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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 210 and 220

#### National School Lunch Program and School Breakfast Program; Competitive Foods

February 1, 1989.

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the National School Lunch Program and the School Breakfast Program regulations to include a definition of "soda water" as part of the "Categories of Foods of Minimal Nutritional Value." The Food and Drug Administration (FDA) has repealed the soda water standard of identity to which this list of categories makes reference. No issues will be affected by this revision since this rule effects no change in current policy. This rule merely replaces a reference to the repealed FDA Standard with the relevant language of the Standard.

**EFFECTIVE DATE:** February 7, 1989.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Ford, Chief, Technical Assistance Branch, Nutrition and Technical Services Division, Food and Nutrition Service, USDA, Room 607, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 756-3558.

#### SUPPLEMENTARY INFORMATION:

##### Classification

This final rule makes technical changes and corrections, and imposes no new requirements or changes in current policy. Therefore, the Department has determined, in accordance with 5 U.S.C. 553(b) and 553(d) that prior notice and comment are unnecessary, and that good cause exists

for making the rule effective upon publication.

This final rule has been reviewed under Executive Order 12291 and has been classified nonmajor because it will not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

Since this final rule was not submitted for prior notice and comment, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 through 612).

These programs are listed in the Catalog of Federal Domestic Assistance under Nos. 10.553 and 10.555. They are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials, and regulations implementing this order (7 CFR Part 3015, Subpart V, and final rule-related notice published in 48 FR 29114, June 24, 1983).

This final rule imposes no new reporting or recordkeeping requirements requiring Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

##### Background

In accordance with Section 10 of the Child Nutrition Act the sale of foods of minimal nutritional value is prohibited in the school food service areas during the breakfast and lunch periods as published in 7 CFR 210.11(b) and 220.12(a). "Food of Minimal Nutritional Value" means a food which provides less than five percent of the USRDA for each of eight specified nutrients per 100 calories and per serving. In the case of artificially sweetened foods, only the "per serving" measure applies. The eight nutrients to be assessed for this purpose are: protein, vitamin A, vitamin C, niacin, riboflavin, thiamin, calcium, and iron. Categories of Foods of Minimal Nutritional Value are listed and defined in 7 CFR, Part 210 Appendix B(a) (1)-(4) and Part 220, Appendix B (1)-(4). The

category headed Soda Water (210 App. B(a)1 and 220 App. B(1)) uses the FDA Standard found at 21 CFR 165.175. Effective February 7, 1989, the FDA is repealing this standard of identity for soda water as published in the Federal Register of January 6, 1989 (54 FR 398). Therefore, this final rule amends the Categories of Foods of Minimal Nutritional Value by removing the reference to FDA's definition of soda water and adding relevant parts of the original definition to the program regulations.

##### List of Subjects

##### 7 CFR Part 210

Food Assistance Programs, National School Lunch Program, Commodity School Program, Grant programs—social programs, Nutrition, Children, Reporting and recordkeeping requirements, Surplus agricultural commodities.

##### 7 CFR Part 220

Food Assistance Programs, School Breakfast Program, Grant programs—social programs, Nutrition, Children, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR Parts 210 and 220 are amended as follows:

#### PART 210—NATIONAL SCHOOL LUNCH PROGRAM

1. The authority citation for Part 210 continues to read as follows:

**Authority:** The provisions of Part 210 issued under Sec. 2-12, 60 Stat. 230, as amended; 80 Stat. 889, as amended; 84 Stat. 270; 42 U.S.C. 1751-1760, 1779.

2. Part 210, Appendix B, paragraph (a)(1) is revised to read as follows:

#### Appendix B—Categories of Foods of Minimal Nutritional Value

(a) \* \* \*

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60° F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete



nutrients added to the food such as vitamins, minerals and protein.

## PART 220—SCHOOL BREAKFAST PROGRAM

1. The authority citation for Part 220 continues to read as follows:

Authority: Secs. 4 and 10 of the Child Nutrition Act of 1966, 80 Stat. 886, 889 (42 U.S.C. 1773, 1779).

2. Part 220, Appendix B, paragraph (1) is revised to read as follows:

### Appendix B—Categories of Foods of Minimal Nutritional Value

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60° F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete nutrients added to the food such as vitamins, minerals and protein.

Date: April 20, 1989.

G. Scott Dunn,

Acting Administrator.

