



Community
Bankers
Association
of Illinois®



Representing Illinois' Real Community Banks

July 25, 2008

Gary K. Van Meter, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090

Re: Proposed 12 CFR 615.5176

Dear Deputy Director Van Meter:

On behalf of the Community Bankers Association of Illinois ("CBAI"), I am writing to express opposition to one of the latest efforts of the Farm Credit Administration ("FCA") to expand the authority of farm credit institutions throughout the United States. Specifically, this comment letter is in response to the FCA's proposal to add a new section (12 CFR 615.5176) to the FCA's regulations. The proposal seeks to allow farm credit institutions and related entities under the FCA's regulatory jurisdiction (collectively referred to herein as "farm credit institutions") to make debt and equity investments in "rural communities." In fact, this proposal to expand farm credit institutions' authority is not grounded in any substantial legal foundation, is inconsistent with Congressional action, goes beyond the specific mission(s) that farm credit institutions were created to perform, contains vague and poorly conceived provisions, and would create a further unnecessary and inappropriate advantage for government-assisted farm credit institutions over traditional banks and savings associations that serve rural communities.

The fact that the FCA's proposal lacks legitimate legal authority is evidenced by the FCA's heavy reliance on the "preamble" to the Farm Credit Act of 1971. In its press release (May 8, 2008) announcing the intent to propose the new regulation and in the Supplementary Information that accompanied the proposed regulation, there are at least four references to the preamble of the Farm Credit Act of 1971 as a source of authority or support for the proposal. The FCA almost certainly knows that a preamble to a statute "is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers" and that "(w)here the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." Association of American Railroads, et al. v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

Rather than look to the preamble of the legislation, which precedes the enacting clause

Page Two
Gary K. Van Meter, Deputy Director
July 25, 2008

and provides no affirmative authority, perhaps the FCA would do well to read and quote the language of the Farm Credit Act of 1971 that actually *follows* the enacting clause and that actually *is* part of the statutory framework to determine the scope of the Act's provisions.

Section 1.1 makes specific references to "the policy of the Congress" and "the objective of this Act." 12 U.S.C. 2001. Those references describe the Act as: (1) promoting a "farmer-owned cooperative Farm Credit System" that will provide credit *to specified persons or entities* (e.g., farmers, cooperatives and "selected farm-related businesses"); (2) encouraging farmers and ranchers to participate in a system of credit *for agricultural producers and for housing in rural areas*; and (3) advocating that credit needs of *farmers, ranchers, and their cooperatives* be served through equitable and competitive interest rates offered to "eligible" borrowers. The language in Section 1.1 of the Act, being part of the "operative" provisions of the law, is more conclusive as to the scope and purpose of the Act than anything in the preamble and the preamble cannot legally be used to justify a regulation or an action that is inconsistent with the operative language of a statute.

The FCA's attempted reliance on the preamble to the Farm Credit Act of 1971 is also undermined by the FCA's own historic acts and omissions. If the FCA truly interpreted the preamble as being a grant or source of authority for the FCA to facilitate credit or related financial assistance generally to "rural communities" that were in need of such financial support, why did the FCA wait thirty-seven years to propose such a badly-needed solution? CBAI concludes that the preamble to the Farm Credit Act of 1971 is not, in fact, a legitimate basis (either in fact or in law) for this proposal by the FCA but is rather a pretext for a proposal that lacks statutory legitimacy.

In addition to its heavy reliance on the preamble, the FCA also suggests that some general "investment provisions" of the Farm Credit Act of 1971 provide support for this proposed new grant of authority. The proposal cites, for example, language that authorizes farm credit institutions to "make other investments as may be authorized under regulations issued by the Farm Credit Administration." 12 U.S.C. 2013(15). However, it should be understood that such regulations are not without boundaries. The FCA is not free to create regulations that allow farm credit institutions to invest in debt or equity instruments *unrelated to* the defined scope of the Act. The board of directors of the FCA is only allowed to approve regulations that are consistent with the specific provisions of the law. 12 U.S.C. 2243. Similarly, the FCA's rulemaking powers are limited to those regulations "necessary or appropriate" for carrying out statutorily enacted provisions of law. 12 U.S.C. 2252.

