

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: Final rule.

SUMMARY: As part of NCUA's Regulatory Modernization Initiative, the NCUA Board (Board) is finalizing amendments to 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, this final rule 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 final rule 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 final rule 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: This rule is effective [INSERT DATE THAT IS 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Senior Staff Attorney, Office of General Counsel, at (703) 518-6540, or Jacob McCall, Program Officer, Office of Examination and Insurance, at (703) 518-6360.

SUPPLEMENTARY INFORMATION:

I. Background

II. Summary of Comments

III. Regulatory Procedures

I. Background

In April 2016, the Board issued a proposed rule¹ to amend its regulation governing FCU occupancy, planning, and disposal of acquired and abandoned premises, and its regulation regarding incidental powers. The regulatory changes in the 2016 proposed rule are identical to the regulatory changes adopted in this final rule as summarized above. The Board received 27 comment letters in response to the proposed rule. Twenty-six of the commenters generally supported the proposal and one commenter opposed the rule. Of the 26 supportive comments, approximately half recommended additional changes or more regulatory relief.

II. Summary of Comments.

As noted above, one commenter opposed the proposed rule in its entirety. This commenter asserted that the proposed rule was a significant departure from the Board's previous interpretation of the Federal Credit Union Act (the Act) and could lead to FCUs exceeding their authority.

As stated in the proposed rule, the Board believes the language in Section 107(4) of the Act supports an interpretation that provides FCUs with more flexibility than permitted by the current rule to acquire and hold real property.² Accordingly, the Board has reconsidered its current

¹ 81 FR 24738 (Apr. 27, 2016).

² 12 USC §1757(4).

approach of requiring FCUs to fully occupy premises. The Board notes that §107(4) of the Act neither explicitly mentions nor requires full occupancy of FCU property.

While this final rule represents a departure from the Board's previous interpretation of §107(4) of the Act, the Board believes the rule is both reasonable and consistent with the requirements of the Act and is within the Board's authority. The Board notes that 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.³ The final rule is reasonable and eliminates the imposition of unnecessary hardship on FCUs whose growth potential and member service strategies may be hampered by the current rule.

The Board reiterates, however, its current view that there is no authority in the 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 Act is clear that any property acquired or held by an FCU must be "necessary or incidental to its operations."⁴ 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.

³ *Chevron v. Natural Res. Def. 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 & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁴ 12 U.S.C. 1757(4).

A. Elimination of requirement that an FCU must plan for, and eventually achieve, full occupancy of acquired premises.

The large majority of commenters strongly supported removing the full occupancy requirement. However, two commenters opposed this particular aspect of the proposed rule. Commenters that disagreed with the elimination of the full occupancy requirement expressed concern that FCUs will be more likely to venture into real estate activities that are beyond the scope of credit union operations envisioned by Congress.

In the proposed rule, the Board emphasized that maintaining the requirement that an FCU must partially occupy real property it obtains will reduce the likelihood and opportunity for speculative investments. The Board reaffirms this position and also notes that NCUA will diligently oversee FCUs' activities in this area to ensure that FCUs are not engaging in speculative investments or other real estate activities that are not permitted under the Act. Any FCU in violation of these requirements could be subject to all administrative remedies available to the agency. Therefore, the Board does not believe this final rule will result in FCUs operating beyond the scope of their authority as Congress provided for in the Act.

B. Partial occupancy.

1. Definition

Under the current rule, an FCU must partially occupy premises acquired for future expansion, within a reasonable period, but no later than six years after the date of acquisition. The proposed rule did not change this requirement, but did modify 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 CUSO in which the FCU has a controlling interest in accordance with GAAP.

Nearly half of the commenters supported the proposed definition of “partially occupy.” Several of these commenters, however, asked how they are to measure different areas of a building (e.g., common, service and mechanical areas) for determining the FCU’s percentage of occupancy. The Board notes that NCUA will consider all shared facilities owned by the FCU as occupied by the FCU, unless the area is specifically leased to an outside entity for their exclusive use. This will include common, service, and mechanical areas, and other shared spaces.

In addition, a few commenters supported the proposed definition, but suggested the rule should allow for exceptions to the fifty percent requirement or permit waivers from the partial occupancy requirement. Some of these commenters noted that an FCU meeting the fifty percent occupancy requirement may, at a later time, occupy less than fifty percent for economic or strategic reasons. One commenter stated that waivers should be allowed in such circumstances. Another commenter suggested that satisfaction of the fifty percent occupancy requirement should be “grandfathered” once initially achieved by the FCU. Finally, one commenter said mixed-use developments in urban areas sometimes require shared space and that common areas and other shared fixtures and utilities should count toward the fifty percent partial occupancy requirement.

The final rule retains the waiver provisions for the partial occupancy requirement. FCUs can request a waiver of either the fifty percent requirement or the six-year requirement. The waiver

process is designed to allow NCUA to evaluate unique circumstances. For example, certain zoning laws affecting a particular property may support NCUA accepting less than fifty percent occupancy or extending the time period for compliance. The Board believes the waiver process balances providing flexibility to FCUs while maintaining safety and soundness.

A few commenters disagreed with the proposed definition in its entirety. One commenter argued against the fifty percent threshold and stated the rule should allow FCUs broader flexibility to occupy a lesser percentage of their premises. As discussed in more detail above, the Board purposefully included the proposed partial occupancy requirement, among other reasons, as a protection against FCUs potentially engaging in impermissible and speculative real estate investment transactions. Further, the ability to request a waiver from the partial occupancy requirement is, in part, an acknowledgement that there may be circumstances where an FCU could prudently occupy a lesser percentage of the premises and still comply with the Act.

