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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AE39

Federal Credit Union Ownership of Fixed Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulation governing federal credit union (FCU) ownership of fixed assets. To provide regulatory relief to FCUs, the final rule eliminates a provision in the current fixed assets rule that established a five percent aggregate limit on investments in fixed assets for FCUs with \$1,000,000 or more in assets. With this elimination, provisions regarding waivers from the aggregate limit are no longer relevant, so the final rule also eliminates those provisions. Instead of applying the prescriptive aggregate limit provided by regulation in the current fixed assets rule, under the final rule, NCUA will oversee FCU ownership of fixed assets through the supervisory process and guidance.

The final rule also makes conforming amendments to the scope and definitions sections of the current fixed assets rule to reflect this modified approach, and it revises the title of §701.36 to more accurately reflect this amended scope and applicability. In addition, the final rule simplifies the current fixed assets rule's partial occupancy requirements for FCU premises acquired for future expansion by establishing a single six-year time period for partial occupancy of all premises and by removing the 30-month requirement for partial occupancy waiver requests.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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I. Background

The Federal Credit Union Act (FCU Act) authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.¹ NCUA's fixed assets rule interprets and implements this provision of the FCU Act.² NCUA's current fixed assets rule: (1) limits FCU investments in fixed assets; (2) establishes occupancy, planning, and disposal requirements for acquired and abandoned premises; and (3) prohibits certain transactions.³ Under the current rule, fixed assets are defined as premises, furniture, fixtures, and equipment, including any office, branch office, suboffice, service center, parking lot, facility, real estate where a credit union transacts or will transact business, office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.⁴

A. 2013 rule.

The Board has a policy of continually reviewing NCUA's regulations to update, clarify, and simplify existing regulations and eliminate redundant and unnecessary provisions. To carry out this policy, NCUA identifies one-third of its existing regulations for review each year and provides notice of this review so the public may comment. In 2012, NCUA reviewed its fixed assets rule as part of this process. As a result of that review, in March 2013, the Board issued

¹ 12 U.S.C. 1757(4).

² 12 CFR 701.36.

³ Id.

⁴ 12 CFR 701.36(c).

proposed amendments to the fixed assets rule to make it easier for FCUs to understand it.⁵ The proposed amendments did not make any substantive changes to the regulatory requirements. Rather, they only clarified the rule and improved its overall organization, structure, and readability.

In response to the Board's request for public comment on the March 2013 proposal, several commenters offered suggestions for substantive changes to the fixed assets rule, such as increasing or eliminating the aggregate limit on fixed assets, changing the current waiver process, and extending the time frames for occupying premises acquired for future expansion. These comments, however, were beyond the scope of the March 2013 proposal, which only reorganized and clarified the rule. Accordingly, in September 2013, the Board adopted the March 2013 proposal as final without change except for one minor modification.⁶ In finalizing that rule, however, the Board indicated it would take the commenters' substantive suggestions into consideration if it were to make subsequent amendments to NCUA's fixed assets rule.

B. July 2014 proposal.

In July 2014, the Board issued a proposed rule to provide regulatory relief to FCUs and to allow FCUs greater autonomy in managing their fixed assets.⁷ These amendments reflected some of the public comments received on the March 2013 proposal. Specifically, in the July 2014

⁵ 78 FR 17136 (Mar. 20, 2013).

⁶ 78 FR 57250 (Sept. 18, 2013).

⁷ 79 FR 46727 (Aug. 11, 2014).

proposal, the Board proposed to allow an FCU to exceed the five percent aggregate limit,⁸ without the need for a waiver, provided the FCU implemented a fixed assets management (FAM) program that demonstrated appropriate pre-acquisition analysis to ensure the FCU could afford any impact on earnings and net worth levels resulting from the purchase of fixed assets. Under the July 2014 proposal, an FCU's FAM program would have been subject to supervisory scrutiny and would have had to provide for close ongoing oversight of fixed assets levels and their effect on the FCU's financial performance. It also would have had to include a written policy that set an FCU board-established limit on the aggregate amount of the FCU's fixed assets. In the July 2014 proposal, the Board also proposed to simplify the partial occupancy requirement for premises acquired for future expansion by establishing a single five-year time period for partial occupancy of any premises acquired for future expansion, including improved and unimproved property, and by removing the current fixed assets rule's 30-month time limit for submitting a partial occupancy waiver request.

