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October 23, 2014

Mr. Barry F. Mardock
Deputy Director, Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Re: RIN 3052-AC84; Proposed rule–Funding /Fiscal Affairs, Loan Policies/Operations, Funding Operations, Investment Eligibility–Federal Register No. 2014-17493 (7-25- 14)

Dear Mr. Mardock and FCA Reviewers:

ICBA is writing on behalf of the nation's 7,000 community banks to express our views on the Farm Credit Administration's (FCA, agency) proposal to amend current regulations governing investments held by Farm Credit banks and associations.

FCA's Stated Purpose for Investment Proposal

FCA's proposed rule (PR, proposal) states its purpose is to amend the agency's regulations governing the eligibility of investments held by Farm Credit banks which includes addressing investment and risk management practices of associations and funding bank supervision of association investments. Other stated purposes of the PR include: reinforce that high quality investments may be purchased and held; comply with section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or DFA) in regards to credit ratings; substitute appropriate standards of creditworthiness and revise its regulatory approach to Farm Credit System (FCSI, System, associations) association investments. Regarding associations, FCA claims the purpose relating to association investments is "to limit the type and amount of investments that an association may hold" and to only allow investments for risk management purposes.

ICBA's Perspectives

Much of the PR is couched in terms of risk management practices. However, the PR minimally references the apparently enormous scope of FCA's authority to approve "other investments" of FCSIs but does not define, explain, or enlighten the public on the FCA's intent regarding scope and eligibility of FCSI investments.

While not explaining the scope of the term "other investments" may avoid controversy for FCA, it does an injustice to the public's right to transparency and accountability of the FCA. For example, the PR's section 615.5143 (management of ineligible investments) states that "we propose to clarify that no investment is ineligible if it has been approved by the FCA." This statement indicates FCA's belief the agency can approve any lending purpose if such loans are called "investments" even when the purpose of the investment exceeds the lending constraints of the Farm Credit Act (Act).

Congress did not authorize an "anything goes" mentality for FCA's approval of investments. The rationale for FCS investments would include allowing FCSIs to hold high-quality, readily marketable investments to provide sufficient liquidity for ongoing operations; to manage interest rate risk; management of surplus funds, for example, by allocating such funds to be deposited in commercial banks and for other similar purposes. ICBA strongly objects to FCA's approach to allow FCSIs to finance businesses, community, infrastructure and other activities under the rubric of "other investments" since such activities undermine the Act's limits on loan purposes and since such activities represent a non-legislated and dramatic expansion of powers for FCSIs.

Proposal Should Be Withdrawn

Our comment letter and attachment including various questions which lay out a number of reasons why FCA should withdraw this proposal. We also point out FCA appears to be utilizing the rationale of conforming FCA regulations to section 939A of the Dodd-Frank Act's credit ratings requirements as a basis for this regulation.

FCA should withdraw this regulation's components that are unrelated to section 939A of the DFA and focus solely on that regulation. That would enable FCA to reissue the remaining portions of this PR and address the issues and questions laid out in this letter and its attachment which address this PR and FCA's recently issued information memorandum (IM). This would afford all interested parties an opportunity to actually understand and comment on the full scope of FCA's proposed revisions to their current regulations.

We are further concerned that FCA appears to be replacing the table and listing of investments in current § 615.5140 and broadly expanding § 615.5142 with a much broader and generalized categories of investments. FCA should first go to Congress and explain the need for these proposed investment expansions. Simply saying that agriculture and the economy have changed and grown more complex is not enough of a rationale. The FCA has provided no clear, point-by-point explanation of why each of these investment expansions are necessary and how they would address issues that the FCS is now facing.

It also appears that FCA is granting a portion of its investment approval authority to Farm Credit Banks (FCBs) which may not be appropriate. For example, proposed § 615.5142(c)(1) and other provisions (proposed§ 615.5142(b); § 615.5142(c)(3); etc.) allow great authority for FCBs to approve association investment requests.

While FCA's stated rationale is to align association investments with FCB funding capability, the real world outcome is that FCA's approval of association investments will be little more than a rubber stamp and virtually meaningless. Just as with CoBank's Verizon loan, FCA will be in a position to be caught flat-footed in terms of what FCS associations are actually investing in, particularly if the proposed provision to allow associations to receive approval from FCBs for entire classes of investments instead of individual investments is adopted.

