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FARM CREDIT ADMINISTRATION

12 CFR Parts 609, 611, 612, 614, 615, and 617

RIN 3052–AB69

Electronic Commerce; Organization; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Borrower Rights

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA) issues this final rule to clarify the rights provided in the Farm Credit Act of 1971, as amended (Act), for loan applicants and borrowers of the Farm Credit System (FCS or System). The final rule further explains the responsibilities of the System in providing these rights, responds to comments, and places all borrower rights provisions in one part of our regulations.

EFFECTIVE DATE: This regulation will be effective 30 days after publication in the **Federal Register** during which time either or both Houses of Congress are in session. We will publish a notice of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of the final rule are to:

- Provide the protections required by the Act to applicants and borrowers with distressed loans;
- Avoid placing unnecessary burdens on System institutions; and
- Use plain language in a question-and-answer format.

II. Background

In the Farm Credit Amendments Act of 1985 [1] and the Agricultural Credit Act of 1987,[2] Congress gave particular rights to borrowers with distressed loans who borrow from System institutions operating under titles I and II of the Act. These rights include notice when a loan becomes distressed; the opportunity to request a restructuring of a distressed loan; review of certain loan decisions; and the right of first refusal on purchasing or leasing agricultural real estate acquired by a System institution through foreclosure or voluntary conveyance. Collectively, these rights are referred to as borrower rights. We published a proposed rule (69 FR 5595) on February 4, 2003, to clarify our expectations for compliance with borrower rights. This final rule addresses the comments received on the proposed rule.

III. Redesignate Portions of Part 614 to Part 617

We are redesignating § 614.4336 and all of subparts L and N of part 614 to a new part 617 to make the borrower rights rules more readily identifiable. We are also redesignating § 612.2130 through § 612.2270 to a new subpart A in part 612 and § 617.1 through § 617.4 to § 612.2300 through § 612.2303. In addition, we are making conforming changes to §§ 609.910(c), 611.1223(d)(6), 611.1290, 614.4560(d), 615.5280(h), and 615.5290(a) and (b) to reflect the redesignation. As a result of finalizing this rule before we finalize the proposed Effective Interest Rate Disclosure rule (68 FR 5587), we are also including amendatory and conforming changes to §§ 611.1223(d)(6), 611.1290, and 614.4560(d) here.

IV. Comments and Our Response

We received 12 comments on our proposed rule from 10 System associations, one System bank, and the Farm Credit Council (FCC) on behalf of the Farm Credit institutions they represent. The commenters generally supported the proposed rule; however, they asked us to change or clarify certain aspects of our proposal. We discuss those aspects, the individual comments associated with them, and our responses below. Those areas of the proposed rule that did not receive comments are finalized as proposed.

V. General Issues

A. Waiver of Borrower Rights

Four System associations commented that FCA should interpret the Act to allow the waiver of borrower rights by certain borrowers, such as large and sophisticated borrowers. They argued that these borrowers are represented by experienced counsel and are at equal-bargaining strength with qualified lenders. They also commented that borrower rights prevent qualified lenders from acting as lead or agent lenders in commercial transactions.

We continue to believe that waivers of borrower rights should be authorized only on a limited basis. Wholesale waiver provisions, such as ones for all large and sophisticated borrowers, would not be consistent with the intent of Congress.

A System association also commented that prohibiting waivers of borrower rights deprives borrowers of a potential ''tool'' for use in negotiating concessions or some other economic value in a workout situation. The association stated that without this ''tool'' the institution has no incentive to listen to such loan-servicing proposals. The institution's position is not in keeping with the legislative intent of borrower rights. Borrower rights are not bargaining tools. They are statutory rights designed to protect borrowers with distressed loans who generally are in unequal-bargaining positions with qualified lenders. The Act and our regulations do not consider these rights to be ''tools'' for obtaining concessions in restructuring discussions, and neither should the System.

B. Borrower Rights and Bankruptcy

Six System associations and the FCC commented that the Bankruptcy Code supersedes all borrower rights and, therefore, no borrower rights should be offered once bankruptcy has been filed. The commenters offered several reasons

[1] Pub. L. 99–205, 99 Stat. 1678.

[2] Pub. L. 100–233, 101 Stat. 1568.

to support this supposition, including (1) A qualified lender may not always be able to satisfy both the Bankruptcy Code and our regulations in a way that is meaningful to the borrower; (2) a borrower who voluntarily files bankruptcy has made an ''election of remedies'' that effectively waives his rights under the Act; (3) the process of debt restructuring under borrower rights should not be concurrent with the process of bankruptcy because it creates a conflict in jurisdiction and right of review; and (4) the Bankruptcy Code and the Act provide separate and distinct remedies to the borrowers.

We do not agree that borrower rights and bankruptcy are mutually exclusive, but that the requirements of the Act and the Bankruptcy Code can co-exist. Further, the courts have ruled that our borrower rights provisions apply to debtors in bankruptcy.[3] Borrower rights under the Act are generally compatible with filing for reorganization in bankruptcy, as both laws are designed to resolve a borrower's financial difficulties. Additionally, bankruptcy reorganization offers various remedies to borrowers, many that are similar to those provided under the Act. We believe that borrowers filing for bankruptcy do not waive their rights under the Act, nor make an election of remedies resulting in a loss of those rights.

One of the associations commented that borrower rights impede the bankruptcy plan negotiation process. We do not believe that notifying a borrower of restructuring opportunities impedes a bankruptcy workout negotiation. Further, we do not believe that informing a borrower in bankruptcy, and his counsel, of his restructuring opportunities conflicts with any bankruptcy provisions. We recognize that combining borrower rights with bankruptcy reorganization may require additional effort by qualified lenders, but believe no real conflict exists between the Act and the Bankruptcy Code.

C. Borrower Rights and Arbitration

The FCC commented that it disagreed with our position that borrower rights may not be set aside as a result of the arbitration process. The FCC stated that our position defeats the purpose of arbitration and creates a disincentive for qualified lenders to use arbitration. We do not agree with the comment. Arbitrators must work within the framework of borrower rights and other prevailing laws when reaching decisions.

VI. Section-by-Section Analysis

A. Definitions

1. Adverse Credit Decision [§ 614.4440(a) to New § 617.7000]

A System association and the FCC commented that the definition of an adverse credit decision excludes those situations where a loan request is approved for less than the amount requested by the applicant. The System association commented that applicants have been confused by receiving notices of the adverse credit decision after agreeing to a loan in a lesser amount. The System association further pointed out that the Federal Reserve Board's (FRB) Regulation B provides that a loan in a reduced amount, if accepted by an applicant and closed, is not an adverse credit action. The System association further commented that if an applicant does not accept a counter offer within a set period of time the nonacceptance would be an adverse credit decision.

The commenter correctly referenced Regulation B and adverse credit decisions; however, the plain language of section 4.14 of the Act does not support the commenter's approach. The plain language of the Act clearly states that making a loan in an amount less than requested is an adverse credit decision. While it may appear confusing for applicants to receive a notice of the adverse credit decision after agreeing to a loan in a lesser amount, we believe this confusion is minimized by qualified lenders appropriately counseling applicants or by providing an explanation of the requirements in the notice of the adverse credit decision.

The FCC commented that our treatment of reduced loan offers is inconsistent with our discussion in the proposed rule on applications for restructuring. We stated that Congress expected borrowers and lenders to negotiate applications for restructuring. If negotiations result in a denial of the application for restructuring, the borrower may appear before the credit review committee (CRC). The FCC argues that we proposed an inconsistent definition of adverse credit decision because we did not specifically identify approved restructuring plans that are less than what the borrower applied for as subject to CRC review. The FCC compared reduced loan requests with reduced restructuring requests when making this argument. The Act and our proposed rule treat these two types of actions differently. Sections 4.13B(a)(2) and 4.14(b)(1) of the Act specifically state that applicants may request CRC reviews of decisions to deny or reduce the amount of the loan applied for. Conversely, section 4.14(b)(2) provides CRC review rights for denied loan restructurings, not reductions in restructuring requests.

2. Application for Restructuring [§§ 614.4440(c) and 614.4512(a) to New § 617.7000]

A System association and the FCC commented that they disagreed with including a borrower's bankruptcy plan of reorganization in our proposed definition of an application for restructuring. They expressed concern that including a bankruptcy plan in the definition may make it difficult or impossible for the qualified lender to comply with all borrower rights provisions. We agree that the proposed definition inadvertently created confusion and are removing bankruptcy plans of reorganization from the definition of ''application for restructuring.'' However, as a paperwork reduction measure, a proposed bankruptcy plan may be considered as the application for restructuring if the bankruptcy filing contains all of the information necessary for a restructuring application, as required by section 4.14A(a)(1) of the Act.

