

National Credit Union Administration

§ 701.36

2. *Redemption prior to maturity.* Subject to the conditions set forth in 12 CFR 701.34, the funds committed to the secondary capital account are redeemable prior to maturity only at the option of the LICU and only with the prior approval of the appropriate regional director.

3. *Uninsured, non-share account.* The secondary capital account is not a share account and the funds committed to the secondary capital account are not insured by the National Credit Union Share Insurance Fund or any other governmental or private entity.

4. *Prepayment risk.* Redemption of U.S.C. prior to the account's original maturity date may expose the account investor to the risk of being unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date. The investor acknowledges that it understands and assumes responsibility for prepayment risk associated with the [name of credit union]'s redemption of the investor's U.S.C. account prior to the original maturity date.

5. *Availability to cover losses.* The funds committed to the secondary capital account and any interest paid into the account may be used by [name of credit union] to cover any and all operating losses that exceed the credit union's net worth exclusive of allowance accounts for loan losses, and in the event the funds are so used, (name of credit union) will under no circumstances restore or replenish those funds to [name of institutional investor]. Dividends are not considered operating losses and are not eligible to be paid out of secondary capital.

6. *Accrued interest.* By initialing below, [name of credit union] and [name of institutional investor] agree that accrued interest will be:

- Paid into and become part of the secondary capital account;
- Paid directly to the investor;
- Paid into a separate account from which the investor may make withdrawals; or
- Any combination of the above provided the details are specified and agreed to in writing.

7. *Subordination of claims.* In the event of liquidation of [name of credit union], the funds committed to the secondary capital account will be subordinate to all other claims on the assets of the credit union, including claims of member shareholders, creditors and the National Credit Union Share Insurance Fund.

8. *Prompt Corrective Action.* Under certain net worth classifications (see 12 CFR 702.204(b)(11), 702.304(b) and 702.305(b), as the case may be), the NCUA Board may prohibit [name of credit union] from paying principal, dividends or interest on its uninsured secondary capital accounts established after

August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.

ACKNOWLEDGED AND AGREED TO this _____ day of [month and year] by:

 [name of investor's official]
 [title of official]
 [name of investor]
 [address and phone number of investor]
 [investor's tax identification number]

 [name of credit union official]
 [title of official]

[61 FR 3790, Feb. 2, 1996, as amended at 61 FR 50695, 50697, Sept. 27, 1996; 64 FR 72270, Dec. 27, 1999; 65 FR 21131, Apr. 20, 2000; 71 FR 4238, Jan. 26, 2006; 73 FR 71912, Nov. 26, 2008]

§ 701.35 Share, share draft, and share certificate accounts.

(a) Federal credit unions may offer share, share draft, and share certificate accounts in accordance with section 107(6) of the Act (12 U.S.C. 1757(6)) and the board of directors may declare dividends on such accounts as provided in section 117 of the Act (12 U.S.C. 1763).

(b) A Federal credit union shall accurately represent the terms and conditions of its share, share draft, and share certificate accounts in all advertising, disclosures, or agreements, whether written or oral

(c) A Federal credit union may, consistent with this section, parts 707 and 740 of this subchapter, other federal law, and its contractual obligations, determine the types of fees or charges and other matters affecting the opening, maintaining and closing of a share, share draft or share certificate account. State laws regulating such activities are not applicable to federal credit unions.

(d) For purposes of this section, "state law" means the constitution, statutes, regulations, and judicial decisions of any state, the District of Columbia, the several territories and possessions of the United States, and the Commonwealth of Puerto Rico.

[47 FR 17979, Apr. 27, 1982, as amended at 50 FR 4637, Feb. 1, 1985; 59 FR 50445, Sept. 27, 1993]

§ 701.36 FCU ownership of fixed assets.

(a) *Investment in Fixed Assets.* (1) No Federal credit union with \$1,000,000 or

more in assets may invest in any fixed assets if the investment would cause the aggregate of all such investments to exceed five percent of the credit union's shares and retained earnings.

(2) The NCUA may waive the prohibition in paragraph (a)(1) of this section.

(i) A Federal credit union desiring a waiver must submit a written request to the NCUA regional office having jurisdiction over the geographical area in which the credit union's main office is located. The request must describe in detail the contemplated investment and the need for the investment. The request must also indicate the approximate aggregate amount of fixed assets, as a percentage of shares and retained earnings, that the credit union would hold after the investment.

(ii) The regional director will inform the requesting credit union, in writing, of the date the request was received and of any additional documentation that the regional director might require in support of the waiver request.

(iii) The regional director will approve or disapprove the waiver request in writing within 45 days after receipt of the request and all necessary supporting documentation. If the regional director approves the waiver, the regional director will establish an alternative limit on aggregate investments in fixed assets, either as a dollar limit or as a percentage of the credit union's shares and retained earnings. Unless otherwise specified by the regional director, the credit union may make future acquisition of fixed assets only if the aggregate all of such future investments in fixed assets does not exceed an additional one percent of the shares and retained earnings of the credit union over the amount approved by the regional director.