It is practically impossible to understand the scope of what FCA is actually proposing without the FCA providing clear answers to the questions ICBA has raised. By withholding information and clear explanations from the public, FCA makes it extremely difficult to provide meaningful comments on the proposal.

FCA's 'Cart before the Horse' Approach

FCA issued an IM in September to provide 'guidance' to FCSIs. However, this guidance suggests that FCSIs can make "investment" requests to FCA not only for real investments but also for lending purposes disguised as investments. For example, FCA claims it could approve "investments" that would allow an FCSI to finance virtually any business or any community-based financial activity or any infrastructure activity.

Issuing guidance before finalizing the regulation is completely backwards unless FCA is indirectly indicating the agency already has its mind made up on key aspects of the PR and doesn't really care what the public's concerns are in terms of the scope of FCA's approval authority. Congress has not authorized FCSIs to be general purpose lenders with GSE backing, able to lend for all types of business, community, infrastructure and other purposes if they cleverly label such financing as "investments."

Further, there is no indication in legislative history that Congress intended for FCA's generalized investment authority to completely undermine and make meaningless the specific lending purposes and constraints of the Act. FCA's new interpretation that it can approve any investment for any purpose suggests that FCSIs could stop making loans and just label all of their financing as "investments" if FCA were to remove the proposed investment portfolio limits.

Additionally, FCA's IM appears to be a nationalized procedure by which all FCSIs can gain approval of their broad-based investment requests. Thus FCA is implementing rulemaking in the form of an IM instead of more appropriately conducting a formal rulemaking process in terms of explaining the true scope and eligibility of the term "other investments."

The purpose of the FCA's IM appears to be to indicate to FCSIs that they can make investments for a virtually unlimited number of purposes and financial activities while allowing FCA to claim in the PR that it makes "no substantive change from current § 615.5140(e), which allows all System institutions to hold other investments the FCA approves on a case-by-case basis." But this statement is extremely disingenuous since FCA is completely changing the application of the term "other investments" to include, not only legitimate investments authorized in statute

but many activities that would more appropriately be considered loans and to do so for an unlimited number of purposes and activities, as referenced in the recently issued IM.

The FCA's IM, intended to establish policy procedures for FCSIs, in order to avoid an honest explanation to the public of FCA's intent, therefore, necessitates comment on the IM in addition to this PR. ICBA has previously submitted an analysis and set of questions regarding the FCA's IM and these materials are attached as part of this comment letter since ICBA believes that FCA needs to address the intended scope of its "other investment" authority under FCA's new interpretation regime. Otherwise, members of the public are not being allowed an opportunity to comment on the real extent of FCA's investments regulations due to the lack of explanation by the FCA. Thus, we again request the FCA answer the questions included in the attached document.

If FCA is seeking to approve virtually any type of financial activity for FCSIs, then these so-called "investments" would not be for risk management purposes only, thus contradicting FCA's statement that FCS association investments would be strictly for risk management purposes. Further, an unlimited scope and eligibility parameter for FCS investments contradicts FCA's claim that it took into account comments made during the 2008 PR comment period. Thousands of bankers opposed the open-ended purposes of FCA's proposed rule.

FCA Needs Common Sense Procedures and Greater Transparency

FCA should withdraw its recent IM on investments until it has dealt with this PR. FCA should also withdraw this PR and reissue it with detailed answers to the questions attached. FCA should explicitly state in any future guidance or IMs that FCSI's investments shall not have the same characteristics as loans and shall not be for financing activities that go beyond the lending constraints of the Act. FCA should clearly explain the difference between loans and bonds and between loans and other FCS investments.

We remind FCA the agency has in the past been criticized by Congress and the GAO for seeking to implement policies by guidance (national charter booklet) instead of through a formal rulemaking process. As indicated in the attachment, FCA's IM appears very similar to the approach FCA took with the national charter initiative, which was subsequently discredited by the GAO analysis.

In addition, since FCA is now once again reviewing a national charter approach for FCSIs, there are many additional implications related to FCSI investments. FCA should reissue this PR after fully explaining its intent regarding geographical boundaries of FCSIs and the potential for the agency to issue a PR regarding national charters.