A System association commented that it appeared that we had deleted the requirement contained in existing § 614.4440(c) that an application for restructuring include a preliminary plan of restructuring from the borrower. In our plain language rewrite of the rule, we deleted the specific phrase ''preliminary restructuring plan proposed by the borrower'' from existing § 614.4440(c)(1). That requirement is contained in the Act at section 4.14A(a)(1)(A); therefore a regulatory provision with the same requirement is unnecessary. Although we deleted the specific phrase, we did not delete the requirement that a borrower submit an application for restructuring that includes a preliminary plan.

3. Independent Evaluator [§ 614.4440(f) to New § 617.7000]

Our proposed rule clarified the definition of ''independent evaluator'' by specifically including the term ''agent'' in the definition instead of referencing it through part 612. A

[3] *In re Kvamme,* 91 B.R. 77 (Bankr. D. N.D. 1988) (holding the Act merely provides for a restructuring opportunity and within bankruptcy that opportunity is no more nor less than what would be available to a borrower outside of bankruptcy (emphasis in original)).

Courts have also held that they are ''not at liberty to pick and choose among congressional enactments and when statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'' *See Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

System association commented that adding ''agent'' to the definition of an independent evaluator makes the term too restrictive. The association recommended adding a time element to the definition so that an independent evaluator would not be considered an agent if he or she did not have a contractual relationship with a qualified lender within 1 year of being selected as an independent evaluator. We declined to make this change, as adding the term ''agent'' to new § 617.7000 does not modify the existing definition.

4. Restructure and Restructuring of a Loan [§§ 614.4440(i) and 614.4512(h) to New § 617.7000]

A System association commented that using ''best opportunity'' in the definition of ''restructure'' was troublesome. A borrower could argue that the restructuring was not the best opportunity or suggest that the lender had somehow influenced the success of the plan. The association suggested changing ''best'' to ''reasonable.'' The purpose of restructuring is not necessarily to return the operation to viability. As such, we removed the phrase referring to viability in the proposed definition to focus the definition on the loan terms.

B. What Happens to Borrower Rights When a Loan is Sold? [New § 617.7015]

A System association commented that the 180-day period for loans designated for sale into a secondary market should be changed to 365 days. We cannot agree to this change since the 180-day period is required by section 4.14A(a)(5)(B)(ii) of the Act.

C. When Acting on a Loan Application, What Are the Notice Requirements and Review Rights? [New § 617.7300 et seq.]

1. What Documents May the CRC Consider? [New § 617.7310(c)]

A System association commented that we limit a borrower's or applicant's entitlement to a copy of a qualified lender's collateral evaluation to just the collateral in connection with the adverse credit decision under review. We do not agree with this comment. Section 4.13A of the Act provides borrowers the right to receive copies of all appraisals of borrower assets made or used by the qualified lender, not just the independent collateral evaluation made in connection with a CRC review.

2. May an Applicant Obtain a New Collateral Evaluation Even if Collateral Was Not a Reason for the Adverse Credit Decision? [New § 617.7310(d)]

Five System associations, a System bank, and the FCC commented that applicants and borrowers receiving notices of the adverse credit decision should not have the right to obtain an independent collateral evaluation unless inadequate collateral was a basis for the adverse credit decisions. We do not agree with the comment. The Act clearly states that applicants and borrowers have the right to request collateral evaluations without regard to whether the evaluations are part of the reasons for the adverse credit decision. We believe restricting this right might cause harm to an applicant or borrower. For example, a notice of the adverse credit decision may not state that collateral was a reason for an adverse credit decision, but the loan might have been approved if the collateral evaluation had resulted in a higher value. We also want to preclude institutions listing reasons other than collateral for the adverse credit decision to avoid providing the right to an independent collateral evaluation.

A System bank also commented that section 4.14(d)(1) of the Act states that a request for a CRC review of an adverse credit decision ''may include'' independent appraisals. The bank argued that ''may include'' is permissive and may be interpreted to mean that the Act does not entitle every applicant or borrower to an independent collateral evaluation when requesting a CRC review. We interpret the Act as expressly providing an applicant or borrower the option of obtaining an independent collateral evaluation when seeking a CRC review. Applicants and borrowers, though not required to, may choose to obtain independent collateral evaluations and submit them as part of CRC review requests. We believe complete disclosure of the reasons for an adverse credit decision will help applicants and borrowers decide whether the expenditure of time and money for an independent collateral evaluation will benefit their CRC reviews. We note, however, that Congress limited such requests to only collateral being offered to secure loans related to the adverse credit decision.

The FCC separately commented that permitting an applicant or borrower to obtain an independent collateral evaluation when inadequate collateral was not among the reasons for the adverse credit decision is at odds with section 4.14(d)(2) of the Act. Section 4.14(d)(2) requires the CRC to provide an applicant or borrower with an approved list of appraisers within 30 days after request, instructs the applicant or borrower to bear the cost of the evaluation, and requires the CRC to include the evaluation in its reconsideration of an adverse credit decision. We do not see a conflict between the applicant's or borrower's right to include independent collateral evaluations in CRC reviews and the procedures for responding to the exercise of this right.

3. When Must an Applicant or Borrower Obtain the Independent Collateral Evaluation? [New § 617.7310(d)(2)]

Three System associations and the FCC disagreed with the proposed 30-day time period for an applicant or borrower to enter into a contractual arrangement with an independent evaluator. The commenters instead requested that we establish a time limit for completing the independent evaluation, such as 30 or 60 days. We do not believe a regulatory time limit to obtain an independent evaluation is appropriate. There may be instances where an applicant or borrower needs a longer time than the 30 or 60 days suggested. Further, we do not believe that restricting a process that is not in the complete control of the qualified lender, applicant, or borrower is in keeping with the spirit of the borrower rights provisions.

Five System associations commented that the 30-day time period to contract with an independent evaluator is too long. Two of the associations provided alternative time periods ranging from 7 days to 2 weeks. One of the associations also suggested that an applicant or borrower execute a written contract for services that complies with the qualified lender's standards. We are maintaining the 30-day period. However, we agree that a written contract for appraisal services should be executed and should comply with a qualified lender's appraisal standards. We have amended our proposal to reflect this change.

D. When and How Does a Qualified Lender Notify a Borrower of the Right to Seek Loan Restructuring? [New § 617.7410]

1. What Notice Should the Qualified Lender Send to a Borrower Who Is a Debtor in a Bankruptcy Proceeding? [New § 617.7410(c)]

A System association, a System bank, and the FCC commented that sending a notice of restructuring to a borrower who has filed bankruptcy violates the automatic stay of a bankruptcy proceeding. The System bank also asked that the notice be made optional to address jurisdictional variations. The FCC argued that some bankruptcy judges have viewed any such letters as a violation of the automatic stay. We do not agree that sending notice of a restructuring opportunity is a violation of the automatic stay. Debtors do not

forfeit borrower rights, including notice of the opportunity to restructure under the Act, when filing for bankruptcy. The automatic stay prohibits creditors from making collection efforts. The notice required by the Act is not a collection effort. It is a means of informing a borrower of his rights under the Act. We believe a properly worded notice is not an effort to collect. However, if a qualified lender is concerned about potential misunderstandings, the qualified lender should include language in the notice that the notice is not a collection attempt. Qualified lenders should check with their own counsel for appropriate wording.

2. Whom Should the Qualified Lender Notify? [New § 617.7410(d)]

Two System associations commented on our proposal to send distressed loan notices to a borrower's attorney in bankruptcy. Both associations stated that not all debtors in bankruptcy have legal representation, and one suggested that the notices be sent directly to the borrower. We agree that not all borrowers retain counsel for a bankruptcy proceeding and we have amended our rule accordingly. The final rule allows for sending notice to the borrower and the borrower's counsel, if known.

A System association asked what notice is required when a borrower has been discharged of debt in a Chapter 7 bankruptcy. When a Bankruptcy Court has discharged a debt, the debt is eliminated. Thus, no borrower rights obligations remain, absent the right of first refusal that may apply.

