

7535-01-U

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: Proposed rule.

SUMMARY: The NCUA Board (Board) is issuing for public comment this proposed rule (2015 proposal) to amend its regulation governing federal credit union (FCU) ownership of fixed assets. To provide regulatory relief to FCUs, the 2015 proposal 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. It also eliminates the provisions in the current fixed assets rule relating to waivers from the aggregate limit. Further, instead of applying the prescriptive aggregate limit provided by regulation in the current fixed assets rule, the Board proposes to oversee FCU ownership of fixed assets through the supervisory process and guidance. The 2015 proposal also makes conforming amendments to the scope and

definitions sections of the current fixed assets rule to reflect this proposed approach, and it amends the title of §701.36 to more accurately reflect this amended scope and applicability.

In addition, the 2015 proposal simplifies the 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 such premises and by removing the 30-month requirement for partial occupancy waiver requests. The Board notes that, in July 2014, it issued a proposal regarding the fixed assets rule that addressed, among other things, the partial occupancy provisions of the fixed assets rule (July 2014 proposal), but NCUA did not finalize that proposal. For reasons discussed below, the 2015 proposal incorporates similar partial occupancy proposed amendments from the July 2014 proposal, with one modification to the time period for partial occupancy.

DATES: Comments must be received on or before [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site:
http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.
Follow the instructions for submitting comments.

- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Notice of Proposed Rulemaking for Part 701, FCU Ownership of Fixed Assets” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: You may view all public comments on NCUA’s website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Pamela Yu, Senior Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540, or Jacob McCall, Program Officer, Office of Examination and Insurance, at the above address or telephone (703) 518-6360.

SUPPLEMENTARY INFORMATION:

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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.

¹ 12 U.S.C. 1757(4).

² 12 CFR §701.36.

³ Id.

⁴ 12 CFR §701.36(c).

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 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.

⁵ 78 FR 17136 (Mar. 20, 2013).

⁶ 78 FR 57250 (Sept. 18, 2013).

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 proposal, the Board proposed to allow an FCU to exceed the five percent aggregate limit,⁸ without the need for a waiver, provided that the FCU implemented a fixed asset 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.

C. Public comments on the July 2014 proposal.

The public comment period for the July 2014 proposal ended on October 10, 2014. NCUA received thirty-six comments on the proposal: two from credit union trade associations; one

⁷ 79 FR 46727 (Aug. 11, 2014).

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

from a bank trade association; sixteen from state credit union leagues; thirteen from FCUs; three from federally insured, state-chartered credit unions; and one from an individual. While commenters generally supported the Board's efforts to provide regulatory relief from the requirements concerning FCU fixed assets, most commenters advocated more relief or suggested alternative approaches to achieving that objective.

One commenter fully supported all aspects of the July 2014 proposal. Two commenters opposed it, and another commenter stated that it represented only a marginal improvement over the current rule.

1. Removal of the waiver requirement to exceed the five percent aggregate limit.

Under the current rule, if an FCU has \$1,000,000 or more in assets, the aggregate of all its investments in fixed assets must not exceed five percent of its shares and retained earnings, unless it obtains a waiver from NCUA.⁹ In the July 2014 proposal, the Board proposed to amend this requirement to allow an FCU to exceed the five percent aggregate limit, without a waiver, provided the FCU implemented a FAM program to manage and monitor the FCU's fixed assets.

Fifteen commenters supported removing the waiver requirement and also supported the requirement to adopt a FAM program for those FCUs that exceed the five percent limit. Five commenters, however, supported removing the waiver requirement but disagreed with the FAM program requirement. One commenter did not support the removal of the waiver requirement.

⁹ 12 CFR §701.36(c).

a. Five percent aggregate limit.

In the July 2014 proposal, the Board did not propose to change the current rule's five percent aggregate limit on an FCU's investment in fixed assets, but many commenters nonetheless advocated its repeal. At least ten commenters suggested that the July 2014 proposal did not provide sufficient regulatory relief and that the five percent aggregate limit should be eliminated. 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 by setting their own credit union board-approved limits. Four commenters argued further that FCUs should be permitted to set their own fixed assets limits without the additional requirement of adopting a burdensome FAM program.

