

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 701**

**RIN 3133-AE05**

**Federal Credit Union Ownership of Fixed Assets**

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

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The NCUA Board (Board) proposes to amend its regulation governing federal credit union (FCU) ownership of fixed assets to help FCUs understand and comply with its requirements. The proposed amendments do not make any substantive changes to those regulatory requirements. Rather, the amendments only clarify the regulation by improving its organization, structure, and ease of use.

**DATES:** Comments must be received on or before [INSERT DATE THAT IS 60 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](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html).  
Follow the instructions for submitting comments.
- E-mail: Address to [regcomments@ncua.gov](mailto: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 Mary Rupp, 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](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Frank Kressman, Associate General Counsel, or Pamela Yu, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6593.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

**II. Summary of the Proposed Rule**

**III. Public Comment**

**IV. Regulatory Procedures**

**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.<sup>1</sup> NCUA's fixed assets rule interprets and implements this provision of the FCU Act.<sup>2</sup> In general, 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 serves its members.<sup>3</sup> NCUA's 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.<sup>4</sup> For purposes of the rule, fixed assets are 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

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<sup>1</sup> 12 U.S.C. 1757(4).

<sup>2</sup> 12 CFR §701.36.

<sup>3</sup> 12 CFR §721.3(d).

<sup>4</sup> 12 CFR §701.36.

business, office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.<sup>5</sup>

A. Why is NCUA Proposing This Rule?

The Board has a policy of continually reviewing NCUA's regulations to "update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions."<sup>6</sup> 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 this review, the Board believes amending the fixed assets rule would make it easier for FCUs to understand. The Board also believes this proposal is consistent with the spirit of Executive Order 13579, which directed independent agencies, including NCUA, to consider whether they can modify, streamline, expand, or repeal existing rules to make their programs more effective and less burdensome.<sup>7</sup> Further, NCUA continually receives questions about the fixed assets rule, indicating there is some confusion about its application. For example, FCUs have asked for clarification regarding the waiver process, as well as the provision that requires an FCU to partially occupy unimproved property acquired for future expansion.<sup>8</sup> Therefore, the Board believes it is appropriate to make the proposed amendments to clarify the waiver and partial occupation requirements and to improve the fixed assets rule overall.

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<sup>5</sup> 12 CFR §701.36(c).

<sup>6</sup> NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2, Developing and Reviewing Government Regulations.

<sup>7</sup> E.O. 13579 (July 11, 2011).

<sup>8</sup> 12 CFR §701.36(b)(2).

B. How Would the Proposed Rule Change the Current Rule?

The Board proposes to: (1) amend the regulatory text using plain language; (2) add an introductory section to define the scope of the regulation; (3) reorganize the existing definitions; (4) add several new definitions; and (5) clarify the processes for obtaining waivers from NCUA. The proposed amendments do not make any substantive changes to the regulatory requirements. Rather, they clarify the rule and improve its overall organization, structure, and readability.

C. Does the Proposed Rule Create New Requirements for FCUs?

No, the proposed amendments do not create any new requirements for FCUs.

## **II. Summary of the Proposed Rule**

A. How is the proposed rule easier to read and use?

President Obama signed the Plain Writing Act of 2010 (Public Law 111-274) into law on October 13, 2010 “to improve the effectiveness and accountability of federal agencies to the public by promoting clear Government communication that the public can understand and use.” The proposal revises the regulatory text to meet plain writing objectives. For example, the proposal uses logical organization, shorter sentences, active voice, and common, everyday words. It also uses lists, where appropriate.

B. How does the proposal improve the organization of the current rule?

The proposal adds a new introductory section to clearly define the scope and application of the rule. It also reorganizes the definition section and moves it to the beginning of the rule. In the

current rule, the definitions are found at the end, which has proven confusing for some FCUs. The Board believes it is more intuitive for readers to look to the beginning of a rule for the definitions that are applicable throughout the rule.

The proposal breaks down several regulatory sections into smaller sub-sections to improve organization and ease of reading. The proposal also introduces definitions for the terms “partially occupy” and “unimproved land or unimproved real property,” as discussed in more detail below. The Board believes these new definitions will help clarify a confusing aspect of the current rule.

### C. What are the newly defined terms in the proposal?

The Board proposes to clarify the provision in the fixed assets rule that requires an FCU to partially occupy unimproved property acquired for future expansion within a time period set by the rule.<sup>9</sup> Recently, the Board amended the rule to permit an FCU up to six years from the date it obtains unimproved real property to meet the partial occupancy requirement, unless NCUA grants a waiver.<sup>10</sup> As noted above, some FCUs are confused about how to apply this standard.