The public comment period for the July 2014 proposal closed on October 10, 2014, and NCUA received thirty-six comments on the proposal. While commenters generally supported the Board's efforts to provide regulatory relief from the requirements concerning FCU fixed assets, most commenters advocated for more relief or suggested alternative approaches to achieving that objective.

For example, a significant number of commenters suggested that the July 2014 proposal did not provide sufficient regulatory relief and that the five percent aggregate limit should be eliminated.

⁸ The five percent aggregate limit on fixed assets is measured in comparison to the FCU's shares and retained earnings.

These commenters noted that the aggregate limit is not statutorily mandated by the FCU Act and, thus, FCUs should be allowed to independently manage their own fixed assets without a strict regulatory limit. Several commenters argued further that FCUs should be permitted to manage their own fixed assets without the additional requirements.

In addition, a large percentage of commenters opposed the proposed FAM program requirement. Commenters argued that it would be unnecessary or overly burdensome, and it would impose additional burdens that FCUs are not already subject to under the current rule. For example, one commenter argued that the July 2014 proposal simply shuffled regulatory burden, rather than providing meaningful regulatory relief. Several other commenters proffered a similar argument that the additional requirements imposed after assets are acquired would increase FCUs' compliance responsibilities and costs, mitigating any flexibility gained under the proposal.

The July 2014 proposal also would have simplified the partial occupancy requirement for premises acquired for future expansion. Virtually all commenters that provided feedback on the proposed amendments to the partial occupancy requirement supported the overall concept of streamlining or improving this aspect of the fixed assets rule. However, most commenters requested additional relief beyond that proposed. For example, a number of commenters suggested that the time period for partial occupancy should be extended. Commenters also recommended that regulatory timeframes for occupancy should be eliminated entirely.

After careful consideration of the public comments, particularly those relating to the fixed assets aggregate limit, the Board determined that additional regulatory relief beyond what was provided

in the July 2014 proposal was warranted. Therefore, the Board did not adopt the July 2014 proposal, including any FAM program requirements. The Board concluded upon further review that oversight of the purchase of FCU investments in fixed assets can be effectively achieved through supervisory guidance and the examination process, rather than through prescriptive regulatory limitations. Accordingly, in March 2015, the Board issued a new proposal to eliminate the five percent aggregate limit on fixed assets.

C. March 2015 proposal.

In March 2015, largely because of the public comments received in response to the July 2014 proposal, the Board issued a new proposal to address commenters' requests for additional regulatory relief from the aggregate limit on fixed assets.⁹ The Board also incorporated into the March 2015 proposal partial occupancy requirements similar to those from the July 2014 proposal, but with one modification to the proposed single time period for partial occupancy, to provide even more regulatory relief to FCUs.

Specifically, in March 2015, the Board proposed to eliminate the five percent aggregate limit on FCU investments in fixed assets. It also proposed to eliminate the related provisions governing waivers of the aggregate limit because those provisions would no longer be relevant in the absence of a prescriptive aggregate limit.

⁹ 80 FR 16595 (Mar. 30, 2015).

In addition, in the March 2015 proposal, the Board proposed to incorporate, with one change, the proposed amendments in the July 2014 proposal relating to the partial occupancy requirements for FCU premises acquired for future expansion. Specifically, the Board proposed to require an FCU to partially occupy any premises acquired for future expansion, regardless of whether the premises are improved or unimproved property, within six years from the date of the FCU's acquisition of those premises. In the July 2014 proposal, the Board proposed to require partial occupancy within a uniform five-year time period. However, in response to public comments, the March 2015 proposal revised it to six years rather than five years for partial occupancy, which would retain the current fixed assets rule's time period for unimproved land or unimproved real property and extend the current rule's time period for improved premises by three years. The March 2015 proposal also reissued, without change, the amendment in the July 2014 proposal to eliminate the current requirement for an FCU that wishes to apply for a waiver of the partial occupancy requirement to do so within 30 months of acquisition of the property acquired for future expansion.