One commenter, however, urged NCUA not to eliminate the aggregate limit because allowing unlimited amounts of investments in fixed assets could pose a significant safety and soundness risk. The same commenter observed that the material loss reviews of several failed FCUs noted the contributory role that excessive fixed assets played in those credit union failures.

Other commenters were not opposed to an aggregate limit, but argued it should be increased. For example, one commenter advocated a fifteen percent aggregate limit. Another suggested that the aggregate limit should be raised to at least twenty percent.

b. Exclusions from the fixed assets ratio.

A number of commenters recommended that certain investments should be excluded from the current rule's fixed assets ratio calculation. Two commenters stated generally that the fixed assets calculation should reflect the greater emphasis placed on technology in the current marketplace and better account for the need to replace obsolete technology and equipment. At least four commenters stated that investments in information technology, including computer hardware and software, should be excluded from the calculation. One commenter indicated that fixed assets should be comprised of land and buildings only. Another commenter stated generally that there should be some type of safe harbor or exclusion to allow for the purchase of necessary equipment.

2. Fixed Assets Management Program.

Fifteen commenters supported the proposed requirement for an FCU to adopt a FAM program before choosing to exceed the five percent aggregate limit. However, most commenters that generally supported this aspect of the proposal also expressed concerns about certain aspects of the requirement.

Approximately one quarter of the commenters opposed the FAM program requirement altogether. Of those, several commenters argued that it is unnecessary or overly burdensome, and it would impose additional burdens that FCUs are not already subject to under the current rule. For example, four commenters noted that the requirement for annual FCU board review is an additional step that is not present under the current waiver process. One commenter argued

that the FAM program requirement would create unnecessary complications to the acquisition of fixed assets over the five percent limit, and the requirement could serve as a deterrent to the acquisition of fixed assets. One commenter argued that the proposal simply shuffles regulatory burden, rather than providing meaningful regulatory relief. Another commenter also argued that the level of analysis that must be included in an FCU's FAM program is beyond what is required under the current waiver process and, thus, the proposal would not reduce regulatory burden. Three commenters proffered a similar argument that the additional requirements imposed after assets are acquired would increase FCUs' compliance responsibilities and costs, negating any flexibility gained under the proposal.

a. Minor acquisitions.

Four commenters requested changes to proposed §701.36(c)(2), which would require an FCU to seek FCU board approval to make investments in fixed assets exceeding the aggregate limit “except for the minor acquisitions of equipment in the normal course of business.” A number of commenters suggested this language should be expanded to include minor acquisitions of furniture and fixtures, in addition to equipment. One commenter suggested “minor acquisitions” should specifically include purchases of desktop technologies, such as computer monitors, printers, faxes, scanners, copiers, and telephones, upgrades or renewals to existing desktop software, and ATMs. Another commenter suggested that “minor acquisitions” should be defined as anything under .005 percent of shares and retained earnings.

b. Future marketability.

At least seven commenters expressed concern with the “future marketability” element of the FAM program. Specifically, proposed §701.36(2)(iii) provided that FCU board oversight of an investment in real property that would cause the FCU to exceed the five percent aggregate limit must reflect the board’s consideration of the “future marketability” of the premises. Commenters noted that this requirement could, in some circumstances, be contrary to the best interest of members, particularly low-income members and members in rural or underserved areas. They argued that the decision to purchase a branch or office location should be based on member service needs, not future marketability. At least four commenters requested that the future marketability provision be eliminated because strategic considerations beyond marketability factor into a decision to acquire fixed assets.

c. Internal controls.

