

SUPPORTING STATEMENT
Federal Credit Union Ownership of Fixed Assets
12 CFR Part 701.36
OMB No. 3133-0040

SUMMARY

NCUA published a final rule on August 3, 2015, at 80 FR 45844, under 12 CFR Part 701, amending Federal credit union ownership of fixed assets. The rule amended §701.36 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, request a waiver from NCUA. The elimination of this waiver requirements will reduce the burden on FCUs by 2,250 hours.

The rule also amends §701.36 by 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, to extend beyond this timeframe as appropriate. This action does not affect the current number of FCUs requesting waivers in this circumstance.

A. JUSTIFICATION

1. Necessity of Information Collection

Section 107(4) of the Federal Credit Union Act states in part that a federal credit union (FCU) shall have the power to purchase, hold, and dispose of property necessary or incidental to its operations. Section 701.36 of NCUA Rules and Regulations implements this statute and includes an information collection. Included within the rule is the opportunity for credit unions to apply for a waiver to any provision if they cannot comply with the requirements of the rule. NCUA reviews the information contained within the waiver to determine if the proposed action would adversely affect the financial soundness of the credit union or pose a risk to the National Credit Union Share Insurance Fund (NCUSIF). The ability to review actions which are not in compliance with Part 701.36 allows NCUA to provide appropriate oversight of the credit union and prevent risk to NCUSIF. The types of wavier covered under this section are:

- *Plan for full occupation of premises.* The fixed asset rule requires FCUs that acquire realty for future expansion but fail to fully occupy that realty within a year must have a plan in place for future occupation. This rule becomes operative only when FCUs decide to acquire real estate and not occupy it within the stated period of time. This part of the information collection requirement is submitted for approval. The Federal Credit Union Act does not permit FCUs to own real estate for purposes other than for providing financial services to members. This part of the information collection is necessary to ensure FCUs do not hold and lease realty indefinitely for unauthorized purposes.
- *Waiver of requirement for partial occupation.* The fixed asset rule requires FCUs that acquire realty for future expansion but fail to at least partially occupy it within

three years, or within six years for unimproved real property, to obtain a waiver from NCUA. This rule becomes operative only when FCUs decide to acquire real estate and not partially occupy it within the stated period of time. This part of the information requirement is submitted for approval. The Federal Credit Union Act does not permit FCUs to own real estate for purposes other than for providing financial services to members. This part of the information collection is necessary to ensure FCUs do not hold and lease realty indefinitely for unauthorized purposes.

- *Waiver of requirement to dispose of abandoned property.* The fixed asset rule requires FCUs that abandon property and fail to complete the sale of the property within 5 years of abandonment to seek written approval from NCUA. This rule becomes operative only when FCUs decide to abandon property and not complete the sale of the abandoned property within the stated period. The Federal Credit Union Act does not permit FCUs to own real estate for purposes other than for providing financial services to members. This part of the information collection is necessary to ensure FCUs do not hold property indefinitely for unauthorized purposes.
- *Waiver of prohibited transaction.* The fixed asset rule requires FCUs to obtain written approval from NCUA before acquiring or leasing, for one year or longer, realty from prohibited parties. This rule becomes operative only when FCUs decide to acquire real estate from a prohibited party. This part of the information requirement is submitted for approval. The Federal Credit Union Act does not permit FCUs to own real estate for purposes other than for providing financial services to members. This part of the information collection is necessary to ensure FCUs do not hold or lease realty for unauthorized purposes.

2. **Purpose and Use of the Information Collection**

There are four parts to the collection associated with the rule: plan for full occupation of premises, waiver of requirement for partial occupation, waiver of requirement to dispose of abandoned property and waiver of prohibited transactions. NCUA reviews the information contained within the waiver to determine if the action would adversely affect the financial soundness of the credit union or pose a risk to the National Credit Union Share Insurance Fund (NCUSIF). NCUA responds to waivers by either granting the request to operate outside of Part 701.36, by denying the request or otherwise compromising to meet the needs of the credit union without raising safety and soundness concerns.

3. **Consideration Given to Information Technology**

The information collection associated with Part 701.36 of NCUA Rules and Regulations would not employ information technology, beyond permission submission via electronic mail. The waiver requirement is fundamentally manual, since the waiver request must be specific and unique to the requestor.

4. **Duplication**

There is no duplication of information collection. The information collection required to comply with § 701.36 is specific to the rule. The waiver process comprising the

information collection would not be applicable to any other information collection process.

5. Effect on Small Entities

The collection of information may impact small businesses or other small entities. As of September 30, 2014, 97 percent of federally chartered credit unions held less than \$1 billion total assets, 80 percent were below \$100 million in total assets, and 35% held less than \$10 million in total assets. These entities would only be required to submit information if they made strategic decisions to operate outside of current occupancy guidelines and were required to draft a plan or submit a waiver to NCUA. Therefore, if the entity operates within guidelines, there are options to avoid information collection. The majority of credit unions, large and small, would not be expected to submit information each year. NCUA estimates approximately 1% of credit unions would be impacted by the information collection.

