AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

OMB # 1115-0194

U.S. Department of Justice
Immigration and Naturalization Service

Attestation by Designated Fingerprinting Service Certified to Take Fingerprints

Part 1. Instructions

To ensure the INS of the integrity of the fingerprint cards submitted by applicants for benefits, all DFS fingerprinters must fill out an attestation on Form I-850A each time they take fingerprints for an immigration benefit applicant. The DFS's fingerprinters are required to execute the attestations in duplicate, giving the original copy to the person being fingerprinted and keeping the second copy, which may be a reproduced copy of the original attestation, on file for at least 3 months for Service inspection. Attestations must be submitted on Form I-850A, Attestation by Designated Fingerprinting Service Certified to Take Fingerprints. Reproduced copies of Form I-850A are acceptable.

Reporting Burden. Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it dispays a currently valid OMB number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: 1)Learning about the law and form **3** minutes 2) completing form **2** minutes and 3) Assembling and filing the application **5** minutes; for a total estimated average of **10** minutes per response. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can WRITE to the Immigration and Naturalization Service, 425 I Street, N.W.; Room 5307, Washington, D.C. 20536. **(Do not mail your completed application to this address.)**

Part 2. Information about DFS

Last name	First name	Middle name

Name and address of company/organization

Street number and name		Suite #
City	State or Province	
Country		Zip/postal code
Certification number of DFS *(As assigned by the INS)*	Expiration date	Fee charged

Part 3. Attestation

I attest that I have complied with the requirements of 8 CFR 103.2(e) and I have properly checked the identity of this person whom I just fingerprinted by comparing the information on the fingerprint card with his/her:

(1) ☐ passport number_____

(2) ☐ alien registration card number_____

(3) ☐ other INS issued photo-ID: name of document_____ document number_____

(4) ☐ other documented proof of ID (state the type of ID document checked and list the document serial numbers, if any)

I understand the fingerprinting procedures as required by 8 CFR 103.2(e)(6) and have received adequate training to perform fingerprinting responsibilities.

This attestion is executed in the presence of the person listed below whom I have just fingerprinted.

_____ *(Print name of person fingerprinted)*

_____ *(Signature of person fingerprinted)*

Part 4. Signature

Print name of fingerprinter	Signature of fingerprinter	Date
Employee ID # *(As assigned by INS)*	Telephone # ( ) -	

Form I-850A (5-21-96)

APPENDIX B

[FR Doc. 96–13856 Filed 6–3–96; 8:45 am]
BILLING CODE 4410–10–C

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

Uniform Rules of Practice and Procedure

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) is amending its regulatory provisions implementing the Uniform Rules of Practice and Procedure (Uniform Rules). The final rule is intended to clarify certain provisions and to increase the efficiency and fairness of administrative hearings.

EFFECTIVE DATE: June 5, 1996.

FOR FURTHER INFORMATION CONTACT: Steven W. Widerman, Trial Attorney, Office of General Counsel, 703/518–6557, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

I. Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101–73, 103 Stat. 183 (1989), required the NCUA, the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System (Board) (agencies) to develop uniform rules and procedures for administrative hearings. The agencies each adopted final Uniform Rules in August 1991.[1] Based on their experience in using the rules since then, the agencies have identified sections of the Uniform Rules that should be modified. Accordingly, the agencies proposed amendments to the Uniform Rules on June 23, 1995 (60 FR 32882).[2]

The NCUA received four comments on the proposal. All commenters generally supported the proposal, but each suggested improvements or further revisions.

The final rule implements the proposal with certain changes, including revisions responsive to some of the concerns expressed by the commenters. The following section-by-section analysis summarizes the final rule and highlights the changes from the proposal that the NCUA made in response to the commenters' suggestions.

The OCC, OTS, FDIC and Board have published separate final rules, effective June 5, 1996, that are substantively identical to the NCUA's final rule (61 FR 20330 *et seq.*), except as noted below in regard to §§ 747.1 and 747.9.

II. Section-by-Section Summary and Discussion of Amendments to the Uniform Rules

Section 747.1 Scope

The proposal added a statutory provision to the list of civil money penalty provisions to which the Uniform Rules apply. The added provision was enacted by section 125 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI), Pub. L. 103–325, 108 Stat. 2160, which amended section 102 the Flood Disaster Protection Act of 1973 (FDPA) (42 U.S.C. 4012a). Section 102 now gives each ''Federal entity for lending regulation'' authority to assess civil money penalties against a regulated lending institution if the institution has a pattern or practice of committing violations under the FDPA or the notice requirements of the National Flood Insurance Act of 1968 (NFIA) (42 U.S.C. 4104a). Under the FDPA, the term ''Federal entity for lending regulation'' includes the agencies and the Farm Credit Administration.