The public has a right to know what FCA intends to do with respect to approving "other investments" and whether FCA is seeking to subvert the Act, which appears to be the case. There are many other aspects related to FCA's plans regarding scope and eligibility of FCS investments. Thus our analysis and questions apply both to FCA's IM and PR.

While FCA's PR often references "eligible investments" and "investment eligibility criteria," such references are not in the context of scope and eligibility parameters but rather in terms of whether FCA views the investments as having appropriate risk characteristics, credit quality, and liquidity features and that align with the FCA's list of investments (i.e. § 615.5140). The PR does not actually foster FCSIs' adherence to the limited purposes of the Act's loan making activities, but undermines adherence to the Act's limitations on loan making, given the FCA's new, open-ended interpretation of the "other investments" category.

Other Issues in Investment PR

FCA's PR addressed various other issues related to FCSI investment management. Our comments regarding several of these issues follow.

Asset Classes

We disagree with the open-ended nature of FCA approving any asset class listed or any class that FCA may decide to approve in the future. If FCA desires to approve other asset classes in the future, it should do so only through a formal rulemaking process.

Regarding the asset class provisions, the PR allows FCSIs to continue to invest in corporate debt securities, which are not as high quality as government bonds and have greater interest rate risks. Such financing therefore contradicts the stated purpose of the PR as promoting high quality investments. The corporate bond securities could allow FCSIs to potentially be the only investor or the majority investor, thus further increasing risks. Allowing FCSIs to finance corporate debt securities as an 'investment' becomes more of an issue given the FCA's apparently new interpretation that the agency could approve any type of investment including for purposes that exceed the Act's lending constraints. FCSIs would apparently be allowed to finance any corporation in America if approved by FCA depending on the specific nature of the investment requests that the FCB and FCA approve.

Diversified Investment Funds

We questions whether FCSIs should finance diversified investment funds as the scope of the financing (investing) is not defined and could be very broad, particularly under FCA's new interpretation model, exceeding the lending constraints and purposes of the Act. Such "investments" would bear higher risks, once again contradicting the PR's stated goal of promoting higher quality investments. ICBA will further review this section with outside advisors and reserves the right to provide further comments.

Obligor Definition; Diversification; Limits

We are concerned with how FCA would define the term "obligor" as this would appear to include any person, business or agency that incurs a loan. We object to FCS investments that are basically for the purpose of financing loans and FCA should clarify whether this definition

would envision FCSIs financing loans to corporations. ICBA also believes there should be portfolio diversification requirements for obligors to reduce risks for FCSIs. Further, it is appropriate to limit the amount of capital that FCSIs may invest in any one obligor and we recommend a limit of one percent of an FCSI's total capital as this would reduce risks.

Private Placements

ICBA disagrees with allowing FCSIs to be involved in private placements or the sale of unregistered securities to a small number of sophisticated investors. Under this scenario, FCSIs could be the sole or majority financier. This provision appears to allow FCSIs to finance private debt or loans to any corporation, similar to what FCA proposed in its withdrawn 2008 proposal. These private placements would, as FCA admits, in many cases be without the disclosure of detailed financial information or even a prospectus and would not be liquid. This completely contradicts FCA's statement that association investments would only be for risk management purposes. FCA would thus be allowing FCSIs to make illegal loans to ineligible businesses with no ties to agriculture with little disclosure to the FCSI or to the public.

Ineligible Investments; Divesture of Association Investments

FCA's proposal states that "No association is required to divest any investments held on the date this rule becomes effective that were previously authorized under former § 615.5140 or otherwise authorized by official written FCA action that allowed the association to continue to hold such investments." ICBA objects to this provision and believes it is puzzling.

This language appears to allow FCS associations to continue to hold the pilot project investments that FCA claimed were coming to an end December 31st. We ask the FCA therefore if the FCA has granted, in writing or otherwise, approval for associations to continue holding their investments that were in place under the current or former rural investment pilot projects? It would be misleading for FCA to claim cancellation of the pilot projects but allow associations to keep the investments that were active within these pilot programs.

ICBA believes that FCA should not allow FCSIs to continue to hold any ineligible investments. If the investments were previously eligible but are not now eligible, FCSIs should be required to divest the investments within six months. It is inappropriate to allow FCSIs to have both eligible and ineligible investments on their books. Allowing investments to mature before divestiture would allow FCSIs to hold ineligible investments for many years and is not necessary since these investments can be sold to other investors given their supposedly high quality.

