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FARM CREDIT ADMINISTRATION

12 CFR Parts 604, 611, 612, 619, 620, 621, 622, 623, and
630

RIN 3052-AC65

Unincorporated Business Entities

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, we, us, or our) issues this final rule to establish a regulatory framework for Farm Credit System (System) institutions' use of unincorporated business entities (UBEs) organized under State law for certain business activities. A UBE includes limited partnerships (LPs), limited liability partnerships (LLPs), limited liability limited partnerships (LLLLPs), limited liability companies (LLCs), and any other unincorporated business entities, such as unincorporated business trusts, organized under State law. The final rule does not apply to UBEs that one or more System institutions may establish as Rural Business Investment Companies (RBICs) pursuant to the institutions' authority under the provisions of title VI of the Farm Security and Rural Investment Act of 2002, as amended (FSRIA), and United

States Department of Agriculture (USDA) regulations implementing FSRIA. This rule does apply, however, to System institutions that organize UBEs for the express purpose of investing in RBICs.

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

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SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of this final rule are to:

- Affirm FCA's authority to regulate and examine the System institutions' use of UBEs, including the authority to impose any conditions FCA deems necessary and appropriate on UBE business activity, and to take enforcement action against System institutions whose business operations use UBEs;

- Prohibit System institutions from using UBEs to engage in direct lending or any activity that exceeds their authority under the Farm Credit Act of 1971, as amended (Act) or circumvents the application of cooperative principles;
- Limit the amount of a System institution's equity investments in UBEs;
- Create a process for FCA review and approval of requests by System institutions to organize or invest in UBEs for certain business activity;
- Establish standards for the proper and adequate disclosure and reporting of System UBE activity; and
- Ensure that the System's use of UBEs remains transparent and free from conflicts of interest.

II. Background

The System's existing investment¹ and incidental powers² provide the authorities for System institutions to invest in and form UBEs for certain business activity.

¹ Sections 1.5(15) and 3.1(13)(A) of the Act set forth the investment authorities for System banks. Sections 2.2(10) and 2.12(18) of the Act set forth the investment authorities for System associations. FCA regulations in subpart E of part 615 imbue service corporations, chartered under section 4.25 of the Act, with the same investment authorities as their organizing System banks and associations.

² Sections 1.5(3), (15) and (21); 2.2(3), (10) and (20); 2.12(3), (18) and (19); 3.1(3) and (16) of the Act.

As business models and structures have evolved under State uniform statutes governing unincorporated, largely limited liability business structures, System institutions, with FCA approval, have been using their incidental and investment authorities to organize and invest in State-chartered UBEs to promote collaborative and expedient initiatives. Since 2009, System institutions have been organizing UBEs for the limited purposes of: (1) Making credit bids at a foreclosure sale or other court-approved auction of property collateralizing a System institution's loans that are in default; and (2) holding and managing acquired property to minimize losses, protect the property's value, and limit potential liability, including taking appropriate actions to limit the potential for liability under applicable environmental law and regulations.³ On a case-by-case basis, FCA has approved the System's use of other types of UBEs for certain business purposes. In view of the many advantages of UBEs for certain business activity, on September 13, 2012, FCA published a proposed rule to establish a regulatory framework for their continued use. The proposed rule, which was published for public comment for 60 days, generated nine comment letters from the public. After

³ FCA Bookletter BL-057, Use of State-Chartered Business Entities to Hold Acquired Property (April 2, 2009).

considering the comments, we now finalize the proposed provisions as discussed below. We note that because this final rule codifies the guidance contained in FCA Bookletter BL-057, the booklet is rescinded upon the effective date of the rule.

We believe this final rule provides a more uniform approval and oversight process for the System's ongoing use of UBEs. The rule emphasizes that incidental powers can be neither the basis for broadening or circumventing a System institution's express powers in carrying on the business of the bank or association nor used to engage in activities that are impermissible under the Act. The delivery of System credit, services and other products will still chiefly be provided by System institutions' direct use of their express powers to serve their eligible borrowers and customers. Without strong justifications to form a UBE, including one-member UBEs, System institutions will continue to conduct all aspects of their business either directly or through a service corporation authorized under section 4.25 of the Act.

In recognizing changing business practices through the System's use of UBEs, we also stress that the preservation of the System's member-focused principles remains paramount. Therefore, this rule prohibits System

institutions from engaging in any activity through UBEs that circumvents the application of cooperative principles. Further, by limiting the use of one-member UBEs, the rule underscores the primarily collaborative purpose of partnerships and multi-member limited liability companies among System institutions to foster more efficient operations and improved services to member-borrowers and other customers.

Finally, to ensure that the System's use of UBEs remains transparent to the public, FCA will post on its Web site the name and business purpose of UBEs organized and controlled by one or more System institutions that are approved under this rule. Those UBEs subject to the notice provision will not be posted on our Web site.

III. Discussion of Comment Letters and Section-by-Section Analysis of Final Rule

We received nine comment letters on the proposed UBE rule. The letters came from each of the four Farm Credit banks (CoBank, ACB; AgriBank, FCB; AgFirst Farm Credit Bank and the Farm Credit Bank of Texas); two System associations, Farm Credit Services of America, ACA and Farm Credit East, ACA; the Farm Credit Council (Council), acting on behalf of its membership; the Independent Community Bankers of America (ICBA); and one other member of the

public. These letters contained a number of constructive comments that resulted in changes to a number of provisions in the proposed rule. We made no changes to the provisions in the proposed rule that either received no comments or supportive ones unless otherwise discussed in this preamble.

General Issues

Four commenters generally support our efforts to set up a regulatory framework, with one of these commenters noting that the framework should not create a restrictive, cumbersome process.

In our response to comments on certain provisions of the proposed rule (see Specific Issues below), we have made some changes that will further streamline the notice and approval processes.

Of those supporting our effort, one commenter notes that the System should be permitted to benefit from the more formal and flexible UBE structures now available, and that their use also helps ensure that System stockholders are more protected from liability. Another commenter, while appreciating FCA's recognition of the System's authority to organize UBEs for appropriate business purposes, believes that FCA currently has an effective policy framework for UBEs and questions the purpose of the

rulemaking as adding little overall value. This same commenter also asserts that the rulemaking lacks adherence to FCA's Policy Statement FCA-PS-59 on Regulatory Philosophy and suggests that FCA discontinue the rulemaking to save unnecessary effort and associated costs ultimately born by System customers and shareholders.

FCA's current practice of considering requests to organize and invest in UBEs on a case-by-case basis is no substitute for the regulatory framework that this final rule provides. Such a framework creates a more uniform oversight process for the System's continued use of UBEs; establishes standards that improve our UBE review and approval process; reinforces and preserves the System's member-focused principles; promotes collaboration between and among System institutions in their organization of UBEs by limiting the use of one-member UBEs; and brings a greater level of transparency to the System's use of UBEs.

Further, we see no inconsistencies between this rulemaking and the FCA Board's Policy Statement FCA-PS-59 on Regulatory Philosophy.⁴ Our rulemaking promotes the principles set forth in FCA-PS-59 in that it supports achievement of the System's public mission, enhances the

⁴ See, FCA Policy Statement FCA-PS-59, Regulatory Philosophy (July 8, 2011). This policy statement may be viewed at www.fca.gov. Under Quick Links, click on FCA Handbook, and then click on FCA Board Policy Statements.

ability of System institutions to better meet the needs of agriculture and rural communities, and underscores the importance of cooperative principles for the farmer-owned Government-sponsored enterprise. The final rule reinforces FCA's obligations to ensure the System's safety and soundness by making it clear that FCA has regulatory, supervisory, oversight, examination, and enforcement authority over the System's use of UBEs. For all these reasons, we have continued this rulemaking process on the basis that the benefits of the rule outweigh its implementation costs.

In its comment letter, the Council recognizes that FCA's goal is to provide a regulatory framework for UBEs through which System institutions can obtain approval either by means of an advance notice to FCA or through an approval process. The Council encourages us to continue to identify additional circumstances in which the notice provision can be used and to streamline the approval process through guidance provided to System institutions via a booklet.

As the Council requests, we anticipate that we will be adding other kinds of UBE requests to the notice provision over time, but are unable to identify such requests beyond those we already have in the final rule. As the System

gains more experience with its use of UBEs, and as we gain more comfort in such use, we foresee permitting more types of UBEs to be organized under the notice provision.

The Council also states its concern over our use of the term "cooperative principles" in the rule, suggesting instead that we reference the specific statutory requirements relating to such principles to avoid disagreement over what the term means.

Because other parties also commented on our use of the term "cooperative principles," we address the Council's comment in the Specific Issues section below.

