

BOARD ACTION MEMORANDUM

TO: NCUA Board

DATE: September 3, 2004

FROM: Office of General Counsel

SUBJ: Final Rule -
FCU Ownership of Fixed Assets

ACTION REQUESTED: Board issuance of the attached Final Rule.

DATE ACTION REQUESTED: September 23, 2004.

OTHER OFFICES CONSULTED: Office of Examination and Insurance, All Regional Directors.

VIEWS OF OTHER OFFICES CONSULTED: Concur.

BUDGET IMPACT, IF ANY: None.

SUBMITTED TO INSPECTOR GENERAL FOR REVIEW: Yes.

RESPONSIBLE STAFF MEMBER: Paul Peterson, Staff Attorney, Office of General Counsel.

SUMMARY: Staff recommends that the NCUA Board issue final amendments to the fixed asset rule. The fixed asset rule governs federal credit union (FCU) ownership of fixed assets and, among other things, limits investment in fixed assets to five percent of an FCU's shares and retained earnings. Most of the amendments clarify and reorganize the requirements of the current rule to make it easier to understand. The only substantive changes are to: (1) eliminate the requirement that an FCU, when calculating its investment in fixed assets, include its investments in any entity that holds fixed assets used by the FCU; and (2) establish a time frame for submission of requests for waiver of the requirement for partial occupation of premises acquired for future expansion.

RECOMMENDED ACTION: The Board issue the attached Final Rule.

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 742

Federal Credit Union Ownership of Fixed Assets

AGENCY: National Credit Union Administration

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) Board is issuing final revisions to its fixed asset rule. The fixed asset rule governs federal credit union (FCU) ownership of fixed assets and, among other things, limits investment in fixed assets to five percent of an FCU's shares and retained earnings. This final rule clarifies and reorganizes the requirements of the current rule to make it easier to understand. The only substantive changes in the final rule are to: (1) eliminate the requirement that an FCU, when calculating its investment in fixed assets, include its investments in any entity that holds fixed assets used by the FCU; and (2) establish a time frame for submission of requests for waiver of the requirement for partial occupation of premises acquired for future expansion.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Paul Peterson, Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Credit Union Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations. 12 U.S.C. 1757(4).

Generally, an FCU may only invest in property it intends to use to transact credit union business, that is, to support its internal operations or serve its members. 12 CFR 721.3(d). NCUA's fixed asset rule limits an FCU's investment in fixed assets and imposes requirements on the planning for, use of, and disposal of real property acquired for future expansion. 12 CFR 701.36.

The NCUA Board has a policy of continually reviewing NCUA regulations to "update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions." NCUA Interpretive Ruling and Policy Statement (IRPS)

87-2, Developing and Reviewing Government Regulations. As a result of the NCUA's 2003 review, the Board determined that the fixed asset rule should be updated. In April, 2004, the Board published its proposed updates for public comment. 69 FR 21439 (April 21, 2004).

B. Section-by-Section Analysis of the Final Rule

This final rule does not vary significantly from the proposed rule. Like the proposed rule, the only substantive revisions in the final rule from the current rule are to (1) eliminate the requirement that an FCU, when calculating its investment in fixed assets, include its investments in any entity that holds fixed assets used by the FCU, and (2) establish a time frame for submission of requests for waiver of the requirement for partial occupation of premises acquired for future expansion. The final rule also reorganizes the paragraph structure and clarifies the provisions governing an FCU's plans for future expansion into fixed assets. A section-by-section analysis of these revisions follows.

§701.36(a)

The final rule renumbers §701.36(c), Investment in Fixed Assets, as §701.36(a). The final rule retains the requirement that FCUs with \$1,000,000 or more in assets cannot invest in fixed assets if the investment would cause the aggregate of all the FCU's fixed assets to exceed five percent of the FCU's shares and

retained earnings. The final rule retains the waiver process that allows FCUs to apply for a waiver of the five percent limitation and reorganizes the waiver provisions to simplify them and make them easier to follow.

§701.36(b)

The final rule renumbers §701.36(d), Premises, to §701.36(b). This paragraph contains provisions on real property owned by an FCU that is not currently used to transact credit union business.

The final rule changes the title of this paragraph to “Premises Not Currently Used to Transact Credit Union Business” to better indicate its scope.

The final rule clarifies that requests for waiver of the partial occupation requirement must be in writing and submitted to NCUA within 30 months of acquisition of the premises. The final rule also clarifies that partial use occurs when FCU staff occupy some part of the space on a full-time basis.