(iv) If the regional director does not notify the credit union of the action taken on its request within 45 calendar days of the receipt of the waiver request or the receipt of additional requested supporting information, whichever occurs later, the credit union may proceed with its proposed investment in fixed assets. The investment, and any future investments in fixed assets, must not cause the credit union to exceed the aggregate investment limit described in its waiver request.

(b) *Premises Not Currently Used To Transact Credit Union Business.* (1) When a Federal credit union acquires premises for future expansion and does not fully occupy the space within one year, the credit union must have a board resolution in place by the end of that year with definitive plans for full occupation. Premises are fully occupied when the credit union, or a combination of the credit union, CUSOs, or vendors, use the entire space on a full-time basis. CUSOs and vendors must be using the space primarily to support the credit union or to serve the credit union's members. The credit union must make any plans for full occupation available to an NCUA examiner upon request.

(2) When a Federal credit union acquires premises for future expansion, the credit union must partially occupy the premises within a reasonable period, not to exceed three years. Premises are partially occupied when the credit union is using some part of the space on a full-time basis. The NCUA may waive this partial occupation requirement in writing upon written request. The request must be made within 30 months after the property is acquired.

(3) A Federal credit union must make diligent efforts to dispose of abandoned premises and any other real property not intended for use in the conduct of credit union business. The credit union must seek fair market value for the property, and record its efforts to dispose of abandoned premises. After premises have been abandoned for four years, the credit union must publicly advertise the property for sale. Unless otherwise approved in writing by the NCUA, the credit union must complete the sale within five years of abandonment.

(c) *Prohibited Transactions.* (1) Without the prior written approval of the NCUA, no federal credit union may invest in premises through an acquisition or a lease of one year or longer from any of the following:

(i) A director, member of the credit committee or supervisory committee, or senior management employee of the federal credit union, or immediate family member of any such individual.

(ii) A corporation in which any director, member of the credit committee or supervisory committee, official, or senior management employee, or immediate family members of any such individual, is an officer or director, or has a stock interest of 10 percent or more.

(iii) A partnership, limited liability company, or other entity in which any director, member of the credit committee or supervisory committee, or senior management employee, or immediate family members of any such individual, is a general partner, or a limited partner or entity member with an interest of 10 percent or more.

(2) The prohibition contained in paragraph (c)(1) of this section also applies to a lease from any other employee if the employee is directly involved in investments in fixed assets unless the board of directors determines that the employee's involvement does not present a conflict of interest.

(3) All transactions with business associates or family members not specifically prohibited by this paragraph (c) must be conducted at arm's length and in the interest of the credit union.

(d) *Regulatory Flexibility Program.* Federal credit unions that qualify for the Regulatory Flexibility Program provided for in part 742 of this chapter are exempt from the five percent limitation described in paragraph (a) of this section. Those federal credit unions are also exempt from the three-year partial occupancy requirement described in paragraph (b) of this section when acquiring unimproved land for future expansion pursuant to the terms of section 742.4(a)(3) of this chapter. For Federal credit unions eligible for the Regulatory Flexibility Program that subsequently lose eligibility:

(1) Section 742.8 of this chapter provides that NCUA may require the credit union to divest any existing fixed assets for substantive safety and soundness reasons; and

(2) The credit union may not make any new investments in fixed assets if, after the investment, the credit union's total investments in fixed assets would exceed the five percent limitation described in paragraph (a) of this section. The regional director may waive this prohibition to allow for new investments.

(e) *Definitions*—As used in this section:

(1) *Abandoned premises* means real property previously used to transact credit union business but no longer used for that purpose and real property originally acquired for future expansion for which the credit union no longer contemplates such use.

(2) *Fixed assets* means premises, furniture, fixtures and equipment.

(3) *Furniture, fixtures, and equipment* means all office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.

(4) *Investments in fixed assets* means:

(i) Any investment in improved or unimproved real property which is being used or is intended to be used as premises;

(ii) Any leasehold improvement on premises;

(iii) The aggregate of all capital and operating lease payments on fixed assets, without discounting commitments for future payments to present value; and

(iv) Any investment in furniture, fixtures and equipment.

(5) *Immediate family member* means a spouse or other family members living in the same household.

(6) *Premises* means any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the credit union transacts or will transact business.

(7) *Senior management employee* means the credit union's chief executive officer (typically this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (*e.g.*, Assistant President, Vice President or Assistant Treasurer/Manager) and the chief financial officer (Comptroller).

(8) *Shares* means regular shares, share drafts, share certificates, other savings.

(9) *Retained earnings* means undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, and other appropriations from undivided earnings as designated by management or the Administration.

[69 FR 58042, Sept. 29, 2004, as amended at 74 FR 13083, Mar. 26, 2009]