

---

# THE FARM CREDIT COUNCIL

50 F STREET NW • SUITE 900 • WASHINGTON, DC 20001-1530 • 202/626-8710

---

## **Via E-Mail**

August 14, 2008

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

RE: RIN 3052-AC42 Rural Community Investments Proposed Rule

Dear Mr. Van Meter:

The Farm Credit Council (Council), on behalf of its membership, appreciates the opportunity to comment on the FCA's Proposed Rule concerning Mission-Related Investments that was published in the June 16, 2008 *Federal Register* (73 Fed Reg 33931).

The comments that follow were developed after soliciting input from all Farm Credit System (System) institutions. A teleconference was held to discuss and incorporate into the comments the input received. Prior to being finalized, draft comments were circulated throughout the System for further review and comment.

Because of the significance of this rulemaking to the System and its current and potential customers, many System institutions will be submitting their own comments on various aspects of this Proposed Rule. We encourage the FCA to consider those views in adopting a Final Rule

Before commenting on the specific issues raised in the Proposed Rule, the Council and its membership wish to commend the FCA Board and staff for commencing this rulemaking effort. As proposed, the new rule will serve to reduce the regulatory burden associated with submitting requests for approval on a "case by case" basis under the current regulations. As such it is accord with the Farm Credit System Reform Act of 1996 (P.L. 104-105) that was enacted to help eliminate regulations that are unnecessary, unduly burdensome or costly, or not based on law.

## GENERAL COMMENTS

The System strongly supports establishment of specific regulatory guidelines for investments that serve to fulfill the role established by Congress for it "to provide for an adequate and flexible flow of money into rural areas..." (Preamble to the Farm Credit Act of 1971, the "Act"). As FCA is aware, agriculture, farming and rural America in general have all undergone a dramatic transformation since the adoption of the Act. We encourage the



agency to move forward with a Final Rule. This new rule will provide a definitive framework for all System institutions to utilize their existing authorities, and is consistent with the information the System and the agency have obtained from the pilot programs that FCA has already authorized. While the specific needs for rural capital vary across the country, the System recognizes that a healthy, vibrant economy is essential to encourage young family farmers and those wishing to begin farming to remain in rural communities.

## BACKGROUND

The Farm Credit Administration's ("FCA's") Proposed Rule on rural community investments ("Proposed Rule") falls well within the FCA's statutory rulemaking authority and is consistent with the FCA's prior statements and guidance regarding the propriety and permissible scope of mission-related investments by System institutions. In addition, the definition of "rural community" in the Proposed Rule is both reasonable and consistent with the definition of "rural area" promulgated by the Department of Agriculture in connection with the Rural Business Investment Program.

### Statutory Authority

As discussed in the supplementary information accompanying the Proposed Rule, several provisions of the Act vest the FCA with authority to define by regulation the permissible investments of System institutions.<sup>1</sup> Neither the Act nor its legislative history indicate that Congress intended to impose limitations on the FCA's authority to promulgate regulations pursuant to these provisions. Indeed, the legislative history of the 1980 amendments to the Act supports the view that the FCA may authorize a broad range of investments. Notably, in discussing the rejection of a proposal to allow bank investments in "acceptances and commercial paper," the report of the House Committee on Agriculture explained that this action was taken "not because the Subcommittee intended to deny such authorities to the banks; rather, it was taken in recognition of the Fact that the [Farm Credit] Act presently permits the banks to make such other investments as may be authorized by the [FCA]. . . . *The Committee believes that this provision furnishes ample authority for the [FCA] to approve such investments by the banks as it may consider appropriate.*"<sup>2</sup> This "ample authority" to approve investments, which Congress expressly recognized in 1980, today provides a more than adequate basis for the promulgation of the Proposed Rule.

Furthermore, although the Act does not circumscribe the FCA's authority to define the permissible investments of System institutions, the agency has reasonably chosen in this rulemaking to exercise that authority through the informing norm of the Act's preamble, which states that the law was enacted to provide for "an adequate and flexible flow of money into rural areas." In this manner, the FCA has used the preamble to give rational contours to the open-ended investment provisions set forth in the Act.<sup>3</sup> The FCA its authority by permitting System institutions to make investments under the Proposed Rule in a broader range of entities than with which they could transact pursuant to their lending authority. Under the Act, System institutions' lending authorities are separate and distinct

---

<sup>1</sup> See Act §§ 1.5(15), 2.2(10), 2.12 (18), 3.1(13)(A), and 4.25 (12 U.S.C. §§ 2013(15), 2073(10), 2093(18), 2122(13)(A), and 2211).

<sup>2</sup> H.R. Rep. No. 96-1287, at 36-37 (1980) (emphasis added).

<sup>3</sup> Cf. *Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("Although the language in the preamble of a statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute.") (quoting *Association of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

from their investment powers; accordingly, there would be no statutory basis for limiting the investments of System institutions to investments in “eligible borrowers” (such as farmers, ranchers, producers and harvesters of aquatic products, and other individuals and entities identified within the Act as eligible to receive credit from System institutions<sup>4</sup>).