The final clarifies that, after real property acquired for future expansion has been held for one year, a board resolution with definitive plans for full utilization must be available for inspection by an NCUA examiner. The final rule also clarifies that full use occurs when the premises are completely occupied by the FCU, or by some combination of the FCU, credit union service corporations (CUSOs),

and credit union vendors, on a full-time basis. CUSO and vendor activities must be primarily to support the operations of the FCU or serve its members.

The final rule clarifies and simplifies the provisions on abandoned premises. The final rule revises the provision that an FCU “shall endeavor to dispose of ‘abandoned premises’ at a price sufficient to reimburse the FCU for its investment and costs of acquisition” to state that an FCU must seek fair market value for the property.

§701.36(c)

The final rule renumbers §701.36(e), Prohibited Transactions, to §701.36(c). The rule retains the prohibition on an FCU acquiring or leasing property (without the prior approval of NCUA) from the FCU’s insiders, their family members, or corporations and partnerships in which the insider has a significant ownership interest. To ensure that all business forms are covered, the rule adds limited liability companies and “other entities” to this list.

§701.36(d)

FCUs that qualify for the Regulatory Flexibility (RegFlex) Program are exempt from the five percent limitation on investment in fixed assets. 12 CFR part 742. Accordingly, the final rule adds a new paragraph (d) to §701.36 with a cross-

reference to the RegFlex Program. The rule also reiterates that FCUs that once qualified for the RegFlex Program and its associated exemptions but no longer qualify for RegFlex must comply with all the provisions of the fixed asset rule.

§701.36(e)

The final rule rennumbers §701.36(b), Definitions, to §701.36(e). The rule retains the definition of “investment in fixed assets” found in subparagraph (4), but deletes the subparagraph (4)(iv) portion of the definition that includes any investments in, and loans to, a partnership or corporation, including a CUSO, that holds any fixed assets used by the FCU. This portion of the definition is unnecessary and, in some cases, may cause investment in fixed assets to be overstated.

The final rule revises the definition of “retained earnings” in subparagraph (7) to mean “undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, and other appropriations from undivided earnings as designated by management or the Administration.” The revision recognizes that reserve accounts may be created out of undivided earnings consistent with generally accepted accounting principles. The rule also separates the definitions of “shares” and “retained earnings” and alphabetizes all the definitions to make them easier to locate.

§742.4(a)

The final rule includes a technical amendment to the RegFlex Program rule reflecting the restructuring of the fixed asset rule.

C. Public Comments

NCUA received 12 comment letters regarding the proposed rule. Almost all the commenters expressed general agreement with the proposed rule, and, in particular, the clarifications and simplifications. Most of the commenters expressed appreciation for NCUA's policy of reviewing its regulations at least once every three years. Summaries of the comments and the Board's reaction follow.

Amendment to Definition of Fixed Asset

Almost all the commenters agree with the change in the definition of fixed asset to exclude investments in entities that hold fixed assets used by the FCU.

One commenter believes that lease payments for fixed assets should also be excluded from the calculation of the fixed asset limit. The Board does not want to exclude lease payments. The Board's longstanding position is that an FCU can over-invest in fixed assets through binding lease arrangements just as it can

over-invest through outright ownership. See, for example, the preamble to the 1989 final fixed asset rule. 54 FR 18466 (May 1, 1989).

Clarification of “Partially Occupy” and “Fully Occupy” and Associated Time

Frames

The proposed rule sought to clarify that premises were considered partially occupied when the credit union is using some part of the space on a full-time basis and fully occupied when the credit union, or a combination of the credit union, CUSOs, or vendors, use the entire space on a full-time basis. Almost all the commenters agreed that the clarifications were helpful.

Most commenters believe it is reasonable that credit unions intending to seek a waiver of the requirement for partial occupation of premises within three years should file the request for waiver within 30 months. One commenter asks that, instead of 30 months, the request for waiver be filed within 35 months, one month before the expiration of the three-year period. One commenter objects to the waiver provision and believes it should be eliminated. This commenter is particularly concerned that a credit union that loses its eligibility for the RegFlex Program should not be granted a waiver.

The final rule retains the 30-month notice requirement. Thirty months seems a reasonable amount of time to prepare a waiver request. The Board also believes

that the Regional Director should have flexibility to grant waivers in appropriate cases, and the final rule retains this waiver authority.