CDRI section 525 also gave the agencies authority to require a regulated lending institution to take remedial actions that are necessary to ensure that the institution complies with the requirements of the national flood insurance program if: (1) The institution has engaged in a pattern and practice of noncompliance with regulations issued pursuant to the FDPA and NFIA; and (2) has not demonstrated measurable improvement in compliance despite the assessment of civil money penalties. The final rule adds a new paragraph to the scope section that reflects this additional authority.[3]

The NCUA received no comments on this section, which is adopted as proposed.

Section 747.6 Appearance and Practice in Adjudicatory Proceedings

The proposal permitted the administrative law judge (ALJ) to require counsel who withdraws from representing a party to accept service of papers for that party until either: (1) A new counsel has filed a notice of appearance; or (2) the party indicates that he or she will proceed on a *pro se* basis.

The NCUA received one comment on this section. The commenter suggested that the proposal did not adequately address certain situations: for example, when counsel withdraws because of a lack of payment of legal fees that is caused by an agency asset freeze, or withdraws because the client discharged him or her. The commenter's implication is that it is unfair to require counsel to continue to accept service in these situations. Moreover, the commenter expressed concern that the administrative proceeding may become involved in a dispute between the client and counsel when the ALJ requires counsel to continue to accept service after a client discharges counsel. The commenter suggested that the rule should require that service be given to both the unreplaced counsel and the party.

The proposal was intended to ensure that a lawyer is always available to receive service in order to prevent a party from halting the administrative proceedings simply by evading service. The regulatory text is clear, however, that the ALJ has the discretion whether to require former counsel to continue to accept service. Fairness to counsel is among the factors the ALJ would consider in exercising this discretion, and the NCUA therefore believes that the provision as proposed is sufficiently flexible to accommodate the concerns raised by the commenter.

The final rule changes the proposal's reference from ''service of process'' to ''service'' to clarify that this section applies to all papers that the party is entitled to receive. This section is otherwise adopted as proposed.

Section 747.8 Conflicts of Interest

The proposal sought to improve in two ways the provisions governing the conflicts of interest that may arise when

[1] The agencies issued a joint notice of proposed rulemaking on June 17, 1991 (56 FR 27790). The agencies issued their final rules on the following dates: NCUA on August 8, 1991 (56 FR 37767); OCC on August 9, 1991 (56 FR 38024); Board on August 9, 1991 (56 FR 38052); FDIC on August 9, 1991 (56 FR 37975); and OTS on August 12, 1991 (56 FR 38317).

[2] On December 30, 1994, NCUA proposed an amendment to the provision of the Uniforms Rules which restricts ex parte communications, § 747.9 (59 FR 67655). The other agencies each issued a similar notice of proposed rulemaking in November and December 1994. The amendment makes clear that the scope of § 747.9 conforms to that of the Administrative Procedure Act. NCUA received two comments on this proposal, both of which are addressed below. This final rule implements the amendment to § 747.9.

[3] Another provision of the CDRI, section 406, amended the Bank Secrecy Act (BSA) (31 U.S.C. 5321) to require the Secretary of the Treasury to delegate authority to the Federal banking agencies, as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), to impose civil money penalties for BSA violations. The definition of Federal banking agencies includes the other agencies, but does not include NCUA. Therefore, while each of the other agencies has inserted this provision in its final rule, NCUA has not.

counsel represents multiple persons connected with a proceeding.

First, the proposal sought to protect the interests of individuals and financial institutions by expanding the circumstances under which counsel must certify that he or she has obtained a waiver from each non-party of any potential conflict of interest. The former rule required counsel to obtain waivers only from non-party institutions ''to which notice of the proceedings must be given.'' The proposal required counsel to obtain waivers from all parties and non-parties that counsel represents on a matter relevant to an issue in the proceeding. It thus ensured that all appropriate party and non-party individuals and institutions are informed of potential conflicts.

Second, the proposal simplified this provision by eliminating the requirement for counsel to certify that each client has asserted that there are no conflicts of interest. The NCUA Board believes that the former provision was superfluous because the responsibility for identifying potential conflicts resides with counsel.

