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October 10, 2014

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

RE: Proposed Rulemaking for Part 701 – Federal Credit Union Ownership of Fixed Assets

Dear Mr. Poliquin:

The Pennsylvania Credit Union Association (PCUA) appreciates the opportunity to comment on the National Credit Union Administration's (NCUA) proposed fixed assets rule 12 CFR Part 701, which will increase a federal credit union's (FCU) flexibility in the management and ownership of its fixed assets. PCUA is a statewide advocacy organization which represents a majority of the over 400 credit unions located in the Commonwealth of Pennsylvania. In this comment letter, we would like to address our concerns and recommendations for the proposal.

PCUA consulted with its Regulatory Review Committee and State Credit Union Advisory Committee (the Committees) in order to provide comments on the proposal. The Committees consist of credit union CEOs and senior management staff, representing credit unions of all asset sizes. The comments contained in this letter reflect the input of the Committees and PCUA staff.

Overall we support NCUA's proposal enabling FCUs to exceed the 5% limit on fixed assets by adopting a Fixed Asset Management program (FAM). We encourage NCUA to adopt improvements to the FAM process such as establishing clear lines concerning NCUA's review of a FAM. In the event of a dispute, we recommend an appeals process. While the proposal takes a significant step toward improving the rules on occupancy, we urge even greater flexibility for FCUs.

Support for FAM

Again, we support the migration away from the current waiver process to the proposed rule whereby an FCU could exceed the 5% limit on the investment in fixed assets by adopting and implementing a FAM. The Committees indicated that a FAM could be a great help in managing fixed assets and planning expansions. Rather than engage in the current waiver process and possibly miss an opportunity to purchase premises, an FCU can act in a timely manner while planning for real property needs, equipment or other fixtures. To that end, however, a FAM, should be a broad policy document that defines and supports an FCU's approach to investing in fixed assets. It should not be viewed as a worksheet or some type of document that requires constant updates in order to justify each branch or purchase of premises.

If, in the examination context, the FAM is viewed as a justification of each move an FCU takes in connection to an investment in fixed assets, it will defeat the purpose of creating the FAM and migrating from the current waiver process.

In addition, we object to certain language in proposed section 701.36(c), which states, “An aggregate investment in fixed assets that exceeds five percent of a federal credit union’s shares and retained earnings is generally considered unsafe and unsound and requires a sufficiently robust FAM to mitigate supervisory concerns.” 70 F.R. No 154 at 46732. NCUA should remove that sentence from the final rule. The first sentence of the proposed rule states the proposition well enough. Safety and soundness concerns are addressed by establishing the requirements for a FAM. Safety and soundness concerns are further advanced by the subsequent subsections that require a board policy and board oversight of the FAM. The sentence or commentary on safety and soundness undercuts an otherwise beneficial change to the fixed asset regulation.

Elements of the FAM, Appeals Process

If NCUA is determined to scrutinize an FCU’s fixed assets, then the Committees support the FAM approach over the prior waiver system. The elements of the FAM and board engagement in connection with investments in fixed assets are reasonable and prudent. The proposed rule clearly signals that safety and soundness require reasonable limits, ongoing oversight, and proper internal controls. The rule should and does discourage speculation or abuse connected to investments in fixed assets. In light of the exacting standards of the FAM, the final rule should limit the extent to which examination teams can require amendments to a FAM. Additionally, the final rule should contain an appeals process in the event of disagreements over a FAM.

The rule affords the appropriate NCUA Regional Director discretion to utilize “the full extent of NCUA’s supervisory authority, including prohibition of any additional investments in fixed assets or divestiture of fixed assets.” 79 F.R. No. 154 at 46732. An FCU’s investment in fixed assets, especially premises, is significant and requires extensive planning. The decision-making process in adopting a FAM will be deliberate. Also, once adopted, the FCU will be relying on the FAM as its roadmap and as a signal to NCUA that it is complying with the regulation. As such, consistent treatment from examination teams, year-in and year-out, will be essential to enabling the FAM to work.

Therefore, a written FAM that addresses all of the elements detailed in the rule should be deemed to be in compliance with the regulation. Only where a FAM contains a material omission from the regulation or where an FCU has deviated from its FAM in a material way should an examination team or the Regional Director have authority to require amendments to a FAM or other enforcement actions. The FAM process will not be effective and FCUs will not be able to execute a FAM with confidence if pro forma balance sheet information, marketability analysis, net worth projections or similar financial data and assumptions can be second-guessed or overruled at the examination level.