3. When Is a Qualified Lender Required To Send Another Restructure Notice to a Borrower Whose Loan Was Previously Restructed? [New § 617.7410(e)]

Two System associations commented that we should expand our definition of performance under a restructure agreement beyond payment terms. One association suggested the definition include nonperformance of contractual requirements, such as liquidating a piece of equipment. The other association suggested that a qualified lender and borrower be given the latitude to define compliance. We recognize that loan restructuring often includes performance criteria in addition to repayment. However, nonpayment criteria cannot be used to determine default under the Act. Section 4.14D(c) of the Act prohibits a qualified lender from initiating foreclosure on a loan that is not past due. Thus, a qualified lender cannot accelerate a borrower's loan if the borrower has made all scheduled payments.

E. How Does a Qualified Lender Decide To Restructure a Loan? [New § 617.7415]

1. How Does a Qualified Lender Decide Whether To Restructure or Foreclose? [New § 617.7415 (a), (b) and (d)]

Two System associations commented that viability should be the deciding factor in determining whether to restructure or foreclose, rather than least cost. We disagree with the comment. Section 4.14A(f) requires that the least cost, that is, the lesser of the cost of restructuring versus the cost of foreclosure, be used when determining whether to restructure or foreclose. Therefore, a restructured loan does not have to restore the farming operation to viability; it only has to be the least-cost alternative. We note however, that viability is an important consideration when calculating the cost of restructure.

One association went on to comment that our position on least cost is contrary to portions of the proposed rule, where we stated that deficient management should weigh heavily in determining the future viability of the operation. We do not agree that our position regarding viability and least cost is in conflict with our statement that deficient management should weigh heavily in determining the future viability of a borrower's operation. Both are relevant factors. The capability of farm management weighs heavily in the potential viability of the operation, and determining viability is part of the overall least-cost analysis.

2. What Should the Qualified Lender Do if the Borrower and the Qualified Lender Cannot Agree on the Financial Inputs Used in the Application for Restructuring? [New § 617.7415(c)]

A System association commented that we define the term ''financial inputs'' and allow benchmarks to include any source or mechanism regularly used by a qualified lender. We agree that benchmarks include any objective source or mechanism regularly used by a qualified lender, which is why we use the phrase ''or other such support'' in the rule. Further, to alleviate any confusion, we have replaced the term ''input'' with ''projections.''

F. How Will a Decision on an Application for Restructuring Be Issued? [New §§ 617.7420 to 617.7425]

1. What Notice Is Required if the Restructuring Request Is Denied? [New § 617.7420(c)]

A System association commented that the notice of the adverse credit decision does not need to include every reason for the denial of an application for restructuring. The association stated that we have exceeded what is necessary and have created an administrative burden. The commenter also stated that our proposal was contradictory to the FRB's staff commentary to Regulation B that a combination of more than four principal reasons for an adverse action is not likely to be helpful to applicants. We disagree with the comment. Borrowers have the right to know all the reasons leading to a denial. Failure to provide all reasons for a denial deprives borrowers of complete information needed to decide whether to request a CRC review of an adverse credit decision. Although the FRB has noted in staff commentary to Regulation B that more than four reasons may not be helpful, it does not limit disclosure to only four or less reasons. We believe including all the reasons for a denial is not unreasonable.

As a general rule, we encourage open and complete communication with borrowers and applicants at every stage of the loan-making process, especially in ensuring that applicants and borrowers receive the rights intended by Congress. At the outset, System institutions should be open to accepting loan applications from all eligible parties. We further encourage System institutions to process those applications, using open, helpful communication. If the loan is denied, qualified lenders should provide complete communication of the specific reasons for denial so that applicants are able to determine whether to seek review of a denial. In the situation where a borrower has a distressed loan, qualified lenders should provide full information on restructuring rights and then engage in meaningful, open negotiations with borrowers to identify and evaluate restructuring opportunities. Again, complete communication of the specific reasons for restructuring denials enable borrowers to make informed decisions on whether to seek CRC reviews.

G. What Type of Notice Should Be Given to a Borrower Before Foreclosure? [New § 617.7425]

Two System associations and the FCC provided comment on the treatment of chronically delinquent borrowers.[4] The two associations commented that we should change our regulations to require only one distressed loan notice per 12-month period. The FCC supported the 12-month comment and suggested linking this requirement to the performance provision on restructuring in new § 617.7410(e). We do not agree that chronically delinquent borrowers should receive limited restructuring opportunities, but we recognize that these borrowers can create a burden for some institutions.

A distressed loan is one where the borrower does not have the financial capacity to pay. In some instances, a chronically delinquent borrower has the financial capacity to pay, so by definition the loan is not distressed. If qualified lenders send distressed loan notices in these cases, they may be using the notices as servicing letters. By doing so, they invoke the requirements of borrower rights, which are only intended for distressed loans. We encourage qualified lenders to use caution when determining whether chronically delinquent loans are distressed, as defined by the Act. However, if a loan is distressed, the qualified lender must send a restructuring notice at least 45 days prior to beginning foreclosure.

H. Distressed Loan Restructuring Directive [New § 617.7500 *et seq.*]

Two System associations and the FCC questioned the need for regulations on issuing borrower rights directives and stated that existing FCA enforcement authorities are adequate. One association commented that these regulations would provide borrowers additional opportunities to delay the restructuring process. Another remarked that our examination process provides an adequate check and balance on borrower rights. The FCC commented that a distinct enforcement process for borrower rights does not provide any additional benefit.

We do not agree with the comments. As discussed in the proposed rule, Congress expressly provided FCA with directive authorities for distressed loan restructurings. However, the Act does not describe the procedures used when issuing directives. Therefore, we are adopting the directive authority, as proposed, to implement our statutory authority.

I. Right of First Refusal [New § 617.7600 et seq.]

1. What Are the Definitions Used in This Subpart? [New § 617.7600]

a. *What Property Is Included in the Term ''Acquired Agricultural Real Estate or Property''*? A System bank, an association, and the FCC commented that the definition of ''acquired agricultural real estate or property'' does not include property acquired through bankruptcy proceedings. All three commenters claim that the right of first refusal should not apply when a System institution obtains title to agricultural real estate in a Chapter 7 trustee sale because this type of sale is not a foreclosure or a voluntary conveyance. The System bank also commented that a bankruptcy sale is outside the language of the Act, and offering the right of first refusal is inconsistent with the Bankruptcy Court's determination that a debtor's sale of property is conducive to reorganization or liquidation.

We do not agree with these comments. Section 4.36 of the Act states that agricultural real estate acquired by a System institution from loan foreclosure or a voluntary conveyance by a borrower is subject to the right of first refusal. Because of the similarities between a Bankruptcy Trustee sale and a loan foreclosure, property acquired by a System institution under these circumstances would be subject to the right of first refusal.

b. *Who is the Previous Owner*? [New § 617.7600] The FCC commented that it does not agree that a previous owner includes a prior record owner of the property in question. They argue that the Act restricts the term previous owner to the borrower on the loan for which the property served as collateral. Further, the FCC contends our definition complicates the process of determining the previous owner's ability to avoid foreclosure since a previous owner who is not a borrower has little or no opportunity to prevent foreclosure. We do not agree that the Act intended to restrict the term ''previous owner'' to a borrower only. We believe the legislative history clearly explains that the intention of the right of first refusal is to preserve the family farm. Restricting the definition of previous owner to individuals signing a debt instrument may not achieve this goal. We believe the System is able to determine the ability of a borrower to avoid foreclosure and then, when appropriate, to offer first refusal rights to the previous owner. If the borrower could have avoided foreclosure, then the previous owner would have no first refusal rights.

2. May a Previous Owner Waive the Right of First Refusal?

The FCC requested clarification on whether a waiver of the right of first refusal may be obtained. The FCC stated that a borrower should be able to freely waive the right of first refusal as part of a debt settlement. The FCC specified that such a waiver would be appropriate when there has been bona fide consideration, the borrower has been specifically advised of his rights, and the borrower has had the opportunity to obtain counsel. In addition, the FCC commented that a borrower should be able to waive this right subsequent to the System institution acquiring the property. We proposed no waiver of the right of first refusal, and the Act does not provide for a waiver. Further, we do not believe a waiver in this situation is appropriate, nor should borrower rights be used as a basis for negotiation in the servicing of a loan. A borrower in a distressed loan situation, including debt settlement, cannot be considered free of duress when the lender is initiating ''waiver'' discussions.

3. How Should System Institutions Document Whether the Borrower Had the Financial Resources To Avoid Foreclosure? [New § 617.7605].