Specifically, the current rule states that “[p]remises are partially occupied when the credit union is using some part of the space on a full-time basis.”<sup>11</sup> In 2004, the Board described the phrase “partially occupy” to mean that an FCU is required to “occupy any of the space” within the

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<sup>9</sup> 12 C.F.R. §701.36(b)(2).

<sup>10</sup> 77 FR 31981 (May 31, 2012). Before this amendment, only an FCU designated under the Regulatory Flexibility (RegFlex) program had the authority to partially occupy unimproved land within six years of acquisition. Non-RegFlex FCUs were required to partially occupy acquired unimproved land within three years of acquisition. In the final rulemaking, NCUA eliminated the RegFlex program and extended the six-year time period to all FCUs.

<sup>11</sup> 12 CFR §701.36(b)(2).

regulatory time frame.<sup>12</sup> Many FCUs find this standard vague, however, and would benefit from a more precise understanding of it. Accordingly, the Board proposes to clarify the meaning of “unimproved land or unimproved real property” and “partially occupy” by adding definitions of these terms to the regulation. While these terms are not expressly defined in the current rule, the proposed definitions reflect NCUA’s current interpretation of them. The addition of the proposed definitions does not impose any new regulatory requirements on FCUs.

1. Unimproved land or unimproved real property

When NCUA initially granted RegFlex FCUs up to six years to partially occupy unimproved land, the Board noted the following in the 2009 rulemaking:

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. . . . [M]any 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.<sup>13</sup>

In establishing the six-year time frame, the Board used the term “unimproved land” as it is commonly defined. For purposes of the fixed assets rule, the common definition of “unimproved

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<sup>12</sup> 69 FR 58039, 58041 (Sept. 29, 2004).

<sup>13</sup> 74 FR 13082, 13083 (Mar. 26, 2009).

land” or “unimproved real property” is raw land or, more specifically, land without development, significant buildings, structures, or site preparation. Unimproved land or real property also includes land that has never had improvements, as well as property that was improved at one time but has since functionally reverted to its unimproved state. An NCUA legal opinion issued in 2009 stated:

[A] piece of land may have improvements so useless or valueless to the FCU so as to be the functional equivalent of unimproved land. For example, an FCU purchases a piece of land for a future branch building that happens to have a decrepit barn on it. In those instances, we believe it is appropriate to treat that kind of property as unimproved for purposes of the six-year occupancy requirement. To receive this treatment, however, an FCU must demonstrate through records generated or in existence at the time of purchase that the FCU intends to demolish the improvements or otherwise treat the improvements as useless or valueless.<sup>14</sup>

There is another instance when NCUA will consider improved land as unimproved for purposes of the fixed assets rule. Specifically, if the improvements, even if functional and intrinsically valuable, serve no purpose for the FCU’s planned use of the property, then NCUA will consider the land unimproved. For example, if an FCU purchases a parcel of land that is improved with water and sewer lines for a residential townhouse development, but the FCU plans to build a parking garage on the parcel, then the improvements have no real value to the FCU. In that

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<sup>14</sup> OGC Legal Op. 09-0719 (Sept. 15, 2009).



instance, the parcel will be considered unimproved. The Board believes the addition of a definition for the term “unimproved land or unimproved real estate” will aid FCUs in their understanding of the requirements under the fixed assets rule.

## 2. Partially Occupy

An FCU’s plan to develop unimproved property should indicate how the FCU will use the premises as part of its business model. It also should provide a detailed description of how the FCU will accomplish that, and it should articulate specific time frames for construction milestones and completion. Whether an FCU has complied with the six-year time frame to “partially occupy” unimproved real property is relative to the FCU’s plan for use of the premises. In making that determination, NCUA will consider an FCU in compliance only if the FCU has completed the improvements to a sufficient extent that the FCU is occupying a meaningful portion of the premises consistent with its usage plan. In the Board’s view, “meaningful” means a portion large enough that an FCU is occupying the premises in a useful and practical way given the scope of the project. This requires an FCU to derive practical utility from the occupied portion considering the date of acquisition and estimated date of completion. For example, an FCU that takes six years to construct a branch location must, at a minimum, occupy that branch as a functional office to transact business and handle member needs. In this example, a “functional office” means one that is, at the time of partial occupation, providing many or most of the services it will provide when completed. As another example, a newly constructed mortgage servicing center must be occupied to the extent that the FCU can utilize it for the general purposes for which it was built. In both examples, the FCU does not need to have totally completed making improvements to the premises, nor does it need to occupy the premises to the

extent it would be when operating at 100% capacity. The partial occupation, however, must be sufficient to evidence the FCU has substantially realized its plan objectives and is occupying the premises in a manner demonstrating that full occupation will be achieved within a reasonable time period.