Concentration Limits

FCA should establish concentration limits for FCSIs rather than allowing FCSIs to establish their own concentration limits.

Association Limits on Investments

FCA's PR proposes a ten percent limit of outstanding loans on associations' investment portfolio for investments guaranteed by the U.S. or government agencies and apparently a ten percent limit on all other association investments. While limits are appropriate, it would make more sense for the limits to be based on each association's capital levels, not loan volumes. In particular, the limit on non-guaranteed investments should be five percent of capital. Further, the "other investments" category should not be allowed to exceed one percent of an association's capital and should not be allowed for purposes that are inconsistent with the Act's lending constraints to ensure FCS associations are focused on making loans to eligible borrowers for eligible purposes and to ensure associations focus on actual investments that are listed, for example, in 615.5140.

As FCA states, "investments at most associations rarely equal or exceed 10 percent of total outstanding loans," which indicates that a 10 percent limit of loans for investments is far too high to be meaningful – it would in essence rarely be reached. Therefore, a five percent limit based on capital levels is much more appropriate. These two limits, five percent of capital for guaranteed investments and five percent of capital for non-guaranteed investments, would allow the total amount of investments to equal ten percent of an association's capital which would be sufficient. Limiting the "other investments" category to one percent of capital within the five percent total limit would ensure the FCA's stated goals (that loans to eligible borrowers always constitute the vast majority of System assets and are consistent with the mission of each association) are met and would ensure associations "investments" are truly investments and not illegal loans.

Another aspect that makes the 10 percent of loan limit rather hollow is the PR's provision that the 10 percent of loan volume level could be maintained even if an FCSI's loan volume were to decline significantly(§ 615.5142(e)(2)). Thus, ICBA objects to allowing associations to continue holding investments when the overall amount exceeds five percent of capital for each FCS association. Bankers recognize limits would be appropriate for associations' investment portfolios, but the only choice FCA suggested was one based on loan volume. That proposed option is ineffective since the limit will rarely, if ever be reached as FCA acknowledges and loan volumes can fluctuate sharply. Focusing the limit on capital is preferable and would focus FCSIs attention on capital levels, thus increasing safety and soundness of FCSIs.

Again, the one percent limit of capital on "other investments" should not allow FCS associations to engage in financing activities that exceed the lending purposes of the Act.

Investment Purposes

FCA's PR states, "Whereas the existing rule authorizes associations to hold investments for the purposes of reducing interest rate risks and managing surplus short-term funds, the proposed rule authorizes associations to hold investments to manage risks. We invite your comments about whether this proposed rule should identify specific purposes for associations to purchase and

hold investments." ICBA believes the PR indeed should identify specific purposes for associations to purchase and hold investments and we request that FCA publish a list of "other investments" that FCA deems eligible. This would provide important information to FCSIs and the public as to the meaning and parameters of "other investments."

The PR states that associations will not be required to request approval for each and every investment from their FCB but instead, would be able to request funding bank approval for a type or class of investments. FCA does not indicate where the statute provides such flexibility. Where does the law state approval of investments can be by "class" of investments? This "flexibility" would appear to increase risks for FCS associations and should not be allowed.

FCA states that proposed § 615.5142(d) would continue to allow an association to request the FCA's approval to purchase and hold "other investments" and thus represents no substantive change from current § 615.5140(e), which allows all System institutions to hold other investments that the FCA approves on a case-by-case basis. ICBA strongly disagrees with this misleading statement since the applicability of this provision is now being changed due to FCA's now broader interpretation of their "other investments" approval authority.

Is FCA stating the agency will not approve any investments not approved in the past, prior to FCA allowing associations to engage in rural investment pilot projects? After all, FCA stated it was withdrawing both its 2008 proposal and the pilot programs that FCA initiated. If FCA is allowing these types of activities under its new investment regime, then FCA is being dishonest by stating it was withdrawing the 2008 proposal on investments; the pilot projects; and that the pending proposal represents no substantive change in the current regulations (that have not been updated since 1999). Obviously, there would be significant changes in terms of expansion from the 1999 regulation. FCA has not explained the intended scope of the new approval authority for "other investments" which is concerning given that several FCA board members have claimed in the past to desire "transparency."