The NCUA received one comment on this section. The commenter noted that the proposal may inhibit multiple representation that otherwise complies with applicable ethics rules. The commenter suggested that the proposal could inappropriately tilt the proceeding in favor of the agencies.

The provision does not limit the right of any party to representation by counsel of the party's choice. Rather, it ensures that all interested persons are informed of potential conflicts so that they may avoid the conflict if they choose. In the NCUA's view, it is reasonable to establish a baseline standard requiring the affirmative waiver of conflicts by all affected persons or entities in order to ensure the integrity of the administrative adjudication process. State rules of professional responsibility that impose more stringent ethical standards are unaffected by this requirement.

In addition, the NCUA is unpersuaded by the argument that the conflicts provision grants the agencies significant advantage in a proceeding. Persons and entities may be well and vigorously represented even if they are not all represented by the same counsel.

Therefore, the NCUA adopts this section as proposed.

Section 747.9 Ex parte Communications

The proposal sought to clarify that the restriction on ex parte communications parallels the requirements of the Administrative Procedure Act (APA). The current § 747.9(b) prohibits ex parte communications between a party, the party's counsel, or another interested person, and the NCUA Board or other decisional employee regarding the merits of an adjudicatory proceeding.

The agencies' intention when adopting the Uniform Rules in 1991 was that § 747.9 conform to, but not exceed, the scope of the APA provisions restricting ex parte communications. The APA prohibits ex parte communications between agency decisionmakers and ''interested persons outside the agency'' regarding the merits of an adjudicatory proceeding. 5 U.S.C. § 557(d). It also prohibits enforcement staff within the agency from participating or advising in the decision, recommended decision, or agency review of an adjudicatory matter except as witness or counsel. 5 U.S.C. § 554(d). The APA does not prohibit agency enforcement staff from seeking approval to amend a notice of, or to settle or terminate, a proceeding.

The current § 747.9(b) could in practice be misinterpreted to expand the prohibition on ex parte communications beyond the scope of the APA to prohibit communications between enforcement staff and the NCUA Board regarding approval to amend or to terminate existing enforcement actions. To insure against such an unintended result, the proposed amendment clarifies that the section is intended to conform to the provisions of the APA by limiting the prohibition on ex parte communications to communications to or from ''interested persons outside the agency,'' 5 U.S.C. 557(d), and by incorporating explicitly the APA's separation of functions provisions, 5 U.S.C. 554(d). This approach is consistent with the most recent Model Adjudication Rules prepared by the Administrative Conference of the United States (ACUS). ACUS, *Model Adjudication Rules* (December 1993).

The NCUA received two comments on this section. One commenter supported the proposal provided that it is limited to intra-agency communications concerning amending a notice of charges or settling or terminating a proceeding. The other commenter claimed that ''NCUA has not stated any compelling need for [the amendment], and we view the proposed rule as inconsistent with the fundamental principles of fairness built into our legal system.'' This commenter fails to recognize that the proposed amendment allows ex parte communications with the NCUA Board only on nonadjudicatory matters, such as when NCUA enforcement staff seeks NCUA Board approval to amend a notice of charges or to settle or terminate an existing enforcement proceeding. Other parties to the proceeding are not entitled to participate in such a decision.

Accordingly, the NCUA adopts this section as proposed.

Section 747.11 Service of Papers

The proposal changed this section by permitting parties, the NCUA Board, and ALJs to serve a subpoena on a party by delivering it to a person of suitable age and discretion at a party's place of work.

The NCUA received one comment on this section. The commenter supported the intent of the proposal, but asserted that the provision permitting service at a person's place of work was too broad to be effective, particularly where a financial institution has numerous branches.

The NCUA interpreted the phrase ''person's place of work'' as used in the proposal to mean the physical location at which an individual works and not as any office of the corporation or association that employs the person. To avoid confusion, the NCUA has added specific reference to physical location to the regulatory text. In addition, the final rule states expressly that only an individual, not a corporation or association, may be served at a residence or place of work.

The same comment points out, however, that the former Uniform Rules did not expressly permit certain methods of service that are useful for serving a corporation or other association. The final rule, therefore, permits service on a party corporation or other association by delivery of a copy of a notice to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Even though a credit union technically may not satisfy the definition of a corporation or other association, it is to be treated as such for purposes of service under this rule.