The Farm Credit Act of 1971 is explicit in referring to the "eligible" recipients of financing under that Act. 12 U.S.C. 2017; 12 U.S.C. 2019; 12 U.S.C. 2020; 12 U.S.C. 2075; 12 U.S.C. 2129. Those references are consistent with the "policy of the Congress" and the

“objective of this Act” specified in Section 1.1 as mentioned above. Nowhere in the Act is there a suggestion that the intended recipients of financial services or assistance from farm credit institutions generally include “rural communities” or special projects in “rural communities.” The FCA cannot *add* through rulemaking any farm credit institution powers or any new “eligible” recipients of farm credit institution financing when Congress has withheld such powers or failed to include such recipients within the scope of the Act.

For the same reasons, the FCA’s proposal would not be entitled to deference under the principles outlined in Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *Chevron* is the oft-cited United States Supreme Court opinion that explains when and why some administrative regulations are entitled to deference by the federal courts. In *Chevron*, the Supreme Court specifically addressed a situation where administrative rulemaking was appropriate to “fill a gap” left by Congress or to make a policy determination when two conflicting interpretations regarding a statutory term were possible. The FCA’s current proposed regulation does not address a “gap” in Congressionally-enacted language nor does it provide a reasonable interpretation regarding an undefined term in the law. Instead, the FCA’s proposal represents an assumption of authority to expand the powers of farm credit institutions based only on a preamble to a statute and on general “investment provisions” that are in reality circumscribed by the boundaries of the Farm Credit Act of 1971. No extra-statutory expansion of farm credit institutions’ powers by rulemaking such as the FCA’s current proposed regulation would be entitled to *Chevron* deference.

As recently as July 11, 2008, the United States Court of Appeals for the District of Columbia Circuit struck down a federal agency’s regulation in part because the regulation exceeded the scope of the agency’s statutory mission. State of North Carolina v. Environmental Protection Agency. (D.C. Cir. July 11, 2008). Much like the FCA’s overreaching effort to claim that investment in infrastructure projects of rural communities is “compatible with the System’s statutory mandate,” the Environmental Protection Agency (“EPA”) had adopted a regimen for compliance with a portion of the federal Clean Air Act that went beyond the explicit language of the federal law. The Court of Appeals noted that “an agency may not ‘trespass beyond the bounds of its statutory authority by taking other factors into account’ than those to which Congress limited it, nor ‘substitute new goals in place of the statutory objectives without explaining how [doing so comports with] the statute’.” Opinion of the Court of Appeals in *State of North Carolina* at page 39, quoting Independent U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 854 (D.C. Cir. 1987).

The Court of Appeals rejected an argument that the EPA’s solution was legitimized by broad rulemaking authority “to prescribe such regulations as are necessary to carry out [its] functions” under the Clean Air Act. The Court noted that the EPA lacked “(c)arte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the [EPA] wishes” and that an administrative agency is “a creature of statute” that has “only those

Page Four
Gary K. Van Meter, Deputy Director
July 25, 2008

authorities conferred upon it by Congress.” Opinion of the Court of Appeals in *State of North Carolina* at Page 44.

Finally, the Court made it clear that when an administrative agency lacks explicit authority, that agency’s public policy goals are irrelevant and the ends will not justify the means. The Court stated that “(a)ll the policy reasons in the world cannot justify reading a substantive provision out of a statute” and that a regulation inconsistent with or in excess of statutory authority was invalid despite the fact that the agency’s regulatory “instinct may be laudatory.” Opinion of the Court of Appeals in *State of North Carolina* at Pages 21 and 42. Thus, even if the FCA believes that rural communities are in need of assistance and that farm credit institutions are positioned to provide such assistance, those beliefs or motivations are irrelevant when Congress has not clearly delegated rulemaking authority to the FCA in this specific area.

The FCA claims in the Supplementary Information that the preamble to the Farm Credit Act of 1971 and the Act’s general investment provisions “form a broad statutory framework that confers considerable discretion on the FCA to decide the purposes, conditions, and limits for all investment activities” of farm credit institutions. That claim is an erroneous, self-serving and seemingly arrogant suggestion that the Farm Credit Act of 1971 and its “purposes, conditions, and limits” are the empire of the FCA and that the FCA is free to make decisions that expand the powers of farm credit institutions through the use of the FCA’s “considerable discretion.” Again, the federal courts have made it clear that the preamble offers *nothing* to the “broad statutory framework” and that the FCA’s rulemaking powers regarding investments are strictly limited to those matters that were conferred upon the FCA by Congress.