Proposed § 615.5142 (d) states that "An association may purchase and hold other investments that we approve. The request for our approval must explain the risk characteristics of the investment and the purpose and objectives for making the investment." But this provision is silent on allowing investments beyond the lending constraints of the Act. No list or examples of eligible investments are provided. FCA appears to prefer not discussing the specifics, apparently because the agency would feel embarrassment at having to explain the details and true intent of this provision. This is inappropriate, non-transparent behavior on FCA's part. We urge FCA to act with true transparency and provide the details of the types of "other investments" it would approve under this catch-all wording. FCA could provide a table listing potentially eligible investments just as they currently have showing eligible investments in § 615.5140(a).

Does FCA's proposal, for example, envision FCA approving "investments" in non-farm businesses which could result in taking loans away from community banks in lieu of "investment" financing provided by an FCS association? If so, such an outcome completely validates our comments in the preceding paragraph.

As stated numerous times, ICBA objects to FCA approving "other investments" that are essentially illegal loans that exceed the lending constraints of the Act.

Conclusion

ICBA appreciates the opportunity to comment on this PR. However, ICBA believes the FCA's recent IM inappropriately establishes policy guidance that should more appropriately be contained in this proposed rule. In addition, ICBA finds a lack of clarity in both the proposed regulation and FCA's IM as to the meaning of the "other investments" that FCA would consider for approval. Thus, ICBA has submitted a list of questions to which we believe the public should know the answers to before either the IM or the PR are allowed to proceed.

ICBA requests that FCA withdraw both the IM and the PR and submit a revised PR with answers to the questions asked. Only after the PR is reissued with clear answers to these questions and eventually concluded as part of a formal rulemaking process should the IM be reissued. The IM should not be a policy tool as policy implementation should be handled through a public rulemaking process. In no case should FCA approve illegal loans if they are labeled as "investments." Thank you for considering these comments and requests.

Should you wish to discuss this letter and the attachment and questions further, please contact Mark Scanlan at 202-659-8111 (mark.scanlan@icba.org).

Sincerely,

Mark Scanlan

Mark Scanlan
Senior Vice President, Agriculture and Rural Policy

Attachment

ICBA Analysis & Questions Regarding FCA Investment Memorandum & Proposed Regulation

ANALYSIS

FCA Seeks to Far Exceed the Limits of the Act: The Act provides only limited authority for FCS institutions (FCSIs) to make loans for farm-related businesses and for community and infrastructure related loans/financing. Yet, FCA's proposal suggests an unlimited variety of these types of credits in addition it appears to allow non-farm general business financing extended by FCSIs when labeled "investments." The Act does not authorize FCSIs to be or become general purpose creditors for broad based business, community and infrastructure financing.

Indeed, the FCA's informational memorandum (IM) suggests a loan ("investment") for any purpose will be considered eligible if the FCSI's board has approved a resolution authorizing the type of investment submitted to FCA for approval. Allowing FCS institutions' boards to determine the scope and eligibility of their lending parameters is inappropriate. Scope and eligibility parameters for all credits whether labeled as loans or investments, should closely confirm to the statute. While such an approach was previously advocated by the Farm Credit Council and other FCS representatives during the scope and eligibility ANPRM several years ago, FCA did not submit the scope and eligibility ANPRM as a proposed rule.

Written testimony presented by FCS representatives in recent years stated that the FCS's powers have not been expanded by Congress since 1971.[1] The only material expansion would appear to be the authorization of the Rural Business Investment Companies (RBICs) during the 2002 farm bill debate. However, the memorandum does not even reference investments in RBICs, suggesting that FCA is seeking expanded financing activities on behalf of FCSIs far outside the bounds of the Act.

In subsequent testimony preceding the 2008 farm bill, FCS witnesses stated their authorities were limited and asked Congress to vastly expand their ability to finance farm related businesses and residential mortgage lending in cities of up to 50,000 residents as part of the System's Horizon Project. Congress flatly rejected these requests. FCS sought legislation to extend credit to "businesses primarily engaged in processing, handling, preparing for market, purchasing, testing, grading, distributing or marketing farm or aquatic products."[2] FCS also sought legislation to extend credit to "businesses that are primarily engaged in furnishing farm or aquatic business services, capital goods, or equipment to farmers, ranchers or harvesters of aquatic products."[3] Yet, FCA's IM would apparently allow these same authorities that Congress rejected and even more.

