

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 721

RIN 3133- AE54

Federal Credit Union Occupancy, Planning, and Disposal of Acquired and Abandoned Premises; Incidental Powers

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: As part of NCUA's Regulatory Modernization Initiative, the NCUA Board (Board) is issuing for public comment a proposed rule to amend its regulation governing federal credit union (FCU) occupancy, planning, and disposal of acquired and abandoned premises, and its regulation regarding incidental powers. To provide regulatory relief to FCUs, the proposal eliminates a requirement in the current occupancy rule (formerly known as the fixed assets rule) that an FCU must plan for, and eventually achieve, full occupancy of acquired premises.

The proposal generally retains the current regulatory timeframes for partial occupancy.

However, it modifies the definition of “partially occupy” to mean occupation and use, on a full-time basis, of at least fifty percent of the premises by the FCU, or by a combination of the FCU and a credit union service organization (CUSO) in which the FCU has a controlling interest in accordance with Generally Accepted Accounting Principles (GAAP).

The proposal also amends the excess capacity provision in NCUA’s incidental powers rule to clarify that an FCU may lease or sell excess capacity in its facilities, but it need not anticipate that such excess capacity will be fully occupied by the FCU in the future. However, the sale or lease of excess capacity in equipment or services, including employee-sharing and data processing for third parties, continues to be limited to circumstances where an FCU reasonably anticipates that such excess capacity will be taken up by the future expansion of services to members.

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: <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.

- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Notice of Proposed Rulemaking for Parts 701 and 721, FCU Occupancy, Planning, and Disposal of Acquired and Abandoned Premises; Incidental Powers” 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:

I. Background

II. Summary of the Proposed Rule

III. Regulatory Procedures

I. Background

Section 107(4) of 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 occupancy rule (formerly referred to as the fixed assets rule) interprets and implements this provision of the FCU Act by establishing occupancy, planning, and disposal requirements for acquired and abandoned premises. The rule also prohibits certain transactions to avoid conflicts of interest in the acquisition or lease of FCU premises.²

Over the past several years, the Board has proposed and adopted several regulatory amendments to modernize §701.36.³ Most recently, in July 2015, the Board approved a final rule to eliminate the five percent aggregate limit on investments in fixed assets for FCUs with \$1,000,000 or more in assets and to streamline the partial occupancy requirements. Public comment in response to these recent amendments has been generally supportive of the Board's ongoing efforts to provide regulatory relief to FCUs in this area. However, commenters have continued to ask for more regulatory relief to provide FCUs with greater flexibility in the management of property necessary or incidental to FCU operations. In particular, commenters have strongly advocated

¹ 12 U.S.C. 1757(4).

² 12 CFR 701.36.

³ 78 FR 57250 (Sept. 18, 2013); 79 FR 46727 (Aug. 11, 2014); 80 FR 16595 (Mar. 30, 2015); 80 FR 45844 (Aug. 3, 2015).

the elimination of regulatory occupancy requirements, especially the requirement for full occupancy.

In general, commenters have maintained that the FCU Act does not expressly mandate specific timeframes for occupancy or otherwise prescribe occupancy requirements for FCU premises. Thus, commenters have urged the Board to liberalize NCUA's occupancy rules.⁴ For example, commenters have said that NCUA should not set a specific time period for full occupancy; that FCU boards and management should determine the best timeframe in which to fully develop property; and that the full occupancy requirement should be eliminated entirely.⁵ Commenters have also suggested that NCUA should replace the "full" occupancy requirement with a "significant" or "substantial" occupancy requirement, defined as fifty-one percent occupancy.⁶

In addition, commenters urging NCUA to reconsider its position on full occupancy have indicated that 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.⁷ Commenters have argued that prescriptive occupancy requirements reduce access to commercial space and limit an FCU's ability to acquire space in the most cost-effective manner. As an example, commenters have noted that some local zoning or mixed-use ordinances, city entitlements, or other use requirements may require a portion of the property to be dedicated to retail business.⁸

⁴ 80 FR 45844 (Aug. 3, 2015).

⁵ 80 FR 16595, 16599 (Mar. 30, 2015).

⁶ *Id.*

⁷ 80 FR 45844 (Aug. 3, 2015).

⁸ 80 FR 16595, 16599 (Mar. 30, 2015).