The fixed assets rule also imposes a partial occupancy requirement on an FCU that acquires improved premises for future expansion.<sup>15</sup> The time frame for partially occupying improved premises an FCU has acquired for future expansion may not exceed three years. However, the same criteria articulated above for partially occupying unimproved property apply to improved premises. Accordingly, an FCU that acquires improved premises for future expansion must, within three years, occupy a meaningful portion of the premises consistent with its usage plan and derive practical utility from the occupied portion. The partial occupancy also must be sufficient to evidence that full occupation will be achieved within a reasonable time period.

The Board understands that the spectrum of construction projects in which FCUs may engage is broad, and that the nature and scope of those projects greatly depend on the particular circumstances and needs of the individual FCU. The same is true with respect to improved premises an FCU may acquire. Accordingly, the Board recognizes it is impractical to attempt to design a one-size-fits-all test for every set of circumstances surrounding a project or purchase. However, the Board believes the standards articulated in the proposed definition, along with the examples of common projects described above, clarifies how NCUA interprets the term “partially occupy.” The Board also notes that an FCU can enhance its likelihood for complying

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<sup>15</sup> 12 CFR §701.36(b)(2).

with the fixed assets rule by coordinating with its examiner and regional office during the expansion or improvement process.

D. How does the proposed rule clarify the waiver process?

Under the current rule, several provisions are subject to waiver including: (1) the aggregate investment limit (current §701.36(a)); (2) the partial occupation requirements (current §701.36(b)(2)); (3) the requirement to dispose of abandoned premises (current §701.36(b)(3)); and (4) the prohibition on certain transactions (current §701.36(c)(1)). The Board proposes to amend the rule to clarify the waiver provisions. The proposed changes are intended to better articulate NCUA's expectations for FCUs requesting waivers and NCUA's obligations in reviewing such requests.

The current rule addresses the waiver requirements somewhat inconsistently. For example, in some instances the express terms "waive" or "waiver" are used. In other instances, the rule uses more ambiguous language such as "[u]nless otherwise approved in writing by NCUA" or "[w]ithout the prior written approval of the NCUA." While articulated differently, in those instances, those provisions are subject to waiver by NCUA. The Board believes the rule would be easier to understand if all waiver provisions are referenced with the same unambiguous terminology. The proposal revises the regulatory text accordingly. Specifically, the word "waiver" is included in the regulatory text in each instance that a particular requirement or limitation is subject to waiver by NCUA.

The current rule also describes the waiver processes somewhat inconsistently. The Board notes that each process varies depending on the particular requirement or limit being waived.

Nevertheless, the Board believes greater uniformity in the description of each waiver process would be helpful to FCUs. As such, under the proposal, each provision in the rule that is subject to waiver describes: (1) the FCU's obligations when submitting a waiver request; (2) NCUA's obligations in reviewing a waiver request; and (3) any other applicable conditions for a waiver.

The Board is aware of concerns that NCUA's current waiver process, in general, is uneven and, in some circumstances, overly burdensome to the practical needs of some FCUs. The Board emphasizes that NCUA is committed to making the agency's waiver process more consistent and user friendly and welcomes public comment on ways of doing so.

### **III. Request for Comment**

The Board encourages public comment on all aspects of this proposed rule. In particular, the Board requests feedback regarding any additional ways to enhance the readability and usefulness of the fixed assets rule.

### **IV. Regulatory Procedures**

#### Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small entities (primarily

those under fifty million dollars in assets). This proposed rule would improve the regulation to help FCUs understand its requirements. The proposed amendments do not make any substantive changes to the regulatory requirements. They are intended to improve the rule's organization, structure, and ease of use. NCUA has determined this proposed rule will not have a significant economic impact on a substantial number of small credit unions.

### 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.<sup>16</sup> 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. As noted above, the proposed amendments would make the rule easier to understand, but would not impose new paperwork burdens.

### 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 federal credit unions, this proposed rule 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

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<sup>16</sup> 44 U.S.C. 3507(d); 5 CFR part 1320.

this rule does not constitute a policy that has federalism implications for purposes of the executive order.

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.<sup>17</sup>

**List of Subjects**

**12 CFR Part 701**

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board, on \_\_\_\_\_, 2013.

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Mary F. Rupp

Secretary of the Board

For the reasons stated above, NCUA proposes to amend 12 CFR part 701 as follows:

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

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<sup>17</sup> Public Law 105–277, 112 Stat. 2681 (1998).

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

**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 to read as follows:

**§701.36 Federal credit union ownership of fixed assets.**

(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 and it: (1) limits investments in fixed assets; (2) establishes occupancy, planning, and disposal requirements for acquired and abandoned premises; and (3) prohibits certain transactions. This section applies only to federal credit unions.

(b) Definitions.

For purposes of this section:

Abandoned premises means real property previously used to transact credit union business, but no longer used for that purpose. It also means real property originally acquired for future credit union expansion, but no longer intended for that purpose.