A System association and the FCC asked if a System institution would violate our regulations by offering the right of first refusal to a borrower who may have had the ability to avoid foreclosure or voluntary conveyance. The Act requires System institutions to provide the right of first refusal to borrowers who do not have the financial resources to avoid foreclosure or voluntary conveyance. It does not prohibit offering this opportunity to other borrowers. However, a System institution should establish an objective standard for making such an opportunity available. The lack of established standards poses a risk of perceived discrimination or favoritism. Also, once the right of first refusal is offered optionally by the institution, the provisions of the Act and regulations governing the means of processing the exercise of that right become applicable.

4. What Should the System Institution Do When It Decides To Sell Acquired Agricultural Real Estate? [New § 617.7610]

A System association requested guidance regarding a System institution's ability to reject an offer to

[4] We refer to borrowers who repeatedly default as chronically delinquent.

purchase agricultural real estate if the offer contains unusual or unacceptable contingencies, such as an unreasonable timeframe to settle. The association also requested that we add a regulatory provision requiring offers from previous owners to be made in writing, dated, and signed. We believe this comment has merit, and we are considering resoliciting comments on this issue.

VII. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 609

Agriculture, Banks, banking, Electronic commerce, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 611

Agriculture, Banks, banking, Rural areas.

12 CFR Part 612

Agriculture, Banks, banking, Conflict of interests, Rural areas.

12 CFR Part 614

Agriculture, Banks, banking, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 615

Accounting, Agriculture, Banks, banking, Government securities, Investments, Rural areas.

12 CFR Part 617

Banks, banking, Criminal referrals, Criminal transactions, Embezzlement, Insider abuse, Investigations, Money laundering, Theft.

■ For the reasons stated in the preamble, parts 609, 611, 612, 614, 615, and 617, chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 609—ELECTRONIC COMMERCE

■ 1. The authority citation for part 609 continues to read as follows:

Authority: Sec. 5.9 of the Farm Credit Act (12 U.S.C. 2243); 5 U.S.C. 301; Pub. L. 106–229 (114 Stat. 464).

Subpart A—General Rules

■ 2. Amend § 609.910(c) by revising the fourth sentence to read as follows:

§ 609.910 Compliance with the Electronic Signatures in Global and National Commerce Act (Public Law 106–229)(E-SIGN).

* * * * *

(c) * * * Thus, System institutions cannot use electronic notification to deliver some notices that must be provided under part 617, subparts A, D, E, and G of this chapter. * * *

* * * * *

PART 611—ORGANIZATION

■ 3. The authority citation for part 611 continues to read as follows:

Authority: Secs. 1.3, 1.13, 2.0, 2.10, 3.0, 3.21, 4.12, 4.15, 4.20, 4.21, 5.9, 5.10, 5.17, 6.9, 6.26, 7.0–7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2011, 2021, 2071, 2091, 2121, 2142, 2183, 2203, 2208, 2209, 2243, 2244, 2252, 2278a–9, 2278b–6, 2279a–2279f–1, 2279aa–5(e)); secs. 411 and 412 of Pub. L. 100–233, 101 Stat. 1568, 1638; secs. 409 and 414 of Pub. L. 100–399, 102 Stat. 989, 1003, and 1004.

Subpart P—Termination of System Institution Status

■ 4. Amend § 611.1223(d)(6) by revising the second sentence to read as follows:

§ 611.1223 Information statement—contents.

* * * * *

(d) * * *

(6) * * * You must explain the effect termination will have on borrower rights granted in the Act and part 617 of this chapter.

* * * * *

■ 5. Amend § 611.1290 by revising the second sentence to read as follows:

§ 611.1290 Continuation of borrower rights.

* * * Institutions that become other financing institutions on termination must comply with the applicable borrower rights provisions in the Act and part 617 of this chapter.

PART 612—STANDARDS OF CONDUCT AND REFERRAL OF KNOWN OR SUSPECTED CRIMINAL VIOLATIONS

■ 6. The authority citation for part 612 continues to read as follows:

Authority: Secs. 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2243, 2252, 2254).

■ 7. Revise the heading of part 612 to read as set forth above.

■ 8. Redesignate §§ 612.2130 through 612.2270 as subpart A and add a heading for new subpart A to read as follows:

Subpart A—Standards of Conduct

PART 614—LOAN POLICIES AND OPERATIONS

■ 9. The authority citation for part 614 is revised to read as follows:

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a–2, 2279b, 2279c–1, 2279f, 2279f–1, 2279aa, 2279aa–5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart H—Loan Purchases and Sales

§ 614.4336 [Removed]

■ 10. Remove § 614.4336.

Subpart L—[Removed]

■ 11. Remove subpart L, consisting of §§ 614.4440 through 614.4444.

Subpart N—Loan Servicing Requirements; State Agricultural Loan Mediation Programs; Right of First Refusal

§§ 614.4514–614.4522 [Removed]

■ 12. Remove §§ 614.4514 through 614.4522 in subpart N.

Subpart P—Farm Credit Bank and Agricultural Credit Bank Financing of Other Financing Institutions

■ 13. Revise § 614.4560(d) to read as follows:

§ 614.4560 Requirements for OFI funding relationships.

* * * * *

(d) The borrower rights requirements in part C of title IV of the Act, and section 4.36 of the Act, and the regulations in part 617 of this chapter shall apply to all loans that an OFI funds or discounts through a Farm Credit Bank or agricultural credit bank, unless such loans are subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*

* * * * *

PART 615—FUNDING AND FISCAL AFFAIRS, LOAN POLICIES AND OPERATIONS, AND FUNDING OPERATIONS

■ 14. The authority citation for part 615 continues to read as follows:

Authority: Secs. 1.5, 1.7, 1.10, 1.11, 1.12, 2.2, 2.3, 2.4, 2.5, 2.12, 3.1, 3.7, 3.11, 3.25, 4.3, 4.3A, 4.9, 4.14B, 4.25, 5.9, 5.17, 6.20, 6.26, 8.0, 8.3, 8.4, 8.6, 8.7, 8.8, 8.10, 8.12 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2018, 2019, 2020, 2073, 2074, 2075, 2076, 2093, 2122, 2128, 2132, 2146, 2154, 2154a, 2160, 2202b, 2211, 2243, 2252, 2278b, 2278b–6, 2279aa, 2279aa–3, 2279aa–4, 2279aa–6, 2279aa–7, 2279aa–8, 2279aa–10, 2279aa–12); sec. 301(a) of Pub. L. 100–233, 101 Stat. 1568, 1608.

Subpart J—Retirement of Equities

■ 15. Section 615.5280(h) is revised to read as follows:

§ 615.5280 Retirement in event of default.

* * * * *

(h) The requirements of this section may be satisfied by notices given pursuant to §§ 617.7405, 617.7410, 617.7420, and 617.7425 of this chapter that contain the information required by this section.

■ 16. Amend § 615.5290 by revising paragraphs (a) and (b) to read as follows:

§ 615.5290 Retirement of capital stock and participation certificates in event of restructuring.

(a) If a Farm Credit Bank or agricultural credit bank forgives and writes off, under § 617.7415, any of the principal outstanding on a loan made to any borrower, where appropriate the Federal land bank association of which the borrower is a member and stockholder shall cancel the same dollar amount of borrower stock held by the borrower in respect of the loan, up to the total amount of such stock, and to the extent provided for in the bylaws of the Bank relating to its capitalization, the Farm Credit Bank or agricultural credit bank shall retire an equal amount of stock owned by the Federal land bank association.

(b) If a production credit association or merged association forgives and writes off, under § 617.7415, any of the principal outstanding on a loan made to any borrower, the association shall cancel the same dollar amount of borrower stock held by the borrower in respect of the loan, up to the total amount of such loan.

* * * * *

PART 617—REFERRAL OF KNOWN OR SUSPECTED CRIMINAL VIOLATIONS

■ 17. The authority citation for part 617 is revised to read as follows:

Authority: Secs. 4.13, 4.13A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.36, 5.9, 5.17 of the Farm Credit Act (12 U.S.C. 2199, 2200, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2219a, 2243, 2252).

PART 617—[REMOVED]

§§ 617.1–617.4 [Redesignated as §§ 612.2300–612.2303]

■ 18. Redesignate §§ 617.1 through 617.4 as new §§ 612.2300 through 612.2303.

■ 19. Remove part 617.

