October 8, 2014

Gerard Poliquin
Secretary of the Board, National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314–3428.

RE: 12 CFR Part 701/ RIN 3133–AE39

Dear Mr. Poliquin

On behalf of the Credit Union Association of New York, I am writing to comment on NCUA's proposal that would require federal credit unions to implement Fixed Assets Management (FAM) plans if they invest more than 5 percent of their assets in building and infrastructure projects. The proposal would eliminate the current requirement, which mandates credit unions to obtain a waiver before exceeding the 5 percent threshold.

Deciding how large a credit union's physical footprint should be and how heavily it should invest in technology are core determinations that should be left to the discretion of each credit union's management team. Credit unions have long questioned the utility of the 5 percent limitation and are appreciative of NCUA's willingness to proactively amend this and other regulations that place unnecessary constraints on credit union operations. In addition, the Association is supportive of creating a five-year horizon for partially occupying property. This amendment would clarify a vague regulation that has confounded both credit union personnel and examiners. While the Association is supportive of the proposed amendments to the fixed-assets regulation in concept, as currently drafted, it is only a marginal improvement over the current fixed-assets rule. In order to provide meaningful mandate relief to federal credit unions, the proposal must be amended to: (1) eliminate or increase the use of the 5 percent asset threshold for triggering increased examiner oversight; (2) reduce the powers examiners would have to alter and block building plans; and (3) clarify that building expansions are not presumptively unsafe.

NCUA Should Raise The 5 percent Threshold

The proposal eliminates the waiver requirement for fixed-assets investments in excess of 5 percent of a credit union's assets, but fixed-assets investments greater than 5 percent would still trigger increased regulatory scrutiny. Credit unions exceeding this threshold would have to implement FAM plans, which would generally consist of a written board policy, board oversight and ongoing internal controls. FAMs would be analyzed in much the same way waiver requests are currently, but would occur during credit union examinations.

NCUA first imposed a 5 percent cap on federal credit unions in 1978 because it wanted to prevent them from over-investing in non-income producing assets (see: 43 FR 58176-58179, 1978). Given the ways in which the world has changed, NCUA should raise the fixed-assets threshold to 15 percent to account for inflation over the last three decades. It is illogical to assume that a threshold that was appropriate in 1978 is appropriate in the 21st century. In 1978, the Internet was still being used exclusively by government researchers, ATMs were in their infancy, a "smartphone" was an oxymoron and bank robberies caused the greatest theft.

In contrast, over the last two decades, credit unions: have spent billions getting wired for Internet services; are under constant pressure to integrate even more technology into their product offerings; are now competing

against companies that specialize in making smartphones; and must constantly adjust software to protect against rapidly changing cyber threats. Fixed assets are no longer non-income producing assets, but crucial components of a credit union's business plan. The cap should be adjusted to reflect these changes. Raising it would ensure that the fixed-assets rule does not result in examiners and regulators being too involved in the management of the credit unions they oversee.

If NCUA is unwilling to eliminate or raise the threshold, it should consider adopting a proposal similar to one it rejected in 1978. Then, in response to a suggestion that different caps be imposed for different types of fixed-assets investments, NCUA concluded that "the aggregate amount invested in non-income producing assets is of critical importance, not the nature of the non-income producing asset." (see: Id, at 58177). Today, not all fixed assets are created equal. NCUA should exclude computer hardware and software investments (equivalent to up to 2.5 percent of a credit union's fixed assets) from the 5 percent threshold calculation. This approach would allow NCUA to continue to have oversight over those aspects of construction that are truly non-income producing while giving credit unions greater authority to make building decisions.

If NCUA feels that 5 percent is still an appropriate threshold, then the final rule's preamble should explain why this is the case. A thoughtful explanation would demonstrate that the existing threshold is not antiquated and arbitrary.

Examiner Authority Over Building Projects Must Be Reduced

As explained in the preamble proposed, 12 CFR 701.36 provides that an unsafe and unsound FAM program or credit unions that do not comply with the FAM program may be subject to supervisory action, including prohibition of additional investments in fixed assets or divestiture of fixed assets. As drafted, regulators will assess whether a project is "unsound" in addition to whether or not a FAM is being implemented. Considering the costs of fixed-assets investments and the potential penalties for going forward with an "unsafe plan," very few credit unions will begin construction projects without getting unofficial feedback from their examiners. Without changes, this regulation will simply replace the requirement to get an official waiver with the desire to get an unofficial one.

Conversely, much of what NCUA is suggesting should be part of a FAM program would include basic due diligence requirements that should be expected of all credit unions undertaking infrastructure projects. In order to ensure that appropriate oversight is coupled with greater credit union flexibility, NCUA should amend the final rule so that the regulator's oversight is limited to assessing a credit union's compliance with its FAM program rather than an assessment of the investment's merits. Specifically, the regulation should include the following language: "A credit union that does not implement a FAM program or that does not comply with its FAM program may be subject to supervisory action, including prohibition of additional investments in fixed assets or divestiture of fixed assets."

Another way in which the power of regulators should be narrowed is to clarify that fixed-assets investments are not presumptively unsafe. Proposed, 12 CFR 701.36(C) provides: "An aggregate investment in fixed assets that exceeds five percent of a federal credit union's shares and retained earnings <u>is generally considered unsafe and unsound</u> and requires a sufficiently robust FAM program to mitigate supervisory concerns. A federal credit union that does not meet the requirements of this paragraph or fails to comply with its FAM program may, in the discretion of the Regional Director, be subject to the full extent of NCUA's supervisory authority, including prohibition of any additional investments in fixed assets or divestiture of fixed assets."

This language creates a presumption. Credit unions would have to prove that their building plans are not unsafe and examiners would approach the analysis of any building plan with skepticism mandated by the regulation. This will result in regulators—not credit unions—making more of the final decisions on fixed-assets investments. The

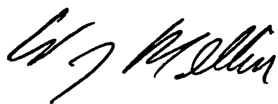
language should be removed and replaced with the requirement that credit unions consider potential risks when making building plans. Specifically the final regulation should be amended to read as follows:

> "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 15 percent of its shares and retained earnings, unless it has implemented an effective fixed assets management (FAM) program, and the federal credit union's board of directors has analyzed and determined that the investment in fixed assets in excess of the 15 percent limit is appropriate, safe and sound, and supported by its FAM program. An aggregate investment in fixed assets that exceeds 15 percent of a federal credit union's shares and retained earnings is generally considered unsafe and unsound and requires a sufficiently robust FAM program to address potential safety and soundness concerns. A federal credit union that does not meet the requirements of this paragraph or fails to comply with its FAM program may, in the discretion of the Regional Director, be subject to the full extent of NCUA's supervisory authority, including prohibition of any additional investments in fixed assets or divestiture of fixed assets. A federal credit union's FAM program must be annually reviewed by its board of directors."

The approach to fixed-assets reform outlined by the Association is based on the belief that the vast majority of boards recognize the importance of fixed-assets investments and should be presumed to act with good judgment in the best interests of their credit unions. At the same time, examiners should be able to hold credit unions responsible in those rare cases where they do not exercise appropriate due diligence.

I hope NCUA will consider this approach and make significant revisions to its fixed-assets investment proposal.

Sincerely,



William J. Mellin
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