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[1] Jay Penick testimony, May 16, 2001, Senate Agriculture Committee, pgs 6 & 8
[2] Doug Stark testimony, March 27, 2007, Subcommittee on Conservation, Credit, Energy and Research, pgs 5 & 6
[3] Ibid.

We note that FCA's chairwoman recently told Congress during her June testimony, in response to a question, that there has not been **ANY** expansion of FCS authorities by the FCA. She emphasized the word "ANY." Given this quite remarkable statement by the FCA Chairwoman and given the only expansion of the Act has been the inclusion of RBIC authority, we must ask FCA:

- Does the memorandum envision continuing the limitations on FCS's ability to provide credit to businesses for which FCS sought legislative authority but was denied in 2008?

- If so, why is this not made clear in the memorandum's wording?

- If not, under what authority is FCA expanding FCS's ability to extend credit to businesses and for residential mortgages in towns beyond 2,500 residents when Congress refused to authorize these activities for FCS?

- Does the FCA interpret its case-by-case investment authority as allowing FCA to approve a broad range of "investments" to businesses, communities, and for residential housing purposes and infrastructure purposes outside the scope of the Act's lending parameters?

The Farm Credit Act and Legislative History Do Not Support FCA's Broad Investment Power Grab: FCS told Congress the basis of its recommended legislative changes as a part of its Horizons Project was a comprehensive review and research effort that concluded FCS's powers were limited and needed legislative expansion. For FCA to now allow FCS to extend credit for these and broader purposes would mean FCS and FCA representatives on several occasions misled Congress and misrepresented the statute's authorities. However, if FCA/FCS did not misrepresent the truth to Congress, then FCS powers are indeed limited in a manner that prohibits extending credit for these purposes and the memorandum should clarify these limitations.

In November, 2013, the FCA withdrew its proposed rule on Rural Community Investments published in the *Federal Register* on June 16, 2008 (73 FR 33931). FCA stated the agency would accommodate these requests on a case-by-case basis. But FCA did not explain the scope and eligibility parameters of the "investments" the agency wanted to approve. However, based on the memorandum's wording, the FCA appears to be suggesting FCS lenders can extend credit for any purpose if approved by boards of directors, their funding bank and FCA. Such broad authority has never been granted by Congress.

Further, it is disingenuous for FCA to suggest the agency withdrew its very broad 2008 proposed regulation to allow FCS lenders to make virtually any type of loan or "investment" but now go ahead and allow these same loans or investments anyway, just under a different procedure. FCA's action amounts to claiming to withdraw a large proposed rule and discontinue all related pilot programs within one year but then adopting blanket authority through a guidance memo to allow FCSIs to do these same projects and whatever else they desire if approved by FCA.

FCA's strategy of seeking expanded powers through guidance memos instead of the public rulemaking process has been sharply criticized by the Government Accountability Office (GAO) in the past (i.e. National Charters). In fact, it appears the flawed and faulty procedures for FCA's issuing of the national charters booklet are eerily similar to FCA's approach in issuing the recent guidance memorandum.
In their October 2000 report GAO stated:

> *"We find these requirements are of general applicability and of future effect . . . if a policy statement is of general applicability, future effect, and prescribes policy, it is not entitled to the policy statement exemption but should have been issued using notice and comment . . . we find that the (National Charters) Booklet constitutes a "rule" under the APA and should have been issued using notice and comment procedures."*[4]

Additionally, we note FCA's 2014 regulatory agenda mentions FCA staff began a regulatory review of FCS's territorial concurrence requirements in September and will review whether current restrictions on FCS lenders are appropriate. On the surface, this appears another effort by the large FCS lenders to once again do away with geographical boundaries on their activities within the System. If the FCA intends to once again seek to do away with territorial boundaries, there could also be a significant impact upon FCSIs investment activities. This calls into question the decision of FCA to pursue investment regulations prior to making a determination on territorial boundaries.