[FR Doc. 89-10270 Filed 4-28-89; 8:45 am]

BILLING CODE 3410-30-M

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 701

#### Federal Credit Union Ownership of Fixed Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

**SUMMARY:** This rule is a revision of § 701.36 of the National Credit Union Administration Rules and Regulations. It is a threshold rule, that is, it only becomes operative when Federal credit unions decide to invest in excess of 5 percent of shares and retained earnings in fixed assets. This revision primarily addresses the definitions area in that it clarifies the definitions of lease payments and investments in a partnership or corporation holding any fixed assets for the Federal credit union.

The rule retains provisions for prior NCUA approval of fixed asset commitments in excess of 5 percent, limitations on property purchased for expansion, prohibited transactions with

designated insiders, and the maximum time limitations on NCUA acting on a credit union's request. There has been no change in the asset threshold that triggers the applicability of the regulation and, therefore, the scope of application of this regulation has not been expanded.

**EFFECTIVE DATE:** May 1, 1989.

**ADDRESS:** National Credit Union Administration Board, 1776 G Street, NW., Washington, DC 20456.

**FOR FURTHER INFORMATION CONTACT:** D. Michael Riley, Director, Office of Examination and Insurance or Timothy Hornbrook, Director, Department of Supervision, at the above address, or telephone: (202) 682-9640.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 701.36 of the NCUA Rules and Regulations requires a Federal credit union with aggregate assets of \$1 million or more to obtain prior approval of the NCUA when its total investment in fixed assets will exceed 5 percent of its shares and retained earnings. This rule requires submission of such reports and statements as may be required by the NCUA Regional Director in support of the request. In October 1988, as part of its regulatory review, the NCUA Board issued a proposed revision to the sections of the rule containing the definitions of terms, prohibited transactions, and deleting some obsolete material pertaining to fixed asset purchase commitments made prior to December 1984. In addition, the NCUA Board sought comments and recommendations concerning applicability of the existing regulation to corporate credit unions. The comment period on the proposal ended on January 23, 1989. (See 53 FR 42953, 10/25/88).

##### Comments

A total of twenty comment letters were received in response to the NCUA Board's proposed regulatory revision to Section 701.36. Fifteen of the twenty comments were from Federal credit unions and five were from credit union trade associations. The comments received are addressed in the following section-by-section analysis of the regulation.

##### Section-by-Section Analysis

###### Section 701.36(a)

This section states that a Federal credit union's investment in fixed assets shall be limited as described in this chapter. This section remains unchanged as proposed.

##### Section 701.36(b), Definitions

The following paragraphs of § 701.36 remain unchanged as proposed: (b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7), and (b)(8). These sections set forth the definitions of premises, furniture, fixtures and equipment, fixed assets, abandoned premises, immediate family members, shares, and senior management officials.

Paragraph (b)(4) of this section, which defines investments in fixed assets, is comprised of five sections of which (i), (ii), and (v), addressing investment in real property for use as a premises, leasehold improvement, and investment in furniture, fixtures, and equipment remain unchanged as proposed.

The proposed changes to § 701.36(b)(4)(iii) received the largest number of comments. The majority of these comments supported the proposed clarification of this section. However, it was evident that there was a general misconception in that the commenters perceived this as a change instead of a clarification of the existing rule concerning the inclusion of capital and operating lease payments as fixed assets.

The preamble to the existing regulation issued on December 28, 1984 states, "It is the Agency's position that these (capital and operating lease payments) should be included in the computation for determining compliance with the 5 percent limitation \* \* \*". (See 49 FR 50365.) The Agency has always considered both types of leases as fixed assets subject to this regulation.

Several commenters suggested the distinction between the types of leases, capital and operating, be made on the basis of Generally Accepted Accounting Practices (GAAP). GAAP establishes the proper accounting for leases, e.g., a capital lease has certain characteristics and must be considered a fixed asset while all leases (those not having the specified characteristics) are treated as operating leases and not recorded as fixed assets. While GAAP draws a distinction between these lease types, it only pertains to the proper method of accounting for leases and not whether or not these are to be considered as fixed assets under this rule. This determination rests with the NCUA Board.

This section, as defined by NCUA, states that aggregate lease payments pursuant to a lease agreement on fixed assets are covered by the rule. Many of the comments mentioned the use of leases in connection with data processing of credit union records. Using this example, a credit union has some



options: an outright purchase or a lease of the hardware and software (there may even be variations of these two options). All would agree that the purchase of hardware and software represent an obvious investment in fixed assets. In the second option, the use of the lease, usually long term, represents a substantial future commitment of credit union funds and it is used in lieu of purchasing the items. The use of the lease is actually the equivalent of the purchase. This is particularly evident when the cost to purchase is equal to or less than the lease payments. While we are aware that there are many other fees paid under a data processing lease, it is impossible to view these payments as independent since all are usually tied, directly or indirectly, to hardware and/or software use. It would be difficult, if not impossible, to segregate portions of these fees as non-fixed assets due to the dependence on the entire system to produce the product.