#### Prior Statements and Guidance

The FCA’s statements during prior rulemakings reflect that the agency has consistently taken an expansive view of the investment powers of System institutions, and furthermore demonstrate that the FCA has looked favorably upon investments intended to further the System’s statutory mission. For instance, in 1999, the FCA noted that it “plan[ned] to initiate a rulemaking in the future that will address the authority of FCS banks and associations to hold equity investments that are related to their agricultural credit mission.”<sup>5</sup> These types of investments, the FCA stated, “further the System’s mission to finance agriculture and rural communities.”<sup>6</sup> More recently, in 2004, the FCA issued a proposed rule amending its regulations governing investments in farmers’ notes.<sup>7</sup> In response to comments from commercial bankers asserting that the farmers’ notes program was a lending program disguised as an investment program, the FCA explained that it had authorized the program pursuant to its statutory authority to regulate investments, and that existing FCA regulations permitted System banks and associations to hold investments for the “fundamental” purpose of advancing their public policy mission of financing agriculture.<sup>8</sup> The views expressed during these rulemakings are consistent with the FCA’s current position regarding the permissibility of equity and debt investments that further the overall objectives of the Act.

To the extent the FCA has made statements during rulemaking that could be read to undermine its current position, such statements can be readily distinguished from the present circumstances. For example, in 1991, the FCA “propose[d] to prohibit Farm Credit banks from holding corporate debt obligations that are convertible into equity securities,” explaining that it believed it was “inappropriate for the banks to have an ownership interest in commercial enterprises.”<sup>9</sup> Under the Proposed Rule, however, banks and associations would not have general authority to make direct equity investments in commercial enterprises; rather, they would be permitted to make limited equity investments in Rural Business Investment Companies (“RBICs”) and venture capital funds that, in turn, invest in rural businesses. Furthermore, this statement was made before Congress, in 2002, established the RBIC program and expressly authorized System institutions to invest in RBICs.<sup>10</sup>

Similarly, in 1993, the FCA rejected a proposal that it “not impose any regulatory restrictions on the size of bank investment portfolios.”<sup>11</sup> The FCA stated that it “reject[ed] this option because it is fundamentally incompatible with the charter, status, and purpose” of the Farm

---

<sup>4</sup> See Act §§ 1.7, 1.9, 1.11, 3.7 (12 U.S.C. §§ 2015, 2017, 2019, 2128).

<sup>5</sup> Investment Management, 64 Fed Reg. 28,884, 28,892-93 (May 28, 1999).

<sup>6</sup> *Id.*

<sup>7</sup> Investments in Farmers’ Notes, 69 Fed. Reg. 55,362 (Sept. 14, 2004). Under the Farmers’ Notes program, certain FCS direct lender associations invest in notes, contracts, and other obligations that eligible farmers enter into with non-System agricultural lenders. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Liquidity; Interest Rate Risk; Eligible Investments, 56 Fed. Reg. 65,961 (Dec. 18, 1991).

<sup>10</sup> See 7 U.S.C. § 2029cc *et seq.*

<sup>11</sup> Liquidity; Interest Rate Risk; Eligible Investments, 58 Fed. Reg. 63,034 (Nov. 30, 1993).

Credit System, which the FCA explained “was established to ensure that farmers had a dependable, stable, and responsive source of credit.” *Id.* The Proposed Rule differs from the rejected proposal because it would impose a clear portfolio limitation on rural community investments. Furthermore, to the extent the FCA’s prior statement about the System’s purpose could be viewed as setting forth limitations on the investment (as distinguished from agricultural lending) powers of System institutions, it is notable that (a) the preamble of the Act expressly indicates that it is intended to provide, in addition to credit to farmers and ranchers, “an adequate and flexible flow of money into rural areas,” and (b) that Congress, through its establishment of the RBIC program, expressed approval of System investments in rural businesses.

The FCA also has issued guidance, in the form of Informational Memoranda, concerning the authority of FCS institutions to engage in mission-related investments. These Memoranda demonstrate that for numerous years the FCA has consistently interpreted the Act and FCA regulations to permit System institutions to hold investments intended to benefit rural communities. In 1999, after the adoption of a final rule amending its regulations on eligible investments, the FCA invited System institutions to submit requests for approval to make mission-related investments such as “revenue bonds that fund rural economic development.”<sup>12</sup> In 2004, citing the System’s statutory mission “to provide for an adequate and flexible flow of money into rural areas,” the FCA noted that it was evaluating how System institutions could “[m]ore fully achieve their statutory mission to finance agriculture and related activities in rural areas by making greater use of their statutory investment authorities.”<sup>13</sup> The following year, the FCA cited, as examples of appropriate mission-related investments, investments to support “rural economic development and infrastructure” and equity investments in rural areas.<sup>14</sup> The Proposed Rule’s authorization of debt and equity investments in rural communities is therefore entirely in keeping with the FCA’s prior guidance on mission-related investments.