Proposed §701.36(c)(3) would have required an FCU’s FAM program to establish ongoing internal controls to monitor and measure the FCU’s investments in fixed assets. Two commenters disagreed with the proposed internal controls requirement, noting that the current fixed assets rule does not have a specific internal controls requirement. These commenters argued that internal controls to monitor fixed assets investments should not be prescribed by specific regulatory requirements, but rather such internal controls should be determined by credit union management and subject to examiner review during the routine examination process.

d. Appeals.

Eight commenters suggested that any final rule should include an appeals process to allow, for example, an FCU to appeal if an examiner contests an FCU's fixed asset investment or disapproves an FCU's FAM program.

e. Conclusion regarding aggregate limit and FAM program.

After careful consideration of the public comments relating to the fixed assets aggregate limit, the Board has determined that additional regulatory relief beyond what was provided in the July 2014 proposal is warranted. Therefore, the Board is not adopting the July 2014 proposed amendments relating to the five percent aggregate limit on fixed assets, including any FAM program requirements. In particular, upon further review, the Board has concluded 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, the Board is issuing this 2015 proposal to remove altogether the five percent aggregate limit on fixed assets, as discussed in further detail below.

D. Partial Occupancy.

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, as discussed more fully below, most commenters requested additional relief beyond that proposed.

1. Time period for partial occupancy.

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. In addition, the rule requires an FCU to partially occupy the premises within a reasonable period, but no later than three years after the date of acquisition, or six years if the premises are unimproved land or unimproved real property. In the July 2014 proposal, the Board proposed to simplify this aspect of the fixed assets rule by establishing a single time period of five 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 five-year time period for partial occupancy of any premises acquired for future expansion. Of those, one commenter stated that an increase of two years for partial occupancy of improved property is a beneficial trade-off for the one year reduction in the timeframe for partial occupancy of unimproved property. The same commenter noted that a single timeframe is easier for compliance purposes.

Two commenters supported a uniform time period, but suggested that five years is insufficient. They recommended that, at a minimum, it should be a uniform six years, as previously provided

for unimproved property. Seven commenters suggested that the time period for partial occupancy should be extended to ten years.

Eight commenters agreed with extending the partial occupancy requirement for improved premises from three to five years, but disagreed with reducing the partial occupancy requirement for unimproved property from six to five years. Of those, two commenters posited that reducing the timeframe would increase an FCU's regulatory burden.

One commenter suggested that the current partial occupancy requirements should be retained, but the rule should require an FCU (or a combination of an FCU, credit union service organization, and/or credit union vendor) to occupy at least 51 percent of the premises to meet the partial occupancy requirement. This commenter argued that relaxing the partial occupancy requirement would encourage FCUs to maximize non-mission related income by leasing out their property. The same commenter further stated that because FCUs are not subject to unrelated business income taxes, they have an incentive to maximize leasing income by delaying occupancy, and this would be an abuse of the credit union tax exempt status. Another commenter also supported retaining separate timeframes for improved and unimproved property, but suggested that both time periods should be lengthened to five years and eight years, respectively.

Approximately thirteen commenters suggested that regulatory timeframes for occupancy should be eliminated entirely. These commenters generally argued that an FCU should have the ability

to make its own determination, in its FAM program or by board policy, about how much time it needs to reach full or partial occupancy of its property.

The Board has carefully weighed these comments, but disagrees with commenters who suggested that regulatory timeframes for occupancy should be eliminated.

Unlike the five percent aggregate limit, which is a safety and soundness safeguard but is not statutorily required, the occupancy requirements in the fixed assets rule have statutory underpinnings. As discussed in the preamble to the July 2014 proposal, an FCU may not hold (or lease to unrelated third parties) real property indefinitely without fully occupying the premises. Section 107(4) of the FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.¹⁰ NCUA has long held that this provision means 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.¹¹ 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. While there is no required timeframe in the fixed assets rule within which an FCU must achieve full occupation, the rule requires an FCU to partially occupy the premises within a

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

¹¹ 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.”)

time period set by the rule and sufficient to show, among other things, that the FCU will fully occupy the premises within a reasonable time.¹²

The Board emphasizes that FCUs already have significant leeway and flexibility in managing real property acquired for future use, given that there is no required time period for full occupation. Moreover, the proposed elimination of the 30-month requirement for partial occupancy waiver requests, which is discussed below, would allow FCUs additional leeway to apply for a waiver later if it deemed appropriate.