6. Consequences of Not Conducting Collection

These requirements are necessary to allow the NCUA to supervise federal credit unions for compliance with the Federal Credit Union Act (FCU Act), which authorizes federal credit unions to purchase, hold, and dispose of property necessary or incidental to its operations. If the information is not collected, the consequence would be that NCUA would be unable to assess compliance with the FCU Act.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

There are no special circumstances. This collection is consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. Consultations Outside the Agency

A proposed rule was published in the *Federal Register* on March 30, 2015, at 80 FR 16595, soliciting comments from the public on proposed amendments to §701.36, with comment period ending April 29, 2015. Comments were received and summarized in the preamble of the final rule, published August 3, 2015, at 80 FR 45844, and below:

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.¹ 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 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 adopted, 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.² The Board continues to believe this objective

¹ 12 CFR 701.36(c).

² 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

can be effectively achieved through the supervisory process as opposed to a regulatory limit.³ 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.

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.⁴ 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.⁵ 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.⁶ 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.

excess investment and/or commitment to invest substantial sums in fixed assets.”).

³ See 80 FR 16595, 16601 (Mar. 30, 2015).

⁴ 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.

⁵ 12 CFR 701.36(d)(2).

⁶ 12 CFR 701.36(b).

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 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 August 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.⁷ 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.⁸ 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 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.

⁷ 12 U.S.C. 1757(4) (emphasis added).

⁸ 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.”)

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 adopted, 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.⁹ 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.¹⁰ The Board requested and received public comment on this topic in connection with the August 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.

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

⁹ 12 CFR 701.36(d)(1).

¹⁰ *Id.*

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 assets¹¹ 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.

9. Payment or Gift

There is no payment or gifts provided to respondents to this information collection.

10. Confidentiality

Credit union examination reports and any documents related thereto are exempt from the Freedom of Information Act disclosure, pursuant to exemption 8, 5 U.S.C. 552(b)(8).

11. Sensitive Questions

No questions of a sensitive nature are asked. No personally identifiable information (PII) is collected.

¹¹ 12 CFR 701.36(c).

12. Burden of Information Collection

- Annualized hour burdens for collections of information.

Information Collection Activity	Number of Respondents	Frequency of Response (Annual (1), Quarterly (4), etc.)	Number of Responses	Burden Hours per Response	Annual Hourly Burden
	(A)	(B)	(C)	(D)	(E)
1. <i>Plan for full occupation of premises</i>	15	1	15	15 Hours	225 Hours
2. <i>Waiver of requirement for partial occupation</i>	15	1	15	15 Hours	225 Hours
3. <i>Waiver of requirement to dispose of abandoned property</i>	10	1	10	10 Hours	100 Hours
4. <i>Waiver of prohibited transactions</i>	3	1	3	10 Hours	30 Hours
Total (Sum)	43	1	43		580 Hours

- Annualized cost to respondents.

Information Collection Activity	Annual Hourly Burden (see 12 above, item E)	Hourly \$ Rate per Response	Total \$ Amount
1 <i>Plan for full occupation of premises</i>	225 Hours	\$ 31.89	\$ 7,175.25
2 <i>Waiver of requirement for partial occupation</i>	225 Hours	\$ 31.89	\$ 7,175.25
3 <i>Waiver of requirement to dispose of abandoned property</i>	100 Hours	\$ 31.89	\$ 3,189.00
4 <i>Waiver of prohibited transactions</i>	30 Hours	\$ 31.89	\$ 956.70
Total (Sum)	580 Hours	\$ 31.89	\$ 18,496.20

13. Capital start-up costs and operation and maintenance costs.

There are no capital start-up or ongoing operation and maintenance costs associated with this information collection.

14. Costs to Federal Government

The NCUA would likely spend an average of 8 man-hours processing each waiver request and 2 man-hours reviewing that processing. The wage rate is about \$55 an hour. The total NCUA cost for each waiver request is then 43 x 8 x \$55 plus 43 x 2 x \$55, or \$23,650.

15. Changes in Burden

The rule results in a reduction in overall burden attributed to a program change. The removal of a provision of §701.36, which places an aggregate limit on the ownership of fixed assets, reduces the estimated burden by 2,250 hours.

16. Information Collection Planned for Statistical Purposes

The information collection is not used for statistical purposes.

17. Approval to Omit OMB Expiration Date

The waivers are triggered by specific events in which FCUs generate their requests as prescribed by regulation. If the expiration date of the OMB approval is contained in regulations, it may be confusing to respondent believing that a regulation may have sunset.

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not involve statistical methods.