II. Public Comments on the March 2015 proposal

The public comment period for the March 2015 proposal ended on April 29, 2015. NCUA received sixteen comments on the proposed rule: two from credit union trade associations, four from state credit union leagues, seven from FCUs, and three from FISCUs. Most commenters were generally supportive of the proposal and the Board's continuing efforts to provide regulatory relief in this area. Four commenters supported the proposal without stipulation, but eight commenters asked for more relief and flexibility or expressed concern about one or more

aspects of the proposal. None of the commenters opposed the proposal entirely. However, one commenter indicated that it could not support the rule without first evaluating any related supervisory guidance.

The substantive comments on the key aspects of the March 2015 proposal are discussed in more detail below.

A. Removal of the 5% aggregate limit.

Section 701.36(c) of the current fixed assets rule establishes an aggregate limit on investments in fixed assets for FCUs with \$1,000,000 or more in assets. For an FCU meeting this asset threshold, the aggregate of all its investments in fixed assets is limited to five percent of its shares and retained earnings, unless NCUA grants a waiver establishing a higher limit.¹⁰ The March 2015 proposal eliminated this provision. It also eliminated the provisions in the current fixed assets rule relating to waivers from the aggregate limit.

Eleven commenters expressed support for eliminating the five percent aggregate limit. Of those, two commenters also supported the reissuance of the proposal without the FAM program requirements that were included in the July 2014 proposal. One commenter asserted that NCUA should not impose an aggregate limit on FCU investments in fixed assets because it is not required by the FCU Act. Two commenters noted that the five percent aggregate limit is outdated and the removal of the limitation is long overdue. One commenter indicated that the current one-size-fits-all rule is very restrictive and may disadvantage credit unions in higher cost

¹⁰ 12 CFR 701.36(c).

areas because credit unions located in areas with higher property costs can reach the cap much more easily and quickly. The same commenter posited that the latest proposed approach is preferable to the current rule because the individuality of each credit union can be incorporated into the supervisory evaluation process through examiner judgment.

Two commenters noted that the removal of the five percent limit will allow credit unions to make the business decisions necessary to thrive, and to accomplish their growth strategies and meet the needs of their members. Another commenter stated that the proposed amendment will allow credit unions more flexibility in finding the greatest value for their members. A different commenter said the change will increase a credit union's flexibility in the management and ownership of its fixed assets. One commenter said that the removal of the aggregate limit represents significant reform that provides FCUs with flexibility to meet their business or operational needs and the needs of members.

One commenter generally supported the concept of moving oversight of fixed assets from the regulatory process to the supervisory process, but expressed concern that the proposal simply shifts the same requirements from regulatory oversight to supervisory oversight.

In view of the generally positive comments received on this aspect of the March 2015 proposal, the Board is adopting, without change, the amendment to remove the five percent aggregate limit. As discussed in the preamble to the March 2015 proposal, the objective of the fixed assets rule is to place reasonable limits on the risk associated with excessive or speculative acquisition

of fixed assets.¹¹ The Board continues to believe this objective can be effectively achieved through the supervisory process as opposed to a regulatory limit.¹² Accordingly, the final rule eliminates the five percent aggregate limit on FCU investments in fixed assets. It also eliminates the related provisions governing waivers of the aggregate limit because those provisions are no longer necessary in the absence of a prescriptive regulatory limit.

The Board emphasizes, however, that NCUA's supervisory expectations remain high. As noted in the March 2015 proposal, the Board cautions that the elimination of the aggregate limit should not be interpreted as an invitation for FCUs to make excessive, speculative, or otherwise irresponsible investments in fixed assets. This final rule reflects the Board's recognition that relief from the prescriptive limit on fixed assets is appropriate, but FCU investments in fixed assets are, and will continue to be, subject to supervisory review. If an FCU has an elevated level of fixed assets, NCUA will maintain close oversight to ensure the FCU conducts prudent planning and analysis with respect to fixed assets acquisitions, can afford any such acquisitions, and properly manages any ongoing risk to its earnings and capital.