The Board continues to believe that, as discussed in the preamble to the July 2014 proposal, a single time period for partial occupancy would simplify and improve the rule.¹³ However, in light of commenters' concerns that shortening the time period for unimproved property from six to five years would increase regulatory burden, the Board has decided to maintain the current time allowed for partial occupancy of unimproved property. Accordingly, the Board is proposing a single six-year time period for partial occupancy in this 2015 proposal. The proposed amendment 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, which the Board believes is a significant measure of relief for FCUs.

2. Waivers.

¹²12 CFR §701.36(b).

¹³ The Board notes that a single time period would be consistent with the Office of the Comptroller of the Currency's (OCC) uniform five-year requirement for real estate acquired by banks for future expansion.

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 July 2014 proposal, the Board proposed to eliminate the 30-month requirement and allow FCUs to apply for a waiver beyond that time frame as appropriate. Seven commenters provided feedback on this aspect of the proposal, and all supported it. In light of the unanimous support from commenters on this aspect of the July 2014 proposal, the Board is restating in this 2015 proposal, without change, the proposed waiver provision originally proposed in the July 2014 proposal. Although the Board is incorporating the same proposed amendments to the partial occupancy waiver requirements, the Board still invites comments on this subject to help inform its decision for the final rule. The Board notes that it is unnecessary for commenters to the July 2014 proposal to resubmit their same comments again. NCUA has considered those previously submitted comments and will consider them again before finalizing this rule. However, commenters with new, different, or updated comments should feel free to submit them as provided for above.

3. Definition.

Although the Board did not propose amending any current definitions in the fixed assets rule, five commenters expressed concern about the definition of “partial occupancy,” as clarified by the March 2013 proposal. Of those, four commenters suggested that the clarification reduced an FCU’s ability to meet partial occupancy requirements, particularly with respect to ATMs deployed on vacant land purchased for future expansion. The commenters asked that any subsequent final rule correct this. One commenter stated generally that any subsequent final rule should reinstate the previous definition.

The Board reiterates that, as indicated in the preambles to the March 2013 proposal and the corresponding final rule,¹⁴ the clarification of the partial occupancy definition did not impose any new regulatory requirements on FCUs or amend the meaning of that term. Rather, it only clarified the partial occupancy provisions by reflecting NCUA's interpretation of them.

Accordingly, the Board is not proposing any amendments in this 2015 proposal as a result of those comments.

E. Full Occupancy.

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 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.¹⁵ The Board did not propose to amend the full occupancy requirement in the July 2014 proposal, but it requested public comment on this topic.

At least four commenters said the current rule should be retained, and NCUA should not set a specific time period for full occupancy. Of those, three commenters said FCUs should have flexibility under the rule. Three commenters noted that FCU boards and management should

¹⁴ 78 FR 17136 (Mar. 20, 2013); 78 FR 57250 (Sept. 18, 2013).

¹⁵ 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. 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.

determine the best timeframe in which to fully develop property. One commenter said there is no need to modify the full occupancy requirement, but NCUA should consider improving the definition of full occupancy.

One commenter stated generally that the full occupancy requirement should be modified and determined on a case-by-case basis. Another commenter suggested that if the requirement is modified, at a minimum, the timeframe for full occupancy should be six years for all property, along with a simple extension process. Two commenters suggested that the full occupancy requirement should be eliminated entirely. Three commenters suggested that NCUA should replace the “full” occupancy requirement with a “significant” or “substantial” occupancy requirement. Of these, one commenter said “substantial occupancy” should be defined as fifty-one percent occupancy. Another commenter suggested “substantial occupancy” should be defined as “within a reasonable period of time consistent with FCU’s usage plan.”

