



This document is scheduled to be published in the Federal Register on 05/28/2015 and available online at <http://federalregister.gov/a/2015-12823>, and on [FDsys.gov](http://FDsys.gov)

[6705-01-P]

FARM CREDIT ADMINISTRATION

12 CFR Part 611

RIN 3052-AC85

Organization; Institution Stockholder Voting Procedures

AGENCY: Farm Credit Administration.

ACTION: Final rule.

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SUMMARY: The Farm Credit Administration (FCA, we, Agency or our) amends FCA's regulations to clarify and enhance Farm Credit System (Farm Credit or System) bank and association stockholder voting procedures for tabulating votes, the use of tellers committees, and other items as identified.

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

Compliance date: All provisions of this regulation require compliance on or before January 1, 2016.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Objectives

The primary objective of this rule is to clarify § 611.340 of our regulations regarding confidentiality and security in stockholder voting procedures and facilitate their safe and sound implementation by System institutions. Specifically, this final rule clarifies that:

- A System bank or association may use a tellers committee to tabulate ballots and still maintain confidentiality and security of the voting process; and
- A small number of administrative employees of a bank or association may assist a tellers committee in verifying a stockholder's eligibility to vote.

II. Background

The Farm Credit Act of 1971, as amended (Act),<sup>1</sup> authorizes the FCA to issue regulations implementing the

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<sup>1</sup> Pub. L. 92-181, 85 Stat. 583 (1971), 12 U.S.C. 2001 et seq.

Act's provisions.<sup>2</sup> Our regulations are intended to ensure the safe and sound operation of System institutions. In order to fulfill our responsibility to maintain the safety and soundness of System institutions and safeguard stockholders' right to a secret ballot, the FCA's regulations provide that banks and associations must ensure the confidentiality and security of stockholder voting, while maintaining cooperative principles.<sup>3</sup>

Section 611.340 of the FCA's regulations requires that the board of directors of each System bank and association adopt policies and procedures to ensure the confidentiality and security of all records and materials related to a stockholder vote including, but not limited to, ballots, proxy ballots, and other related materials. Also, this section requires that System bank and association policies and procedures ensure that ballots and proxy ballots are provided only to stockholders who are eligible to vote as of the record date set for the stockholder vote. Banks and associations must ensure the confidentiality of all information and materials regarding how or whether an

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<sup>2</sup> Section 5.17(a) (9) of the Act authorizes the FCA to prescribe rules and regulations necessary or appropriate for carrying out the Act.

<sup>3</sup> Section 4.20 of the Act requires that "[i]n any election or merger vote, or other proceeding subject to a vote of the stockholders. . .the institution (1) may not use signed ballots; and (2) shall implement measures to safeguard the voting process for the protection of the right of stockholders. . .to a secret ballot."

individual stockholder has voted, including protecting the information from disclosure to anyone, except vote tabulators and the FCA.

### III. Comments and Our Responses

The comment period for the proposed rule closed on December 15, 2014. We received three comment letters on our proposed rule: one letter from the Farm Credit Council (Council) on behalf of its members; one letter from a Farm Credit bank; and one letter from a Farm Credit association. One commenter supported the proposed rule and two commenters supported the proposed rule with suggested changes and/or clarifications. After careful consideration of the comments, the proposed rule is finalized as proposed with the exception of a clarification in § 611.340(a)(4), discussed below in Section B.

#### A. Persons Allowed to Perform Certain Roles

The Farm Credit bank commented that because we had clearly prohibited employees, directors, director-nominees and nominating committee members from serving as members of the tellers committee, we should clarify that these same categories of people are prohibited from serving as members of an independent third party vote tabulator. While we agree that such categories of persons would not be allowed to participate as an independent third party vote

tabulator, we do not believe that such language needs to be included in the regulation, as it is inherent in the generally understood concept of an "independent" third party. We believe it is clear that under no circumstance could an employee, director, director-nominee or member of the nominating committee of an institution ever fall within a reasonable interpretation of "independent." As an example, one dictionary definition defines "independent," in part, as: "(1) not subject to control by others: self-governing; (2) not affiliated with a larger controlling unit. . . ." <sup>4</sup> This definition is used as an illustrative example only, but confirms that categories of individuals such as those highlighted by the Farm Credit bank would not, under any reasonable interpretation, fall within the commonly understood meaning of "independent." So, while we do not believe it is necessary to specifically include this in the regulation text, we invite any System bank or association with questions regarding whether an independent third party vote tabulator is truly independent to contact the Agency to discuss any specific instance on which the institution seeks guidance.

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<sup>4</sup> <http://www.merriam-webster.com/dictionary/independent>.