Supervisory guidance and review.

Most commenters generally supported the overall concept of overseeing FCU ownership of fixed assets through the supervisory process and guidance, instead of applying a prescriptive aggregate

¹¹ See 43 FR 26317 (June 19, 1978) ("This regulation is intended to ensure that the officials of FCUs have considered all relevant factors prior to committing large sums of members' funds to the acquisition of fixed assets."); 49 FR 50365, 50366 (Dec. 28, 1984) ("The intent of the regulation is to prevent, or at least curb, excessive investments in fixed assets and the related costs and expenses that may be beyond the financial capability of the credit union."); 54 FR 18466, 18467 (May 1, 1989) ("[T]he purpose of the regulation is to provide some control on the potential risk of excess investment and/or commitment to invest substantial sums in fixed assets.").

¹² See 80 FR 16595, 16601 (Mar. 30, 2015).

limit provided by regulation. One commenter noted that the supervisory examination process works well in the majority of cases. Another commenter said the proposed approach is rational because investments in fixed assets present little safety and soundness risk.

A number of other commenters, however, expressed concern about the oversight of FCU fixed assets through supervisory guidance and review. One commenter argued that a credit union's purchase of a fixed asset should not be left to an individual examiner's interpretation of what should be acquired by the credit union. One commenter encouraged the agency to adopt guidance that clearly articulates the criteria that an examiner will use to determine if a credit union's investments in fixed assets are safe and sound. Another commenter suggested that when a credit union maintains a well-capitalized net worth ratio and positive earnings, and produces a sound business plan, NCUA should not intervene or second guess the credit union's decisions. Another commenter stated generally that supervisory guidance and the examination process should allow a credit union flexibility to manage its own operations and not subject it to micro-management and the rigid scrutiny of examiners. A different commenter stated that fixed assets acquisitions must be evaluated within the context of the individual strategies of each credit union and examiners should be trained accordingly.

In addition, six commenters requested that any guidance governing investments in fixed assets be issued for public comment. One commenter said the Board should re-issue for public comment a new proposal that includes proposed supervisory guidance as an appendix to the proposed rule. One commenter asked that guidance be provided before any final rule is adopted. Another

commenter suggested that guidance should be issued in conjunction with the final rule. One commenter simply urged that guidance be timely issued.

While the Board appreciates the value in affording the opportunity for public comment, the Board does not believe that formal notice-and-comment procedures for the final rule's companion guidance are required or necessary in this circumstance. As noted above, the Board has already formally solicited public comment on the subject of fixed assets in 2013, 2014, and 2015, and virtually all of the amendments contained in this final rule are in response to the comments received. Further, the amendments are intended to grant significant regulatory relief to FCUs, and a fourth notice-and-comment process on this subject would only further delay their implementation.

The Board notes that supervisory guidance does not require notice and comment rulemaking under the Administrative Procedure Act (APA), and thus, it does not have the force and effect of law or regulation.¹³ The purpose of supervisory guidance and other interpretive rules is generally “to advise the public of the agency’s construction of the statutes and rules that it administers.”¹⁴ Supervisory guidance regarding FCU ownership of fixed assets is not intended to supplant FCUs’ business decisions or to impose rigid and prescriptive requirements on FCUs in the management of their investments in fixed assets. Rather, the guidance will provide

¹³ Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). The term “interpretative rule,” or “interpretive rule,” is not defined by the APA, but the United States Supreme Court has noted that the critical feature of interpretive rules is that they are “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1203-04, 191 L. Ed. 2d 186 (2015) (citing, Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L.Ed.2d 106 (1995)).

¹⁴ Id.

examiners and credit unions with clear information about NCUA's supervisory expectations with respect to the final rule, and establish a consistent framework for the exam and supervision process for the review of credit union management of fixed assets.

