



Credit Union National Association

cuna.org

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May 20, 2013

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke St
Alexandria, VA 22314

Re: Comments on Notice of Proposed Rulemaking for Part 701, FCU
Ownership of Fixed Assets

Dear Ms. Rupp:

The Credit Union National Association (“CUNA”) appreciates the opportunity to comment on the National Credit Union Administration Boards (“NCUA”) request for public comment on its proposed amendments to the ownership of fixed assets rule. By way of background, CUNA is the nation’s largest credit union trade organization, representing approximately 90 percent of our nation’s 7,000 state and federal credit unions, which serve over 96 million members.

The amendments to Section 701.36 would “clarify the regulation by improving its organization, structure and ease of use.” We agree that the organization of the current rule should be improved, and we support the proposed plain language revisions that include new definitions and rewordings.

However, we believe the rule in its current and proposed forms is overly broad and rigid. We urge the agency to take this opportunity to adopt substantive changes, addressed below, that will make the rule more effective and meaningful for credit unions, while remaining faithful to the letter and intent of the Federal Credit Union Act.

Prior to the 2010 RegFlex¹ amendments, as you know, RegFlex credit unions could exceed the five percent fixed assets ownership limitation or cap without a waiver. Now these credit unions and all other credit unions that will exceed the cap with a fixed assets purchase must seek NCUA approval to execute a business decision that leads to exceeding the cap.

¹ See 75 Fed. Reg. 66295 (October 28, 2010) in which the Regulatory Flexibility (RegFlex) exemption that allowed certain federal credit union to exceed the five percent fixed asset ownership limitations that are part of the current and proposed fixed assets rule was eliminated.



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This problem is intensified by the broad scope of the rule in terms of what it considers “fixed assets.” The rule restricts investments not only in real property, but also in technology and systems that are increasingly central to the success of all financial institutions. Overly restricting investments in these items—or subjecting the relevant decisions to a slow and unpredictable process -- does not facilitate credit unions’ use of online and mobile banking technologies even though the utilization of such technologies is more important now than ever.

Limits on the Ownership of Fixed Assets

A number of credit unions have publicly raised concerns² about the current regulatory limit imposed on the ownership of fixed assets, which is not statutory but was set by NCUA through its rule making process. Federal credit unions’ only avenue now for relief from the cap is to seek a waiver but as this letter discusses, the waiver process is cumbersome and inefficient.

Instead of subjecting federal credit unions that are approaching the cap to the waiver process, we think a more effective approach would be to eliminate the cap from the rule, since it is not a statutory requirement. In its place, NCUA could establish requirements that credit unions have written policies that set parameters on their use and ownership of fixed assets that are appropriate for that credit union. Such policies and their implementation would be subject to examiner review.

We believe the agency has latitude to allow credit unions much more flexibility regarding the regulatory fixed assets cap, and we urge the Board to exercise it. However, if NCUA decides to retain the fixed assets cap, we urge the agency to address the issues we raise below.

Definitions

The proposed rule adds definitions of “unimproved land” or “unimproved real property” and “partially occupy.” Currently, NCUA does not formally define these terms in its fixed assets rule, but relies on informal definitions of these terms in other guidance. Clear and concise definitions are necessary for users to understand and apply the concepts of a rule or regulation and decrease the need for guidance. We agree that important definitions should be part of a rule or regulation whenever possible.

While we support the definitions of “unimproved land” and “unimproved real property,” the definition for “partially occupy” is not sufficiently clear and uses several undefined terms, such as “meaningful” to describe the percentage of premises that a credit union must occupy to meet the definition of “partially occupy.”

² See public comments to NCUA’s 2012 annual one-third regulatory review where commenters requested that NCUA revisit the five percent limitations on the ownership of fixed assets. NCUA does not address these comments in its 2012 annual report of this review only stating that “[w]e continue to receive questions about the fixed assets rule.”

We believe NCUA should develop proposed quantifiable standards for “partially occupy” so that credit unions could provide their input on how this term should be defined and applied, from a practical standpoint.

The purpose of the fixed assets rule is to limit federal credit unions’ exposure to real estate and other similar assets to reduce the chances of speculation in these non-core assets. However, computers, ATMs and other equipment are also purchased to provide service to members and these purchases are also subject to the fixed assets cap. Often, this equipment is required for federal credit unions to merely remain competitive with other financial institutions in the banking marketplace. Eliminating computers and other equipment from the definition of fixed assets would allow NCUA staff to focus on ownership of real estate and give credit union management the ability to manage their use of computers and other technological equipment without having to navigate through the waiver process.

Waiver Process Criteria

NCUA does not provide in the fixed assets rule and other guidance the criteria³ that agency staff relies on to determine whether to grant a waiver request. The proposal does state that waiver requests will be based on safety and soundness considerations, but this is a highly subjective measure that could give rise to broad discretion. The minimum criteria that NCUA uses to grant waivers should be articulated by NCUA and issued for public comments.

Such minimum criteria could be applied mechanically to allow a credit union to exceed the five percent ownership limitation without approval from NCUA when the requirements are met. A credit union that does not meet the criteria should still be allowed to apply for a waiver to the regional director.

NCUA should also use the blanket waiver approach to give credit unions additional flexibility similar to its recent member business loan (“MBL”) guidance. A blanket waiver from the five percent ownership limitation would give credit unions some degree of flexibility in determining the fixed assets they choose to own to help them serve the needs of their members without relying on the waiver process.

Grandfathering or permitting a blanket waiver for credit unions that relied on the RegFlex exemption to exceed the five percent limitation should also be provided to restore to these credit unions the ability to make nimble business decisions regarding the purchase of fixed assets.

We also urge the NCUA to consider adding an appeal process to denied waiver requests. Under the current and proposed fixed assets rule, credit unions have no recourse to appeal a denied waiver request. An appeals process would help

³ NCUA recently published waiver criteria for member business loans. Although we may not agree with all elements of the criteria, this is an important first step in operating the agency in an open manner that promotes fairness or the impression of fairness.

ensure that waiver requests are treated in a fair and impartial manner while holding decision makers accountable for their decisions.

Further, NCUA should issue an annual report detailing the waiver request statistics from each region. Freely sharing information detailing the waiver program's statistics would give the credit union industry assurances that these inconsistencies have been properly addressed and on an ongoing basis.

In closing, CUNA supports NCUA's efforts to make its rules and regulations easier to understand. However, reorganizing the current requirements for the purchase of fixed assets while addressing problem areas in the substance of a rule would be an even more important development for credit unions. In addition, such a step would free up resources at the agency that are now used to review applications for waivers from the fixed assets rule.

Thank you for the opportunity to comment on the NCUA's request for public comment on its proposed amendments to the ownership of fixed assets. If you have any questions concerning our letter, please feel free to contact me at (202) 508-6736.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mitchell Dunn".

Mary Mitchell Dunn
Deputy General Counsel and Senior Vice President