There is no evidence that the FCA proposal is consistent with the will of Congress. In fact, a recently-proposed expansion of farm credit institution powers and activities was excluded from a Farm Bill passed by Congress. It is impossible to reconcile a recent, clear and specific rejection of expanded powers by Congress with the notion that the FCA has *carte blanche* authority to create substantial new powers on its own.

Furthermore, it is noteworthy that as part of its rationale in support of the regulation the FCA cites the fact that the Farm Security and Rural Investment Act of 2002 statutorily granted specified powers to farm credit institutions regarding rural business investment companies. What the FCA’s proposal does not seem to grasp is the significance of the parts played by the Congress in *enacting legislation* and the President in *signing legislation* that granted such new authority to farm credit institutions. There is no linkage between authority granted to farm credit institutions by statute and new extra-statutory powers that the FCA seeks to grant through rulemaking.

As explained above, farm credit institutions were created to offer certain financial services to a narrow and statutorily-defined class of recipients. The mission of the FCA is to administer the laws of the United States as those laws guide and define the activities of farm credit institutions. The powers of the FCA (other than enforcement powers) are embodied in Section 5.17 of the Farm Credit Act of 1971. 12 U.S.C. 2252. There is no evidence that any enactments of Congress have elevated the FCA to the status of an entity that is free to create and implement public policy decisions that the FCA believes will be for the betterment of rural America. Any public policy decisions not specifically addressed in the Farm Credit Act of 1971 and not specifically delegated to the FCA are withheld from the FCA and instead are the province of the Congress.

Likewise, farm credit institutions lack the authority to act or to make investments if such actions or investments are not clearly within the scope of the Farm Credit Act of 1971. The Act does not authorize the FCA or farm credit institutions to broaden their respective missions and to carve out new and creative ways of providing financing to "rural" entities that were never contemplated by Congress when the provisions of the Act were enacted.

To the extent that the FCA refers to its existing regulations, interpretations or "pilot programs" in the Supplementary Information, those references provide no foundation for the proposed regulation. It should be obvious that no prior action can serve to legitimize a subsequent action that is, standing alone, illegitimate.

CBAI also finds that the proposed regulation and the Supplementary Information that accompanied it contain vague, ill-conceived and misleading provisions. For example, proposed Section 615.5176(d) suggests that farm credit institutions could invest in "other investments in rural communities that are not expressly authorized by this section if they are approved by the Farm Credit Administration." How can CBAI or any other interested person assess whether that proposed investment authority will be acceptable or objectionable? Given the FCA's recent campaigns for expanded farm credit institution powers, we have no reason to believe that the FCA will be narrow, neutral and objective when deciding whether a proposed investment "not expressly authorized" will be within the scope of the Farm Credit Act of 1971. Would the FCA be inclined to authorize investments that Congress has considered and rejected, or has never contemplated as being within the scope of the Act? CBAI has a legitimate concern that the proposed "miscellaneous" investment authority in Section 615.5176(d) could be used to grant authority to farm credit institutions that goes beyond an objective reading of the statutes.

There is also some uncertainty regarding the definition of "rural communities" in the FCA's proposal. The proposal uses the term "rural communities" and defines that term as those communities that are "outside an urbanized area as determined by the latest decennial census of the United States." Proposed Section 615.5176(a). In the Supplementary Information that precedes the text of the proposed regulation, the FCA refers alternatively to "areas that have less

than 50,000 residents” and “communities that have fewer than 50,000 residents.” There is certainly a difference between an “area” and a “community.” Furthermore, the United States Census Bureau’s definition of an “urbanized area” requires an understanding of what is a “densely settled” area and whether it includes populations in contiguous areas. Will the FCA require farm credit institutions to determine what is or is not an “urbanized area” by applying *all* of the standards and factors utilized by the U.S. Census Bureau, or will “rural communities” become shorthand for “communities that have fewer than 50,000 residents” for purposes of the proposed regulation?

It is also noteworthy that the Supplementary Information suggests that the FCA “relied on Census Bureau terminology to ensure that the geographic areas in which investments are permitted are readily identifiable and easily distinguished.” In fact, instead of relying on relevant Census Bureau terminology it appears that the FCA has “cherry picked” terminology that supports its desire to broaden the investment authority of farm credit institutions.