The Board recognizes that clear and timely supervisory guidance is important to the effective implementation of this final rule. Thus, before this final rule takes effect, NCUA will issue updated supervisory guidance to examiners that will be shared with FCUs. The guidance will reflect current supervisory expectations¹⁵ that require an FCU to demonstrate appropriate due diligence, ongoing board and management oversight,¹⁶ and prudent financial analysis to ensure the FCU can afford any impact on earnings and net worth levels caused by its purchase of fixed assets. The guidance will ensure examiners effectively identify any risks to safety and soundness due to an FCU's excessive investment in fixed assets. It will focus on evaluating the quality of an FCU's fixed assets management relative to its planning for fixed assets acquisitions and controlling the related financial risks. The guidance will also focus on evaluating an FCU's quality of earnings and capital relative to its projected performance under both baseline (expected) and stressed scenarios. The Board notes that the evaluation of fixed assets is not a current baseline review requirement for any examinations, and is only expected if examiners identify a material safety and soundness concern. In general, if an FCU can demonstrate an ability to afford and manage its fixed assets, the level of fixed assets will not be a supervisory concern.

¹⁵ See NCUA Examiner's Guide, Chapter 8.

¹⁶ The credit union's board needs to approve plans for any investment in fixed assets that will materially affect the credit union's earnings. Credit union management should only purchase fixed assets in compliance with policy approved by the credit union's board.

Appeals.

Two commenters recommended that the final rule include a formal appeals process to allow credit unions the opportunity to defend fixed assets investment decisions that are challenged through supervision.

The Board emphasizes that it is not NCUA's goal to second guess an FCU's reasonable business decisions, and NCUA anticipates that open communications between an FCU and its examiner should resolve most kinds of fixed assets disputes about which commenters have raised concern. Nevertheless, as with any other regulation, an FCU that fails to comply with the requirements of this final rule may be subject to commensurate supervisory action. The Board notes that all rights and procedures generally available to an FCU in appealing an NCUA administrative or enforcement action are likewise available to an FCU under this final rule.

B. Partial occupancy.

Most commenters were supportive of the overall concept of streamlining or improving the fixed assets rule's partial occupancy requirement. A number of commenters, however, asked for additional relief beyond that proposed.

Uniform 6-year partial occupancy timeframe.

Under the current rule, if an FCU acquires premises for future expansion and does not fully occupy them within one year, it must have an FCU board resolution in place by the end of that year with definitive plans for full occupation.¹⁷ The current rule does not set a specific time period within which an FCU must achieve full occupation of premises acquired for future expansion. However, partial occupancy of the premises is required within a reasonable period, but no later than three years after the date of acquisition of improved property, or six years if the premises are unimproved land or unimproved real property.¹⁸ Partial occupancy must be sufficient to show, among other things, that the FCU will fully occupy the premises within a reasonable time and consistent with its plan for the premises.¹⁹ In the March 2015 proposal, the Board proposed to simplify the occupancy requirements in the fixed assets rule by establishing a single time period of six years from the date of acquisition for partial occupancy of any premises acquired for future expansion, regardless of whether the premises are improved or unimproved.

Three commenters agreed with the proposal to establish a single, uniform six-year time period for partial occupancy. One commenter, however, suggested that six years is too short a timeframe to achieve partial occupancy. Another commenter agreed that partial occupancy within six years may be appropriate in some instances, but disagreed that it should be mandated by regulation. Two commenters suggested that the rule should allow for up to ten years for partial occupancy. One commenter noted generally that allowing a longer timeframe for partial occupancy would reduce the need for waivers. One commenter said the proposed six-year

¹⁷ 12 CFR 701.36(d)(1). The reasonableness of an FCU's plan for full occupation is evaluated through the examination process and based upon such factors as the defensibility of projection assumptions, the operational and financial feasibility of the plan, and the overall suitability of the plan relative to the FCU's field of membership.

¹⁸ 12 CFR 701.36(d)(2).