■ 20. Redesignate newly designated §§ 612.2300–612.2303 as subpart B and add a heading for Subpart B to read as follows:

Subpart B—Referral of Known or Suspected Criminal Violations

§ 612.2300 [Amended]

■ 21. Amend newly designated § 612.2300 by removing the reference ''§ 617.2'' each place it appears and add in its place, the reference ''§ 612.2301'' in paragraphs (a), (c), and (e).

■ 22. Add a new part 617, subpart A, to read as follows:

PART 617—BORROWER RIGHTS

Subpart A—General

Sec.

617.7000 Definitions
617.7005 When may electronic communications be used in the borrower rights process?
617.7010 May borrower rights be waived?

Subpart A—General

§ 617.7000 Definitions.

For the purposes of this part, the following terms apply:

Adverse credit decision means a credit decision where a qualified lender:

(1) Decides not to make a loan to an applicant;

(2) Approves a loan in an amount less than the applicant requested; or

(3) Denies an application for restructuring.

Applicant means any person who completes and executes a loan application from a qualified lender.

Application for restructuring means a written request from a borrower to restructure a distressed loan. The request must be submitted on the appropriate forms prescribed by the qualified lender and accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.

Distressed loan means a loan that the borrower does not have the financial capacity to pay according to its terms, as determined by the qualified lender, and exhibits one or more of the following characteristics:

(1) The borrower is demonstrating adverse financial and repayment trends.

(2) The loan is delinquent or past due under the terms of the loan contract.

(3) One or both of the factors listed in paragraphs (1) and (2) of this section, together with inadequate collateralization, present a high probability of loss to the qualified lender.

Foreclosure proceeding means:

(1) A foreclosure or similar legal proceeding to enforce a lien on property, whether real or personal, that secures a non-interest-earning asset or distressed loan; or

(2) The seizing of and realizing on non-real property collateral, other than collateral subject to a statutory lien arising under titles I and II of the Act, to effect collection of a nonaccrual or distressed loan.

Independent evaluator means an individual who is a qualified evaluator and who satisfies the standards of § 614.4260, subpart F of this chapter, and the standards set by the qualified lender for the type of property to be evaluated. The independent evaluator may not be an employee or agent of a qualified lender or have a relationship with the lender or any of its officers or directors in contravention of part 612 of this chapter.

Loan means an extension of credit made to a farmer, rancher, or producer or harvester of aquatic products, for any agricultural or aquatic purpose and other credit needs of the borrower, including financing for basic processing and marketing that directly relates to the borrower's operations and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products.

Loan application means a complete oral or written request for an extension of credit made in accordance with a qualified lender's procedures for the type of credit requested. An application is complete when the qualified lender receives all the information normally obtained and used in evaluating applications for credit. This information may include credit reports, supporting information for the credit requested, and reports by governmental agencies or other persons necessary to guarantee, insure, or provide security for the credit or collateral.

Qualified lender means:

(1) A System institution, except a bank for cooperatives, that makes loans as defined in this section; and

(2) Each bank, institution, corporation, company, credit union, and association described in section 1.7(b)(1)(B) of the Act (commonly referred to as an other financing institution), but only with respect to loans discounted or pledged under section 1.7(b)(1).

Restructure and restructuring of a loan means a reamortization, renewal, deferral of principal or interest, monetary concessions, or the taking of any other action to modify the terms of, or forbear on, a loan.

§ 617.7005 When may electronic communications be used in the borrower rights process?

Qualified lenders may use, with the parties' agreement, electronic commerce (E-commerce), including electronic communications for borrower rights disclosures. Part 609 of this chapter addresses when a qualified lender may use E-commerce. Consistent with these rules, a qualified lender should interpret part 617 broadly to allow electronic transmissions, communications, records, and submissions. However, electronic communications may not be used for a notice of default, acceleration, repossession, foreclosure, eviction, or the right to cure when a borrower's primary residence secures the loan. In these instances, a qualified lender must use paper disclosures.

§ 617.7010 May borrower rights be waived?

(a) A qualified lender may not obtain a waiver of borrower rights, except as indicated in paragraph (b) of this section.

(b) A borrower may waive rights relating to distressed loan restructuring, credit reviews, and the right of first refusal as follows:

(1) When a loan is guaranteed by the Small Business Administration.

(2) In connection with a loan sale as provided in § 617.7015.

(c) All waivers must be voluntary and in writing. The document evidencing the waiver must clearly explain the rights the borrower is being asked to waive and provide an explanation of such rights.

§ 617.7015 What happens to borrower rights when a loan is sold?

(a) *What happens when a qualified lender sells a loan to another qualified lender?* A loan made by a qualified lender and subsequently sold, in whole or in part, to another qualified lender is subject to the borrower rights provisions of title IV of the Act.

(b) *What happens when a qualified lender sells a loan into the secondary market?*

(1) Except as provided in paragraph (b)(2) of this section, the borrower rights provisions of sections 4.14, 4.14A, 4.14B, 4.14C, 4.14D, and 4.36 of the Act do not apply to a loan made on or after February 10, 1996, and designated for sale into a secondary market at the time the loan was made.

(2) Borrower rights apply to a loan designated for sale under paragraph (b)(1) of this section but not sold into a secondary market during the 180-day period that begins on the date of designation. The provisions of paragraph (b)(1) of this section will subsequently apply on the date of sale if the loan is later sold into a secondary market.

(c) *What happens when a qualified lender sells a loan to a nonqualified lender?*

(1) Except for loans sold to another qualified lender or designated for sale into a secondary market, a qualified lender must comply with one of the following requirements before selling a loan or interest in a loan subject to borrower rights:

(i) The qualified lender and borrower must agree to include provisions in the loan contract with the borrower, or a written modification thereto, that ensure that the buyer of the loan will be obligated to provide the borrower the same rights a qualified lender must provide; or

(ii) The qualified lender must obtain from the borrower a signed written consent to the sale, which clearly states the borrower waives statutory borrower rights.

(2) Before the qualified lender obtains the borrower's consent to the sale of the loan and the waiver of borrower rights under paragraph (c)(1)(ii) of this section, the qualified lender must disclose in writing to the borrower:

(i) A complete description of the statutory rights the borrower will waive;

(ii) Any changes in the loan terms or conditions that will occur if the qualified lender does not sell the loan;

(iii) That waiving borrower rights will not become effective unless the qualified lender sells the loan; and

(iv) That borrower rights will become effective again if any qualified lender repurchases the loan or any interest in the loan.

(3) The consent to the loan sale and waiver of borrower rights shall have no effect until the qualified lender sells the loan. Borrower rights become effective again if any qualified lender repurchases the loan or any interest in the loan.

(4) A qualified lender may not make a loan conditioned on the borrower consenting to the loan's sale and a waiver of borrower rights.

■ 23. Amend part 617 by adding new subparts D, E, F, and G to read as follows:

Subpart D—Actions on Applications; Review of Credit Decisions

Sec.

617.7300 When acting on a loan application, what are the notice requirements and review rights?
617.7305 What is a CRC and who are the members?
617.7310 What is the review process of the CRC?
617.7315 What records must the qualified lender maintain on behalf of the CRC?

Subpart D—Actions on Applications; Review of Credit Decisions

§ 617.7300 When acting on a loan application, what are the notice requirements and review rights?

Each qualified lender must make its decision on a loan application as quickly as possible. The qualified lender must provide prompt written notice of its decision to the applicant. The qualified lender is required to notify all primary applicants. If a loan application has more than one primary applicant, the qualified lender may send the original notice to the applicant designated to receive notices and may send copies to all other applicants. If the qualified lender makes an adverse credit decision on a loan application, the notice must include:

(a) The specific reasons for the qualified lender's decision;

(b) A statement that the applicant may request a review of the decision;

(c) A statement that a written request for review must be made within 30 days after the applicant receives the qualified lender's notice; and

(d) A brief explanation of the process for seeking review of the decision, including the independent collateral evaluation review process, whom to contact for access to information, and the applicant's right to appear in person before the credit review committee (CRC).

§ 617.7305 What is a CRC and who are the members?

The board of directors of each qualified lender must establish one or more CRCs to review adverse credit decisions made by a qualified lender. The CRC may only review adverse credit decisions at the request of the applicant or borrower. The CRC has the ultimate decision-making authority on the loan or application under review.

CRC members are selected by the board of directors of each qualified lender and must include at least one of the qualified lender's farmer-elected board members. The loan officer involved in the adverse credit decision being reviewed may not serve on the CRC when it reviews that loan.

§ 617.7310 What is the review process of the CRC?