The Farm Credit bank also commented that it was unclear whether the administrative employees who may assist the tellers committee are allowed to be stockholders as well. We agree that an employee who happens to also be a stockholder could effectively perform the administrative duties of voter eligibility verification so long as there is no particular conflict of interest in that employee's ability to serve in that role.

In the proposed rule preamble, we clarified certain limitations on these employees such as that they could not be part of management or principally involved in the loan-making, pricing or servicing functions of the institution. We did not state that the administrative employees could not be stockholders and, since the tellers committee is made up entirely of stockholders, it would seem counter-intuitive that there would be such a prohibition on the administrative support staff of the tellers committee. We agree with the commenter that there is no reason to prohibit employee-stockholders from serving as the administrative support for the tellers committee, but have concluded clarifying language is not needed in the regulation text since no such prohibition exists in the current language.

The Farm Credit association commenter took issue with the limitation imposed on the administrative employees assisting the tellers committee in that they cannot be part of the institution's management. The association stated that "[t]his language would prohibit the Association's corporate secretary (who in some institutions is a member of the Association's leadership team) from being involved in and insuring that the duties and responsibilities of the tellers committee are accurately performed." The association asked that we amend the regulation text to specifically carve out an exception for the corporate secretary to serve as one of the administrative employees allowed to assist the tellers committee with voter eligibility verification.

The function of the corporate secretary contemplated by the commenter, such as "insuring that the duties and responsibilities of the tellers committee are accurately performed" is not the intended purpose behind allowing a small number of administrative staff to assist the tellers committee with voter eligibility verification. The assistance provided by the limited number of administrative employees is to perform certain ministerial tasks involved in voter eligibility verification, such as checking the name or identity code of a voter on an outer envelope of a

ballot to confirm that the voter is an eligible voting stockholder. However, the institution could include in its policies and procedures that the corporate secretary, for example, is responsible for training the tellers committee's members and designated administrative staff on their appropriate roles. Alternatively, the corporate secretary could be responsible for reviewing the institution's policies and procedures for compliance with the regulation. In order to promote the goal of a confidential voting process free of undue influence, we believe that the administrative employees assisting the tellers committee with voter eligibility verification should not be members of an institution's management or leadership team. As such, we did not make the requested change to carve out an exception for the corporate secretary to perform this role.

B. List of Eligible Voting Stockholders

The Farm Credit bank commented that the proposed rule may result in the list of eligible voting stockholders as of the voting record date to be submitted multiple times to different individuals or groups during the election process. The proposed rule stated that a list of eligible voting stockholders as of the voting record date must be provided to either the tellers committee or the independent

third party, whichever group will be tabulating the vote, in order for the group to determine the validity of the votes cast. In the event that a tellers committee tabulates the votes and decides to utilize the services of a small number of administrative employees to assist with voter eligibility verification, it would be the tellers committee's responsibility to provide the list to those administrative employees. The proposed regulation did not contemplate that the list would be given by the institution directly to the administrative employees. The proposed rule simply gave the tellers committee the option to use a small number of administrative employees from the institution to assist the members in performing their duties.

The commenter further suggested that we clarify that the voter eligibility verification process can be performed in advance of the tellers committee's tabulation and certification. The proposed regulation text provided that if a tellers committee is used, verification of voter eligibility must be done separate and apart from the opening and tabulating of the actual ballots. However, we agree with the commenter that we should clarify that the separate verification can be performed in advance of the actual vote tabulation. As such, we have added language to

the regulation text at § 611.340(a)(4) to clarify that verification of voter eligibility may be done in advance of the vote tabulation any time after the list of eligible voting stockholders has been provided to the tellers committee.

### C. Signatures

The Farm Credit bank suggested that the regulation be modified to specifically state that, like identity codes, signatures can be used as part of the authentication process, as long as the signatures are separate from the ballot to maintain voter confidentiality. It is our understanding that this is a common practice amongst institutions. However, there is no need for this to be specifically stated in the regulation text because the regulation has always required, and continues to require, System institutions to adopt policies and procedures that ensure "that all information and materials regarding how or whether an individual stockholder has voted remain[s] confidential . . ." and the regulation has also always prohibited the use of signed ballots. If institutions wish to adopt policies and procedures regarding the use of signatures on outer envelopes (not the ballot itself), so that the prohibition on signed ballots is not violated, it is certainly within an institution's prerogative to do so.

However, we believe it is best left to each individual institution to create its own policies and procedures that meet all of the requirements of this regulation regarding confidentiality and security in voting.

