

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Parts 701 and 742**

**RIN 3133-AD53**

**Regulatory Flexibility Regarding Ownership of Fixed Assets**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** NCUA is amending its Regulatory Flexibility (RegFlex) Program to provide additional flexibility to qualifying federal credit unions (FCUs) when acquiring unimproved land for future expansion. Previously, when an FCU acquired unimproved land for future expansion and did not fully occupy the completed premises within one year, it was required to partially occupy the completed premises within three years or obtain a waiver. This amendment increases the three years to six years for RegFlex FCUs without a waiver. NCUA is also making conforming amendments to its fixed asset rule to be consistent with the RegFlex changes.

**DATES:** The rule is effective April 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frank Kressman, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

**1. Proposal**

NCUA issued proposed amendments to its RegFlex and fixed assets rules in September 2008 as summarized above. 73 FR 57013 (October 1, 2008). NCUA received six comment letters on the proposal: three from credit unions, two from credit union trade associations, and one from a bank trade association. All commenters except the bank trade association support the amendments.

**2. Fixed Assets**

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

Generally, the fixed asset rule provides limits on fixed asset investments, establishes occupancy and other requirements for acquired and abandoned premises, and prohibits certain transactions. [12 CFR §701.36](#). Fixed assets are defined in §701.36(e) as premises, furniture, fixtures, and equipment and

includes 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.

Section 701.36 prohibits an FCU with \$1 million or more in assets from investing in fixed assets, the aggregate of which exceeds five percent of the FCU's shares and retained earnings; although upon an FCU's application, a regional director may set a higher limit. 12 CFR §701.36(a)(1)-(2). If an FCU acquires premises, as broadly defined in §701.36(e), for future expansion and does not fully occupy the space within one year, its board must have a resolution in place by the end of that year with plans for full occupation and make those plans available to NCUA upon request. 12 CFR §701.36(b)(1). Additionally, the FCU must partially occupy the premises within a reasonable period, not to exceed three years, unless the FCU obtains a waiver within 30 months of acquiring the premises. 12 CFR §701.36(b)(1)-(2). In this rulemaking, NCUA is only addressing the circumstance where an FCU is acquiring unimproved land but no other kind of premises.

### **3. Regulatory Flexibility Program**

The RegFlex Program exempts from certain regulatory restrictions and grants additional powers to those FCUs that have demonstrated sustained superior performance as measured by CAMEL ratings and net worth classifications. 12

CFR §742.1. An FCU may qualify for RegFlex treatment automatically or by application to the appropriate regional director. 12 CFR §742.2. Also, an FCU's RegFlex authority can be lost or revoked. 12 CFR §742.3.

## **B. Discussion**

Although a RegFlex eligible FCU is exempt from the five percent aggregate limit on fixed asset investments under the current rule, it is not exempt from the requirement to partially occupy premises acquired for future expansion within three years or request a waiver of this requirement. 12 CFR §701.36(a), §701.36(b)(2), §701.36(d), §742.4(a)(3). Where an FCU is acquiring unimproved land, the partial occupancy requirement often is more difficult to satisfy than if the FCU were purchasing premises with an existing branch building. The Board is aware that some FCUs contend the fixed asset rule's three-year partial occupancy requirement, even with a waiver option, is burdensome and an unnecessary level of oversight for RegFlex FCUs that have demonstrated sustained superior performance.

Although the NCUA Board believes additional regulatory relief can and should be granted, the time limit for an FCU to fulfill the partial occupancy requirement cannot be unlimited. That would be the equivalent of an FCU making an impermissible real estate investment and also could cause serious safety and soundness concerns. NCUA recognizes, however, that many real estate transactions are complex, time consuming, and can involve a host of wide-

ranging issues that must be addressed before an FCU is ready to occupy the premises. This is especially true in the unimproved land context considering the addition of construction-related issues. Accordingly, NCUA is extending the three-year time period to six years for RegFlex FCUs but only with respect to the acquisition of unimproved land. NCUA believes six years is a sufficiently long time period to provide RegFlex FCUs with the flexibility they need to manage their fixed asset portfolios, in any context, free of unnecessary regulation and consistent with safe and sound credit union operations. All other substantive aspects of the fixed asset rule remain unchanged, including an FCU's ability to request a waiver of the partial occupancy requirement. NCUA adopts the amendments as proposed without change.

### **C. Regulatory Procedures**

#### Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under ten million dollars in assets). This rule provides additional flexibility and reduces regulatory burden. Accordingly, this rule will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

#### Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. 104-121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within the Office of Management and Budget (OMB), has determined that, for purposes of SBREFA, this is not a major rule.

#### Paperwork Reduction Act

NCUA has determined that this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of OMB.

#### Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This 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. NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

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, 1999, Pub.L. 105-277, 112 Stat. 2681 (1998).

**List of Subjects**

**12 CFR Part 701**

Credit unions.

**12 CFR Part 742**

Credit unions, reporting and recordkeeping requirements.

By the National Credit Union Administration Board on March 19, 2009.

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Mary Rupp

Secretary of the Board

For the reasons discussed above, NCUA amends 12 CFR parts 701 and 742 as follows:

**PART 701 – ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS**

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

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq., 42 U.S.C. 1861 and 42 U.S.C. 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Section 701.36(d) introductory text is amended by adding a sentence between the first and second sentences to read as follows:

**§ 701.36 FCU Ownership of fixed assets.**

\* \* \* \* \*



(d) \* \* \* Those federal credit unions are also exempt from the three-year partial occupancy requirement described in paragraph (b) of this section when acquiring unimproved land for future expansion pursuant to the terms of section 742.4(a)(3) of this chapter. \* \* \*

\* \* \* \* \*

## **PART 742 – REGULATORY FLEXIBILITY PROGRAM**

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

**Authority:** 12 U.S.C. 1756, 1766.

4. Section 742.4(a)(3) is amended by adding two sentences at the end to read as follows:

### **§ 742.4 RegFlex Relief.**

(a) \* \* \*

(3) \* \* \* Section 701.36(b)(2) of this chapter concerning the three-year partial occupancy requirement when acquiring unimproved land for future expansion; RegFlex credit unions are instead subject to a six-year partial

occupancy requirement when acquiring unimproved land but remain subject to all other provisions of that section including the waiver provision;

\* \* \* \* \*