The final rule also provides that, if the agent is one authorized by a statute to receive service and the statute so requires, the serving party must also mail a copy to the party. The final rule also restructures this provision for clarity.

Section 747.12 Construction of Time Limits

The proposal clarified that the additional time allotted for responding to papers served by mail, delivery service, or electronic media transmission under § 747.12(c) is not included in determining whether an act is required to be performed within ten

days. The proposal also clarified that additional time allotted for responding to papers served by mail, delivery, or electronic media transmission is counted by calendar days and, therefore, a party must count Saturdays, Sundays, and holidays when calculating a time deadline.

The NCUA received one comment on this section, asserting that Saturdays, Sundays and holidays should be excluded when calculating a time deadline because small credit unions and U.S. Post Offices frequently are not open on those days. This comment addresses time deadlines generally, whereas the proposed amendment counts Saturdays, Sundays and holidays only when calculating *extra* time added under § 747.12(c) for responding to papers served by mail, delivery, or electronic media transmission. The proposed amendment does not affect the current rule excluding those days from deadlines of ten days or less, and including them in deadlines of more than ten days. NCUA adopts the section as proposed.

Section 747.20 Amended Pleadings

The proposal changed this section to permit a party to amend its pleadings without leave of the ALJ and to permit the ALJ to admit evidence over the objection that the evidence does not fall directly within the scope of the issues raised by a notice or answer.

The NCUA received one comment on this section. The commenter asserted that the change could unduly prejudice a party if a notice were amended to add or delete allegations immediately prior to the hearing. The commenter expressed concern that the amendment would give a party insufficient time to seek additional discovery or file for summary judgment.

The regulatory text gives the ALJ discretion to revise the hearing schedule to ensure that no prejudice results from last minute amendments to a notice. The NCUA believes this approach is adequate to avoid prejudice to a party and, therefore, the NCUA adopts this section as proposed.

Section 747.24 Scope of Document Discovery

The former Uniform Rules were silent on the use of interrogatories. The proposal expressly prohibited parties from using interrogatories on grounds that other discovery tools are more efficient and less burdensome and therefore more appropriate to administrative adjudications. NCUA received two comments on this subsection. One urged that interrogatories not be expressly prohibited so that they would be available for use on a limited basis. The other urged that interrogatories be expressly permitted without limitation. Both comments are effectively moot in failing to recognize that NCUA's current Local Rule of Practice and Procedure, with a single narrow exception, already expressly prohibits all forms of discovery other than production of documents. 12 CFR 747.100.

The proposal also sought to focus document discovery requests so that they are not unreasonable, oppressive, excessive in scope, or unduly burdensome to any of the parties. Accordingly, the proposal preserved the former rule's limitation on document discovery by permitting discovery only of documents that have material relevance. However, the proposal specifically provided that a request should be considered unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things: (1) It fails to include justifiable limitations on the time period covered and the geographic locations to be searched; (2) the time provided to respond in the request is inadequate; or (3) the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 747.25.

Under the proposal, the scope of permissible document discovery is not as broad as that allowed under Rule 26(b) of the Federal Rules of Civil Procedure (28 U.S.C. app.). Historically, given the specialized nature of enforcement proceedings in regulated industries, discovery in administrative proceedings has not been as expansive as it is in civil litigation.

The NCUA received one comment on this subsection, urging that the Federal Rule 26(b) standard in the current subsection be retained. The agencies' experience with document discovery in their administrative proceedings has been that substantial time and resources are squandered on extraneous document discovery. A standard somewhat more restrictive than that of Federal Rule 26(b) is needed to reasonably confine document discovery. Accordingly, the NCUA adopts this subsection as proposed.

Section 747.25 Request for Document Discovery From Parties

The NCUA proposed several changes to § 747.25. First, the proposal sought to reduce unnecessary burden by permitting a party to: (1) Respond to document discovery either by producing documents as they are kept in the ordinary course of business or by organizing them to correspond to the categories in a document request; and (2) identify similar documents by category when they are voluminous and are protected by the deliberative process, attorney-client, or attorney work-product privilege.

The proposal also amended § 747.25 to permit a party to require payment in advance for the costs of copying and shipping requested documents; and clarified that, if a party has stated its intention to file a timely motion for interlocutory review, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege until the motion for interlocutory review has been decided.