Fixed assets means premises and furniture, fixtures, and equipment.

Furniture, fixtures, and equipment means all office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.

Investments in fixed assets means: (1) any investment in improved or unimproved real property which a federal credit union is using, or intends to use, as premises; (2) any leasehold improvement on premises; (3) the aggregate of all capital and operating lease payments on fixed assets, without discounting commitments for future payments to present value; or (4) any investment in furniture, fixtures, and equipment.

Immediate family member means a spouse or other family member living in the same household.

Partially occupy means occupation, on a full-time basis, of a portion of the premises that is: (1) consistent with the federal credit union's usage plan for the premises; (2) significant enough that the federal credit union is deriving practical utility from the occupied portion, relative to the scope of the usage plan; and (3) sufficient to show that the federal credit union will fully occupy the premises within a reasonable time.



Premises means any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the federal credit union transacts or will transact business.

Senior management employee means the federal credit union's chief executive officer, any assistant chief executive officers, and the chief financial officer. For example, these individuals typically hold the title of President or Treasurer/Manager, Assistant President, Vice President or Assistant Treasurer/Manager, and Comptroller.

Shares means regular shares, share drafts, share certificates, or other savings.

Retained earnings means undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, and other appropriations from undivided earnings as designated by the federal credit union's management or NCUA.

Unimproved land or unimproved real property means: (1) raw land or land without development, significant buildings, structures, or site preparation; (2) land that has never had improvements; (3) land that was improved at one time but has functionally reverted to its unimproved state; or (4) land that has been improved, but the improvements serve no purpose for the federal credit union's planned use of the property and are of little value relative to the project.

(c) Limits on Investment in Fixed Assets.

(1) If a federal credit union 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. NCUA may waive this aggregate limit.

(i) To seek a waiver, a federal credit union must submit a written request to its regional office. The request must: (1) describe the proposed investment; (2) indicate the approximate aggregate amount of fixed assets the federal credit union would hold after the investment (as a percentage of shares and retained earnings); and (3) fully explain why the federal credit union needs the waiver.

(ii) The regional director will inform the federal credit union, in writing, of the date its request was received and of any additional documentation needed.

(iii) Within 45 days of the receipt of the federal credit union's waiver request or all necessary documentation, whichever is later, the regional director will provide the federal credit union a written response, either approving or disapproving the request. The regional director's decision will be based on safety and soundness considerations.

(iv) If a waiver is approved, the regional director will set an alternative limit on the federal credit union's aggregate investments in fixed assets, either as a dollar limit or as a percentage of its shares and retained earnings. Unless the regional director specifies otherwise, the federal credit union's future investments in fixed assets must not exceed an additional one percent of its shares and retained earnings over the amount approved.

(v) If the regional director does not respond in writing within the timeframe specified in clause (iii) above, the federal credit union may proceed with its proposed investment. However, the federal credit union's investment in fixed assets, and any such future investments, must not exceed the aggregate limit it requested.

(d) Premises Not Currently Used To Transact Credit Union Business.

(1) If a federal credit union acquires premises for future expansion 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. Premises are fully occupied when the federal credit union (or the federal credit union and a credit union service organization or a vendor) uses the entire space on a full-time basis. Credit union service organizations and vendors must use the space primarily to support the federal credit union or to serve the federal credit union's members. The federal credit union must make its plans for full occupation available to NCUA upon request.

(2) If a federal credit union acquires premises for future expansion, it must partially occupy them within a reasonable period, but no later than three years after the date of acquisition. If the premises are unimproved land or unimproved real property, however, the three-year partial occupation requirement is extended to six years. NCUA may waive the partial occupation requirements. To seek a waiver, a federal credit union must submit a written request to its regional office within 30 months after the property is acquired 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.

(3) A federal credit union must make diligent efforts to dispose of abandoned premises and any other real property it does not intend to use in transacting business. The federal credit union must seek fair market value for the property, and record its efforts to dispose of abandoned premises. After premises have been abandoned for four years, the federal credit union must publicly advertise the property for sale. The federal credit union must complete the sale within five years of abandonment, unless NCUA waives this requirement. 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.

(e) Prohibited Transactions.

(1) A federal credit union must not acquire, or lease for one year or longer, premises from any of the following, unless NCUA waives this prohibition:

(i) A member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual;

(ii) A corporation in which a member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual, is an officer or director, or has a stock interest of 10 percent or more; or

(iii) A partnership, limited liability company, or other entity in which a member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual, is a general partner, or a limited partner or entity member with an interest of 10 percent or more.

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

(3) All transactions with business associates or family members not specifically prohibited by this section must be conducted at arm's length and in the interest of the federal credit union.

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

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