It appears FCA may intend to approve the broadest possible investment authorities and then seek to provide national lending territories for FCS associations. If this is FCA's intention, then the current order of regulations under review only make sense from the standpoint of FCA planning to do whatever possible to expand the financing activities of the FCS and creating what are in essence nationally based GSE lenders with unlimited GSE powers. This is contrary to FCA's definition of the term "GSE" in the proposed rule wherein FCA admits that GSEs are for limited public policy purposes. FCA appears to constantly forget the FCS is GSE intended to serve limited and narrowly defined agricultural credit markets. This would also suggest why FCA refused allowing bankers to attend FCA's secret meetings earlier this year on the future of the System in that FCA, recognizing the controversial nature of national charters for FCS wanted to avoid disclosing any details on their planned regulatory expansion of FCS territorial boundaries.

Regarding FCA's 2008 proposed investments rule, ICBA objected to FCA's approval of any FCSI's "investment" request on a case-by-case basis:

> *"Moreover, the proposed rule would allow the FCA to approve any other investment or type of investment not outlined in the proposal. FCA would have unfettered authority to authorize all kinds of debt financing contrary to the Act's lending restrictions. Such sweeping*

[4] Opinion on Whether the Farm Credit Administration's National Charter Initiative is a Rule Under the Congressional Review Act FILE: B-286338 Date: October 17, 2000

authorities are inappropriate for a GSE as GSEs by their nature are intended to have targeted financial activities to ensure their government-derived privileges are not leveraged in such a way as to crowd out private sector financial institutions.

"The FCA has shown a propensity to take any action it can, no matter how questionable, to expand the FCS's powers . . .such actions, veiled from the public's view and from a public comment process, would be undeterminable, unobservable, and unknown.

"This 'miscellaneous' investment authority provision would cover a much more sweeping and expansive finance regime than has ever before been contemplated by either FCA or Congress. This "catchall" provision should be dropped as it is incompatible with the proposal's stated rationale."

FCA Misrepresents Their Investment Authority: FCA's intent to approve loans or "investments" on a case-by-case basis that have virtually unlimited scope and eligibility parameters far exceeds the statute's lending constraints and is far broader than the entirety of the remainder of the proposed 2008 regulation which FCA claimed to withdraw.

FCA stated in a May 8, 2008 press release that the basis for the Rural Community Investments proposed rule was the preamble to the Act. However, as ICBA pointed out in our initial comments on the proposal, the preamble cannot be used to override the specific lending restrictions or the Congressional declaration of policy and objectives found in Section 1.1 of the Act. The Act's purpose is to *provide sound, adequate, and constructive credit to American farmers and ranchers and their cooperatives, and to selected farm-related businesses.*

In the previous proposed rule which FCA supposedly withdrew, FCA cited sections 1.5 (15) and 3.1 (13) of the Act. In FCA's current proposed regulation to approve virtually any type of loan or "investment," FCA cites sections 2.2 (10) and 2.12 (18) of the Act. These sections authorize buying and selling obligations of, or insured by, the United Sates or agencies thereof, or securities backed by the full faith and credit of any such agency; depositing excess funds into commercial banks and making other investments as may be authorized under regulations issued by the FCA. FCA's authority to approve other investments are a minor part of the general corporate powers of the FCA, not an unlimited grant of authority for FCA to allow FCSIs to finance virtually any business, community or infrastructure purpose or project.

The generalized wording of the Act in these sections is not intended to allow a massive expansion of credit by mislabeling loans as "investments" thus allowing FCSIs to finance virtually any activity in contradiction to the Act. Courts have ruled against the type of specious logic FCA is using to grant itself sweeping powers: "generalizations are inadequate to overcome the plain textual indication (of a statute)"[5]

[5] United Savings Assn v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988).

The general corporate powers of the Act are not part of the Act's financing authorities:

Policy and Objectives (Sec. 1.1)
Lending Authority (Sec 1.7,
Eligibility (Sec. 1.9),)
Purposes for Extensions of Credit' (Sec. 1.11)
Lending Power (CoBank, Sec. 3.7) , and 'Eligibility' (CoBank Sec. 3.8)

These sections, not the general corporate powers, are where Congress specifically addressed the purposes for which FCS should extend credit and the scope of how broad or narrow such financing should be. Every statute has certain generalizations since Congress expects federal agencies to implement legislation consistent with the Congressional intent and legislative history and thus grants agencies a modest amount of flexibility to manage the day to day and ongoing operations of the agency and the institutions and individuals the agency regulates. Congress does not try to anticipate every single action of every single agency and those regulated by such agencies and attempt to write prescriptive language relating to all anticipated actions.