(a) *How will an applicant or borrower know when the CRC will consider the review request?* The qualified lender must inform the applicant or borrower 15 days in advance of the CRC meeting where the applicant or borrower's request will be reviewed.

(b) *Who may make a personal appearance before the CRC?* Each applicant or borrower who has requested a review may appear in person before the CRC. The applicant or borrower may be accompanied by counsel or other representative when seeking a reversal of a decision on a loan or an application for restructuring.

(c) *What documents may the CRC consider?* An applicant or borrower may submit any documents or other evidence to support the information contained in the loan or application for restructuring. The documents should demonstrate that the application for a loan or restructuring satisfies the credit standards of the qualified lender and is an eligible loan or application for restructuring. Additionally, the applicant or borrower is entitled to a copy of each independent collateral evaluation used by the qualified lender.

(d) *May an applicant obtain a new collateral evaluation even if collateral was not a reason for the adverse credit decision?* As part of a CRC review, an applicant may request an independent collateral evaluation of the agricultural real estate securing the loan or being offered as security, regardless of whether collateral was an identified reason for the adverse credit decision. The independent collateral evaluation may be for any interest(s) in the property securing the loan, except stock or participation certificates issued by the qualified lender and held by the applicant or borrower.

(1) *Who may conduct an independent collateral evaluation?* The independent collateral evaluation must be conducted by an independent evaluator. The CRC must provide the applicant or borrower with a list of three independent evaluators approved by the qualified lender within 30 days of the request for an independent collateral evaluation. The applicant or borrower must select and engage the services of an evaluator from the list. The evaluation must comply with the collateral evaluation requirements of part 614, subpart F, of this chapter. The qualified lender must provide the applicant or borrower a copy of part 614, subpart F, for presentation to the selected independent evaluator. A copy of part 614, subpart F, signed by the evaluator is a required exhibit in the subsequent evaluation report.

(2) *When must an applicant or borrower obtain the independent collateral evaluation and who pays for the evaluation?* The applicant or borrower must enter into a contractual arrangement for evaluation services within 30 days of receiving the names of three approved independent evaluators. The contractual arrangement must be a written contract for services that complies with the lender's appraisal standards. The evaluation must be completed within a reasonable period of time, taking into consideration any extenuating circumstance. The applicant or borrower is responsible for the costs of the independent evaluation.

(3) *How does the CRC use an independent collateral evaluation when making a decision?* The CRC will consider the results of any independent collateral evaluation before making a final determination with respect to the loan or restructuring, except the CRC is not required to consider a collateral evaluation that does not conform to the collateral evaluation standards described in part 614, subpart F, of this chapter.

(e) *When must the CRC issue a decision?* The CRC must reach a decision, and it must be the final decision of the qualified lender, not later than 30 days after the meeting on the request under review. The CRC must make every reasonable effort to conduct reviews and render decisions in as expeditious a manner as possible. After making its decision, the committee must promptly notify the applicant or borrower in writing of the decision and the reasons for the decision.

§ 617.7315 What records must the qualified lender maintain on behalf of the CRC?

A qualified lender must maintain a complete file of all requests for CRC reviews, including participation in state mediation programs, the minutes of each CRC meeting, and the disposition of each review by the CRC.

Subpart E—Distressed Loan Restructuring; State Agricultural Loan Mediation Programs

Sec.

617.7400 What protections exist for borrowers who meet all loan obligations?
617.7405 On what policies are loan restructurings based?
617.7410 When and how does a qualified lender notify a borrower of the right to seek loan restructuring?
617.7415 How does a qualified lender decide to restructure a loan?
617.7420 How will a decision on an application for restructuring be issued?
617.7425 What type of notice should be given to a borrower before foreclosure?
617.7430 Are institutions required to participate in state agricultural loan mediation programs?

Subpart E—Distressed Loan Restructuring; State Agricultural Loan Mediation Programs

§ 617.7400 What protections exist for borrowers who meet all loan obligations?

(a) A qualified lender may not foreclose on a loan because the borrower failed to post additional collateral when the borrower has made all accrued payments of principal, interest, and penalties on the loan.

(b) A qualified lender may not require a borrower to reduce the outstanding principal balance of a loan by any amount that exceeds the regularly scheduled principal installment when due and payable, unless:

(1) The borrower sells or otherwise disposes of part, or all, of the collateral without the prior approval of the qualified lender and the proceeds from the sale or disposition are not applied to the loan; or

(2) The parties agree otherwise in writing.

(c) After a borrower has made all accrued payments of principal, interest, and penalties on a loan, the qualified lender may not enforce acceleration of the borrower's repayment schedule due to the borrower's untimely payment of those principal, interest, or penalty payments.

(d) If a qualified lender places a loan in non-interest-earning status and this results in an adverse action being taken against the borrower, such as revoking any undisbursed loan commitment, the lender must document the change of status and promptly notify the borrower in writing of the action and the reasons for taking it. If the borrower was not delinquent on any principal, interest, or penalty payment at the time of such action and the borrower's request to have the loan placed back into accrual status is denied, the borrower may obtain a review of the denial before the CRC pursuant to § 617.7310 of this part. The borrower must request this review within 30 days after receiving the lender's notice.

§ 617.7405 On what policies are loan restructurings based?

Loan restructurings must be made in accordance with the policy adopted by

the supervising bank board of directors under section 4.14A(g) of the Act.

§ 617.7410 When and how does a qualified lender notify a borrower of the right to seek loan restructuring?

(a) *What are the notice requirements?* When a qualified lender determines that a loan is, or has become, distressed, the lender must provide one of the following written notices to the borrower stating that the loan may be suitable for restructuring.

(1) A notice stating that the loan has been identified as distressed and that the borrower has the right to request a restructuring of the loan (nonforeclosure notice).

(2) A notice that the loan has been identified as distressed, that the borrower has the right to request a restructuring of the loan, and that the alternative to restructuring may be foreclosure (45-day notice). The qualified lender must provide this notice to the borrower no later than 45 days before the qualified lender begins foreclosure proceedings with respect to any loan outstanding to the borrower. This notice must specifically state that if the loan is restructured and the borrower does not perform under the restructure agreement (as described in § 617.7410(e)), the qualified lender may initiate foreclosure proceedings without further notice.

(b) *What should each notice include?*

(1) A copy of the policy the qualified lender established governing the treatment of distressed loans; and

(2) All materials necessary for the borrower to submit an application for restructuring.

(c) *What notice should a qualified lender send to a borrower who is a debtor in a bankruptcy proceeding?* The qualified lender should send a notice that identifies the loan as distressed and the statutory right to file an application for a restructuring. The notice may also restate the language from the automatic stay provision to emphasize that the notice is not intended as an attempt to collect, assess, or recover a claim.

(d) *Whom should the qualified lender notify?* The qualified lender is required to notify all primary obligors. If the obligors identify one party to receive notices, the qualified lender should send the original notice to that person and send copies to the other obligors. For borrowers in a bankruptcy proceeding, the qualified lender should send the notice to the borrower and, if retained, the borrower's counsel.

(e) *When is a qualified lender required to send another restructure notice to a borrower whose loan was previously restructured?* A qualified lender must notify a borrower of the right to file another application to restructure the loan if the qualified lender sent the nonforeclosure notice to the borrower and the borrower has performed on the previous restructure agreement. Performance means that a borrower has made six consecutive monthly payments, four consecutive quarterly payments, three consecutive semiannual payments, or two consecutive annual payments. However, a qualified lender is not required to send another notice if they previously sent a 45-day notice, as described in § 617.7410(a)(2), and a borrower did not perform under a restructure agreement, as described above.

(f) *Does the borrower have the opportunity to meet with the qualified lender after receiving the restructure notice?* The qualified lender must provide any borrower to whom a notice has been sent with a reasonable opportunity to meet personally with a representative of the lender. The borrower and lender may meet to review the status of the loan, the financial condition of the borrower, and the suitability of the loan for restructuring. A meeting to discuss a loan that is in a non-interest-earning status may also involve developing a plan for restructuring, if the qualified lender determines the loan is suitable for restructuring.

(g) *May the qualified lender voluntarily consider restructuring for a borrower who did not submit a restructuring application?* A qualified lender may, in the absence of an application for restructuring from a borrower, propose restructuring to an individual borrower.

§ 617.7415 How does a qualified lender decide to restructure a loan?