One commenter, however, argued that the full occupancy requirement should be stricter. This commenter suggested that NCUA should require full occupancy within three years of reaching partial occupancy, to ensure that FCUs are not participating in impermissible real estate activities. Citing OCC guidance, the commenter indicated that, historically, three years has been a reasonable time for national banks to reach full occupancy.

The Board appreciates these comments and, after careful consideration of the points raised, it has determined to retain the current full occupancy provision. Accordingly, the Board is not proposing to amend the full occupancy requirement in this 2015 proposal. As discussed above,

the limited authority in Section 107(4) the FCU Act means that an FCU may not hold real property indefinitely without fully occupying the premises. There is no authority for an FCU to invest speculatively in real estate or to otherwise engage in real estate activities that do not support its purpose of providing members with financial services. The Board reiterates there is no required time period within which an FCU must achieve full occupation. However, the limited authority for FCUs to invest in property granted by the FCU Act mandates that full occupancy must be achieved. The Board believes the current rule gives FCUs substantial flexibility in managing fixed assets acquired for future use within the authority granted in the FCU Act, and thus, no changes are proposed.

F. Leasing.

At least five commenters recommended that the fixed assets rule be amended to allow an FCU to generate income from premises. Of those, three commenters urged NCUA to consider a “de minimis ownership exception” under which land that is not valued at more than three percent of shares and retained earnings would not be subject to the occupancy requirements. One commenter suggested that more flexibility is needed for an FCU to retain undeveloped property on a long-term basis and encouraged NCUA to allow 2.5 percent to 5 percent of an FCU’s net worth to be invested in undeveloped or vacant properties. Another commenter argued that excess space should not sit idle if it could be used to generate value for the membership, even if such space is not specifically used for member business.

At least seven commenters argued that the requirement for full occupancy should allow for an FCU to lease or sublease a portion of its premises as needed. Two of these commenters argued that restrictive occupancy requirements reduce access to commercial space and limit an FCU's ability to acquire space in the most cost-effective manner. Four commenters cited a number of reasons why an FCU might want to lease its property, including zoning or retail requirements, city entitlement, or other use requirements.

Four commenters discussed credit union mergers. They suggested that, in a merger, space may be available in an existing building if operations are combined. The ability to lease or sublease this excess space could permit an FCU to realize short-term income from the lease while retaining property that fits into the FCU's long-term plans for member service. Four commenters suggested that an FCU should be allowed to maximize long-term assets, instead of avoiding reasonable acquisitions or underutilizing space to ensure compliance with occupancy requirements.

As discussed above, NCUA's long-standing interpretation is that the limited statutory authority for FCUs to invest in property mandates that full occupancy must be achieved, and there is no authority for an FCU to engage in real estate activities that do not support its purpose of providing financial services to its members. The Board has also long recognized, however, that in planning for future expansion, FCUs should be able to sell or lease their excess capacity as a matter of good business practice.¹⁶ Indeed, the incidental powers rule permits the sale or lease of

¹⁶ 66 FR 40845, 40851 (Aug. 6, 2001).

excess capacity in FCU fixed assets.¹⁷ Excess capacity is the excess use or capacity remaining in facilities, equipment, or services that an FCU properly invested in with the good faith intent to serve its members, and where the FCU reasonably anticipates that the excess capacity will be taken up by the future expansion of services to its members.¹⁸ An FCU's sale or lease of excess capacity may, for example, involve leasing excess office space, sharing employees, or using data processing systems to process information for third parties.¹⁹ However, in adopting the excess capacity provision in the incidental powers rule, the Board noted in 2001 that:

“NCUA has consistently held the position that an FCU has limited authority in the leasing of fixed assets and the sale of excess data processing capacity. FCUs are not in the business of providing others with data processing capacity or any other service that is not within their express or incidental powers; rather, they are cooperative financial institutions organized to provide financial services to their members.”²⁰