In its comments, the ICBA states its belief that System institutions do not have the appropriate legal authority to form UBEs regardless of their intended merits, and that FCA has failed to provide a sound legal basis for permitting System institutions to form UBEs. The ICBA states that even FCA acknowledges this lack of express legal authority in the Act, relying instead on the System's investment authorities as the basis for authorizing the creation of UBEs. The ICBA recommends that FCA seek the necessary authorities from Congress rather than circumventing the Act by giving it an intentional misreading. The ICBA also states that FCA's assertion that the formation of UBEs is appropriate based on Congressional

intent for System institutions to operate collaboratively so as to improve the efficiency of their products and services, is not a legal basis to allow the System to form entities not authorized by the Act.

FCA is confident in relying upon the System's incidental powers and investment authorities as sound legal bases for the System's use of UBEs. The System's incidental powers enable its institutions to organize non-corporate affiliates for authorized business operations in light of currently accepted, commercially reasonable practices used by other financial institutions. FCA has allowed the formation and use of UBEs where the use of a service corporation chartered under section 4.25 of the Act was neither commercially reasonable or practical (as in the case of UBEs formed for acquired property), nor permitted (as in the case of UBEs formed to offer crop insurance, a service that is precluded under section 4.25 of the Act). Moreover, the UBE structures enable the System to deliver certain products and services with enhanced safety and soundness via entities that address ownership rights, management, operations, assumption of liability, allocation of profits and losses, payment of taxes, and the limiting of liability.

The ICBA notes that FCA does not explain why the use of service corporations, which are permitted under the Act, fails to provide the flexibility that System institutions need and that, in allowing the formation of UBEs under a "fairly benign" application and approval process, the FCA will be discouraging the System's future use of service corporations.

We do not anticipate that System institutions will refrain from using service corporations as a result of their authority to organize UBEs. The UBE notice, approval, reporting and disclosure provisions in this rule are in many ways as comprehensive as the service corporation review and approval process and System institutions must justify the need for their use.

The ICBA also asks that we explain why we believe System institutions are permitted to purchase or own crop insurance agencies and why we are apparently allowing System institutions to engage in illegal "tying" schemes in which farmers are offered lower interest rates on loans in exchange for purchasing System provided crop insurance. The ICBA concludes that the public deserves more transparency on this issue.

The ICBA's contention that System institutions are not authorized to provide crop insurance services through a UBE

is misguided. The Act only prohibits System institutions from providing insurance services through a service corporation structure. In fact, System institutions, both individually and in coordination with one another, have long been providing hail and multi-peril crop insurance to its borrowers outside of the service corporation structure. Such services fulfill a primary purpose of the System, which is to provide sound, adequate, and constructive credit and closely related services to American farmers and ranchers and their cooperatives for efficient farming operations. As a fundamental need for crop farmers, crop insurance is a closely related service that System institutions have express authority to provide under the Act. The use of UBEs for such purpose will facilitate the provision of these important services to System borrowers and is a significant reason why service corporations are unable to provide the flexibility that System institutions need to fulfill the Act's purpose. We also note that section 4.29 of the Act and § 618.8040 of our regulations prohibit illegal tying arrangements.

Finally, the ICBA disagrees with our language that Congress intended the System to provide coordinated services or products to "rural communities," noting its belief that the Act authorizes the System to provide credit

and related services only to those borrowers specified in the Act. The ICBA therefore concludes that all existing UBEs should be dissolved and/or rechartered under the guidelines and constraints of authorized service corporations.

The Act authorizes the System to provide credit and related services to eligible persons as specified in the Act. However, we note that by servicing eligible borrowers, which includes providing credit for rural homes, services closely related to agriculture, and farm-related businesses, the System does indeed improve the well-being of rural communities where the overwhelming majority of eligible borrowers live and work. Therefore, based on the sound legal basis, the benefits, and the safeguards incorporated into this final rule, we will permit the continued use of UBEs concurrent with the System's authority to organize service corporations.

One public commenter thinks the regulation is out of control and harms business, but offers no further elaboration. Without specific comments, we are unable to address this individual's concerns. However, as stated above, this rule provides adequate safeguards for the regulation and oversight of the System's use of UBEs for limited business purposes authorized under the Act.

Specific Issues

1. Definitions [§ new 611.1151]

We received comments recommending that two definitions be added to § 611.1151. One commenter suggested that because the rule establishes a "necessary or expedient" standard for use of a UBE, we should define the term to avoid creating an uncertain and arbitrary standard.

FCA declines to adopt this recommendation based on the fact that this standard, used in all banking legislation, is meant to provide flexibility in a System institution's use of its incidental authorities. From our perspective, a definition would narrow the term to the institution's detriment by removing the significant discretion currently enjoyed by System institutions to decide what is necessary or expedient to their business.

This same commenter also suggests that we define the "unusual and complex" standard for establishing a UBE to hold and manage acquired loan collateral consistent with its usage in BL-057.

In the final rule, we adopt part of the commenter's suggestion by adding a definition of "unusual and complex collateral" to § 611.1151 that is consistent with its use in BL-057. This final rule now defines "unusual and complex collateral" to mean acquired property that may

expose the owner to risks beyond those commonly associated with loans, including, but not limited to, acquired industrial or manufacturing properties where there is an increased risk of incurring potential environmental or other liabilities that may accrue to the owners of such properties.

This same commenter also suggests that we enhance the booklet definition to include the concept of increasing the marketability and potential value of acquired loan collateral through the use of a UBE as well as easing the sale of acquired property consistent with borrower rights requirements.

We do not agree that there is a need to enhance the definition beyond the one provided in BL-057 as the commenter suggests. The final rule reflects the limited purposes of those UBEs formed to hold and manage acquired property: (1) Making credit bids at a foreclosure sale or other court-approved auction of property collateralizing System institutions' loans that are in default; and (2) holding and managing acquired property to minimize losses, protect the property's value, and limit potential liability, including taking appropriate actions to limit the potential for liability under applicable environmental law and regulations. We believe these limited purposes

encompass the goals of not only protecting, but also enhancing the property's value to ease its eventual sale.

2. Assessing UBE Investments and Business Activity [new § 611.1152(b)]

One commenter notes that it is understood FCA would want to recover examination costs associated with a System institution's investments in UBEs, but states that the proposed rule fails to define a clear standard or methodology for adding such costs to current regulatory assessment requirements. The commenter notes that the proposed rule provision appears to contradict the well-defined regulatory assessment formula, imposes added costs, and possibly creates an inequity by subjecting institutions with UBEs to double assessments—that is, one on the equity investment included in total assets and one on the UBE itself. The commenter asks that FCA establish a specific formula for assessing UBEs.

FCA never intended to change the assessment formula set forth in § 607.3. Consequently, in response to the commenter's concern, we have modified the language in § 611.1152(b) to cite only to section 5.15 of the Act. The cost of regulating and examining System institutions' activities involving UBEs will be taken into account under FCA's current assessment formula.

3. General Restrictions and Prohibitions on the Use of UBEs

[new § 611.1153]

a. Authorized Business Activity must be Necessary or Expedient, as Determined by the FCA, to the Business of One or More System Institutions Owning the UBE. [new § 611.1153(a)(1)]

Two commenters object to the language that would allow FCA to determine what is necessary or expedient to the institution's business, stating that such language places FCA in a management role more aptly reserved for a System institution's board of directors or management team. The commenters state that FCA's role should be limited to evaluating a System institution's rationale for forming a UBE and requesting any other information deemed necessary.

In response to the commenter's objection, we have decided to remove the language "as determined by FCA." We note, however, that in doing so, FCA will evaluate an institution's assessment that the UBE is necessary or expedient to the institution's business in our review process under the notice or approval provision. To this end, we expect a board of directors to substantiate its statement that the UBE meets this criterion in its submission to FCA.

b. Circumvention of Cooperative Principles [new
§ 611.1153(b)]

We received comments from two commenters and the Council on this provision, prohibiting System institutions from using UBEs to engage in activities that would circumvent the application of cooperative principles. One commenter believes that this limitation could restrict potential future innovation that might further enhance the System's ability to effectively serve its mission to agriculture and rural America. Another commenter states that since FCA retains the right to approve or otherwise regulate any and all investments by System institutions in a UBE, the limitation is unnecessary to protect the System's integrity or its cooperative principles.

We do not agree with the commenters that this restriction unnecessarily limits a System institution's ability to be innovative. This rule provides greater flexibility for System institutions to collaborate on initiatives to better serve agriculture and rural America through innovative and diverse business structures while respecting the fact UBEs must operate within the Act and regulation and cannot have any greater authority than that of System institutions. Moreover, the prohibitions on UBEs making direct loans or engaging in any other activities

that circumvent cooperative principles ensure that these primary functions remain within the corporate charters of System institutions and the stated objectives of the farmer-owned Farm Credit System as set forth in section 1.1 of the Act.