Commenters have also posited that generating long-term income from FCU premises would generate value for the FCU's membership.⁹

The Board has carefully considered the numerous comments received on this subject since at least 2013.¹⁰ The Board also has reconsidered the regulatory position that the limited authority for FCUs to invest in property granted by Section 107(4) of the FCU Act means that an FCU may not hold real property indefinitely without fully occupying the premises. Accordingly, as discussed in more detail below, the Board is proposing to eliminate from the current occupancy rule the requirement that an FCU must plan for, and eventually achieve, full occupancy of its premises. The proposal generally retains the current regulatory timeframes for partial occupancy and the related waiver provisions, including those finalized in July 2015.¹¹ However, the current definition of “partially occupy” is modified in the proposal to reflect that an FCU need not fully occupy premises, but the FCU (or a combination of the FCU and a CUSO in which the FCU has a controlling interest in accordance with GAAP) must utilize at least fifty percent of the premises on a full-time basis within the required timeframe to achieve partial occupancy. For consistency, the proposal also amends the excess capacity provision in the incidental powers rule and makes

⁹ Id.

¹⁰ In fact, requests for relief from the full occupancy requirement date back to at least 2004. See 69 FR 58039, 58041 (Sept. 29, 2004) (“Several commenters believe NCUA should reduce or eliminate the rule's requirements for both partial and full occupation, but particularly for full occupation. These commenters contend it is difficult for a credit union to obtain a building or lease space that is a perfect fit for the credit union's current and near term plans and the rule's occupation requirements restrict credit union growth and may be anticompetitive. One commenter cites the perceived difficulty rural and low-income credit unions have in finding appropriate office space, and another cites the perceived difficulty a continuing credit union in a merger has in balancing reduced staffing needs with the buildings it inherits in a merger.”)

¹¹ 80 FR 45844 (Aug. 3, 2015).

technical and conforming amendments¹² to reflect the proposed policy change regarding full occupancy for FCU premises.

The proposed rule is discussed in greater detail below.

II. Summary of the Proposed Rule

A. Occupancy rule.

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.¹³ For purposes of the rule, “premises” means any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the FCU transacts or will transact business.¹⁴ 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 six years after the date of acquisition, regardless of whether the premises are improved or unimproved.¹⁵ Partial occupancy must be sufficient to show, among other things, that the FCU

¹² For example, the proposed rule generally removes references to “future expansion” and other language that implies an FCU must plan for and achieve full occupancy of its premises.

¹³ 12 CFR 701.36(c)(1). Under the current rule, 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.

¹⁴ 12 CFR 701.36(b).

¹⁵ 12 CFR 701.36(c)(2).

will fully occupy the premises within a reasonable time and consistent with its plan for the premises.¹⁶

The occupancy requirements in the current rule have a statutory basis, but full occupancy of FCU premises is not expressly or specifically mandated by statute. Section 107(4) of the FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.¹⁷ NCUA has long held that the limited authority granted by this provision means that an FCU may not hold, or lease to unrelated third parties, real property indefinitely without fully occupying the premises.¹⁸

After further consideration, however, the Board believes the language in Section 107(4) of the FCU Act supports an interpretation that provides FCUs' with more flexibility to acquire and hold real property. Accordingly, the Board has reconsidered its current approach of ensuring that FCU investment in and use of real property is consistent with the FCU Act by requiring FCUs to fully occupy premises. Section 107(4) neither explicitly mentions nor expressly requires full occupancy of FCU property. Accordingly, the Board proposes to eliminate the full occupancy and related planning requirements in the current occupancy rule. Specifically, the proposed rule deletes the requirement in current §701.36(c)(1) that, if an FCU 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.

¹⁶ 12 CFR 701.36(b).

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

¹⁸ 69 FR 58039, 58041 (Sept. 29, 2004).

While this proposed change represents a departure from the Board’s previous interpretation of Section 107(4), it is both reasonable and consistent with the requirements of the FCU Act. The United States Supreme Court has emphasized that an “initial agency interpretation is not instantly carved in stone,” and “to engage in informed rulemaking, [an agency] must consider varying interpretations and the wisdom of its policy on a continuing basis,” indicating that an agency may change its interpretive position on the statutes it administers.¹⁹ In light of the continuing requests from commenters for relief from the full occupancy requirement, the proposed change is required to avoid unnecessarily imposing undue hardship on FCUs that may have difficulty realizing their growth potential and member service strategies under the current rule.

The Board emphasizes, however, that it maintains its current view that 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 generally support its purpose of providing financial services to its members. The statute is clear that any property acquired or held by an FCU must be “necessary or incidental to its operations.”²⁰ NCUA has stated consistently 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.²¹

¹⁹ Chevron v. Natural Resources Defense Council, 467 U.S. 837, 863-864 (1984). The Supreme Court has also found that an agency is entitled to Chevron deference if it reverses an earlier interpretation. See e.g., Rust v. Sullivan, 500 U.S. 173 (1991); National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005).