The FCA intentionally elected to use the term “urbanized area” as its guideline for determining the ceiling for “rural communities.” The Census Bureau also uses the term “urban area,” but that term might have been problematic for the FCA because an “urban area” refers to both “urbanized areas” and to “urban clusters.” The term “urban cluster” includes a densely settled area with a population of between 2,500 and 49,999. Thus, the use of the term “urban area” (as opposed to “urbanized area” selected by the FCA) would have significantly lowered the ceiling from areas with populations of 50,000 to areas with populations of 2,500.

And if one is outside of both an “urbanized area” and an “urban cluster,” what terminology does the Census Bureau use? The answer is “rural.” Therefore, instead of *relying* on key Census Bureau terminology to define what constitutes a “rural” community, the FCA has ignored the most applicable Census Bureau terminology and has embraced only the terminology that suits its purposes.

The FCA defends its expansive definition of “rural community” by concluding that for the proposed investment authority to be useful it would have to be made available in areas that have “sufficient population densities to support healthcare and other essential facilities serving rural residents.” CBAI believes that such a statement, rather than providing an adequate justification for the definition chosen by the FCA, is a concession by the FCA that through this rulemaking it is contemplating farm credit institution investments for purposes and in places that were never conceived of, let alone approved by, Congress in the Farm Credit Act of 1971.

Farm Credit System institutions benefit from government assistance and tax advantages not available to traditional banks and savings associations such as CBAI’s members. Given the FCA’s apparent agenda to continuously expand the powers of farm credit institutions, CBAI

concludes that the proposed extra-statutory investment authority for farm credit institutions could be used to provide farm credit institutions with investment and transactional opportunities not available to CBAI's members. The FCA claims that its proposal would not allow farm credit institutions, at this time, to make "loans to otherwise ineligible borrowers." This claim is misleading as the proposal could indeed have that effect and could lead to farm credit institutions competing directly against community banks for loans in rural communities.

Also, the FCA has gone to great lengths to support its current proposal by suggesting that prior expansions of farm credit institutions' activity on behalf of rural America demonstrate that the proposed new investment authority is "compatible" with the mission of farm credit institutions. It is foreseeable that the FCA could some day make the argument that the "rural community investment" authority sought today will be "compatible" with further expansion of farm credit institutions' lending authority in rural communities tomorrow. This is particularly true since, as noted above, the FCA erroneously believes that it has unchecked discretion to determine the "purposes, conditions, and limits for all investment activities" of farm credit institutions.

The authority for traditional banks and savings associations to invest in their communities is specifically conferred and limited by statute. Through its continuing efforts to expand the investment and transactional powers of farm credit institutions, the FCA is an advocate for additional and unauthorized tools that can be used by farm credit institutions to the competitive disadvantage of traditional banks and savings associations.

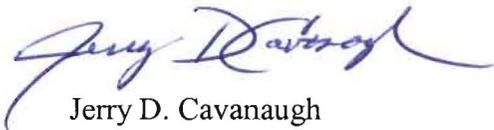
The Supplementary Information offered by the FCA in support of its proposed regulation states that traditional banks and savings associations, including community banks, stand to benefit from the rural community investment authority proposed by the FCA. To the best of our knowledge, CBAI's member community banks were not consulted when the FCA created this new investment authority proposal. CBAI represents approximately 480 banks, savings banks and savings and loan associations in Illinois, including both state-chartered and federally-chartered financial institutions. On behalf of our members, we request that the FCA not assume that it can divine the wishes or best interests of our community banks when it comes to the actions of farm credit institutions or the agenda of the FCA.

In conclusion, the FCA's proposed Section 615.5176 lacks a legal foundation, is inconsistent with recent Congressional action and with the scope of the Farm Credit Act of 1971, contains vague and poorly defined terms and provisions, and would provide new extra-statutory authority for farm credit institutions that could further benefit farm credit institutions in ways not shared by traditional banks and savings associations. To the extent that "rural communities" are

Page Eight
Gary K. Van Meter, Deputy Director
July 25, 2008

faced with infrastructure or other community development needs or may benefit from investments by any entity, such public policy considerations and any solutions must come from Congress and not from an administrative agency (i.e., the FCA) that is not expressly tasked with a broad mission of serving the financial needs of rural America.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jerry D. Cavanaugh". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Jerry D. Cavanaugh
General Counsel
Community Bankers Association of Illinois