Another commenter objects to FCA's implication that System institutions would engage in activities that might circumvent the requirements of the Act. The commenter believes it would be preferable for FCA to focus on the statutory requirements relating to cooperative principles rather than attempt to define the term by regulation. This same commenter adds that the application of cooperative principles goes beyond and has little to do with established statutory requirements and, instead, "... encompasses a way of doing business that is the responsibility of the membership, directors, and management to determine how best to implement for their individual institution." To avoid creating confusion with clear legal requirements and dictating how members should run their cooperatives, the commenter recommends that we drop the term "cooperative principles" and replace it with a more technically precise term such as "circumvention of the Act's requirements." Another commenter suggests that the term "cooperative principles" make specific reference to

the specific statutory requirements for the System's cooperative structure by citing to the Act's provisions on stock ownership, patronage, and borrower and voting rights.

After considering the foregoing comments, FCA has decided not to remove this restriction from the final rule. We agree, in part, with one of the commenters that certain cooperative principles may go beyond the statutory and regulatory provisions relating to the System's cooperative structure to also encompass "a way of doing business" that is in some measure left to an institution's member-owners. FCA Board Policy Statement FCA-PS-80 on cooperative operating philosophy underscores that cooperative principles are an integral part of the System's cooperative structure under the Act and therefore requires an institution to conduct its business with this member-focused perspective in mind.⁵ For this reason, we are removing the "as determined by FCA" language from this provision in the final rule but point out that in our review process under the notice and approval provisions, FCA must be satisfied that an institution has adequately demonstrated that its use of a UBE will not contravene

⁵ See, section 1.1(a) of the Act and FCA Policy Statement FCA-PS-80, Cooperative Operating Philosophy—Serving the Members of Farm Credit System Institutions (October 14, 2010). This policy statement may be viewed at www.fca.gov. Under Quick Links, click on FCA Handbook, and then click on FCA Board Policy Statements. Sections 611.350, 615.5220, and 615.5230 of our regulations also address cooperative principles.

cooperative principles. Therefore, we expect an institution's board to substantiate in its statement to FCA that the UBE's service, function, or activity will not circumvent cooperative principles.

c. Transparency and the Avoidance of Conflicts of Interest

[new § 611.1153(c)]

The ICBA and one other commenter offered suggestions on this provision requiring that the business between the System institution and the UBE remain transparent and free from conflicts of interest. One commenter indicates support of the need to maintain a clear separation of UBEs from their parent organizations, but is concerned that the term "commingling" could be misconstrued and inappropriately applied. The commenter provides the example of an institution and its UBE sharing the same physical resources, which might be construed as an improper "commingling," even though their internal controls maintain appropriate levels of separation. The commenter adds that unless commingling results in a piercing of the corporate veil or a clear conflict of interest, the proper sharing of resources should not be restricted so that existing resources can be fully leveraged.

The restriction in the proposed rule states that business transactions, accounts, and records of the UBE are

not to be commingled with those of the System institution. We want to clarify that this restriction does not prevent the use of the same physical resources as long as the transactions, records and accounts are separately accounted for and adequate internal controls are in place to ensure such separation. For these reasons, we see no need to change the language in the final rule.

The ICBA supports all transparency requirements but believes they should include all UBEs and allow for the public review of UBE documents to ensure that laws are being followed.

We note that the System's use of UBEs will be made transparent to the public under FCA's plan to post on its Web site the name and business purpose of UBEs organized and controlled by one or more System institutions that are approved under the rule. We do not agree with the ICBA's suggestion that the transparency provision should allow for public review of UBE documents to ensure a UBE's compliance with the law. It is FCA's responsibility rather than that of the general public to determine that a System institution has properly established a UBE and is complying with applicable law and regulation.

d. Prohibition on UBE Subsidiaries [new § 611.1153(f)]

Two parties commented on the prohibition on creating UBE subsidiaries. One commenter stated that the prohibition removes needed flexibility to manage acquired property associated with syndicated, participated, or other loan transactions where it may be more workable for each investor's pro rata interest in the acquired property to be held in a separate subsidiary of the parent UBE. According to the commenter, such an arrangement would avoid difficult negotiations relating to management agreements and ownership structures. Since ownership interests in the UBEs would be clear and unambiguous, the commenter believes that FCA's examination process in looking at this subsidiary structure would not be difficult. The second commenter generally supports our limitation on use of multi-layered UBEs but urges us to consider comments from others in dealing with acquired property associated with syndicated loans and other complex multi-owner situations.

We are persuaded by the comments that we should allow some flexibility in the final rule for those acquired property UBEs involving both System and non-System lenders. Therefore, we are permitting an exception to the prohibition on UBE subsidiaries by allowing System institutions to establish UBEs as subsidiaries of an acquired property UBE to hold each investor's pro rata

interests in acquired property provided that the loan collateral at issue involves multi-lender transactions that include System and non-System institutions. This exception is not available when the acquired property is owned solely by System institutions. In those instances, System institutions can effectively work through the partnership or management agreements to establish their pro rata interests within the single UBE while still protecting their limited liability.

e. Limit on Amount of Equity Investments in UBEs [new § 611.1153(h)]

We received a comment from the ICBA and one other comment on this provision, which limits a System institution's aggregate amount of equity investments in UBEs to one percent of its total loans outstanding, calculated at the time of each investment. One commenter remarked that the limit is too small, especially for smaller institutions, and will result in unnecessary requests for exemptions.⁶

We decline to increase the aggregate limit based on our belief that small associations should take a more cautious approach in determining whether to establish a UBE for certain business activity. Moreover, given the small

⁶ This limit does not apply to a System institution's equity investment in an acquired property UBE.

number of UBEs currently affiliated with System institutions, we do not believe this limit will result in an overwhelming number of requests for exceptions.

The ICBA does not agree that FCA should be able to make exceptions to restrictions listed in the proposed rule, stating that such exceptions create the appearance that we would favor some institutions over others. The ICBA suggests that FCA go through a public comment process to make any additional changes to the methodologies in the regulations.

As proposed, this final rule allows only two instances where FCA is able to make exceptions to the restrictions on a case-by-case basis. The first exception is in this provision § 611.1153(h) at issue. It allows FCA to set either a higher or lower limit than the one-percent aggregate equity investment limit based on safety and soundness or other relevant concerns. The second exception is in § 611.1153(i), in which System institutions are prohibited from making an equity investment in a third-party UBE except as FCA may authorize under § 615.5140(e) for de minimis and passive investments.⁷ We do not agree with the ICBA that these two exceptions create an appearance that we are favoring some System institutions

⁷ Such requests will be considered on a case-by-case basis outside of this final rule in accordance with the requirements of § 615.5140(e).

over others. As an arm's-length regulator, we must carry out our oversight responsibilities with impartiality, providing equal access and consideration to all System institutions. We would determine such exceptions according to these principles. Our final rule will retain the foregoing exceptions, which we deem necessary for safety and soundness concerns.

f. Limitation on Non-System Equity Investments [new § 611.1153(j)]

Four respondents provided comments on this provision, which limits non-System investment in a System-owned UBE to 20 percent of total equity. One commenter thought the limit could be an issue for a loan syndicated to non-System lenders, which, if the loan became distressed, might force a System institution to buy out a commercial bank's interest.

At the outset, we note that this 20-percent outside investment limitation applies only to those UBEs organized to provide limited services integral to a System institution's daily internal operations, such as fixed asset, electronic transaction, or trustee services. Further, the UBE operating agreement would address the process for an outside investor to extricate itself from the UBE based on financial or other reasons.

Another commenter contends that a System UBE should be able to attract and leverage outside ownership as long as the System institution controls it and FCA retains full authority over it. This same commenter suggests increasing outside ownership to 50 percent. A third commenter asks FCA to reexamine the limitation as well.⁸

Contrary to the suggestions of these commenters, we see no justification for expanding outside ownership beyond the 20 percent of total equity that is permitted for those UBEs performing limited services considered integral to a System institution's daily internal operations. Were we to increase outside ownership to 50 percent, as one commenter suggests, the System would no longer be a majority owner. Given that the outside investor authority for service corporations (where non-System ownership is also limited to 20 percent of total equity) has yet to be exercised by System institutions in the 12 years that they have had this regulatory authority, we see no need to increase the 20-percent cap in this final rule.

In contrast to the other commenters, the ICBA opposes allowing non-System persons or entities to invest in a System-controlled UBE, arguing that the Act does not authorize outside investments in service corporations or in

⁸ FCA notes that this restriction does not apply to acquired property UBEs that often involve System and non-System lenders.

UBEs. It notes that outside investments violate cooperative principles, would be unmanageable for FCA to regulate and examine, pose safety and soundness risks, and raise questions on voting rights due to the non-member status of third-party investors.