The NCUA received two comments on this section. One comment suggested that a request for interlocutory review should automatically stay the proceeding. Under § 747.28(d) of the Uniform Rules, a party may request that a proceeding be stayed during the pendency of an interlocutory review, and the ALJ has the discretion to decide whether a stay is appropriate. The NCUA believes that this procedure adequately protects the parties. For this reason and to avoid adding unnecessary delays in the administrative proceedings, the NCUA declines to provide for an automatic stay whenever a party requests interlocutory review.

The second comment asserted that permitting the NCUA to require payment in advance for document copying and shipping costs would give the NCUA an advantage over other creditors if the party is bankrupt following the administrative hearing. The commenter does not assert that it is a violation of the bankruptcy laws for the NCUA or any other creditor to require prepayment for products or services. Moreover, the NCUA believes that the situations causing the commenter's concern would be very rare. Accordingly, the NCUA adopts this section as proposed.

Section 747.27 Deposition of Witness Unavailable for Hearing

The proposal clarified that a party may serve a deposition subpoena on a witness who is unavailable by serving the subpoena on the witness's authorized representative. The final rule does not include this proposed change because, in § 747.11(d), the final rule expressly permits a party to serve a subpoena by delivering the subpoena to an agent, which includes delivery to an authorized representative. The proposed change to § 747.27 would be redundant. The NCUA received no comments on

this section. The final rule does not, therefore, change this provision.

Section 747.33 Public Hearings

The proposal changed this section to specify that a party must file a motion for a private hearing with the NCUA Board, and not the ALJ, but must serve the ALJ with a copy of the motion.

The NCUA received no comments on this section, which is adopted as proposed.

Section 747.34 Hearing Subpoenas

The former Uniform Rules did not specifically require that a party inform all other parties when a subpoena is issued to a non-party. The proposal required that, after a hearing subpoena is issued by the ALJ, the party that applied for the subpoena must serve a copy of it on each party. Under the proposal, any party may move to quash any hearing subpoena and must serve the motion on each other party.

The NCUA received no comments on this section, which is adopted as proposed.

Section 747.35 Conduct of Hearings

The proposal limited the number of counsel permitted to examine a witness and clarified that hearing transcripts may be obtained only from the court reporter. The former Uniform Rules were silent on these issues.

The NCUA received no comments on this section, which is adopted as proposed.

Section 747.37 Post-hearing Filings

The proposal changed the title of this section from ''Proposed findings and conclusions'' to ''Post-hearing filings'' to describe more accurately the content of the section.

The proposal also moved, from § 747.35(b) to § 747.37(a), the provision that requires the ALJ to serve each party with notice of the filing of the certified transcript of the hearing (including hearing exhibits). The proposal added a requirement that the ALJ must use the same method of service for this notice for each recipient.

Finally, the proposal clarified that the ALJ may, when appropriate, permit parties more than the allotted 30 days to file proposed findings of fact, proposed conclusions of law, and a proposed order.

The NCUA received no comments on this section, which is adopted with a minor technical change.

Section 747.38 Recommended Decision and Filing of Record

Under the former Uniform Rules, the ALJ was not required to file an index of the record when he filed the record with the NCUA Board. The proposal added this requirement and reorganized this section to improve its clarity.

The NCUA received no comments on this section, which is adopted as proposed.

Technical Changes

The final rule makes several technical changes to the proposal that make the final rule specific to the NCUA. These changes appear throughout the rule text. For example, bracketed references to the ''agency head'' have been replaced with ''the NCUA Board'' and the blank part designation before each section number has been filled in with ''747.''

III. Rationale for Expedited Effective Date

The effective date of NCUA's final rule, June 5, 1996, is less than the thirty days from publication. The APA requires thirty days' notice of effectiveness, but permits that requirement to be waived upon a showing of good cause. 5 U.S.C. 553(d)(3). Good cause exists in this case for making NCUA's final rule effective June 5. The Uniform Rules were originally developed and recently revised jointly with the other agencies. The purpose of the June 5 effective date for NCUA's final rule adopting the revisions is to conform to the effective date of the other agencies' final rules. No party to an NCUA administrative proceeding governed by the Uniform Rules will be prejudiced by the June 5 effective date because the revisions adopted in the final rule apply only to formal administrative proceedings commenced (through filing of a notice of charges) after the effective date (*see* 58 FR 37766). Formal administrative proceedings pending on or before the effective date will not be affected by the revisions.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the NCUA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

This final rule imposes only procedural requirements in administrative adjudications. It contains no substantive requirements. It improves the Uniform Rules of Practice and Procedure and facilitates the orderly determination of administrative proceedings. The changes in this final rule are primarily clarifications and impose no significant additional burdens on regulated institutions, parties to administrative actions, or counsel.

