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May 11, 2004

Ms. Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: National Credit Union Administration; 12 CFR Parts 701 and 742; Federal Credit Union Ownership of Fixed Assets; 69 Federal Register 21439, April 21, 2004

Dear Ms. Baker:

The National Credit Union Administration ("NCUA") Board is seeking comment to proposed amendments to its fixed asset rules. The American Bankers Association ("ABA") believes that NCUA's fixed asset rule is inconsistent with the statutory requirement that an Federal credit union ("FCU") purchase, hold, and dispose of property necessary or incidental to its operations. The proposed waiver regarding partial use of premises for future expansion is inconsistent with the law. Also, ABA believes that NCUA should utilize more binding agreements such as written agreements, instead of waivers, when dealing with FCU non-compliance with the fixed asset limit.

The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks—makes ABA the largest banking trade association in the country.

Background

The Federal Credit Union Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations. 12 U.S.C. 1757(4). Generally, an FCU may only invest in property it intends to use to transact credit union business, that is, to support its internal operations or serve its members. 12 CFR 721.3(d). NCUA's fixed asset rule limits an FCU's investment in fixed assets and imposes requirements on the planning for, use of, and disposal of real property acquired for future expansion. 12 CFR 701.36.

The proposed rule retains the current requirement that FCUs with $1 million or more in assets cannot invest in fixed assets if the investment would cause the aggregate of all the FCU's fixed assets to exceed five percent of the FCU's shares and retained earnings. This fixed asset limitation ensures that a credit union's resources are used to meet the credit needs of its members.

The current rule permits FCUs to apply for a waiver of the five percent limitation. Also, FCUs that qualify for the NCUA's Regulatory Flexibility ("RegFlex") Program are exempt from the five percent limitation on investment in fixed assets. 12 CFR 701.36(c), part 742.

ABA's Position

NCUA proposes (a) to amend the waiver requirements for partial occupation of premises acquired for future expansion and (b) to authorize waivers for RegFlex FCUs that lose RegFlex qualifications. ABA opposes these proposed amendments.

Waiver for Partial Occupation of Premises Acquired for Future Expansion

When an FCU acquires premises for future expansion, the credit union must plan to fully utilize the premises. NCUA proposes that "full use occurs when the premises are completely occupied by the FCU, or by some combination of the FCU, credit union service corporations (CUSOs), and credit union vendors, on a full-time basis. CUSO and vendor activities must be primarily to support the operations of the FCU or serve its members."

NCUA acknowledges that FCUs do not have the authority to own and lease out space indefinitely for purposes unrelated to FCU operations or member service. But it seems that the request for waivers is incongruent with this goal.

The rule currently states that for future expansions, an FCU must ***partially*** occupy the premises within a reasonable period, not to exceed three years. Premises are partially occupied when FCU staff is using some part of the space on a full-time basis.

For example, an FCU could acquire an office building. As currently crafted, a credit union would in theory partially occupy the building, if it placed a loan production office in a room in the building, while leasing the excess office space to tenants. It is hard to fathom how the leasing of this excess office space is "necessary or incidental to its operation", as stipulated by the Federal Credit Union Act.

Furthermore, the proposed rule states that NCUA may waive this partial occupation requirement upon written request. The request must be made within 30 months after the property is acquired. Once again, this is inconsistent with the requirement that an FCU fully use the property.

ABA believes that 3 years is sufficient time for an FCU to partially occupy premises, if not fully occupy premises. If an FCU cannot occupy this space within this allotted time, it raises the efficacy of the investment in the fixed asset in the first place. This raises the question whether the FCU's management and board of directors are meeting their fiduciary responsibilities "to make more available to people of small means credit for provident purposes." 12 U.S.C. 1751

Furthermore, FCUs are not subject to Unrelated Business Income Taxes (UBIT). The leasing of excess space is **neither** necessary **nor** incidental to the operation of FCUs and would represent unrelated business income. While ABA is well aware that Congressional action is needed to address the application of UBIT to FCUs, NCUA still has an **affirmative obligation** to American taxpayers to limit income from unrelated business sources by FCUs.

Waiver for Noncompliance to RegFlex Qualification

NCUA's RegFlex Program exempts qualified credit unions from all or part of identified NCUA regulations, including the 5 percent fixed asset limit.

The Board proposes that FCUs that once qualified for the RegFlex Program and its associated exemptions but no longer qualify for RegFlex must comply with all the provisions of the fixed asset rule. The example cited in the proposed rule states that "a RegFlex FCU that exceeds the five percent limitation on investment in fixed assets and subsequently loses its RegFlex qualification must either reduce its fixed asset holdings below five percent or obtain a waiver."

In general, the American Bankers Association concurs with the Board's position. FCUs that are no longer RegFlex qualified should comply with the fixed asset rule limit.

However, ABA believes that the waiver caveat causes this proposed amendment to demonstrate a lack of seriousness. In lieu of granting a waiver, NCUA should stipulate that an FCU should enter into a written agreement with NCUA. The agreement would specify how an FCU would restore compliance with RegFlex Program requirements. The agreement would also stipulate a timeframe to restore compliance. If a FCU fails to comply with the terms of the written agreement, a FCU would be required to divest itself of fixed assets so as to comply with the five percent fixed asset limit.

Additionally, ABA believes that such enforcement actions should be publicly disclosed.

Conclusion

In conclusion, ABA believes NCUA should re-evaluate its fixed asset rule. The rule permits FCUs for extended periods to hold property, which is not being used for the necessary or incidental operations of FCUs. The granting of waivers for partial use only exacerbates this problem. Furthermore, the proposed granting of waivers for FCUs that no longer comply with RegFlex qualifications raises serious doubts about the NCUA Board's willingness to curb abusive behavior of FCUs. If you have any questions regarding this letter, please contact the undersigned or John Rasmus at 202-663-5333.

Sincerely

Keith J. Leggett