The FCA has permitted this same level of non-System equity investment in System-owned service corporations under FCA regulations (see § 611.1135(b)) based on our determination that such a minority level would not jeopardize the cooperative structure of a System institution or its associated principles, be unmanageable to regulate or examine, or negatively affect the safety and soundness of the institution. Nor do we agree with the ICBA's contention that this exception would jeopardize cooperative principles or create a safety and soundness risk. With regard to voting rights for non-System investors, we note that the partnership or membership agreement would control how decisions are made within the UBE for the majority and minority equity holders. We emphasize that the voting rights established within the UBE will have no effect on the voting rights of the member/borrowers of the System institution itself. For all the foregoing reasons, FCA has retained this limited outside investment authority as proposed.

4. Notice of Equity Investments in UBEs [new § 611.1154]

FCA received 11 comments on various provisions of § 611.1154. The ICBA opposes the notice provision entirely and believes all requests for UBE formations should be made through the approval provision. The ICBA adds that allowing some System institutions to provide notice only is discriminatory in that it favors the large institutions, serves no legitimate purpose, and appears to violate cooperative principles.

FCA does not believe the notice provision favors the large System institutions, serves no legitimate purpose, or violates cooperative principles. The eligibility for providing notice of a UBE formation versus submitting an approval application is based on the type of business activity, function or service being conducted in the UBE, all of which has no bearing on the size of a System institution. A number of System institutions, differing in size, have been using UBEs for acquired property and to provide hail and multi-peril crop insurance without jeopardizing cooperative principles or otherwise putting the institutions at risk. Based on the experience gained by the System in using UBEs for such purposes, and FCA's consequent experience in overseeing such UBEs, we see no reason for such UBEs to be subject to an approval process.

The notice provision serves the purpose of avoiding unnecessary administrative burdens and costs and has therefore been retained in this final rule.

We summarize the remaining comments under the relevant sections that follow.

a. Applicability [new § 611.1154(a)]

The proposed rule included a notice provision available only to System institutions with a Financial Institution Rating System (FIRS) rating of 1 or 2. Those with lower FIRS ratings would have been required to request FCA approval of the proposed UBE under § 611.1155. One commenter remarks that requiring prior approval for an institution to use a UBE to hold and manage acquired property increases the time and expense needed to manage the assets. The commenter references a statement in BL-057 that it is generally inappropriate for FCA to provide prior approval or concurrence regarding decisions on use of UBEs for acquired property purposes.

We note that System institutions, regardless of FIRS ratings, have organized UBEs to hold and manage acquired property since the booklet's issuance in 2009 without negative consequences. Therefore, FCA agrees to remove the FIRS rating restriction altogether from the notice provision based on our more considered belief that such a

restriction is unnecessary to ensure that such UBEs will not put an institution at further risk. We retain the requirement, however, that System institutions notify FCA of their intent to form an acquired property UBE. This notice allows us to keep track of such UBEs and to ensure that their use will help the institution manage its acquired property.

b. Notice Requirements [new § 611.1154(b)]

Our proposed rule requires System institutions to provide notice to FCA 20 business days in advance of making an equity investment in a UBE. Five commenters said that 20 business days was excessive. These commenters stated that because decisions to hold acquired property often occur within a relatively short span of time after commencing a collection/foreclosure action, requiring at least 20 business days for an advance notice is inconsistent with the need to reach a quick resolution. One commenter suggests a standard that is "as soon as is reasonably practicable," but not less than 5 business days prior to formation. Other commenters note that the 20 business days advance notice is too restrictive and that System institutions need to be able to respond in a timely manner to decisions made by lender groups and borrowers relating to a collection of large syndicated loans.

FCA has considered the foregoing concerns related to the 20 business days advance notice and, consequently, has adopted a 10 business day advance notice requirement in this final rule. We believe that a 10 business-day review is a fair compromise between the proposed 20 business-day review and the requested 5-day review, which is not sufficient for FCA purposes. The notice provision allows us time to review the documentation provided by the System institution. Should we find noncompliance issues or safety and soundness concerns, FCA will notify the institution before the notice period ends that it must delay the UBE's formation and submit an application for approval under § 611.1155. We are adding this requirement to the notice provision as a counterbalance to our removing the FIRS restriction and decreasing by half the number of business days required for the notice. This requirement is now found at § 611.1154(d).

c. A Certified Resolution of the System Institution's Board of Directors [new § 611.1154(b)(3)]

We received several comments on the requirement to submit a certified board resolution under the notice provision. One commenter believes that the board resolution requirement is too prescriptive and inappropriately dictates how boards must conduct their

oversight responsibilities. The commenter adds that it has long been an acceptable governance standard for the board of directors to adopt a policy authorizing management to conduct certain activities within established limits, controls, and reporting requirements. Such a practice, according to the commenter, would ensure timely and appropriate use of authorities when management must act quickly. The commenter suggests that FCA allow System institutions to follow this business practice and use a policy-based approach.

FCA strongly believes that the System's authority to organize UBEs rises to the level of board action. As the body that is ultimately held accountable for an institution's actions and outcomes, we believe that it is both appropriate and necessary for System boards to approve the investment in, and business activity of, a UBE. Moreover, we do not believe that a board policy in this area is an adequate substitute for this rule. While a policy-based approach may be appropriate for administering a program, it is not relevant to the formation of a UBE, which requires FCA's advance review or approval. However, we encourage System boards to develop policies on the use of UBEs that might include reporting requirements on UBE activity to the board and other internal controls ensuring

that UBE activity remains in compliance with the requirements of this rule.

Another commenter is concerned with the level of board involvement in forming UBEs when they are used to hold and manage acquired property, stating that requiring certified board resolutions for every investment in an acquired property UBE is burdensome and may cause delays in the collection/foreclosure process.

We understand that requiring a certified board resolution each time an institution organizes a UBE to hold and manage acquired property in which unusual and complex collateral is involved could become burdensome and possibly cause disruptions in the collection and foreclosure process. To ease these concerns, this final rule allows the board of directors to adopt a blanket certified resolution that would cover all acquired property UBEs that the institution may form. This "blanket resolution," as we refer to it, must be filed with FCA with each advance notice of an acquired property UBE. This requirement is now found at § 611.1154(b)(3). We note that the use of this blanket resolution is applicable only for the acquired property UBEs. Notices of hail and multi-peril crop insurance UBEs, and those UBEs added to the notice

provision by FCA in the future, will still require a separate and timely certified board resolution.

d. A Statement from the Board of Directors [new § 611.1154 (b) (5)]

Three commenters remarked that requiring a separate board-adopted statement is inefficient, ineffective, unnecessary, and bureaucratic and that FCA should allow the statement to be addressed within the context of a board adopted policy instead. One commenter believes that the restrictions and prohibitions required as part of the board statement in paragraph (b) (5) (vi) unnecessarily restrict potential future innovation that could further enhance a System institution's ability to effectively serve its mission to agriculture and rural America and is simply not necessary to protect the System's integrity or its cooperative principles.

As with the board resolution, FCA believes that it is both appropriate and necessary for the board to affirm that the UBE will operate in accordance with certain requirements and restrictions in the rule. This statement provides that a UBE cannot be used to make direct loans, perform any functions, services or engage in any activities that the System institution itself is not authorized to carry out under the Act and regulations or to exceed the

stated purpose of the UBE as set forth in its articles of formation. The statement also provides board support that the UBE is necessary or expedient to the institution's business and will operate with transparency, free from conflicts of interest, and in accordance with applicable law.

Also, we are perplexed by the comment that § 611.1154(b)(5)(vi) unnecessarily restricts System institutions' potential future innovation. This provision provides that UBEs will not engage in direct lending or exceed their stated purpose. These directives parallel the limits on service corporations formed under section 4.25 of the Act. As previously discussed, this rule gives System institutions yet another means to conduct certain business activity through expedient and efficient business structures while retaining the primary functions of a System institution within its federal charter, subject to all statutory and regulatory restrictions. The System's desire to innovate is necessarily restricted by applicable law, regulation, and safety and soundness concerns.

Although we are retaining the board statement, we clarify in the final rule that a separate board action is not required for the statement. By approving and adopting

its resolution, the board will also be approving the board statement included with the certified resolution.

Finally, we note that the regulation does not require a board statement for acquired property UBEs that are filed under the notice provision. Under the notice provision, the board statement is required only for those UBEs organized to provide hail or multi-peril crop insurance or other functions, services, or activities that FCA may allow to be filed under the notice provision in the future (see § 611.1154(b)(5)).

In the final rule, we are moving the board statement requirement from § 611.1154(b)(5) to § 611.1154(b)(4) so that the certified board resolution and the board statement appear in sequence. As a result of this technical change, the requirement for a letter from the funding bank approving the institution's equity investment in the UBE is being moved to § 611.1154(b)(5).

e. Funding Bank Approval Letter [new § 611.1154(b)(4)]

In the final rule, we are moving the requirement for the funding bank's approval of the equity investment to § 611.1154(b)(5). Moreover, to alleviate the need for the funding bank to approve each association's equity investment in a UBE organized to hold and manage unusual or complex collateral associated with loans, we are allowing a

funding bank to provide a blanket approval letter for all such UBEs that its district associations may invest in or organize.

f. Supplementation or Omission of Information [new § 611.1154(c) and § 611.1155(b)]

We received one comment that this provision creates ambiguity and uncertainty as to what information a System institution should provide in order to establish or invest in UBEs.