V. Executive Order 12612

This final rule, like the current part 747 it is replacing, will apply to all Federally insured credit unions. The NCUA Board, pursuant to Executive Order 12612, has determined, however, that this joint 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. Further, this joint proposed rule will not preempt provisions of state law or regulations.

VI. Effective Date

Section 302 of the Riegle Community Development and Regulatory Improvement Act 1994 delays the effective date of regulations promulgated by the Federal banking agencies that impose additional reporting, disclosure, or other new requirements to the first date of the first calendar quarter following publication of the final rule. The NCUA believes that Section 302 is not applicable to this final rule, because the regulation does not impose any additional reporting or other requirements not already contained in the current version of the Uniform Rules.

Text of the Final Rule

The text of the amendments to 12 CFR part 747 follows:

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

List of Subjects in 12 CFR Part 747

Administrative Practice and Procedure, Bank Deposit Insurance, Claims, Credit Unions, Crime, Equal Access to Justice, Hearing Procedures, Investigations, Lawyers, Penalties.

Authority and Issuance

For the reasons set out in the preamble, part 747 of chapter VII of title 12 of the Code of Federal Regulations is amended as set forth below:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

1. The authority citation for part 747 is revised to read as follows:

Authority: 12 U.S.C. 1766, 1786, 1784 and 1787; and 42 U.S.C. 4012a.

Subpart A—[Amended]

2. In § 747.1, paragraph (c)(2) is amended by removing ''and'' after the semicolon, paragraph (c)(3) is revised, paragraph (c)(4) is added, paragraph (d) is redesignated as paragraph (e) and revised, and new paragraph (d) is added to read as follows:

§ 747.1 Scope.

* * * * *

(c) * * *

(3) The terms of any final or temporary order issued under section 206 of the Act or any written agreement executed by the National Credit Union Administration (''NCUA''), any condition imposed in writing by the NCUA in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein, pursuant to 12 U.S.C. 1786(k); and

(4) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(d) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g)); and

(e) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in Subparts B through J of this Part.

3. In § 747.6, paragraph (a)(3) is revised to read as follows:

§ 747.6 Appearance and practice in adjudicatory proceedings.

(a) * * *

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the NCUA Board, shall file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

* * * * *

4. In § 747.8, paragraph (b) is revised to read as follows:

§ 747.8 Conflicts of interest.

* * * * *

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 747.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

5. In § 747.9, paragraphs (a) and (b) are revised and a new paragraph (e) is added to read as follows:

§ 747.9 Ex parte communications.

(a) *Definition.* (1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between—

(i) An interested person outside the NCUA (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the NCUA Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the NCUA Board until the date that the NCUA Board issues its final decision pursuant to § 747.40(c):

(1) No interested person outside the NCUA shall make or knowingly cause to be made an ex parte communication to any member of the NCUA Board, the administrative law judge, or a decisional employee; and

(2) No member of the NCUA Board, administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the NCUA any ex parte communication.

* * * * *

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the NCUA in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under section 747.40, except as witness or counsel in public proceedings.

6. In § 747.11, paragraphs (c)(2) and (d) are revised to read as follows:

§ 747.11 Service of papers.

* * * * *

(c) * * *

(2) If a party has not appeared in the proceeding in accordance with § 747.6, the NCUA Board or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

* * * * *

7. In § 747.12, paragraphs (a), (c)(1), (c)(2), and (c)(3) are revised to read as follows:

§ 747.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in § 747.12(c), intermediate Saturdays, Sundays, and Federal holidays are not included.

* * * * *

(c) * * *

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the NCUA Board or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

8. Section 747.20 is revised to read as follows:

§ 747.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the NCUA Board or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

9. In § 747.24, paragraphs (a) and (b) are revised to read as follows:

§ 747.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requester's written agreement to pay in advance for the copying, in accordance with § 747.25.