Due to the discretionary nature of the review and the consequences of a negative review, we maintain that the final rule should include an appeals process. We encourage the NCUA to include in the new rule a provision for a meaningful appeals process, one that allows the FCU to present its position to an independent administrative law judge (ALJ). The results of the review must be supported by findings of fact and conclusions of law. The ALJ’s ruling should constitute final agency action that can be appealed to the federal court system should either party want to seek further redress.

Occupancy

The Committees appreciate NCUA's attempt at providing some flexibility and uniformity regarding occupancy. Overall, sections 701.36(c) and (d) should be reconciled to eliminate confusion and assist FCUs in planning for occupancy. Specifically, we suggest eliminating subsection (d) and the adoption of one cohesive rule on occupancy. We are recommending that the amendments to the rule allow for partial or full occupancy of unimproved and improved land or real property within a reasonable time after acquisition. Credit unions need to have more flexibility, not less, in order to do more long-range planning and adjust to the economy when necessary.

Under the current fixed assets rule, if an FCU purchases unimproved land or property, it must partially occupy the property within six years of acquisition. For other premises, the FCU must partially occupy within three years. Under the proposed rule, both unimproved and improved property must be partially occupied within five years. Also if an FCU acquires premises for future expansion, it must fully occupy the premises within one year or have a board resolution in place with definitive plans for full occupation. Full occupation occurs if the FCU uses the entire space on a full-time basis, or if the credit union and a CUSO or vendor uses the entire space on a full-time basis. A CUSO or vendor using the space must be using it primarily to serve the FCU or its members.

The Committees indicated that five years may be too rigid a timetable for unimproved land and the final rule should allow for more flexibility regarding partial occupancy. Once the land is purchased, several factors that are beyond a credit union's control, such as the economy, local ordinances, or zoning could delay construction and occupation. From an economic standpoint, divestiture following a mandated timeframe for occupancy could be irrational and harm the credit union's balance sheet or income statement. The institution of a FAM, with proper monitoring by the FCU's board, and a clear plan for occupation should ease safety and soundness concerns over occupancy. If the FCU adopts a FAM that passes scrutiny at exam time and acquires fixed assets in accordance with the FAM, no rigid time table should be necessary. If the FCU seeks to deviate from its FAM in a significant way, only then should it be necessary to seek a waiver.

Accordingly, the final rule should state that the FAM provides the roadmap for partial or full occupancy. For example, an FCU may need to "land bank" in order to deploy branches where it so desires. The FAM could articulate the needs for real property and an estimate for occupancy. The rule should be flexible enough to enable the FCU to determine the timing of when it will partially or fully occupy premises. That decision would be supported by the pro forma financial statements and marketability elements included in the proposal. The FCU could further identify budgetary, legal, construction or other factors to justify its determination on occupancy.

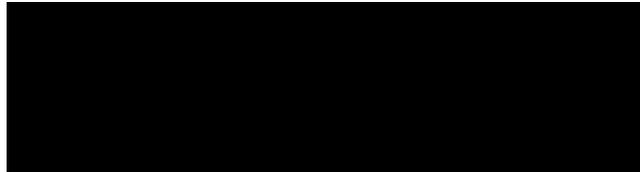
Additionally, we propose that the final rule clarify partial and full occupancy in a manner that accommodates generating income from premises. We want to be clear that we are not advocating for real estate speculation and purchasing assets solely for investment income. However, the Committees have identified situations where leasing space to a third party may make good economic sense. A building or parcel may represent a good economic value but the space may exceed what the FCU might need to conduct member business. FCUs should be enabled to capitalize on these opportunities. Excess space should not sit idle, but be used to generate value for the membership, even if such space is not specifically used for member business. To discourage speculation, limits on income from leasing could be imposed, either as a percentage of income or relative to the size or value of the property. An FCU should be able to benefit from an opportunity to earn income on a property that has been purchased for future growth.

Conclusion

In closing, the ability for credit unions to use the FAM in order to better manage their growth and expansion efforts, rather than having to wait for a waiver before making a purchase, is supported. But, the reduction in the time permitted to partially occupy unimproved land may increase the burden in requiring a credit union to seek an exception to the five-year occupation rule. Credit unions would like to see more flexibility for partial occupancy and more flexibility to earn income from unused portions of property. Finally, we advocate for a meaningful appeal process if an examiner has directed a credit union to reduce its assets or prohibited it from acquiring an asset that may be necessary for growth. The PCUA urges you to please take these points in to consideration when drafting the final rule. Thank you for your time and attention.

Very truly yours,

PENNSYLVANIA CREDIT UNION ASSOCIATION



Richard T. Wargo, Jr., Esq.
Executive Vice President/General Counsel

cc: P. Conway, President & CEO
PCUA Association Board
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