The requirements in both the notice and approval provisions clearly state what we expect System institutions to provide. However, because we cannot anticipate all the reasons for UBE use, this provision gives FCA the flexibility to ask for additional information on unusual or complex applications or to permit the omission of certain information on less complex applications. Therefore, we have retained this provision in the final rule, which provides needed flexibility affecting the clarity of the notice or approval process.

5. Approval of Equity Investments in UBEs [new § 611.1155]

a. Request [new § 611.1155(a)]

Two commenters claim that the proposed rule fails to require timely action or response by FCA on any request. The commenters believe that FCA should hold itself to a

reasonable timeframe to approve or deny any request, consistent with the 60-day requirement for merger applications.

Although we decline to add a provision in the final rule requiring FCA action by a certain time, it is FCA's practice to act within 60 business days of the receipt of a complete approval request whenever feasible. We note that the 60-day requirement for action on mergers is a statutory requirement.⁹ There is no statutory time limit on most approval requests coming before the Agency.

b. A Certified Resolution of the System Institution's Board of Directors [new § 611.1155(a)(4)]

We received the same comments on the requirement for a certified board resolution under the approval provision as we did under the notice provision. We refer you to § 611.1154(b)(3) above for a discussion of these comments. For all the reasons stated in our discussion of the comments under the Notice provision, we have retained the requirement for a certified board resolution under this approval provision.

⁹ This 60-day statutory time limit in section 7.11 of the Act also applies to termination of a System institution's status as a member of the System, dissolutions, and transfer of lending authority. In the latter case, all transfers of lending authority from banks to federal land bank associations and agricultural credit associations have occurred.

c. A Statement from the Board of Directors [new § 611.1155 (a) (6)].

Similarly, comments on the board statement, which is required under both the notice and approval provisions, were summarized under the notice provision in § 611.1154(b) (5). No new or additional comments were made on the board statement in this section.

As we explained in our response to the comments on the notice provision in proposed § 611.1154(b) (5), we are retaining the board statement requirement but clarify that we are not requiring a separate board action for the statement. In adopting its resolution, the board also will be approving the board statement included with the certified resolution.

In the final rule, we are combining the certified board resolution and board statement requirements into § 611.1155(a) (4). As a result of this technical change, the requirement for a letter from the funding bank approving the institution's equity investment in the UBE is being moved to § 611.1155(a) (5).

d. Denial of a Request [new § 611.1155(c)]

One commenter believes that FCA should establish clear and transparent regulatory standards for denial of a bona

fide request. Otherwise, a denial could be arbitrary and capricious and subject to the personal views of FCA staff.

With respect to establishing standards for denial of a request, we have not included such standards in the final rule because we are unable to anticipate all the reasons for denying a request. By law, FCA is obligated to act in a reasoned, impartial, and equitable manner in its approval and denial actions. Should a System institution believe that we failed to do so, our decision may be judicially challenged based on the arbitrary and capricious standard. Therefore, should we deny a request, our reasons for denial will be made clear after careful, impartial and judicious consideration.

6. Ongoing Requirements [new § 611.1156]

One commenter suggests that we replace the word "interest" in § 611.1156(a) with the word "investment." We decline to make the change because the word "interest" is broader in meaning and connotes not only the institution's equity investment in the UBE, but also interests such as that of preserving the operations of the UBE's ongoing business, maintaining good customer relationships, and avoiding reputational risk.

a. Divestiture [new § 611.1156(b) - (d)]

Three commenters remarked on the divestiture provisions. One commenter believes that the provisions are redundant and confusing and suggests that we combine them into one standard. This commenter also is concerned that FCA's authority to require divestiture without a suitable cause should be restricted and suggests that FCA establish standards for a divestiture order. Another commenter, remarking on the same subject, is concerned that § 611.1156(c) allows FCA to require divestiture at any time without any triggering event, thus resulting in a complete loss to the institution. The commenter recommends that we delete paragraph (c) from the rule.

In response to these comments, we have deleted some and combined other paragraphs of § 611.1156(b) in this final rule to eliminate the redundancy in the divestiture provisions. However, we have retained the provision that allows FCA to direct a System institution to divest of its investment in a UBE. We note that this provision mirrors the discretion retained by FCA for those UBEs that we have approved on a case-by-case basis. Such approvals are subject to a condition giving FCA the right to order a divestiture without a pre-determined triggering event. As we are unable to anticipate all the conditions that might

trigger the need for divestiture, we retain this authority in the final rule.

The ICBA agrees with FCA that a System institution must divest its ownership interest or withdraw as a member or partner from any UBE if a non-System entity takes control of the UBE. However, the ICBA comments that the divestiture should take place within a period not to exceed 6 months with a right to appeal for an extension of not more than 3 months should more time be needed. Finally, the ICBA adds that such a time limit should apply to divestitures of all UBEs, including those that have no non-System ownership.

We understand the ICBA's timeliness concerns. However, we decline to set a specific time limit for divestiture given that investments in UBEs are generally not liquid or marketable. Moreover, there may be legal or practical impediments to divesting within a particular timeframe depending on the nature and ownership structure of the UBE. Although we are not imposing a time requirement in the regulation, we expect System institutions to act expeditiously and may specify a time limit when FCA directs divestiture.

7. Grandfather Provision [new § 611.1158]

a. Scope [new § 611.1158(a)]

We received several comments on the scope of the provision that allows those existing UBEs that received specific, written approval by the FCA prior to the effective date of this final rule, as well as existing acquired property UBEs, to be grandfathered under the rule. Two commenters expressed support for this provision and one commenter asks that FCA confirm that all existing UBEs are effectively grandfathered and may continue current or intended business activities.

In response to the request that FCA confirm that all existing UBEs are grandfathered, we specifically stated in the proposed rule, and retain the same language in the final rule, that "those UBE formations or equity investments that received specific, written approval by FCA prior to the effective date of this regulation" are grandfathered as well as those UBEs organized to acquire and manage unusual or complex collateral associated with loans. If a System institution is unsure as to whether a UBE's formation or investment in a UBE meets this criterion, it should contact FCA for confirmation.

The ICBA, on the other hand, opposes the grandfathering of existing UBEs, stating that such a practice adds greater risk to the System and undermines safety and soundness standards.

We do not agree with the ICBA's comments opposing the grandfather provision. All grandfathered UBEs were subject to a careful review process, including a review of the System institution's safety and soundness. To subject them anew to the notice or approval requirements of the rule would violate the principles of due process. We note that, although exempt from the notice and approval provisions in the rule, grandfathered UBEs will remain subject to their conditions of approval and will be subject to the ongoing and disclosure and reporting requirements in the rule as set forth in § 611.1158(b)(2).

b. System Institutions' Obligations [new § 611.1158(b)]

Two commenters asked the FCA to adopt a materiality threshold on the degree of change that would trigger an approval request for a grandfathered UBE. One commenter believes it is unreasonable to think that business activity, ownership interests in, or control of any UBE will remain static over time and that any change or expansion to these attributes requiring an advance notice to FCA would create a burdensome and restrictive process. The same commenter states that the 20 business days advance notice is burdensome, restrictive, and may be impossible to achieve.

One commenter asks that FCA create a process for System institutions to invest, divest and/or reinvest in grandfathered UBEs.

In response to these comments, we have modified § 611.1158(b)(3) in the final rule to change the advance notice requirement from 20 business days to 10 business days consistent with our change to the advance notice provision in § 611.1154. Also, in response to the request for more clarity on what changes or expansions would trigger an advance notice, the final rule provides that an advance notice is required for any of the following occurrences in a grandfathered UBE: (1) A change or expansion of the authorized business activity, service or function of the UBE; (2) an introduction of non-System ownership to the UBE or an increase in the current level of non-System ownership in the UBE, to the extent such ownership is authorized under the final rule; or, (3) a change in control of the UBE as we define the term "control" in the rule. The purpose of the advance notice is to inform FCA of a change or expansion that meets one or more of the foregoing criteria now included in this final rule. If FCA determines, upon review, that the proposed change or expansion is material, we will notify the System institution before the end of the advance notice period

that it may not proceed with the proposed change or expansion before submitting a request for approval under § 611.1155. We have added this clarifying language to the final rule in § 611.1158(b)(4).