* * * * *

10. In § 747.25, paragraphs (a), (b), (e), and (g) are revised to read as follows:

§ 747.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR part 4 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

* * * * *

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

* * * * *

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may

deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

* * * * *

11. In § 747.33, paragraph (a) is revised to read as follows:

§ 747.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the NCUA Board, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice, any respondent may file with the NCUA Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the NCUA Board. The form of, and procedure for, these requests and replies are governed by § 747.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

* * * * *

12. In § 747.34, paragraphs (a) and (b)(1) are revised to read as follows:

§ 747.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

* * * * *

13. In § 747.35, paragraph (a)(3) is redesignated as paragraph (a)(4), a new paragraph (a)(3) is added, and paragraph (b) is revised to read as follows:

§ 747.35 Conduct of hearings.

(a) * * *

(3) Examination of witnesses. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

* * * * *

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

14. In § 747.37, the section heading and paragraph (a)(1) are revised to read as follows:

§ 747.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

* * * * *

15. Section 747.38 is revised to read as follows:

§ 747.38 Recommended decision and filing of record.

(a) Filing of recommended decision and record. Within 45 days after expiration of the time allowed for filing reply briefs under § 747.37(b), the administrative law judge shall file with and certify to the NCUA Board, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the NCUA Board for final determination the record of the proceeding, the administrative law judge shall furnish to the NCUA Board a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence

at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

Dated: May 28, 1996.

Becky Baker,

Secretary of the Board, National Credit Union Administration.

[FR Doc. 96–13814 Filed 6–3–96; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–NM–188–AD; Amendment 39–9642; AD 96–11–18]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–80 Series Airplanes, and Model MD–88 and MD–90 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–80 series airplanes, and Model MD–88 and MD–90 airplanes, that requires a one-time measurement of the length of the oxygen mask lanyards of the passenger service unit (PSU), and modification of lanyards that are longer than the proper length. This amendment is prompted by a report that the length of the oxygen mask lanyards of the PSU were found to be too long, apparently due to improper installation during production. The actions specified by this AD are intended to ensure that the length of these oxygen mask lanyards is correct, so that the oxygen canister will be properly activated when needed during an emergency.

DATES: Effective July 9, 1996.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 9, 1996.

ADDRESSES: The service information referenced in this AD may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Department C1–L51 (2–60). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Walter Eierman, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (310) 627–5336; fax (310) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9–80 series airplanes, and Model MD–88 and MD–90 airplanes was published in the Federal Register on February 12, 1996 (61 FR 5334). That action proposed to require, for Model DC–9–80 series airplanes and Model MD–88 airplanes, a one-time measurement of the length of the oxygen mask lanyards of the PSU, and modification, if necessary. For Model MD–90 airplanes, the action proposed to require modification of the oxygen mask lanyards of the PSU.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

Several commenters support the proposed rule.

Request To Extend Compliance Time

Two commenters request that the compliance time be extended from the proposed 24 months to 36 months. One of these commenters states that it would have to special schedule its fleet of airplanes in order to accomplish the proposed measurement and modification within the proposed compliance time; this would entail considerable additional expenses and schedule disruptions.

The FAA does not concur. In developing an appropriate compliance time for this action, the FAA considered not only the degree of urgency associated with addressing the subject unsafe condition, but the practical aspect of completing the required modification within an interval of time that parallels normal scheduled maintenance for the majority of affected operators. However, under the provisions of paragraph (c) of the final rule, the FAA may approve requests for adjustments to the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

Request To Provide Time Frame of Improper Installation

One commenter maintains that the unsafe condition occurred because correct procedures were not followed during aircraft production. In light of this, the commenter requests that the proposal be revised to provide a time frame during which the addressed problem occurred and allow operators to inspect a sampling of airplanes produced during that time to determine if the lanyard problem is present on those airplanes.

The FAA does not concur with the commenter's request. The FAA is unable to determine the time frame during which the apparent improper installation occurred because the manufacturing procedures that existed during the production of all of the affected airplanes did not contain provisions for monitoring the length of the lanyard. Therefore, all airplanes listed in the applicability of the final rule may be subject to the addressed unsafe condition.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 1,200 McDonnell Douglas Model DC–9–80 series airplanes, Model MD–88 airplanes, and Model MD–90 airplanes of the affected design in the worldwide fleet. The FAA estimates that 650 airplanes of U.S. registry will be affected by this AD.

For airplanes on which inspection of the lanyard is required, it will take approximately 81 work hours per airplane to accomplish the required inspection, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $4,860 per airplane.

For airplanes on which modification of the lanyard is required, it will take approximately 121 work hours per airplane to accomplish the required modification at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the