While the NCUA Board is mindful of the differences of opinion in this area, the purpose of the regulation is to provide some control on the potential risk of excess investment and/or commitment to invest substantial sums in fixed assets. Accordingly, the NCUA Board has determined not to change the existing regulation in this area. Clarification in this section is warranted and, therefore, the reference to capital and operating leases is added to the regulation.

The definition in § 701.36(b)(4)(iv) has been clarified by listing the inclusion of any entity described in § 701.27, Credit Union Service Organization (CUSO) as proposed. The wording previously used did include CUSOs since most, if not all, are partnerships or corporations. The CUSO's investment in fixed assets, as defined in this regulation, will be considered in the credit union's total of fixed assets for the purpose of applying this regulation. In the case of multiple owners, each owner will consider a prorated share of the CUSO's fixed assets as part of its own fixed assets. This proration will be in direct proportion to the credit union's ownership of the CUSO. The commenters were supportive of this clarification and, therefore, this section is amended to reflect this change.

#### *Section 701.36(c), (d), and (e)*

The following paragraphs of § 701.36 remain unchanged as proposed: (c)(1), (c)(2), (c)(3), and (c)(4). Paragraph (c)(5) of this section is deleted as proposed since it contains out-of-date material.

Section 701.36, paragraphs (d)(1) and (d)(2) remain unchanged as proposed.

Section 701.36, paragraph (e)(1), parts (i), (ii), and (iii) have been modified to eliminate the word official in (i) as proposed, and the word union from credit union committee in (ii) and (iii). Paragraphs (e)(2) and (e)(3) remain unchanged.

This regulation, as amended, continues to apply to corporate Federal credit unions. The majority of all commenters indicated that corporate Federal credit unions need to be covered by this rule or another rule. However, many did not believe that the use of 5 percent of shares and retained earnings is an appropriate measure due to the volatility of a corporate credit union's share base. Several commenters indicated that the limitation on corporate credit unions should be based on a percentage of reserves, a less volatile part of the corporate's balance sheet. While there was no definite consensus of opinion on how to establish this limitation, it is clear to the NCUA Board that some form of change regarding corporate credit unions is warranted.

Section 704 of the NCUA Rules and Regulations pertains to corporate credit unions. It does not presently contain a section on fixed assets. The NCUA Board believes that this is the appropriate section for any regulation of corporate credit unions in the area of the purchase of fixed assets. This regulation will be reviewed and the inclusion of a fixed asset limitation will be proposed as the NCUA Board deems appropriate. In the interim, Section 701.36 will continue to apply. However, each corporate's commitment of funds to fixed assets will be reviewed on the basis of safety and soundness concerns on a continuous basis.

#### **Regulatory Procedures**

##### *Regulatory Flexibility Act*

The NCUA Board certifies that the rule does not have a significant impact on a substantial number of small credit unions because it applies only to credit unions with assets of at least \$1 million. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

##### *Paperwork Reduction Act*

This rule makes no changes to collection requirements, therefore, it need not be sent to the Office of Management and Budget for approval.

##### *Executive Order 12612*

The rule does not affect state regulation of state-chartered credit unions.

#### **List of Subjects in 12 CFR Part 701**

Credit union, Fixed assets.

By the National Credit Union Administration Board on April 21, 1989.

Becky Baker,  
Secretary of the Board.

Accordingly, NCUA amends 12 CFR Part 701 as follows:

#### **PART 701—[AMENDED]**

1. The authority citation for Part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789, and 1796.

Section 701.31 is also authorized by 15 U.S.C. 1601, *et seq.*, 42 U.S.C. 1861 and 42 U.S.C. 3601-3610.

2. Section 701.36 is revised as follows:

##### **§ 701.36 FCU ownership of fixed assets.**

(a) A federal credit union's ownership in fixed assets shall be limited as described in this chapter.

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

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

(2) Furniture, Fixtures, and Equipment includes all office furnishings, office machines, computer hardware and software, automated terminals, heating and cooling equipment.

(3) Fixed Assets means premises and furniture, fixtures and equipment as these terms are defined above.

(4) Investments in fixed assets means:

(i) Any investment in real property (improved or unimproved) 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 pursuant to lease agreements for fixed assets;

(iv) Any investment in the bonds, stock, debentures, or other obligations of a partnership or corporation, including any entity described in § 701.27, holding any fixed assets used by the Federal credit union and any loans to such partnership or corporation; or

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

(5) Abandoned premises means former Federal credit union premises from the date of relocation to new quarters, and property originally acquired for future expansion for which such use is no longer contemplated.