In response to the commenter's request that we provide a process in the rule for System institutions wanting to invest, divest, or reinvest in grandfathered UBEs, we have modified § 611.1158 to include such a process in § 611.1158(c). A System institution asking to invest for the first time in a grandfathered UBE or an institution that had divested its previous equity investment and wants to reinvest in a grandfathered UBE must follow either the notice provision in § 611.1154 or the approval provision in § 611.1155, depending on the UBE's business purpose. Not all requirements will apply under either the notice or approval provisions to the requesting System institution because the UBE is already established and is grandfathered under the rule. Consequently, FCA expects to allow the omission of some information under our discretion to do so in §§ 611.1154(c) and 611.1155(b) of the rule. If a System institution chooses to divest its equity investment or withdraw as a partner or member in a grandfathered UBE, it is expected to follow the requirements of the UBE's membership or partnership agreement. FCA also retains its

right to require an institution to divest its equity interest in a UBE under the provisions of § 611.1156.

8. Disclosure and Reporting Requirements [§ 611.1157]

Because all System institutions organizing or investing in a UBE under the notice or approval provisions must also comply with the disclosure and reporting requirements of this section, we have deleted proposed § 611.1154(d) of the notice provision, which included the same requirement.

9. Contents of the Annual Report to Shareholders

[§ 620.5(a)(11)]

FCA is making a technical correction to this section by moving the annual disclosure requirement on UBEs from § 620.5(a)(11) to § 620.5(a)(12) in this final rule. This change is necessary because the final rule on Compensation, Retirement Programs, and Related Benefits included a new disclosure provision in § 620.5(a)(11).

Two commenters believe the disclosure requirements are overly prescriptive and that System institutions should determine the nature of the disclosure based on the relative materiality of the UBEs being disclosed. One commenter saw no value in listing the names of all UBEs formed to hold acquired property and suggested the

disclosure be limited to the number of UBEs formed for that purpose.

To ensure transparency and meaningful disclosure, FCA retains the disclosure requirements as proposed. FCA believes that shareholders should be informed of the extent to which their institutions' functions, services, or activities are being provided by State-organized or State-chartered non-System entities (the UBEs), the identity of these entities, their purpose and scope of activities, and their relationship to the institution itself. We also believe it is appropriate to vary the level of required disclosure depending on the purpose of the UBE rather than the relative materiality of a UBE, as one commenter suggested. Finally, as member-owned and member-controlled cooperatives, System boards of directors and executive management have an obligation to engage and communicate with their member-owners through financial reports that provide transparent and relevant information on the results of the institution's business operations over the previous year.¹⁰ Such annual disclosures, which inform the member-owners of the extent of the System institution's activities

¹⁰ See section 5.17(a)(8) of the Act; section 514 of the Farm Credit Banks and Associations Safety and Soundness Act of 1992; and §§ 620.3, 620.5, 630.5, and 630.20 of FCA regulations.

conducted through UBEs, are not overly burdensome or without merit.

IV. 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 Farm Credit 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, Farm Credit System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 604

Sunshine Act.

12 CFR Part 611

Agriculture, Banks, banking, Rural areas.

12 CFR Part 612

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

12 CFR Part 619

Agriculture, Banks, banking, Rural areas.

12 CFR Part 620

Accounting, Agriculture, Banks, banking, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 621

Accounting, Agriculture, Banks, banking, Penalties, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 622

Administrative practice and procedure, Crime, Investigations, Penalties.

12 CFR Part 623

Administrative practice and procedure.

12 CFR Part 630

Accounting, Agriculture, Banks, banking, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, parts 604, 611, 612, 619, 620, 621, 622, 623, and 630 of chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 604--FARM CREDIT ADMINISTRATION BOARD MEETINGS

1. The authority citation for part 604 continues to read as follows:

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

§ 604.420 [Amended]

2. Section 604.420 is amended by removing the words "service organizations" in paragraph (i)(1) and adding in their place, the words "service corporations chartered under the Act".

PART 611--ORGANIZATION

3. The authority citation for part 611 is revised to read as follows:

Authority: Secs. 1.2, 1.3, 1.4, 1.5, 1.12, 1.13, 2.0, 2.1, 2.2, 2.10, 2.11, 2.12, 3.0, 3.1, 3.2, 3.3, 3.7, 3.8, 3.9, 3.21, 4.3A, 4.12, 4.12A, 4.15, 4.20, 4.21, 4.25, 4.26, 4.27, 4.28A, 5.9, 5.17, 5.25, 7.0-7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2002, 2011, 2012, 2013, 2020, 2021, 2071, 2072, 2073, 2091, 2092, 2093, 2121, 2122, 2123, 2124, 2128, 2129, 2130, 2142, 2154a, 2183, 2184, 2203, 2208, 2209, 2211, 2212, 2213, 2214, 2243, 2252, 2261, 2279a-2279f-1, 2279aa-5(e)); secs. 411 and 412 of Pub. L. 100-233, 101 Stat. 1568, 1638; sec. 414 of Pub. L. 100-399, 102 Stat. 989, 1004.

§ 611.1130 [Amended]

4. Section 611.1130 is amended in the first sentence of paragraph (a) by removing the words "service organizations organized under the Act" and adding in their place, the words "service corporations chartered under the Act".

5. Revise the heading of subpart I to read as follows:

Subpart I--Service Corporations

§ 611.1136 [Amended]

6. Section 611.1136 is amended by:

a. Revising the section heading;

b. Removing the words "and unincorporated service organizations" in paragraph (c);

c. Removing the words "service organization" or "service organizations" each place they appear and adding in their place, the words "service corporation" or "service corporations" respectively.

The revision reads as follows:

§ 611.1136 Regulation and examination of service corporations.

* * * * *

7. Add a new subpart J, consisting of §§ 611.1150-611.1158, to read as follows:

Subpart J--Unincorporated Business Entities

Sec.

- 611.1150 Purpose and scope.
- 611.1151 Definitions.
- 611.1152 Authority over equity investments in UBEs for business activity.
- 611.1153 General restrictions and prohibitions on the use of UBEs.
- 611.1154 Notice of equity investments in UBEs.
- 611.1155 Approval of equity investments in UBEs.
- 611.1156 Ongoing requirements.

611.1157 Disclosure and reporting requirements.
611.1158 Grandfather provision.

Subpart J--Unincorporated Business Entities

§ 611.1150 Purpose and scope.

(a) Purpose. This subpart sets forth the parameters for one or more Farm Credit System (System) institutions to organize or invest in an Unincorporated Business Entity (UBE) in accordance with the Farm Credit Act of 1971, as amended (Act).

(b) Scope. Except as authorized under these regulations, no System institution may manage, control, become a member or partner, or invest in a State-organized or chartered business entity. This subpart applies to each System institution that organizes or invests in a UBE, including a UBE organized for the express purpose of investing in a Rural Business Investment Company. This subpart does not apply to UBEs that one or more System institutions have the authority to establish as Rural Business Investment Companies pursuant to the provisions of title VI of the Farm Security and Rural Investment Act of 2002, as amended (FSRIA) and United States Department of Agriculture regulations implementing FSRIA.

§ 611.1151 Definitions.

For purposes of this subpart, the following definitions apply:

Articles of formation means registration certificates, charters, articles of organization, partnership agreements, membership or trust agreements, operating, administration or management agreements, fee agreements or any other documentation on the establishment, ownership, or operation of a UBE.

Control means that one System institution, directly or indirectly, owns more than 50 percent of the UBE's equity or serves as the general partner of an LLLP, or constitutes the sole manager or the managing member of a UBE. However, under generally accepted accounting principles (GAAP), the power to control may also exist with a lesser percentage of ownership, for example, if a System institution is the UBE's primary beneficiary, exercises significant influence over the UBE or establishes control under other facts and circumstances in accordance with GAAP. Under this definition, a System institution also will be deemed to have control over the UBE if it exercises decision-making authority in a principal capacity of the UBE as defined under GAAP.

Equity investment means a System institution's contribution of money or assets to the operating capital of a UBE that provides ownership rights in return.

System institution means each System bank under titles I or III of the Act, each System association under title II of the Act, and each service corporation chartered under section 4.25 of the Act.

Third-party UBE means a UBE that is owned or controlled by one or more non-System persons or entities as the term "control" is defined under GAAP.

UBE means a Limited Partnership (LP), Limited Liability Partnership (LLP), Limited Liability Limited Partnership (LLLLP), Limited Liability Company (LLC), Business or other Trust Entity (TE), or other business entity established and maintained under State law that is not incorporated under any law or chartered under Federal law.

UBE business activity means the services and functions delivered by a UBE for one or more System institutions.

Unusual and complex collateral means acquired property that may expose the owner to risks beyond those commonly associated with loans, including, but not limited to, acquired industrial or manufacturing properties where there is increased risk of incurring potential environmental or

other liabilities that may accrue to the owners of such properties.

§ 611.1152 Authority over equity investments in UBEs for business activity.

(a) Regulation, supervisory, oversight, examination and enforcement authority. FCA has regulatory, supervisory, oversight, examination and enforcement authority over each System institution's equity investment in or control of a UBE and the services and functions that a UBE performs for the System institution. This includes FCA's authority to require a System institution's dissolution of, disassociation from, or divestiture of an equity investment in a UBE, or to otherwise condition the approval of equity investments in UBEs.