Accordingly, the Board emphasizes that an FCU already has the authority under the incidental powers rule to obtain short-term income by leasing excess capacity in its fixed assets to third parties. However, there are limits to that authority. The fixed assets must have been acquired by an FCU, in good faith, for the purpose of providing financial services to its members, and the

¹⁷ The incidental powers rule defines an incidental powers activity as one that is necessary or requisite to enable an FCU to carry on effectively the business for which it is incorporated. An activity meets the definition of an incidental powers activity if it: (1) is convenient or useful in carrying out the mission or business of credit unions consistent with the FCU Act; (2) is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and (3) involves risks similar in nature to those already assumed as part of the business of credit unions. 12 CFR §721.2.

¹⁸ 12 CFR §721.3(e).

¹⁹ Id.

²⁰ 66 FR 40845, 40851 (Aug. 6, 2001).

FCU must reasonably anticipate, and plan,²¹ that the excess capacity will be fully occupied by the FCU in the future.

II. Summary of the 2015 Proposal

As discussed above, because of the public comments received in response to the July 2014 proposal, the Board is issuing this 2015 proposal to address commenters' requests for additional regulatory relief from the aggregate limit on fixed assets. The Board is also incorporating similar partial occupancy requirements from the July 2014 proposal, with one modification to the proposed single time period for partial occupancy, to provide additional relief to FCUs.

A. Aggregate limit on investments in fixed assets.

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.²² 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.²³ The aggregate limit is not statutorily required by the FCU Act. Rather, it was established by regulation in 1978 as a safety and soundness measure to prevent losses or impaired operations of FCUs from overinvestment in non-income producing fixed assets.²⁴

²¹ See 12 CFR §701.36(d)(1).

²² As of September 30, 2014, 226 of the total 3,707 FCUs with assets over \$1,000,000 are currently above the five percent aggregate limit.

²³ 12 CFR §701.36(c).

²⁴ 43 FR 58176 (Dec. 13, 1978).

In the past few years, and most recently in response to the July 2014 proposal, FCUs have asked the Board to consider increasing or eliminating the aggregate limit.²⁵ In addition to the comments discussed above, FCUs have repeatedly mentioned that the five percent limit is too low for FCUs to effectively manage their investments in fixed assets and to achieve growth. They have argued that the current limit does not allow FCUs adequate flexibility in acquiring fixed assets to serve their members' needs.

As discussed in the preamble to the July 2014 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.²⁶ Upon further review and consideration, the Board believes this objective can be effectively achieved through the supervisory process as opposed to a regulatory limit. Accordingly, the Board proposes to eliminate the five percent aggregate limit on FCU investments in fixed assets. It also proposes to eliminate the related provisions governing waivers of the aggregate limit because those provisions will no longer be necessary in the absence of a prescriptive regulatory limit.

An FCU's ability to afford a given level of fixed assets depends on a variety of factors, including its level of net worth and earnings, its operational efficiency, and risks to its future earnings and

²⁵ See, e.g., 75 FR 66295, 66297 (Oct. 28, 2010); 78 FR 57250, 57250 (Sept. 18, 2013); 79 FR 46727 (Aug. 11, 2014).

²⁶ 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.").

growth inherent in the FCU's balance sheet and strategic plans. Excessive levels of fixed assets can create earnings and capital accumulation problems for an FCU, and lead to greater losses to the National Credit Union Share Insurance Fund (NCUSIF), if the FCU fails and its fixed assets cannot be sold at or above their recorded value. Fixed assets not only hold member funds in non-income producing assets, but they also typically involve a material increase in FCU operating expenses, such as depreciation, maintenance, and other related expenses. According to NCUA data, excessive levels of fixed assets have contributed to the failure of some credit unions. Of the 63 FCU failures²⁷ that resulted in a loss to the NCUSIF since 2009, excessive levels of fixed assets contributed in part to the failures in 10 of those cases (16 percent), and were a primary contributor in 3 cases (5 percent). However, overall, excessive fixed asset levels have not been a disproportionate contributor to FCU failures. In many cases, FCUs have effectively managed elevated levels of fixed assets to safely achieve member service and growth objectives. For the 264 FCUs with fixed assets ratios exceeding five percent as of December 2004, 197 (74.62 percent) were still active as of December 2013. In comparison, the total number of credit unions from December 2004 to 2013 went from 9,128 to 6,554, representing a 71.8 percent survival rate. Thus, the level of consolidation in FCUs with elevated fixed assets levels has been no higher than for FCUs with lower levels. Also, CAMEL rating and net worth ratio distributions were not significantly different for FCUs with elevated fixed assets levels than for those without. Further, over the last 10 years, NCUA has granted approximately 500 waivers