D. Confidentiality Certification

The Farm Credit bank expressed support for the confidentiality certification contained in new § 611.340(c). However, the bank commented that the certification may prohibit communication with stockholders about their own ballot or voting process. The certification requirement previously applied only to independent third party vote tabulators. We concluded that this requirement should be extended to any individual involved in tabulating votes or verification of voter eligibility. The certification reinforces the significance of the regulation, which requires that all information regarding how or whether an individual stockholder has voted remains confidential. The importance of the confidentiality provision and accompanying certification is to ensure that members of the tellers committee and employees assisting the tellers committee do not disclose how or whether a stockholder has voted in order to preserve the stockholder's secret ballot. If a stockholder initiated contact with a tellers committee member, or

administrative employee assisting the tellers committee, the confidentiality certification would not prohibit that individual from responding to the stockholder on a question about that stockholder's own ballot. It would, however, prohibit responding to a question from the stockholder about any other stockholder's ballot.

#### E. General Support

The Council supported the proposed changes to the regulation. Specifically, the Council commented that the changes would clarify a System institution's option to utilize a tellers committee in the tabulation of votes. The Council also commented that appropriate safeguards were included in the regulation to allow for administrative employees to assist the tellers committee.

#### 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 would 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 in 12 CFR Part 611

Agriculture, Banks, banking, Rural areas.

For the reasons stated in the preamble, part 611 of chapter VI, title 12 of the Code of Federal Regulations is amended as follows:

PART 611--ORGANIZATION

1. The authority citation for part 611 continues 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.

2. Section 611.340 is revised to read as follows:

§ 611.340 Confidentiality and security in voting.

(a) Each Farm Credit bank and association's board of directors must adopt policies and procedures that:

(1) Ensure the security of all records and materials related to a stockholder vote including, but not limited to, ballots, proxy ballots, and other related materials.

(2) Ensure that ballots and proxy ballots are provided only to stockholders who are eligible to vote as of the record date set for the stockholder vote.

(3) Provide for the establishment of a tellers committee or an independent third party who will be responsible for validating ballots and proxies and tabulating voting results. A tellers committee may only consist of voting stockholders who are not employees, directors, director-nominees, or members of that election cycle's nominating committee.

(4) Ensure that a list of eligible voting stockholders (or identity codes of eligible voting stockholders) as of the voting record date is provided to the tellers committee or independent third party that will be tabulating the vote to ensure the validity of the votes cast. A small number of specifically authorized administrative employees of the institution may assist the tellers committee in such verifications, provided the institution implements procedures to ensure the confidentiality and security of

the information made available to the employees. If an institution is using a tellers committee, verification of voter eligibility must be done separate and apart from the opening and tabulating of the actual ballots and may be done in advance of the vote tabulation, any time after the list of eligible voting stockholders has been provided to the tellers committee.

(5) Ensure that all information and materials regarding how or whether an individual stockholder has voted remain confidential, including protecting the information from disclosure to the institution's directors, stockholders, or employees, or any other person except:

(i) A duly appointed tellers committee;

(ii) A small number of specifically authorized administrative employees assisting the tellers committee by validating stockholders' eligibility to vote;

(iii) An independent third party tabulating the vote;

or

(iv) The Farm Credit Administration.

(b) No Farm Credit bank or association may use signed ballots in stockholder votes. A bank or association may use balloting procedures, such as an identity code, that can be used to identify whether an individual stockholder is eligible to vote or has previously submitted a vote. In

weighted voting, the votes must be tabulated by an independent third party.

(c) An independent third party or each member of the tellers committee that tabulates the votes, and any administrative employees assisting the tellers committee in verifying stockholder eligibility to vote, must sign a certificate declaring that such party, member, or employee will not disclose to any person (including the institution, its directors, stockholders, or employees) any information about how or whether an individual stockholder has voted, except that the information must be disclosed to the Farm Credit Administration, if requested.

(d) Once a Farm Credit bank or association receives a ballot, the vote of that stockholder is final, except that a stockholder may withdraw a proxy ballot before balloting begins at a stockholders' meeting. A Farm Credit bank or association may give a stockholder voting by proxy an opportunity to give voting discretion to the proxy of the stockholder's choice, provided that the proxy is also a stockholder eligible to vote.

(e) Ballots and proxy ballots must be safeguarded before the time of distribution or mailing to voting stockholders and after the time of receipt by the bank or association until disposal. When stockholder meetings are

held for the purpose of conducting elections or other votes, only proxy ballots may be accepted prior to any or all sessions of the stockholders' meeting and mail ballots may only be distributed after the conclusion of the meeting. In an election of directors, ballots, proxy ballots, and election records must be retained at least until the end of the term of office of the director. In other stockholder votes, ballots, proxy ballots, and records must be retained for at least 3 years after the vote.

(f) An institution and its officers, directors, and employees may not make any public announcement of the results of a stockholder vote before the tellers committee or independent third party has validated the results of the vote.

Date: May 21, 2015

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

[FR Doc. 2015-12823 Filed: 5/27/2015 08:45 am; Publication Date: 5/28/2015]