(b) Assessing UBE investments and business activity. In accordance with section 5.15 of the Act, the cost of regulating and examining System institutions' activities involving UBEs will be taken into account when assessing a System institution for the cost of administering the Act.

§ 611.1153 General restrictions and prohibitions on the use of UBEs.

(a) Authorized UBE business activity. All UBE business activity must be:

(1) Necessary or expedient to the business of one or more System institutions owning the UBE; and

(2) In no instance greater than the functions and services that one or more System institutions owning the UBE are authorized to perform under the Act and as determined by the FCA.

(b) Circumvention of cooperative principles. System institutions are prohibited from using UBEs to engage in direct lending activities or any other activity that would circumvent the application of cooperative principles, including borrower rights as described in section 4.14A of the Act, or stock ownership, voting rights or patronage as described in section 4.3A of the Act.

(c) Transparency and the avoidance of conflicts of interest. Each System institution must ensure that:

(1) The UBE is held out to the public as a separate or subsidiary entity;

(2) The business transactions, accounts, and records of the UBE are not commingled with those of the System institution; and

(3) All transactions between the UBE and System institution directors, officers, employees, and agents are conducted at arm's length, in the interest of the System institution, and in compliance with standards of conduct rules in §§ 612.2130 through 612.2270.

(d) Limit on one-member UBEs. A UBE owned solely by a single System institution (including between and among a parent agricultural credit association and its production credit association and Federal land credit association subsidiaries and between a parent agricultural credit bank and its subsidiary Farm Credit Bank) as a one-member UBE is limited to the following special purposes:

(1) Acquiring and managing the unusual or complex collateral associated with loans; and

(2) Providing limited services such as electronic transaction, fixed asset, trustee or other services that are integral to the daily internal operations of a System institution.

(e) Limit on UBE partnerships. A System institution operating through a parent-subsidary structure may not create a UBE partnership between or among the parent agricultural credit association and its production credit association and Federal land credit association

subsidiaries or between a parent Agricultural Credit Bank and its Farm Credit Bank subsidiary.

(f) Prohibition on UBE subsidiaries. Except as provided in this paragraph, a System institution may not create a subsidiary of a UBE that it has organized or invested in under this subpart or enable the UBE itself to create a subsidiary or any other type of affiliated entity. A System institution may establish a UBE as a subsidiary of a UBE formed pursuant to paragraph (d)(1) of this section to hold each investor's pro-rata interest in acquired property provided that the loan collateral at issue involves a multi-lender transaction that includes System and non-System lenders.

(g) Limit on potential liability.

(1) Each System institution's equity investment in a UBE must be established in a manner that will limit potential exposure of the System institution to no more than the amount of its investment in the UBE.

(2) A System institution cannot become a general partner of any partnership other than an LLLP.

(h) Limit on amount of equity investment in UBEs.

The aggregate amount of equity investments that a single System institution is authorized to hold in UBEs must not exceed one percent of the institution's total outstanding

loans, calculated at the time of each investment. On a case-by-case basis, FCA may approve an exception to this limitation that would exceed the one-percent aggregate limit. Conversely, FCA may impose a percentage limit lower than the one-percent aggregate limit based on safety or soundness and other relevant concerns. This one-percent aggregate limit does not apply to equity investments in one-member UBEs formed for acquired property as permitted in paragraph (d)(1) of this section. Any equity investment made in a UBE by a service corporation must be attributed to its System institution owners based on the ownership percentage of each bank or association.

(i) Prohibition on relationship with a third-party UBE. A System institution is prohibited from:

(1) Making any equity investment in a third-party UBE except as may be authorized on a case-by-case basis under § 615.5140(e) of this chapter for de minimis and passive investments. Such requests would be considered outside of this rule.

(2) Serving as the general partner or manager of a third-party UBE; or

(3) Being designated as the primary beneficiary of a third-party UBE, either alone or with other System institutions.

(j) Limitation on non-System equity investments.

Non-System persons or entities may not invest in a UBE that is controlled by a System institution except that non-System persons or entities may own 20 percent or less of the equity of a System-controlled UBE organized to deliver services integral to the daily internal operations of a System institution.

(k) UBEs formed for acquiring and managing collateral.

The provisions of paragraphs (i) and (j) of this section do not apply to UBEs formed for the purpose of acquiring and managing unusual or complex collateral associated with multiple-lender loan transactions in which non-System persons or entities are participants.

§ 611.1154 Notice of equity investments in UBEs.

(a) Applicability. This notice provision is applicable only to System institutions that wish to make an equity investment in UBEs whose activities are limited to the following purposes:

- (1) Acquiring and managing unusual or complex collateral associated with loans;
- (2) Providing hail or multi-peril crop insurance services in collaboration with another System institution in accordance with § 618.8040 of this chapter; and

(3) Any other UBE business activity that FCA determines to be appropriate for this notice provision.

(b) Notice requirements. System institutions must provide written notice to FCA so that the notice is received by FCA no later than 10 business days in advance of making an equity investment in a UBE for authorized UBE business activity described in paragraph (a) of this section. The notice must include:

(1) The UBE's articles of formation, including its name and the State in which it is organized, length of time it will exist, its partners or members, and its management structure;

(2) The dollar amount of the System institution's equity investment in the UBE;

(3) A certified resolution of the System institution's board of directors authorizing the equity investment in, and business activity of, the UBE and the board's approval to submit the notice to the FCA. For UBEs organized to acquire and manage unusual or complex collateral associated with loans as identified in paragraph (a)(1) of this section, the board of directors may adopt a blanket board resolution to cover all such UBEs that the System institution will organize.

(4) Except for those UBEs identified in paragraph (a)(1) of this section, a board statement included with the certified board resolution affirming that the UBE:

(i) Is needed to achieve operating efficiencies and benefits;

(ii) Is necessary or expedient to the System institution's business;

(iii) Will operate with transparency;

(iv) Will conduct its business activity in a manner designed to prevent conflicts of interest between its purpose and operations and the mission and operations of the System institution(s);

(v) Will otherwise be in compliance with applicable Federal, State, and local laws; and

(vi) Will not be used by the System institution to make direct loans; perform any functions or provide any services that the System institution is not authorized to perform or provide under the Act and FCA regulations; or to exceed the stated purpose of the UBE as set forth in its articles of formation.

(5) A letter from the funding bank that it has approved the institution's equity investment in the UBE. For those UBEs organized to acquire and manage unusual or complex collateral associated with loans as identified in

paragraph (a) (1) of this section, the funding bank may provide a blanket approval letter to cover all such UBEs that its district associations may invest in or organize.

(6) Any additional information the System institution wishes to submit.

(c) Supplementation or omission of information. FCA may require the supplementation or allow the omission of any information required under paragraph (b) of this section.

(d) Other requirements. A System institution may not organize or invest in those UBEs identified in paragraph (a) of this section if the FCA notifies the institution before the end of the 10 business day advance notice period that such investment requires FCA approval under the provisions of § 611.1155.

§ 611.1155 Approval of equity investments in UBEs.

(a) Request. System institutions must receive FCA approval before organizing or investing in any UBE that does not qualify for the notice provision set forth in § 611.1154(a). A request for approval under this section must include the following information:

(1) A detailed statement of the risk characteristics of the investment, as required by § 615.5140(e) of this chapter and the initial amount of equity investment;

(2) A detailed statement on the purpose and objectives of the UBE; the need for the UBE and the operating efficiencies and benefits that will be achieved by using the UBE;

(3) The proposed articles of formation addressing, at a minimum, the following:

(i) The UBE's name, the State in which it is organized, the city and State in which its principal office is to be located, and its partners or members and management structure;

(ii) Specific business activities that the UBE will conduct;

(iii) General powers of the UBE;

(iv) Ownership, voting, partnership, membership and operating agreements for the UBE;

(v) Procedures to adopt and amend the partnership, membership or operating agreement of the UBE;

(vi) The standards and procedures for the application and distribution of the UBE's earnings; and

(vii) Length of time the UBE will exist.

(4) A certified resolution of the System institution's board of directors authorizing the equity investment in the UBE and the UBE business activity and the board's approval to submit the request to the FCA. The

certified board resolution must include a board statement affirming that the UBE:

(i) Is necessary or expedient to the System institution's business;

(ii) Will operate with transparency;

(iii) Will conduct its business activity in a manner designed to prevent conflicts of interest between its purpose and operations and the mission and operations of the System institution(s);

(iv) Will comply with applicable Federal, State, and local laws; and

(v) Will not be used by the System institution to make direct loans; perform any functions or provide any services that the System institution is not authorized to perform or provide under the Act and FCA regulations; or exceed the purpose of the UBE as stated in its articles of formation.