(a) *What criteria does a qualified lender use to evaluate an application for restructuring?* The qualified lender should consider the following:

(1) Whether the cost to the lender of restructuring the loan is equal to or less than the cost of foreclosure, considering all relevant criteria. These criteria include:

(i) The present value of interest and principal foregone by the lender in carrying out the application for restructuring;

(ii) Reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the application for restructuring;

(iii) Whether the borrower's application for restructuring included a preliminary restructuring plan and cash flow analysis, taking into account income from all sources to be applied to the debt and all assets to be pledged, that show a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and

(iv) Whether the borrower has furnished, or is willing to furnish, complete and current financial statements in a form acceptable to the qualified lender.

(2) Whether the borrower is applying all income over and above necessary and reasonable living and operating expenses to the payment of primary obligations;

(3) Whether the borrower has the financial capacity and the management skills to protect the collateral from diversion, dissipation, or deterioration;

(4) Whether the borrower is capable of working out existing financial difficulties, taking into consideration any prior restructuring of the loan, reestablishing a viable operation, and repaying the loan on a rescheduled basis; and

(5) In the case of a distressed loan that is not delinquent, whether restructuring consistent with sound lending practices may be taken to reasonably ensure that the loan will not have to be placed into non-interest-earning status in the future.

(b) *What should be included in determining the cost of foreclosure?*

(1) The difference between the outstanding balance due, as provided by the loan documents, and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(2) The estimated cost of maintaining a loan classified as a high-risk asset;

(3) The estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as the result of the foreclosure, including attorneys' fees and court costs;

(4) The estimated cost of value changes in collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and

(5) All other costs incurred as the result of the foreclosure or liquidation of a loan.

(c) *What should the qualified lender do if the borrower and the qualified lender cannot agree on the financial projections used in the application for restructuring?* If the borrower and lender are not able to agree on supportable or realistic financial projections, the lender may use benchmarks to determine the operational input costs and chattel

security values. These benchmarks may include, but are not limited to, the borrower's 5-year production average; averages in the county where the farming operation is located, based on data from United States Department of Agriculture, local colleges or universities, or other recognized authority; and other such reasonable sources.

(d) *How does the qualified lender decide whether to restructure or foreclose?* If a qualified lender determines the potential cost to the lender of restructuring the loan as proposed in the application for restructuring is less than or equal to the potential cost of foreclosure, the qualified lender must restructure the loan. If two or more restructuring alternatives are available, the qualified lender must restructure the loan using the alternative that results in the least cost to the lender.

(e) *What documentation should the qualified lender retain?* In the event that an application for restructuring is denied, a qualified lender must maintain sufficient documentation to demonstrate compliance with paragraphs (a), (b), and (c) of this section, as applicable.

§ 617.7420 How will a decision on an application for restructuring be issued?

(a) *When must a qualified lender make a decision on an application for restructuring?* Each qualified lender must provide a written decision on an application for restructuring and provide this decision to the borrower within 15 days from the conclusion of the negotiations used to develop the application for restructuring.

(b) *How does a qualified lender notify the borrower of the decision?* On reaching a decision on an application for restructuring, the qualified lender must provide written notice in any manner that requires a primary obligor to acknowledge receipt of the lender's decision. In the case of a loan involving one or more primary obligors, the original notice may be provided to the primary obligor identified to receive such notice, with copies provided by regular mail to the other obligors.

(c) *What notice is required if the restructuring request is denied?* When an application for restructuring is denied, the notice must include:

(1) The specific reason(s) for the denial and any critical assumptions and relevant information on which the specific reasons are based, except that any confidential information shall not be disclosed;

(2) A statement that the borrower may request a review of the denial;

(3) A statement that any request for review must be made in writing within 7 days after receiving such notice.

(4) A brief explanation of the process for seeking review of the denial, including the appraisal review process and the right to appear before the CRC, pursuant to § 617.7310 of this part, accompanied by counsel or any other representative, if the borrower chooses.

§ 617.7425 What type of notice should be given to a borrower before foreclosure?

The qualified lender must send the 45-day notice, as described in § 617.7410(a)(2), no later than 45 days before any qualified lender begins foreclosure proceedings. The notice informs the borrower in writing that the loan may be suitable for restructuring and that the qualified lender will review any suitable loan for possible restructuring. The 45-day notice must include a copy of the policy and the materials described in § 617.7410(b). The notice must also state that if the loan is restructured, the borrower must perform under this restructure agreement. If the borrower does not perform, the qualified lender may initiate foreclosure.

(a) *Does the notice have to inform the borrower that foreclosure is possible?* The notice must inform the borrower that the alternative to restructuring may be foreclosure. If the notice does not inform the borrower of potential foreclosure, then the qualified lender must send a second notice at least 45 days before foreclosure is initiated.

(b) *How are borrowers who are debtors in a bankruptcy proceeding notified?* A qualified lender must restate the language from the automatic stay provision to emphasize that the notice is not intended to be an attempt to collect, assess, or recover a claim. The qualified lender should send the notice to the borrower and, if retained, the borrower's counsel.

(c) *May a qualified lender foreclose on a loan when there is a restructuring application on file?* No qualified lender may foreclose or continue any foreclosure proceeding with respect to a distressed loan before the lender has completed consideration of any pending application for restructuring and CRC consideration, if applicable. This section does not prevent a lender from taking any action necessary to avoid the dissipation of assets or the diversion, dissipation, or deterioration of collateral if the lender has reasonable grounds to believe that such diversion, dissipation, or deterioration may occur.

§ 617.7430 Are institutions required to participate in state agricultural loan mediation programs?

(a) If initiated by a borrower, System institutions must participate in state mediation programs certified under section 501 of the Agricultural Credit Act of 1987 and present and explore debt restructuring proposals advanced in the course of such mediation. If provided in the certified program, System institutions may initiate mediation at any time.

(b) System institutions must cooperate in good faith with requests for information or analysis of information made in the course of mediation under any loan mediation program.

(c) No System institution may make a loan secured by a mortgage or lien on agricultural property to a borrower on the condition that the borrower waive any right under the agricultural loan mediation program of any state.

(d) A state mediation may proceed at the same time as the loan restructuring process of § 617.7415 or at any other appropriate time.

Subpart F—Distressed Loan Restructuring Directive

Sec.

617.7500 What is a directive used for and what may it require?
617.7505 How will the qualified lender know when FCA is considering issuing a distressed loan restructuring directive?
617.7510 What should the qualified lender do when it receives notice of a distressed loan restructuring directive?
617.7515 How does the FCA decide whether to issue a directive?
617.7520 How does the FCA issue a directive and when will it be effective?
617.7525 May FCA use other enforcement actions?

Subpart F—Distressed Loan Restructuring Directive

§ 617.7500 What is a directive used for and what may it require?

(a) A distressed loan restructuring directive is an order issued to a qualified lender when FCA has determined that the lender has violated section 4.14A of the Act.

(b) A distressed loan restructuring directive requires the qualified lender to comply with the specific distressed loan restructuring requirements in the Act.

(c) A distressed loan restructuring directive is enforceable in the same manner and to the same extent as an effective and outstanding cease and desist order that has become final. Any violation of a distressed loan restructuring directive may result in FCA assessing civil money penalties or seeking a court order pursuant to section 5.31 or 5.32 of the Act.

§ 617.7505 How will the qualified lender know when FCA is considering issuing a distressed loan restructuring directive?

When FCA intends to issue a distressed loan restructuring directive, it will notify the qualified lender in writing. The notice will state:

(a) The reasons FCA intends to issue a distressed loan restructuring directive;

(b) The proposed contents of the distressed loan restructuring directive; and

(c) Any other relevant information.

§ 617.7510 What should the qualified lender do when it receives notice of a distressed loan restructuring directive?

(a) A qualified lender should respond to the notice by stating why FCA should not issue a distressed loan restructuring directive, by proposing changes to the directive, or by seeking other suitable relief. The response must include any information, documentation, or other relevant evidence that supports the qualified lender's position. The response may include a plan for achieving compliance with the distressed loan restructuring requirements of the Act. The response must be in writing and delivered to FCA within 30 days after the date on which the qualified lender received the notice. In its discretion, FCA may extend the time period for good cause. FCA may shorten the 30-day period with the consent of the qualified lender or when FCA determines that providing the full 30 days would result in a borrower not receiving distressed loan restructuring rights.

(b) If the qualified lender fails to respond within 30 days or such other time period specified by FCA, this failure will constitute a waiver of any objections to the proposed distressed loan restructuring directive.

§ 617.7515 How does the FCA decide whether to issue a directive?