## SPECIFIC COMMENTS

### Section 615.5176 (a) - Rural Communities

The definition of “rural community” in the Proposed Rule is reasonable, particularly given that the Act does not contain a singular definition of the term “rural.” For rural housing purposes, the Act defines “rural area” to mean a community with a population of 2,500 or less.<sup>15</sup> By contrast, in the context of the financing of water and waste disposal facilities by banks for cooperatives, “rural area” is defined to mean areas with populations not exceeding 20,000.<sup>16</sup> In the absence of a uniform definition of “rural” within the provisions of the Act, the FCA’s decision to define “rural community” in a manner it deems consistent with the intended purpose of the Proposed Rule and the underlying statute cannot be viewed as unreasonable.

---

<sup>12</sup> FCA Informational Memorandum, Prior Approval of New Investment Activities (Aug. 2, 1999). The FCA explained in this Memorandum that “mission-related” investments were those that “directly relate to agriculture, increase the flow of funds to farmers, ranchers, and rural areas, or otherwise support the ongoing mission of the Farm Credit System.”

<sup>13</sup> FCA Informational Memorandum, Investments in Rural America (June 25, 1994).

<sup>14</sup> FCA Informational Memorandum, Investments in Rural America – Pilot Investment Programs (Jan. 11, 2005).

<sup>15</sup> *See Act* § 1.11(b)(3) (12 U.S.C. § 1.11(b)(3)).

<sup>16</sup> *See Act* § 3.7(f) (12 U.S.C. § 2128(f)).

In this regard, the definition of “rural community” in the Proposed Rule is consistent with the definition of “rural area” in the Department of Agriculture’s regulations implementing the RBIC program. The Proposed Rule defines rural communities as those “outside an urbanized area as determined by the last decennial census of the United States.” An “urbanized area” is defined by the Census Bureau as a “densely settled area that has a population density of at least 50,000.”<sup>17</sup> Thus, under the Proposed Rule, “rural communities” will be those with populations of 50,000 or less. Similarly, a “rural area” for purposes of the RBIC program is defined as:

an area that is located outside a standard metropolitan statistical area, or within a community that has a population of 50,000 or less inhabitants. As used in this definition, “community” means any area outside of a metropolitan statistical area (MSA) or any territory within an MSA that is not within an urbanized area, all as defined by the Bureau of the Census of the United States Department of Commerce (Census Bureau) at the last decennial census.

Under this definition, “rural areas” – like “rural communities” under the Proposed Rule – constitute areas with populations of 50,000 or less. In addition, the meaning of “rural area” is defined by reference to Census Bureau definitions, again, in the same manner as for “rural communities” in the Proposed Rule. The uniformity of the definitions of “rural community” and “rural area” illustrates that the definition of “rural community” in the Proposed Rule is neither novel nor overly broad, and that the FCA’s decision to base the definition on a definition prescribed by the Census Bureau is reasonable and consistent with regulatory principles.

Moreover, as the agency notes, a community must be of sufficient size to have the “critical mass” of people to support various infrastructure and health care needs. Indeed, we believe that in many instances, there are critical rural investment projects providing significant benefit to farmers, ranchers and fisherman that exist in communities of greater than 50,000 (and that farmers, ranchers and fisherman are the primary beneficiaries). The FCA should be willing to consider approval of those types of community investments on a case by case basis, and not deny approval for the sole reason that the location of the facility is in a town with a population in excess of 50,000.

#### Section 615.5176 (b) – Debt Securities

The System recognizes that under the Proposed Rule, some investments could be made in entities that may otherwise be eligible for direct System financing under Titles I, II or III of the Farm Credit Act. We recommend that the categories of permitted investments be clarified to avoid any potential conflicts between the authorities of individual System institutions.

#### Section 615.5176 (e) (4) – Liquidity Reserve

We concur with the agency in excluding rural community investments in the calculation of liquidity reserves. However, we note that while unlikely, in some instances there may be appropriate investments for liquidity reserve purposes that could also be considered to be rural investments. Bona fide investments made within the regulatory parameters for liquidity

---

<sup>17</sup> See Census Bureau Glossary (available at <http://www.census.gov/dmd/www/glossary.html>).

reserves should not be arbitrarily excluded from that calculation based solely on the nature of the entity issuing the investment.

Section 615.5176 (e) (5) – Association Investments

As the Proposed Rule reflects, association investment programs require approval by their respective funding bank. FCA should clarify that the approval is of the program adopted by the association. Funding bank approval of each specific investment is not required by the regulation, but is subject to the terms of the general financing agreement between the bank and association. Associations and their funding banks may establish institution-specific conditions, parameters, or limits that are more restrictive than those imposed under this regulation.

Again, we thank the FCA for this opportunity to comment on this important rule-making effort. We urge the agency to move forward with its consideration of the comments received, and to adopt a Final Rule as soon as you have completed your review. Please do not hesitate to contact me if we can provide any other information.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charles P. Dana".

Charles P. Dana  
Senior Vice President and General Counsel