Several commenters believe NCUA should reduce or eliminate the rule's requirements for both partial and full occupation, but particularly for full occupation. These commenters contend it is difficult for a credit union to obtain a building or lease space that is a perfect fit for the credit union's current and near term plans and the rule's occupation requirements restrict credit union growth and may be anticompetitive. One commenter cites the perceived difficulty rural and low-income credit unions have in finding appropriate office space, and another cites the perceived difficulty a continuing credit union in a merger has in balancing reduced staffing needs with the buildings it inherits in a merger. Another commenter stated that office construction projects take more than three years from first planning to building occupation and that it is "impractical to write a regulation that will inevitably require a waiver." A few commenters also believe credit unions eligible for the RegFlex program should be exempt from any requirements to fully occupy a building because of the lack of safety and soundness concerns for these credit unions. Two commenters cite with approval the Office of the Comptroller of the Currency's (OCC's) approach to real estate owned by national banks. The OCC requires partial occupation of bank-owned real estate but not always full occupation.

The Board recognizes the difficulties associated with the management of real estate and other fixed assets but believes that the fixed asset rule, as revised by this rulemaking, provides maximum flexibility to FCUs within the bounds of the law and safety and soundness. Federal credit unions are chartered for the purpose of providing financial services to their members and it is not permissible for them to engage in real estate activities that do not support that purpose.

While it may sometimes be difficult for credit unions to find real estate to fit their needs or to downsize real estate holdings following a merger, the Board believes the rule provides enough flexibility to meet various circumstances. The rule allows an FCU to own or lease premises it will not occupy immediately but needs for future expansion and gives FCUs significant leeway on how to achieve both partial and full occupation. For example, there is no set time period within which an FCU must achieve full occupation. While the rule requires an FCU to develop a definitive plan for full occupation, it has an entire year after it acquires property to develop the plan. Further, with regard to partial occupation, the rule permits FCUs to hold real estate for significant periods of time – up to three years – before the FCU has to occupy any of the space. If an FCU needs additional time beyond three years to achieve partial occupation, it may request approval for additional time from its Regional Director. The Board believes that it would be unusual, even when an FCU is constructing its own premises, for the FCU not to achieve partial occupation within three years. Still, if the construction process will

take more than three years, a waiver is appropriate and the credit union should obtain it before binding itself contractually to the project.

The Board is aware that the Office of the Comptroller of the Currency has a different view of the powers of national banks under the National Bank Act, but the Board has concluded, for both legal and safety and soundness reasons, that FCUs may not lease real estate to unrelated third parties indefinitely. As noted above, the acquisition of real estate and other fixed assets must support the provision of financial services to credit union members and the Board believes the rule provides significant and sufficient flexibility for FCUs in how they address any excess capacity they may have in fixed assets they acquire.

Fixed Asset Limitation.

The current rule limits an FCU's fixed assets to five percent of shares and retained earnings. Credit unions eligible for the RegFlex Program are exempt from this limitation and there is a waiver process that other credit unions may use to avoid the five percent limitation.

A few commenters are concerned with the proposed rule's clarification that credit unions that lose their eligibility for the regulatory flexibility program must again comply with the fixed asset rule's five percent limitation. One commenter suggests that a credit union that loses its status have up to five years to dispose

of fixed assets, citing a similar time frame in the rule for disposition of abandoned premises. Another commenter suggests that credit unions with less than 9% net worth should have their RegFlex Program status extended for purposes of compliance with the fixed asset limitation even if they lose their RegFlex status for other purposes. One commenter suggests that NCUA apply the 5% limit on fixed assets to credit unions that have a 7% or less net worth ratio, and that NCUA modify its rule to increase the limit in direct proportion to the amount that the net worth ratio exceeds 7%. Another commenter believes the ratio of fixed assets to a combination of deposits and capital is not a meaningful test of prudent management.

In addressing these comments, the Board first wishes to clarify a statement made in the preamble of the proposed rule. The preamble stated that an FCU eligible for the RegFlex Program with fixed assets exceeding five percent of shares and retained earnings and that subsequently loses its RegFlex eligibility must either reduce its fixed asset holdings below the five percent level or obtain a waiver. The RegFlex Program regulation, however, has a grandfather provision that states:

Any action by the credit union under the RegFlex authority will be grandfathered. Any actions subsequent to losing the RegFlex authority must meet NCUA's regulatory requirements. This does not diminish NCUA's authority to require a credit union to divest

its investments or assets for substantive safety and soundness reasons.