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

(7) Shares mean all savings (regular shares, share drafts, share certificates, other savings) and retained earnings means regular reserve, reserve for contingencies, supplemental reserves, reserve for losses and undivided earnings.

(8) 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).

(c) *Investment in fixed assets.* (1) No Federal credit union with \$1,000,000 or more in assets, without the prior approval of the Administration, shall invest in fixed assets if the aggregate of all such investments exceeds 5 percent of shares and retained earnings.

(2) A Federal credit union shall submit such statement and reports as the NCUA regional director may require in support of any investment in fixed assets in excess of the limit specified above.

(3) If the Administration determines that the proposal will not adversely affect the credit union, an aggregate dollar amount or percentage of assets will be approved for investment in fixed assets. Once such a limit has been approved, and unless otherwise specified by the regional director, a Federal credit union may make future acquisitions of fixed assets, provided the aggregate of all such future investments in fixed assets does not exceed an additional 1 percent of the shares and retained earnings of the credit union over the amount approved.

(4) Federal credit unions shall submit their requests to the NCUA regional office having jurisdiction over the geographical area in which the credit union's main office is located. The regional office shall inform the requesting credit union, in writing, of the date the request was received. If the credit union does not receive notification of the action taken on its request within 45 calendar days of the request was received by the regional office, the credit union may proceed with its proposed investment in fixed assets.

(d) *Premises.* (1) When real property is acquired for future expansion, at least partial utilization should be accomplished within a reasonable period, which shall not exceed 3 years unless otherwise approved in writing by the Administration. After real property

acquired for future expansion has been held for 1 year, a board resolution with definitive plans for utilization must be available for inspection by an NCUA examiner.

(2) A Federal credit union shall endeavor to dispose of "abandoned premises" at a price sufficient to reimburse the Federal credit union for its investment and costs of acquisition. Current documents must be maintained reflecting the Federal credit union's continuing and diligent efforts to dispose of "abandoned premises." After "abandoned premises" have been on the Federal credit union's books for 4 years, the property must be publicly advertised for sale. Disposition must occur through public or private sale within 5 years of abandonment, unless otherwise approved in writing by the Administration.

(e) *Prohibited transactions.* (1) With the exception of a short term informal lease agreement (maturity less than 1 year) no Federal credit union may acquire or lease premises without the prior written approval of the Administration 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 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 with an interest of 10 percent or more.

(2) The prohibition contained in paragraph (e)(1) also applies to any employee not otherwise covered 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 subsection (e) must be conducted at arm's length and in the interest of the credit union.

[FR Doc. 89-10282 Filed 4-28-89; 8:45 am]

BILLING CODE 7535-01-M

## 12 CFR Part 701

### Organization and Operations of Federal Credit Unions

**AGENCY:** National Credit Union Administration ("NCUA").

**ACTION:** Final amendment.

**SUMMARY:** This amendment revises existing § 701.20—Surety Bond and Insurance Coverage for Federal Credit Unions ("FCU's"). Section 701.20 sets forth the requirements for surety bond coverage for losses caused by credit union employees and officials and for general insurance coverage for losses caused by persons outside of the credit union (e.g., losses due to theft, vandalism). The amendment requires a provision in FCU bonds assuring that a surety notify the NCUA Board whenever bond coverage of a federally insured credit union is terminated in its entirety, or when it is terminated on an individual employee or official.

**EFFECTIVE DATE:** May 1, 1989.

**ADDRESS:** National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

**FOR FURTHER INFORMATION CONTACT:** Robert Fenner, General Counsel, or Allan Meltzer, Assistant General Counsel, at the above address, or telephone (202) 682-9630.

**SUPPLEMENTARY INFORMATION:** On October 13, 1988, the NCUA Board requested comment on a proposal to require that credit union bonds include a provision requiring that the NCUA be notified whenever: (1) Bond coverage on a federally insured credit union in its entirety is terminated; and (2) bond coverage on an employee, director, officer, supervisory or credit committee member is terminated. (See 53 FR 41610, October 24, 1988). In addition to requesting comment on the proposed change itself, the proposed rule invited comment on the following specific issues. First, should the regulation be made applicable to federally-insured, state-chartered credit unions? Second, what use should be made of the information received, i.e. should the information be used internally, be given to other government agencies, or be made available to the credit union community as a whole? Third, would dissemination of this information be considered a "Routine use" under the provisions of the Privacy Act?

A total of twenty-seven comments on various aspects of the proposal were received. Nineteen were from federal credit unions, one from a state-chartered, federally insured credit