One commenter argued that there is no need for a prescriptive fifty percent occupancy requirement. Another commenter urged that the fifty percent occupancy threshold be removed or, alternatively, that the threshold be reduced to no more than twenty-five percent. A different commenter suggested “partially occupy” should be defined as “less-than-full occupancy that is material and visible actual usage.” The same commenter also suggested that the addition of an absolute prohibition on real estate speculation, analogous to NCUA’s regulatory ban on credit union speculation on derivatives, could be adopted as an added safeguard against speculative real estate investing. One commenter noted the fifty percent threshold is somewhat ambiguous with respect to mixed-use properties and larger tracts of land. The same commenter recommended

that the final rule revert to an earlier iteration of the regulatory definition, which at one point required only full occupancy of FCU property on a part-time basis.

The Board believes that removing the full occupancy requirement provides FCUs with greater flexibility in managing their real estate, and that it is important to maintain the partial occupancy requirement to ensure safety and soundness. The fifty percent standard provides FCUs with a clear guideline for achieving compliance, and the waiver provisions ensure further flexibility when warranted.

2. CUSOs

Several commenters asked what is meant by “a controlling interest in a CUSO.” As stated in the proposed rule, NCUA defines controlling interest in a CUSO using GAAP standards, which are dependent upon the ownership structure of the CUSO and are codified within FASB Accounting Standards Codification (ASC), Topic 810, *Consolidation*. Generally, controlling interest would mean more than 50% voting ownership of the CUSO or an ownership interest which allows the credit union to direct the policies and management that guide the ongoing activity of the CUSO.

In addition, two commenters disagreed with the controlling interest requirement for CUSOs entirely. These commenters suggested that an FCU and its CUSO should be able to meet the partial occupancy threshold regardless of the amount of ownership interest the FCU has in the CUSO. One of the commenters further suggested that the types of entities with which an FCU may meet the fifty percent occupancy requirement should be expanded to include credit union industry “partners” or other credit union service providers.

The Board stated in the proposed rule that:

Occupancy of FCU premises with third-party vendors or CUSOs in which the FCU does not maintain a controlling interest 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.⁵

Further, the Board notes that this definition 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 Act.

3. Timeframe for Partial Occupancy

Nearly half of the commenters offered input on the current rule's six-year regulatory timeframe for partial occupancy of improved and unimproved property. Of these, several urged that the regulatory timeframe for partial occupancy be eliminated entirely or, alternatively, be extended to ten years.

Three commenters recommended the rule be modified to allow ten years for partial occupancy of unimproved property or raw land. One commenter suggested that the occupancy requirement for unimproved property should be removed entirely. In addition, two commenters suggested that

⁵ 81 FR 24738 (Apr. 27, 2016).

the occupancy waiver provision should be amended to require NCUA to grant waivers upon request unless there are specific safety and soundness concerns.

The Board notes that the final rule will retain the waiver provisions for the partial occupancy requirement, which allows an FCU to request a waiver of the six-year requirement. The Board believes the waiver process, as currently written, provides sufficient flexibility while protecting safety and soundness.

C. Incidental powers.

As discussed above, the proposed rule 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, would continue 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.

Four commenters expressed support for this aspect of the proposed rule and one commenter disagreed with it, stating that it would allow credit unions to exceed their authority under the Act. The Board does not believe that anything in this final rule will allow FCUs to exceed their authority under the Act.

D. Additional comments.

Two commenters advocated the creation of an independent appeals process for adjudicating disagreements between NCUA and an FCU concerning the acquisition and use of FCU premises. The creation of such a process was not part of the proposed rule and is, therefore, outside the scope of this final rulemaking. The Board will, however, consider this for inclusion in any future amendments it proposes to this rule.

Finally, one commenter suggested that there should be a de minimis exception for fixed assets that are financially immaterial to the FCU's operations. This commenter asserted that such de minimis fixed assets should not be subject to any regulatory occupancy requirements, including the fifty percent rule and the six-year occupancy timeframe. The Board notes that the occupancy rule implements provisions of the Act. The Act does not distinguish certain fixed assets from other fixed assets based on financial materiality. The Board believes this final rule provides significant flexibility and regulatory relief to FCUs and does not include a de minimis exception.

III. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires NCUA to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a 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 final rule would provide regulatory relief by eliminating the need to develop a plan for full occupancy. Also, FCUs currently have limited flexibility to purchase real estate with excess capacity. NCUA certifies that this final 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.⁶ 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 final 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 final rule does not impose new paperwork burdens. Rather, the final 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 of premises each year. Accordingly, the reduction to existing paperwork burdens that would result from the final is analyzed below:

⁶ 44 U.S.C. 3507(d); 5 CFR part 1320.

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

Estimated FCUs: 15

Frequency of waiver request: Annual

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 to reflect these changes. NCUA is submitting a copy of this 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 did not receive any comments on the PRA aspects of the rule.

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 final rule does 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 1999.⁷

List of Subjects

12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 721

Credit unions, functions, implied powers.

⁷ Public Law 105–277, 112 Stat. 2681 (1998).

By the National Credit Union Administration Board, on _____ 2016.

Gerard Poliquin

Secretary of the Board

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

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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.

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