12 CFR 742.8. Accordingly, an FCU that loses its RegFlex eligibility and finds itself with fixed assets exceeding five percent of shares and retained earnings does not have to divest itself of any fixed assets unless NCUA affirmatively orders it to do so for safety and soundness reasons. If the FCU wants to acquire additional fixed assets, the FCU will need a waiver from the Regional Director before the acquisition if, after acquisition, the FCU would exceed the five percent limit. The Board has amended the final rule text to reflect this more clearly.

As stated above, a few commenters request modification of the five percent limit for FCUs that lose their RegFlex eligibility. The Board does not believe these credit unions need any special variance from the five percent limit. A Regional Director has authority to grant waivers and set conditions on those waivers. For FCUs that lose RegFlex eligibility and have or want fixed assets that would put them over the five percent limit, a Regional Director has authority to establish appropriate fixed asset levels on a case-by-case basis.

D. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small entities (those credit unions under ten million dollars in assets). NCUA believes that, under the current rule, the only burden imposed on small credit unions is the requirement to submit a waiver request if investment in fixed assets exceeds 5% of retained shares and earnings. There are presently about 4,500 small, federally-insured credit unions. Each year, only about ten of these credit unions submit a waiver request, and NCUA estimates each waiver request takes about ten hours to prepare. Accordingly, and as stated in the preamble to the proposed rule, NCUA does not believe the rule imposes a significant economic impact on a substantial number of small entities and no flexibility analysis is required. NCUA received no comments about this conclusion.

Paperwork Reduction Act

The proposed rule requested comment on the information collection requirements contained in the fixed asset rule and advised that NCUA was seeking the reinstatement of Collection of Information, FCU Ownership of Fixed Assets, Control Number 3133-0040. No comments were received. On July 7, 2004, the Office of Management and Budget (OMB) approved the reinstatement of Control Number 3133-0040, with revisions as proposed and an expiration date of July 31, 2007.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in [44 U.S.C. 3502\(5\)](#), voluntarily complies with the executive order. This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999--Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined

by section 551 of the Administrative Procedure Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects

12 CFR Part 701

Credit unions.

12 CFR Part 742

Credit unions, Reporting and recordkeeping requirements

By the National Credit Union Administration Board on September 23, 2004.

Mary Rupp,

Secretary of the Board.

Accordingly, the NCUA amends 12 CFR parts 701 and 742 as follows:

PART 701-- Organization and Operation of Federal Credit Unions

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31

U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq., 42 U.S.C. 1861 and 42 U.S.C. 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Revise §701.36 to read as follows:

§701.36 FCU Ownership of Fixed Assets.

(a) Investment in Fixed Assets.

(1) No federal credit union with \$1,000,000 or more in assets may invest in any fixed assets if the investment would cause the aggregate of all such investments to exceed five percent of the credit union's shares and retained earnings.

(2) The NCUA may waive the prohibition in paragraph (a)(1) of this section.

(i) A federal credit union desiring a waiver must submit a written request to the NCUA regional office having jurisdiction over the geographical area in which the credit union's main office is located. The request must describe in detail the contemplated investment and the need for the investment. The request must also indicate the approximate aggregate amount of fixed assets, as a percentage of shares and retained earnings, that the credit union would hold after the investment.

(ii) The regional director will inform the requesting credit union, in writing, of the date the request was received and of any additional documentation that the regional director might require in support of the waiver request.

(iii) The regional director will approve or disapprove the waiver request in writing within 45 days after receipt of the request and all necessary supporting documentation. If the regional director approves the waiver, the regional director will establish an alternative limit on aggregate investments in fixed assets, either as a dollar limit or as a percentage of the credit union's shares and retained earnings. Unless otherwise specified by the regional director, the credit union may make future acquisition of fixed assets only if the aggregate all of such future investments in fixed assets does not exceed an additional one percent of the shares and retained earnings of the credit union over the amount approved by the regional director.

(iv) If the regional director does not notify the credit union of the action taken on its request within 45 calendar days of the receipt of the waiver request or the receipt of additional requested supporting information, whichever occurs later, the credit union may proceed with its proposed investment in fixed assets. The investment, and any future investments in fixed assets, must not cause the credit union to exceed the aggregate investment limit described in its waiver request.

(b) Premises Not Currently Used to Transact Credit Union Business.