²⁰ 12 U.S.C. 1757(4).

²¹ 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.

Although the Board's position on full occupancy has evolved, it continues to read the FCU Act as requiring that an FCU may purchase or hold property only for a permissible purpose or activity; that is, to support the FCU's provision of financial services to its members. As the Board noted in the preamble to the July 2015 final rule, the requirement for an FCU to partially occupy its acquired premises within a specified timeframe is intended to function as a reasonable safeguard against speculative real estate investments or other real estate activities that are not permitted for FCUs under the FCU Act.²² Making speculative investments in real property exceeds an FCU's authority and can lead to safety and soundness problems. Making speculative investments in real property increases an FCU's exposure to market factors unrelated to financial services. As well, managing unoccupied real property or commercial leases creates operational risk exposures which are significantly different from those related to managing authorized financial services permissible for FCUs. By maintaining the requirement that FCUs must partially occupy real property, NCUA reduces the opportunity for speculative investment and helps FCUs align their real property investment decisions with the operational needs of the FCU and its members.

Requiring an FCU to fully occupy its acquired premises may, under certain circumstances: (1) hinder its ability to obtain cost-effective office space necessary to serve its members; (2) restrict its growth; or (3) place it at a competitive disadvantage. However, without a reasonable occupancy requirement, there is little to inhibit an FCU from: (1) speculating on real property

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.")

²² 80 FR 45844 (Aug. 3, 2015).

with the sole intent of realizing a profit from its future sale; (2) acting as a property developer or full-time landlord; or (3) otherwise venturing into real estate activities that are beyond the scope of its authority under Section 107(4). Accordingly, the Board has determined that an FCU must at least partially occupy each of its acquired real property. For both legal and safety and soundness reasons, the proposed rule retains the requirement that an FCU premises, including unimproved property, must be partially occupied within six years from the date of its acquisition. An FCU may apply for a waiver if it is not able to achieve partial occupancy of its premises within six years.²³

Under the current rule, “partially occupy” means occupation, on a full-time basis, of a portion of the premises that is: (1) consistent with the FCU’s usage plan for the premises; (2) significant enough that the FCU is deriving practical utility from the occupied portion relative to the scope of the usage plan; and (3) sufficient to show that the FCU will fully occupy the premises within a reasonable time.²⁴ The Board proposes to modify the current definition of “partial occupancy” to eliminate references to the current requirement to plan for full occupancy (usage plan) and the need to show that the FCU will fully occupy the premises. Additionally, the Board proposes to amend that definition to emphasize that at least fifty percent of FCU premises must be occupied and used, on a full-time basis, by the FCU or a combination of the FCU and a CUSO in which the FCU has a controlling interest in accordance with GAAP.²⁵ Occupancy of FCU premises with third-party vendors or CUSOs in which the FCU does not maintain a controlling interest

²³ 12 CFR 701.36(c)(2).

²⁴ 12 CFR 701.36(b).

²⁵ FASB Accounting Standards Update (ASU) 805 defines controlling interest as “the ability of an entity to direct the policies and management that guide the ongoing activities of another entity so as to increase its benefits and limit its losses from that other entity’s activities.” More generally, controlling interest is majority interest or any other ownership interest which entitles the owner to direct the activities of the CUSO.

will not count towards the fifty percent partial occupancy requirement because these entities operate at the direction of other owners and may not be obligated to primarily support the FCU that acquired the premises or to primarily serve that FCU's members. The proposed definition, which incorporates elements from the current rule's definition of full occupancy,²⁶ will ensure that any property acquired or held by an FCU is primarily utilized for a purpose that is necessary or incidental to its operations, as required by the FCU Act.

B. Incidental powers.

The Board recognizes that in planning for future expansion, FCUs should be permitted to sell or lease their excess capacity as a matter of good business practice.²⁷ The incidental powers rule permits an FCU to sell or lease its excess capacity with respect to its property and services.²⁸ Under that rule, excess capacity refers to the excess use or capacity remaining in FCU facilities, equipment, or services.²⁹ An FCU's sale or lease of excess capacity, for example, may involve leasing excess office space, sharing employees, or using data processing systems to process information for third parties.³⁰ However, while an FCU has the authority under the rule to obtain income by selling or leasing excess capacity in its facilities, equipment, or services to third parties, that authority is subject to the following conditions: (1) the facilities, equipment, or services must have been acquired by an FCU, in good faith, for the purpose of providing

²⁶ 12 CFR 701.36(c)(1).

²⁷ 66 FR 40845, 40851 (Aug. 6, 2001).