After the closing date of the qualified lender's response period, or following receipt of the qualified lender's response, FCA must decide if there is sufficient information to support the issuance of a directive or if additional information is necessary. Once FCA has received sufficient information, it must decide whether to issue a directive as originally proposed or as modified.

§ 617.7520 How does the FCA issue a directive and when will it be effective?

A distressed loan restructuring directive is effective immediately on receipt by the qualified lender, or on such later date as may be specified by FCA, and will remain effective and enforceable until it is stayed, modified, or terminated by FCA.

§ 617.7525 May FCA use other enforcement actions?

FCA may issue a distressed loan restructuring directive in addition to, or instead of, any other action allowed by law, including cease and desist proceedings, civil money penalties, or the granting or conditioning of any application or other requests by the System institution.

Subpart G—Right of First Refusal

Sec.

617.7600 What are the definitions used in this subpart?
617.7605 How should System institutions document whether the borrower had the financial resources to avoid foreclosure?
617.7610 What should the System institution do when it decides to sell acquired agricultural real estate?
617.7615 What should the System institution do when it decides to lease acquired agricultural real estate?
617.7620 What should the System institution do when it decides to sell acquired agricultural real estate at a public auction?
617.7625 Whom should the System institution notify?
617.7630 Does this Federal requirement affect any state property laws?

Subpart G—Right of First Refusal

§ 617.7600 What are the definitions used in this subpart?

In addition to the definitions in § 617.7000, the following definitions apply to this subpart.

Acquired agricultural real estate or property means agricultural real estate acquired by a System institution as a result of a loan foreclosure or a voluntary conveyance by a borrower who, as determined by the institution, does not have the financial resources to avoid foreclosure.

Previous owner means:

(1) The prior record owner who was a borrower from a System institution and did not have the financial resources, as determined by the institution, to avoid foreclosure on acquired agricultural real estate; or

(2) The prior record owner who is not a borrower and whose acquired agricultural real estate was used as collateral for a loan to a System borrower.

System institution means a Farm Credit System institution, except a bank for cooperatives, which makes loans as defined in § 617.7000.

§ 617.7605 How should System institutions document whether the borrower had the financial resources to avoid foreclosure?

The right of first refusal applies only to borrowers who did not have the financial resources to avoid foreclosure or voluntary conveyance. A System institution must clearly document in its files whether the borrower had the resources to avoid foreclosure or voluntary conveyance.

§ 617.7610 What should the System institution do when it decides to sell acquired agricultural real estate?

(a) Notify the previous owner,

(1) Within 15 days of the System institution's decision to sell acquired agricultural real estate, it must notify the previous owner, by certified mail, of the property's appraised fair market value as established by an accredited appraiser and of the previous owner's right to:

(i) Buy the property at the appraised fair market value, or

(ii) Offer to buy the property at a price less than the appraised value.

(2) That any offer must be received within 30 days of receipt of the notice.

(b) Act on an offer to buy the acquired agricultural real estate at the appraised value. Within 15 days after the receipt of the previous owner's offer to buy the acquired agricultural real estate at the appraised value, the System institution must accept the offer and sell the property to the previous owner if the offer was received within 30 days of the notice required in paragraph (a)(2) of this section.

(c) Act on an offer to buy the acquired agricultural real estate at less than the appraised value.

(1) The System institution must consider the offer if it was received within 30 days of the notice required in paragraph (a)(2) of this section.

(2) If the System institution accepts this offer, it must notify the previous owner of the decision and sell the acquired agricultural real estate to the previous owner within 15 days of receiving the offer to buy the acquired agricultural real estate at a value less than the appraised value.

(3) If the System institution rejects this offer, it must notify the previous owner of the decision within 15 days of receiving the offer to buy the acquired agricultural real estate at a value less than the appraised value. The previous owner has 15 days from receipt of the notice to submit an offer to buy at such price or under such terms and conditions. The System institution may not sell the acquired agricultural real estate to any other person:

(i) At a price equal to, or less than, that offered by the previous owner; or

(ii) On different terms or conditions than those extended to the previous owner without first notifying the previous owner by certified mail and providing an opportunity to buy the

property at such price or under such terms and conditions.

(d) For purposes of this section, financing by the System institution is not a term or condition of the sale of acquired agricultural real estate. A System institution is not required to provide financing to the previous owner for purchase of acquired agricultural real estate.

§ 617.7615 What should the System institution do when it decides to lease acquired agricultural real estate?

(a) Notify the previous owner,

(1) Within 15 days of the System institution's decision to lease acquired agricultural real estate, it must notify the previous owner, by certified mail, of the property's appraised rental value, as established by an accredited appraiser, and of the previous owner's right to:

(i) Lease the property at a rate equivalent to the appraised rental value of the property, or

(ii) Offer to lease the property at rate that is less than the appraised rental value of the property.

(2) That any offer must be received within 15 days of receipt of the notice.

(b) Act on an offer to lease the acquired agricultural real estate at a rate equivalent to the appraised rental value of the property.

(1) Within 15 days after receipt of such offer, the System institution may accept the offer to lease the property at the appraised rental value and lease the property to the previous owner, or

(2) Within 15 days after receipt of such offer, the System institution may reject the offer to lease the property at the appraised rental value when the institution determines that the previous owner:

(i) Does not have the resources available to conduct a successful farming or ranching operation; or

(ii) Cannot meet all the payments, terms, and conditions of such lease.

(c) Act on an offer to lease the acquired agricultural real estate at a rate that is less than the appraised rental value of the property.

(1) The System institution must consider the offer to lease the property at a rate that is less than the appraised rental value of the property. Notice of the decision to accept or reject such offer must be provided to the previous owner within 15 days of receipt of the offer.

(2) If the System institution accepts the offer to lease the property at less than the appraised rental value, it must notify the previous owner and lease the property to the previous owner.

(3) If the institution rejects the offer, the System institution must notify the previous owner of this decision. The previous owner has 15 days after receipt of the notice in which to agree to lease the property at such rate or under such terms and conditions. The System institution may not lease the property to any other person:

(i) At a rate equal to or less than that offered by the previous owner; or

(ii) On different terms and conditions than those that were extended to the previous owner without first informing the previous owner by certified mail and providing an opportunity to lease the property at such rate or under such terms and conditions.

§ 617.7620 What should the System institution do when it decides to sell acquired agricultural real estate at a public auction?

System institutions electing to sell or lease acquired agricultural real estate or a portion of it through a public auction, competitive bidding process, or other similar public offering must:

(a) Notify the previous owner, by certified mail, of the availability of such property. The notice must contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms or conditions to which such sale or lease will be subject;

(b) Accept the offer by the previous owner if the System institution receives two or more qualified bids in the same amount, the bids are the highest received, and one of the qualified bids is from the previous owner; and

(c) Not discriminate against a previous owner in these proceedings.

§ 617.7625 Whom should the System institution notify?

Each certified mail notice requirement in this section is fully satisfied by mailing one certified mail notice to the last known address of the previous owner or owners.

§ 617.7630 Does this Federal requirement affect any state property laws?

The rights provided under section 4.36 of the Act and this section do not affect any right of first refusal under the law of the state in which the property is located.

Dated: March 3, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 04–5138 Filed 3–8–04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NE–31–AD; Amendment 39–13445; AD 2004–03–01]

RIN 2120–AA64

Airworthiness Directives; Air Cruisers Company Emergency Evacuation Slide/Raft System; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to Airworthiness Directive (AD) 2004–03–01 applicable to certain Air Cruisers Company Emergency Evacuation Slide/Raft System that was published in the **Federal Register** on February 5, 2004 (69 FR 5459). The AD number, referenced in paragraph (i), in the Credit for Previous Repacking section, is incorrect. This document corrects that AD number. In all other respects, the original document remains the same.

EFFECTIVE DATE: Effective February 5, 2004.

FOR FURTHER INFORMATION CONTACT: Leung Lee, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7309; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: A final rule AD, FR Doc 04–2051, applicable to certain Air Cruisers Company Emergency Evacuation Slide/Raft System, was published in the **Federal Register** on February 5, 2004 (69 FR 5459). The following correction is needed:

PART 39—[AMENDED]

§ 39.13 [Corrected]

■ On page 5461, in the second column, in the Credit for Previous Repacking section, in paragraph (i), in the fourth line, ''2003–11–03 ''is corrected to read ''2003–03–11''.

Issued in Burlington, MA, on March 2, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–5129 Filed 3–8–04; 8:45 am]

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