(1) When a federal credit union acquires premises for future expansion and does not fully occupy the space within one year, the credit union must have a board resolution in place by the end of that year with definitive plans for full occupation. Premises are fully occupied when the credit union, or a combination of the credit union, CUSOs, or vendors, use the entire space on a full-time basis. CUSOs and vendors must be using the space primarily to support the credit union or to serve the credit union's members. The credit union must make any plans for full occupation available to an NCUA examiner upon request.

(2) When a federal credit union acquires premises for future expansion, the credit union must partially occupy the premises within a reasonable period, not to exceed three years. Premises are partially occupied when the credit union is using some part of the space on a full-time basis. The NCUA may waive this partial occupation requirement in writing upon written request. The request must be made within 30 months after the property is acquired.

(3) A federal credit union must make diligent efforts to dispose of abandoned premises and any other real property not intended for use in the conduct of credit union business. The credit union must seek fair market value for the property, and record its efforts to dispose of abandoned premises. After premises have been abandoned for four years, the credit union must publicly advertise the property for sale. Unless otherwise approved in writing by the NCUA, the credit

union must complete the sale within five years of abandonment.

(c) Prohibited Transactions.

(1) Without the prior written approval of the NCUA, no federal credit union may invest in premises through an acquisition or a lease of one year or longer from any of the following:

(i) A director, member of the credit committee or supervisory committee, or senior management employee of the federal credit union, or immediate family member of any such individual.

(ii) A corporation in which any director, member of the credit committee or supervisory committee, official, or senior management employee, or immediate family members of any such individual, is an officer or director, or has a stock interest of 10 percent or more.

(iii) A partnership, limited liability company, or other entity in which any director, member of the credit committee or supervisory committee, or senior management employee, or immediate family members of any such individual, is a general partner, or a limited partner or entity member with an interest of 10 percent or more.

(2) The prohibition contained in paragraph (c)(1) of this section also applies to a lease from any other employee if the employee is directly involved in investments in fixed assets unless the board of directors determines that the employee's involvement does not present a conflict of interest.

(3) All transactions with business associates or family members not specifically prohibited by this paragraph (c) must be conducted at arm's length and in the interest of the credit union.

(d) Regulatory Flexibility Program. Federal credit unions that qualify for the Regulatory Flexibility Program provided for in part 742 of this chapter are exempt from the five percent limitation described in paragraph (a) of this section. For federal credit unions eligible for the Regulatory Flexibility Program that subsequently lose eligibility:

(1) Section 742.8 of this chapter provides that NCUA may require the credit union to divest any existing fixed assets for substantive safety and soundness reasons; and

(2) The credit union may not make any new investments in fixed assets if, after the investment, the credit union's total investments in fixed assets would exceed the five percent limitation described in paragraph (a) of this section. The regional director may waive this prohibition to allow for new investments.

(e) Definitions -- As used in this section:

(1) Abandoned premises means real property previously used to transact credit union business but no longer used for that purpose and real property originally acquired for future expansion for which the credit union no longer contemplates such use.

(2) Fixed assets means premises, furniture, fixtures and equipment.

(3) Furniture, fixtures, and equipment means all office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.

(4) Investments in fixed assets means:

(i) Any investment in improved or unimproved real property which is being used or is intended to be used as premises;

(ii) Any leasehold improvement on premises;

(iii) The aggregate of all capital and operating lease payments on fixed assets, without discounting commitments for future payments to present value; and

(iv) Any investment in furniture, fixtures and equipment.

(5) Immediate family member means a spouse or other family members living in the same household.

(6) Premises means any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the credit union transacts or will transact business.

(7) Senior management employee means the credit union's chief executive officer (typically this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g., Assistant President, Vice President or Assistant Treasurer/Manager) and the chief financial officer (Comptroller).

(8) Shares means regular shares, share drafts, share certificates, other savings.

(9) Retained earnings means undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, and other appropriations from undivided earnings as designated by management or the Administration.

PART 742 – Regulatory Flexibility Program

3. The authority citation for part 742 continues to read as follows:

Authority: 12 U.S.C 1756 and 1766.

4. Revise §742.4(a) to read as follows:

§742.4 From what NCUA regulations will I be exempt?

(a) RegFlex credit unions are exempt from the provisions of the following NCUA regulations without restrictions or limitations: § 701.25, § 701.32(b) and (c), § 701.36(a), § 703.5(b)(1)(ii) and (2), § 703.12(c), § 703.16(b), and § 723.7(b) of this chapter.

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