(5) A letter from the funding bank that it has approved the institution's equity investment in the UBE;

(6) Any additional information the System institution wishes to submit.

(b) Supplementation or omission of information. FCA may require the supplementation or allow the omission of any information required under paragraph (a) of this

section based on the complex or noncomplex nature of the proposed UBE.

(c) Denial of a request. The FCA will specify in writing to the submitting System institutions the reasons for denial of any request to organize or invest in a UBE.

§ 611.1156 Ongoing requirements.

A System institution that organizes or invests in a UBE must also comply with the following requirements:

(a) Maintain and ensure FCA's access to all books, papers, records, agreements, reports and other documents of each UBE necessary to document and protect the institution's interest in each entity;

(b) Divest, as soon as practicable, the institution's equity or beneficial interest in, and sever any relationship with a UBE:

(1) That conducts activities beyond those authorized to carry out its limited purpose or that are contrary to the Act or FCA regulations, or as otherwise directed to do so by FCA; or

(2) Where non-System persons or entities obtain control as defined under GAAP. This paragraph does not apply to UBEs formed for the purpose of acquiring and managing unusual or complex collateral associated with

multiple-lender loan transactions in which non-System persons or entities are participants.

§ 611.1157 Disclosure and reporting requirements.

(a) Annual report to shareholders. In its annual report to shareholders, as set forth in § 620.5(a)(12) of this chapter, a System institution must provide information on its UBE investment and business activity.

(b) Periodic reports as directed. As directed by FCA, a System institution must submit periodic reports to FCA on any equity investment in a UBE or UBE status as provided under § 621.12 of this chapter, and in accordance with §§ 621.13 and 621.14 of this chapter.

(c) Dissolution of a UBE. A System institution must submit a timely report to FCA on the dissolution of a UBE that it controls.

§ 611.1158 Grandfather provision.

(a) Scope. The following equity investments in UBEs are grandfathered from the Notice and Approval provisions under §§ 611.1154 and 611.1155, respectively.

(1) Those UBE formations or equity investments that received specific, written approval by FCA prior to the effective date of this regulation; and

(2) Those UBE formations or equity investments that occurred prior to the effective date of this regulation to

acquire or manage unusual or complex collateral associated with loans.

(b) System institutions' obligations. All System institutions with grandfathered UBEs:

(1) Remain subject to their conditions of approval;

(2) Are subject to the ongoing requirements of § 611.1156 and the disclosure and reporting requirements of § 611.1157; and

(3) May not change or expand the authorized business activity, service, or function of the UBE as approved by FCA, add or increase the level of non-System ownership in the UBE to the extent such ownership is authorized under § 611.1153(j), or change control of the UBE as control is defined in § 611.1151 without giving written notice of such changes to FCA at least 10 business days in advance of any such change or expansion.

(4) A System institution may not proceed with any change or expansion as defined in paragraph (b)(3) of this section if the FCA notifies the institution before the end of the 10 business day advance notice period that the proposed change or expansion is material and must be submitted for FCA approval under the provisions of § 611.1155.

(c) System institution investments or reinvestments in grandfathered UBEs. System institutions investing for the first time in grandfathered UBEs or reinvesting after having previously divested their equity investment must provide notice to FCA or obtain FCA approval under either the notice provision in § 611.1154 or the approval provision in § 611.1155 depending on the function, service, or activity of the grandfathered UBE in which the institution seeks to invest or reinvest.

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

8. 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).

9. Section 612.2130 is amended by revising paragraphs (p) and (t) to read as follows:

§ 612.2130 Definitions.

* * * * *

(p) Service corporation means each service corporation chartered under the Act.

* * * * *

(t) System institution and institution mean any bank, association, or service corporation in the Farm Credit

System, including the Farm Credit Banks, banks for cooperatives, Agricultural Credit Banks, Federal land bank associations, agricultural credit associations, Federal land credit associations, production credit associations, the Federal Farm Credit Banks Funding Corporation, and service corporations chartered under the Act.

PART 619--DEFINITIONS

10. The authority citation for part 619 continues to read as follows:

Authority: Secs. 1.4, 1.5, 1.7, 2.1, 2.2, 2.4, 2.11, 2.12, 3.1, 3.2, 3.21, 4.9, 5.9, 5.17, 5.19, 7.0, 7.1, 7.6, 7.8, and 7.12 of the Farm Credit Act (12 U.S.C. 2012, 2013, 2015, 2072, 2073, 2075, 2092, 2093, 2122, 2123, 2142, 2160, 2243, 2252, 2254, 2279a, 2279a-1, 2279b, 2279c-1, 2279f); sec. 514 of Pub. L. 102-552, 106 Stat. 4102.

11. Add a new § 619.9338 to read as follows:

§ 619.9338 Unincorporated business entities.

An Unincorporated Business Entity means a Limited Partnership (LP), Limited Liability Partnership (LLP), Limited Liability Limited Partnership (LLLLP), Limited Liability Company (LLC), Business or other Trust Entity (TE), or other business entity established and maintained under State law that is not incorporated under any law or chartered under Federal law.

PART 620--DISCLOSURE TO SHAREHOLDERS

12. The authority citation for part 620 continues to read as follows:

Authority: Secs. 4.3, 4.3A, 4.19, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2154, 2154a, 2207, 2243, 2252, 2254); sec. 424 of Pub. L. 100-233, 101 Stat. 1568, 1656; sec. 514 of Pub. L. 102-552, 106 Stat. 4102.

Subpart B--Annual Report to Shareholders

13. Section 620.5 is amended by:

a. Removing the words "service organization" in paragraph (a)(3) and adding in their place, the words "service corporation chartered under the Act"; and

b. Adding a new paragraph (a)(12) to read as follows:

§ 620.5 Contents of the annual report to shareholders.

* * * * *

(a) * * *

(12) For banks and associations, business relationships with unincorporated business entities (UBEs).

(i) Except as provided in paragraph (a)(12)(ii) of this section, describe the business relationship with any UBE, as defined in § 611.1151 of this chapter, that was organized by the bank or association or in which the bank or association has an equity interest. Include in the description the name of the UBE, the type of business

entity, the purpose for which the UBE was organized, the scope of its activities, and the level of ownership. If the bank or association does not have an equity interest, but manages the operations of a UBE that is controlled by a System institution, describe this business relationship and any fees received.

(ii) If the UBE is organized for the purpose of acquiring and managing unusual or complex collateral associated with loans, the bank or association need only disclose the name of the UBE, the type of business entity, and the purpose for which the UBE was organized.

PART 621--ACCOUNTING AND REPORTING REQUIREMENTS

14. The authority citation for part 621 continues to read as follows:

Authority: Secs. 5.17, 8.11 of the Farm Credit Act (12 U.S.C. 2252, 2279aa-11); sec. 514 of Pub. L. 102-552.

§ 621.1 [Amended]

15. Section 621.1 is amended by removing the words "service organizations" and adding in their place, the words "service corporations".

§ 621.2 [Amended]

16. Section 621.2(e) is amended by removing the words "service organization" and adding in their place, the words "service corporation".

PART 622—RULES OF PRACTICE AND PROCEDURE

17. The authority citation for part 622 continues to read as follows:

Authority: Secs. 5.9, 5.10, 5.17, 5.25-5.37 of the Farm Credit Act (12 U.S.C. 2243, 2244, 2252, 2261-2273); 28 U.S.C. 2461 note; and 42 U.S.C. 4012a(f).

§ 622.2 [Amended]

18. Section 622.2(d) is amended by removing the words "service organization chartered under part E of title IV of the Act" and adding in their place, the words "service corporation chartered under the Act".

PART 623—PRACTICE BEFORE THE FARM CREDIT ADMINISTRATION

19. The authority citation for part 623 is revised to read as follows:

Authority: Secs. 5.9, 5.10, 5.17, 5.25-5.37 of the Farm Credit Act (12 U.S.C. 2243, 2244, 2252, 2261-2273).

§ 623.2 [Amended]

20. Section 623.2(d) is amended by removing the words "service organization chartered under part E of title IV of the Act" and adding in their place, the words "service corporation chartered under the Act".

PART 630—DISCLOSURE TO INVESTORS IN SYSTEM-WIDE AND CONSOLIDATED BANK DEBT OBLIGATIONS OF THE FARM CREDIT SYSTEM

21. The authority citation for part 630 continues to read as follows:

Authority: Secs. 4.2, 4.9, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2153, 2160, 2243, 2252, 2254); sec. 424 of Pub. L. 100-233, 101 Stat. 1568, 1656; sec. 514 of Pub. L. 102-552, 106 Stat. 4102.

§ 630.20 [Amended]

22. Section 630.20 is amended by removing the words "service organization" in paragraph (a)(2) and adding in their place, the words "service corporation".

Date: May 21, 2013

Dale L. Aultman,
Secretary,
Farm Credit Administration Board.

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