¹⁹ 12 CFR 701.36(b).

timeframe is an improvement over the current rule, but preferred that the regulatory occupancy timeframes be removed altogether.

Six commenters suggested that the partial occupancy requirement should be eliminated entirely. Of those, four commenters observed that the FCU Act does not require a specific timeframe for occupancy or otherwise prescribe occupancy requirements for permissible real estate holdings. One commenter posited that NCUA has the statutory authority to provide greater flexibility in the partial occupancy requirements of the fixed assets rule.

As discussed in the preambles to the July 2014 and the March 2015 proposals, the FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.²⁰ NCUA has interpreted this provision to mean that an FCU may only invest in property it intends to use to transact credit union business or in property that supports its internal operations or member services.²¹ There is no authority in the FCU Act for an FCU to invest in real estate for speculative purposes or to otherwise engage in real estate activities that do not support its purpose of providing financial services to its members.

As noted above, the purpose of the fixed assets rule is to place reasonable controls on the risk associated with excess or speculative acquisition of fixed assets. The Board believes that, while

²⁰ 12 U.S.C. 1757(4) (emphasis added).

²¹ See 43 FR 58176, 58178 (Dec. 13, 1978) (“Part 107(4) of the Federal Credit Union Act provides that a credit union may purchase, hold, and dispose of property necessary or incidental to its operations. Retaining a piece of property whose only purpose is to provide office space to other entities is clearly not necessary or incidental to the Federal credit union’s operations. Further, investing in, or holding, property with the intent of realizing a profit from appreciation at a future sale is also outside the powers of a Federal credit union.”); 69 FR 58039, 58041 (Sept. 29, 2004) (“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.”)

partial occupancy is not expressly mandated by the FCU Act, the requirement for an FCU to partially occupy premises acquired for future expansion within a specified timeframe functions as a reasonable safeguard against speculative real estate investments or other impermissible real estate activities that are not permitted for FCUs under the FCU Act. Further, the Board maintains that a single six-year time period for partial occupancy will simplify and improve the rule, and the final rule adopts this amendment without modification. The final rule therefore retains the current time period for unimproved land or unimproved real property, and extends the current time period for improved premises by three years.

The Board emphasizes that the elimination of the 30-month requirement for partial occupancy waiver requests, which is discussed below, will allow an FCU additional leeway to apply for a waiver, as needed, if it is not able to achieve partial occupancy of premises within six years.

30-month waiver deadline.

Under the current rule, an FCU must submit its request for a waiver from the partial occupancy requirement within 30 months after the property is acquired. In the March 2015 proposal, the Board proposed to eliminate the 30-month requirement and allow FCUs to apply for a waiver beyond that time frame as appropriate. Four commenters provided feedback on the proposal to eliminate the 30-month timeframe for requesting a waiver of the partial occupancy requirement, and all were supportive of it. One commenter noted that the current 30-month waiver deadline does not allow FCUs the necessary flexibility to react to unanticipated business developments. The same commenter indicated that delays often occur outside the 30-month waiver timeframe

and FCUs are left without options, causing greater hardship for an FCU already facing a business set-back in the development of its unimproved property.

In light of the unanimous support from commenters on this aspect of the proposal, the Board is adopting, without change, the proposal to eliminate the 30-month timeframe for requesting a waiver of the partial occupancy requirement.

C. Additional Comments.

Full occupancy.

As mentioned above, the current rule does not set a specific time period within which an FCU must achieve full occupancy of premises acquired for future expansion. However, if an FCU acquires such premises and does not fully occupy them within one year, it must have a board resolution in place by the end of that year with definitive plans for full occupation.²² Further, partial occupancy of the premises is required within a set timeframe and must be sufficient to show, among other things, that the FCU will fully occupy the premises within a reasonable time and consistent with its plan for the premises.²³ The Board requested and received public comment on this topic in connection with the July 2014 proposal. The Board did not propose to amend the full occupancy requirement in the March 2015 proposal, but several commenters provided comment on this subject.

²² 12 CFR 701.36(d)(1).