²⁸ 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.

²⁹ 12 CFR 721.3(e).

³⁰ Id.

financial services to its members; and (2) the FCU must reasonably anticipate that the excess capacity will be taken up by the future expansion of services to its members.³¹

To conform to the above proposed amendments to the occupancy rule, the Board proposes to amend the incidental powers rule regarding the sale or lease of excess capacity by removing the condition that excess capacity in FCU facilities must eventually be fully occupied by the FCU. The Board continues to believe, however, that the sale or lease of excess capacity in equipment or services, including employee-sharing and data processing for third parties, should be limited to circumstances where an FCU reasonably anticipates that the excess capacity will be taken up by the future expansion of services to its members.

In adopting the excess capacity provision in the incidental powers rule, the Board reasoned in 2001 that “[t]he sale of excess capacity offers FCUs the opportunity to provide financial services to its members, even though member demand for the services does not initially meet the FCU’s capacity.”³² However, the Board also noted:

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.³³

³¹ Id.

³² 66 FR 40845, 40851 (Aug. 6, 2001).

³³ Id.

While the Board has reconsidered its position with respect to requiring full occupancy of FCU facilities, the Board maintains its view that FCUs are not, and should not be, in the business of providing third parties with data processing capacity or other equipment or services outside their express or incidental powers. Accordingly, under this proposal, an FCU's authority to sell or lease excess capacity in equipment and services continues to be conditioned on the FCU's reasonable anticipation that its members will eventually fully utilize the excess capacity.

III. 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 \$100 million) and publishes its certification and a short, explanatory statement in the Federal Register together with the rule.

The proposed rule would provide regulatory relief by eliminating the need to develop a plan for full occupancy. However, FCUs currently have limited flexibility to purchase real estate with excess capacity. NCUA certifies that the proposed rule 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.³⁴ 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 proposed rule provides regulatory relief to FCUs by eliminating the requirement that, if an FCU does not fully occupy premises acquired for future expansion within one year, it must have a board resolution in place by the end of that year with definitive plans for full occupation. The proposed rule does not impose new paperwork burdens. The proposed rule would relieve FCUs from the current requirement to have a board-approved plan for full occupation of its premises.

According to NCUA estimates, approximately 15 FCUs are required to develop a plan for full occupation premises each year. Accordingly, the reduction to existing paperwork burdens that would result from the proposal is analyzed below:

Estimate of the reduced burden by eliminating the full occupancy planning requirement.

Estimated FCUs: 15

Frequency of waiver request: Annual

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

Reduced hour burden: 15 hours

15 FCUs x 15 hours = 225 hours 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 proposed rule 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: Dawn Wolfgang
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Fax No. 703-837-2861

E-mail: OCIOOPRA@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 occupancy and incidental powers regulations apply only to FCUs, the 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 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 1999.³⁵

List of Subjects

12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 721

Credit unions, functions, implied powers.

By the National Credit Union Administration Board, on 2016.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, NCUA proposes to amend 12 CFR parts 701 and 721 as follows:

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

³⁵ 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. Amend the title of §701.36 and amend §§701.36(a) and (b) to read as follows:

§701.36 Federal credit union occupancy 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 and disposal requirements for acquired and abandoned premises, and by prohibiting certain transactions. This section applies only to federal credit unions.

(b) * * *

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

* * * * *

Partially occupy means occupation and use, on a full-time basis, of at least fifty percent of each of the premises by the federal credit union, or the federal credit union and a credit union service organization in which the federal credit union has a controlling interest in accordance with Generally Accepted Accounting Principles (GAAP).

* * * * *

3. Remove §701.36(c)(1); redesignate §701.36(c)(2) as §701.36(c)(1) and amend it to read as follows:

(c) Premises not currently used to transact credit union business. (1) If a federal credit union acquires premises, including unimproved land or unimproved real property, it must partially occupy each of 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.

4. Redesignate §701.36(c)(3) as §701.36(c)(2).

PART 721 — INCIDENTAL POWERS

5. The authority for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

6. Amend §721.3 to read as follows:

§721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(a) * * *

(b) * * *

(c) * * *

(d) * * *

(e) Excess capacity. Excess capacity is the excess use or capacity remaining in facilities, equipment, or services that you properly invested in or established, in good faith, with the intent

of serving your members or supporting your business operations. You may sell or lease the excess capacity in facilities, such as office space and other premises. You may sell or lease the excess capacity in equipment or services, such as employees and data processing, if you reasonably anticipate that the excess capacity will be taken up by the future expansion of services to your members.

* * * * *

DRAFT