²⁷ This figure includes all FCUs over \$1,000,000 in assets. FCUs under that asset threshold and federally insured, state-chartered credit unions are not subject to the aggregate limit and therefore excluded from this figure.

to FCUs to operate at levels of fixed assets above the five percent aggregate limit, including some above 20 percent of total assets.²⁸

In addition, the experience with FCUs operating with higher fixed assets ratios under NCUA's former Regulatory Flexibility Program (RegFlex)²⁹ indicates that the risks associated with investment in fixed assets are manageable through supervision. Out of the 149 former RegFlex FCUs with fixed assets over the five percent aggregate limit, 120 FCUs (80 percent) were still operating nearly a decade later.³⁰ By comparison, as noted above, the overall survival rate for all credit unions during the same time period was 71.8 percent. Further, 25 of those 120 FCUs (20 percent) have continued to operate effectively above the five percent aggregate limit, indicating that some FCUs can safely maintain elevated levels of fixed assets over time.

Therefore, upon further analysis, the Board has determined that oversight of FCU investments in fixed assets would be effectively achieved through the supervisory process, and evaluated on a case-by-case basis. The Board emphasizes, however, that NCUA's supervisory expectations remain high. The Board cautions that the proposed 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. Rather, the 2015 proposal reflects the Board's

²⁸ Since 2004, approximately 94 percent of waivers were for levels of fixed assets less than 10 percent of total assets.

²⁹ The RegFlex Program was established in 2002, 66 FR 58656 (Nov. 23, 2001), and eliminated in 2012, 77 FR 31981 (May 31, 2012). RegFlex relieved FCUs from certain regulatory restrictions and granted them additional powers if they demonstrated sustained superior performance as measured by CAMEL ratings and net worth classification. One of the flexibilities enjoyed by RegFlex FCUs at one time was relief from the aggregate limit on fixed assets.

³⁰ As of December 31, 2013, in 95 of those 120 FCU (80 percent), fixed assets levels had declined to under 5 percent.

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 it 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.

If the Board finalizes this 2015 proposal, NCUA will issue updated supervisory guidance to examiners that will be shared with FCUs. The guidance will reflect current supervisory expectations³¹ that require an FCU to demonstrate appropriate due diligence, ongoing board and management oversight,³² 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.

B. Partial occupancy.

³¹ See NCUA Examiner's Guide, Chapter 8.

³² 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.

For the reasons discussed above, the Board is incorporating, 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 is proposing 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 had proposed to require partial occupancy within a uniform five years. However, as discussed above, in response to public comments, this 2015 proposal provides six years rather than five years for partial occupancy, which retains the current time period for unimproved land or unimproved real property and extends the current time period for improved premises by three years.

In addition, the Board is reissuing in this 2015 proposal, without change, the amendment in the July 2014 proposal to eliminate the requirement that an FCU that wishes to apply for a waiver of the partial occupancy requirement must do so within 30 months of acquisition of the property acquired for future expansion.