²³ Id.

One commenter stated that the FCU Act includes no express occupancy mandate on FCU property that supports the purpose of providing financial services to credit union members. Accordingly, the commenter believed that NCUA's interpretation of Section 107(4) of the FCU Act is unnecessarily restrictive, and the Board should eliminate the occupancy requirements from the rule. In support of this contention, the same commenter suggested that removing occupancy restrictions would allow FCUs to better compete with other financial institutions.

Another commenter stated generally that NCUA should reconsider its position on full occupancy because it oftentimes makes sense for a credit union to own a building and lease out part or all of the building to help offset the cost of property ownership.

The Board appreciates the additional comments on the full occupancy requirement and is carefully considering commenters' continued requests for relief in this area. The Board may address the full occupancy requirement in a future proposed rulemaking.

Small credit union exemption.

One commenter suggested NCUA review the small credit union exemption in the current fixed assets rule in order to provide additional regulatory relief to FCUs. This commenter asserted that the fixed assets rule does not apply to credit unions with less than \$1 million in assets, and observed that NCUA has not adjusted the exemption amount in a number of years.

The Board clarifies, however, that the current exemption for FCUs with less than \$1 million in assets²⁴ does not exempt those FCUs from the entirety of the fixed assets rule. Rather, the exemption applies only to the five percent aggregate limit on FCU ownership of fixed assets, which is eliminated in this final rule. Thus, the small credit union exemption to that limit is rendered moot and likewise eliminated.

III. Final Rule

After careful consideration of all the public comments, the Board is generally adopting the March 2015 proposed rule as final without change.

In summary, this final rule amends the current fixed assets rule by: (1) eliminating the five percent aggregate limit on fixed assets for FCUs with \$1,000,000 or more in assets, as well as the provisions relating to waivers from that aggregate limit; (2) establishing a single time period of six years from the date of acquisition of real property for an FCU to partially occupy any premises acquired for future expansion, regardless of whether the premises are improved or unimproved property; and (3) eliminating the requirement that an FCU applying for a waiver of the partial occupancy requirement do so within 30 months of acquisition of any property acquired for future expansion.

²⁴ 12 CFR 701.36(c).

In addition, the final rule makes conforming and technical amendments to the scope, definitions, and other sections of the fixed assets rule to reflect these changes, and it amends the title of §701.36 to more accurately reflect its amended scope and applicability.

A. Existing waivers or enforcement constraints.

Because the final rule eliminates the five percent aggregate limit on fixed assets and the provisions relating to waivers from that aggregate limit, any waiver previously approved by NCUA concerning this aspect of the rule is rendered moot upon the effective date of this final rule. However, any constraints imposed on an FCU in connection with its investments in fixed assets, such as may be contained in a Letter of Understanding and Agreement, Document of Resolution, Regional Director Letter, Preliminary Warning Letter, or formal enforcement action, will remain intact. Thus, any particular enforcement measure to which an FCU is uniquely subject takes precedence over the more general application of the regulation. A constraint may take the form of a limitation or other condition that is actually imposed as part of a waiver. In such cases, the constraint will survive the adoption of this final rule.

IV. Regulatory Procedures

A. Regulatory Flexibility Act.

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that

describes the impact of a rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than \$50 million) and publishes its certification and a short, explanatory statement in the Federal Register together with the rule. This rule will provide regulatory relief by allowing FCUs to manage their investments in fixed assets without having to prepare and submit a waiver request to exceed the five percent aggregate limit. Regulatory relief will also be achieved by extending the time period from three to six years for a FCU to partially occupy improved premises acquired for future expansion and by eliminating the requirement to submit a waiver request within 30 months after the property is acquired. This will reduce the number of credit unions needing to request an occupancy waiver. This rule will result in no additional costs to FCUs. NCUA certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act.

