity of federally insured credit unions, it is important that the language in Part 749 surrounding catastrophic act preparedness remain guidance.

Appendix B suggests that all credit unions develop a Catastrophic Act Preparedness Program. Among other criteria, the guidance recommends the Program include internal controls for annually reviewing and testing the Program. While this is only guidance, annual review and testing is unnecessary and unfeasible for some credit unions. Instead, these criteria should be updated to reflect reviewing and testing of the Program no less than once every three years. Of course, credit unions may choose to conduct such activity annually. However, providing guidance more appropriate for most credit unions may encourage those without a Catastrophic Act Preparedness Program to pursue such an important tool.

Alternatively, the NCUA may want to consider providing other recommendations rather than full annual testing, such as:

- Team simulation exercises to simulate various disaster scenarios and test their response procedures;
- Tech-based testing to simulate disaster scenarios and test response of IT systems (*i.e.*, data recovery testing);
- Vendor-supported testing; and
- Monitor/evaluation to determine whether the credit union has any tools or processes currently in place to monitor/evaluate its ability to recover from a disaster.

Below are a number of recommendations on other guidance that might be helpful for catastrophic act or other disaster preparedness:

- Conduct risk assessments in order to consider natural disasters (*e.g.*, earthquakes, floods, and wildfires) and man-made disasters (*e.g.*, cyberattacks and terrorist attacks);
- Develop a Business Continuity Plan to outline procedures to ensure essential functions can continue after a disaster;
- Provide employee training to ensure staff is familiar with their roles and procedures in the event of a catastrophic act;
- Maintain a communication plan to ensure employees, members, and other stakeholders are informed before, during, after a disaster;
- Partner with regulators and industry trade associations to share best practices;

- Conduct vendor management to evaluate vendors to ensure appropriate disaster recovery plans are in place, as well as a contingency plan in the event the vendor is unable to fulfill its obligations during a disaster; and
- Provide member education on steps to protect assets and any offerings the credit union may have available to members in the event of an emergency.

Regulation Versus Guidance

In a prior Part 749 rulemaking, the NCUA attempted to clarify the issue of guidance versus regulation by stating, “The Board has weighed the fact that guidance is available from other sources and the potential for confusion regarding enforceability of a regulation versus guidance. The Board believes the benefit to credit unions in having the guidance in the appendix to the regulatory requirement will enhance access to the guidance and will facilitate compliance.”⁷ In that rulemaking, the agency further noted that “including specific words like ‘recommended’ and ‘guidance’ means, as a legal matter, that the guidance is just that—guidance—and is not enforceable as a regulation. These words clarify and minimize, to the extent linguistically possible, the potential for misinterpretation.”⁸

Part 749 should be updated to clearly reflect that guidance included in Appendix A and Appendix B does not carry the weight of or examination expectation of regulation. Further, while the agency is clear that these and other appendices are suggestions in the form of guidance, it is imperative that credit unions be afforded the ability to operate their records preservation programs and processes in accordance with management’s best judgement in a manner most appropriate for their credit union. As such, we urge the NCUA to communicate unequivocally in the regulation, as well as to its examination staff, that credit unions have latitude to operate their records preservation programs as they deem proper, consistent with regulatory requirements as provided in the text of Part 749.

In addition, section 749.2 includes guidance within the regulatory text. Specifically, this section provides that it is “*recommended* credit unions include in these procedures a method for using duplicate records to restore vital member services in the event of catastrophic act.”⁹ Including guidance within the regulation leads to confusion. It would be more appropriate to include such a recommendation in Appendix A.

Further, if confusion continues to persist regarding the difference between regulation and guidance in this Part, the NCUA could consider moving the existing guidance contained in the appendices. Perhaps such guidance could be moved from Part 749 to the agency’s “Support Services” section of the NCUA’s website.

⁷ 72 Fed. Reg. 42,271 (Aug. 2, 2007).

⁸ 12 U.S.C. 1766(e).

⁹ 12 CFR § 749.2 (emphasis added).

As noted above, it would be helpful for Appendix A to offer suggested timeframes for retention of various types of records—such as seven years for “key operational records.” However, it should be clear that these are suggestions, and a credit union’s decision to apply a different retention period is not grounds for examiner scrutiny.

Additional Resources

The NCUA sought feedback specifically on additional resources the agency can provide to assist credit unions with Part 749. We continue to hear from credit unions that compliance webinars hosted by the agency—particularly with the opportunity for audience Q&A—are very helpful in understanding regulatory expectations. Thus, following revisions to Part 749, we ask the agency to host a series of webinars.

In addition, the NCUA should consider additional resources on the following with respect to preserving vital records:

- Disaster mitigation (including recommended precautions to take to avoid flood, fire, or other disasters, or handle records in response to such events);
- Records and data backup methodologies (*e.g.*, requirements for maintenance of electronic copies on-site and off-site, any requirements for digitization of copies of physical documents stored, and confirmation that digital copies alone are acceptable);
- Continuity of operations, particularly in the context of records preservation;
- Records recovery;
- Glossary with definitions that can be referenced;
- Resource links to other regulations that have specific retention requirements related to document retention;
- Online tool to help create a retention schedule;
- Ability to sign up for regulation update notifications; and
- Provide tools/templates, such as toolkits, checklists, templates, and sample policies to assist credit unions in developing and implementing effective compliance programs.

To be clear, any information from the agency on the preceding items must be in the form of guidance and/or best practices. The NCUA should not establish any new regulatory requirements or examination expectations without adhering to the Administrative Procedure Act, or similar legal obligations.

Conclusion

America’s Credit Unions appreciates the opportunity to comment on the ANPR regarding the agency’s Records Preservation Program. We thank the NCUA for pursuing clarity to Part 749, which has long been a source of confusion. We look forward to a notice of proposed rulemaking to update Part 749. Should you have any questions or require any additional information, please

National Credit Union Administration

June 24, 2024

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contact me, Regulatory Advocacy Senior Counsel at LMartone@americascreditunions.org or (202) 508-6743.

Sincerely,

A handwritten signature in black ink that reads "Luke Martone". The signature is written in a cursive style with a long horizontal stroke at the end.

Luke Martone
Regulatory Advocacy Senior Counsel