C. Conforming amendments.

The Board is also proposing to make conforming amendments to the fixed assets rule's scope and definitions sections. Specifically, the Board proposes to amend §701.36(a) of the current fixed assets rule to remove reference to the aggregate limit on FCU investments in fixed assets. This language is unnecessary with the proposed removal of the aggregate limit. This 2015 proposal also amends §701.36(b) of the current fixed assets rule to remove the regulatory definitions of the following terms: "fixed assets," "furniture, fixtures, and equipment,"

“investments in fixed assets,” “retained earnings,” and “shares.” These definitions are included in the current rule to provide meaning to certain terms used in the regulatory provision establishing the aggregate limit on fixed assets. With the proposed removal of the aggregate limit, however, inclusion of these regulatory definitions is no longer necessary.

D. Amended title.

Finally, the Board proposes to amend the title of the regulation to more accurately reflect its amended scope and applicability. Currently, the rule is titled “Federal credit union ownership of fixed assets.” If the 2015 proposal is finalized, the rule will be retitled “Federal credit union occupancy, planning, and disposal of acquired and abandoned premises.”

E. Effect on existing waivers.

Should the 2015 proposal become finalized as proposed, any existing waiver of the five percent aggregate limit on fixed assets will be rendered moot as of the effective date of the final rule.

III. Request for Public Comment

Because the proposed amendments are intended to grant regulatory relief to FCUs, and the Board perceives no reason to delay their implementation, the Board is issuing the 2015 proposal for a 30-day public comment period instead of NCUA’s customary 60 days. Additionally, the Board already solicited comments on this subject in the July 2014 proposal. The Board invites

comment on all issues discussed in this 2015 proposal; however, as noted earlier, it is not necessary for commenters to resubmit any comments they previously submitted in response to the July 2014 proposal. NCUA has already reviewed those comments and will consider them again before finalizing this rule.

IV. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed 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.

The 2015 proposal would provide regulatory relief to help FCUs better manage their investments in fixed assets. NCUA certifies that the 2015 proposal 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.³³ 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 2015 proposal 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 its shares and retained earnings, unless it obtains a waiver from NCUA. The 2015 proposal does not impose new paperwork burdens. However, the 2015 proposal would 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 2015 proposal. Accordingly, the reduction to existing paperwork burdens that would result from the 2015 proposal 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

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

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 intends to obtain a modification of its OMB Control Number, 3133-0040, to support these changes. NCUA is submitting a copy of the 2015 proposal to OMB, along with an application for a modification of the OMB Control Number.

The PRA and OMB regulations require that the public be provided an opportunity to comment on the paperwork requirements, including an agency's estimate of the burden of the paperwork requirements. The Board invites comment on: (1) whether the paperwork requirements are necessary; (2) the accuracy of NCUA's estimates on the burden of the paperwork requirements; (3) ways to enhance the quality, utility, and clarity of the paperwork requirements; and (4) ways to minimize the burden of the paperwork requirements.

Comments should be sent to the NCUA Contact and the OMB Reviewer listed below:

NCUA Contact: Amanda Wallace
National Credit Union Administration

1775 Duke Street
Alexandria, Virginia 22314-3428
Fax No. 703-837-2861
E-mail: OCIOFRA@ncua.gov

OMB Contact: Office of Management and Budget
ATTN: Desk Officer for the National Credit Union Administration
Office of Information and Regulatory Affairs
Washington, DC 20503

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 regulation applies only to FCUs, the 2015 proposal would 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 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 rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act of 1999.³⁴

List of Subjects

12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board, on _____, 2015.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, NCUA proposes to amend 12 CFR §701.36 as follows:

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

³⁴ Public Law 105-277, 112 Stat. 2681 (1998).

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109-351, 120 Stat. 1966.

2. Revise §701.36(a) to 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.

* * * * *

3. Revise §701.36(b) by removing the following definitions: “fixed assets”, “furniture, fixtures, and equipment”, “investments in fixed assets”, “retained earnings”, and “shares”.

4. Remove §701.36(c).

5. Revise §701.36(d) to read as follows:

(d) * * *

(1) * * *

(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.

* * * * *

6. Redesignate §701.36 (d) as §701.36(c) and redesignate §701.36(e) as §701.36(d).

DRAFT