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.²⁵ For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. The final rule provides regulatory relief to FCUs by eliminating the requirement that, for an FCU with \$1,000,000 or more in assets, the aggregate of all its investments in fixed assets must not exceed five percent of

²⁵ 44 U.S.C. 3507(d); 5 CFR part 1320.

its shares and retained earnings, unless it obtains a waiver from NCUA. The final rule does not impose new paperwork burdens. However, the final rule will relieve FCUs from the current requirement to obtain a waiver to exceed the five percent aggregate limit on investments in fixed assets.

According to NCUA records, as of September 30, 2014, there were 3,707 FCUs with assets over \$1,000,000 and subject to the five percent aggregate limit on fixed assets. Of those, approximately 150 FCUs would prepare and file a new waiver request to exceed the five percent aggregate limit. This effort, which is estimated to create 15 hours burden per waiver, would no longer be required under the final rule. Accordingly, the reduction to existing paperwork burdens that would result from the final rule is analyzed below:

Estimate of the reduced burden by eliminating the waiver requirement.

Estimated FCUs which will no longer be required to prepare a waiver request and file a waiver request:	150
Frequency of waiver request:	Annual
Reduced hour burden:	15

150 FCUs x 15 hours = 2250 hours annual reduced burden

In accordance with the requirements of the PRA, NCUA submitted a copy of the rule to the Office of Management and Budget for its review and approval.

C. Executive Order 13132.

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. Because the fixed assets rule applies only to FCUs, and not to state-chartered credit unions, this final 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 the various levels of government. As such, NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families.

NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act of 1999.²⁶

E. Small Business Regulatory Enforcement Fairness Act.

²⁶ Public Law 105-277, 112 Stat. 2681 (1998).

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) 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 APA. NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA because it will provide regulatory relief to give FCUs greater autonomy in managing their investments in fixed assets. The elimination of the aggregate limit on fixed assets and the extension of the occupancy requirement will significantly reduce the number of FCUs needing to prepare a waiver request. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

List of Subjects in 12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board, on July 23, 2015.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, NCUA amends 12 CFR part 701 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, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Amend §701.36 as follows:

- a. Revise the section heading and paragraph (a).
- b. In paragraph (b) remove the following definitions: “fixed assets”, “furniture, fixtures, and equipment”, “investments in fixed assets”, “retained earnings”, and “shares”.
- c. Remove paragraph (c).
- d. Redesignate paragraph (d) as (c).
- e. Revise newly redesignated paragraph (c)(2).
- f. Redesignate paragraph (e) as (d).
- g. Revise newly redesignated paragraphs (d)(2) and (4).

The revisions read as follows:

§701.36 Federal credit union occupancy, planning, and disposal of acquired and abandoned premises.

(a) Scope. Section 107(4) of the Federal Credit Union Act (12 U.S.C. 1757(4)) authorizes a federal credit union to purchase, hold, and dispose of property necessary or incidental to its operations. This section interprets and implements that provision by establishing occupancy, planning, and disposal requirements for acquired and abandoned premises, and by prohibiting certain transactions. This section applies only to federal credit unions.

* * * * *

(c) * * *

(2) If a federal credit union acquires premises for future expansion, including unimproved land or unimproved real property, it must partially occupy them within a reasonable period, but no later than six years after the date of acquisition. NCUA may waive the partial occupation requirements. To seek a waiver, a federal credit union must submit a written request to its Regional Office and fully explain why it needs the waiver. The Regional Director will provide the federal credit union a written response, either approving or disapproving the request. The Regional Director's decision will be based on safety and soundness considerations.

* * * * *

(d) * * *

(2) A federal credit union must not lease for one year or longer premises from any of its employees if the employee is directly involved in acquiring premises, unless the federal credit union's board of directors determines the employee's involvement is not a conflict of interest.

* * * * *

(4) To seek a waiver from any of the prohibitions in this paragraph (d), a federal credit union must submit a written request to its Regional Office and fully explain why it needs the waiver. Within 45 days of the receipt of the waiver request or all necessary documentation, whichever is later, the Regional Director will provide the federal credit union a written response, either approving or disapproving its request. The Regional Director's decision will be based on safety and soundness considerations and a determination as to whether a conflict of interest exists.

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