Furthermore, Congress does not expect agencies to distort generalized wording in an effort to undermine an Act's constraints and purposes. But this is what FCA's preposterous interpretations would do.

FCA Is Abusing Their Regulatory Powers: This immense power grab by the FCA is unwarranted and illegal and an abuse of the discretionary authority granted to FCA. Although the general corporate powers in the Act includes generalized wording (i.e. "invest association funds in such obligations as may be authorized in regulations of the Farm Credit Administration") this language is surrounded by language that explains the immediate context of what is envisioned by "such obligations" and "other investments." For example, the immediately preceding text in section 2.12 indicates that FCS associations can (16) "issue association notes or other obligations to any commercial bank or other financial institution; buy and (17) sell obligations of or insured by the United States or any agency thereof or any banks of the Farm Credit System." The following provision (18) that associations may also "invest funds" in such obligations would most directly relate to the obligations in the preceding paragraphs (i.e., commercial banks, U.S. agencies, etc.) but does not create a massive, unlimited 'catch-all' financing scheme.

FCA's Position is not Logical: To follow FCA's logic, one could just as easily claim the very next provision of this section (19) which allows associations to "*perform such other function delegated to the association by the Farm Credit Bank of the district*" would enable district FCS banks to direct associations to finance cruise boats to Alaska; oil rigs in the Gulf of Mexico or vacation condos in Boca Raton. But these inappropriate interpretations reflect the same irrational logic as FCA utilizes for its catch-all interpretation regarding the generalized 'other investments' wording. In fact, there are other provisions with generalized wording which FCA could interpret in a manner that would also completely change the character and purpose of this GSE, but such interpretations, similar to FCA's self-serving and misguided interpretation via the

recent IM, are nonsensical. Such interpretations are illogical and amount to the FCA playing a game of "gotcha" with Congressional drafters of the Act.

The Statute has not Changed: Courts also review whether there have been changes in statute that warrant significant new interpretations or reinterpretation of regulations. While FCA might try to claim this new "guidance" and the catch-all interpretation of approving virtually any type of loan (investment) no matter how inconsistent with the Act is allowable if FCA deems it to be an "investment" are not major regulatory revisions or reinterpretations, such claims would amount to blatant untruthfulness.

In addition, courts have maintained specific terms of statutes take precedence and override more general terms of a statue.[6] In this situation, to permit the general investment authority to supersede the Act's lending restrictions would turn the Act's entire statutory structure on its head.

For example, although shopping malls are ineligible for FCS loans, shopping malls could be considered an essential community facility under FCA's memorandum's policy directive and could be financed by any FCS association provided the developer issues a "debt security" or "obligation" or "bond."

Further, the U.S. Supreme Court stated: "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general."[7]

In addition, FCA appears to be ignoring the statute's directive in section 5.9 (1) which states the "FCA's approval of regulations to implement the Act shall not be "inconsistent with its (the Act's) provisions." Clearly, the FCA's newly found interpretation of its investment authorities is inconsistent with the Act's constraints on FCSIs and the purposes for which they may extend credit.

Lending Restrictions: In particular, FCA's investment authority must be construed in light of the very extensive lending restrictions applicable to FCS lenders. The Act permits loans to non-farmers and non-farmer-owned businesses in only two instances. First, the Act gives express permission to finance single-family mortgages of non-farmers in communities of less than 2500 population. In addition, the Act permits loans to businesses that provide farm-related services directly related to the on-farm operating needs of farmer and ranchers.

The IM and the current proposed rule's vague and catch-all investment authority which the FCA would incorporate into existing regulations is just as broad, if not broader, than the 2008 rule that FCA withdrew. FCA could, for example, approve "investment" requests for FCSIs to purchase debt securities in "rural" communities without any requirement the issuer be a farmer or rancher, or a citizen acquiring a home mortgage in a community of less than 2,500 population. Nor would there be a limit to financing only single-family rural residences. Nor would these

[6] Fourco Glass Co vs. Transmirra Products Corp., 353 U.S. 222, 228 (1957).
[7] Ibid

"investments" be limited to businesses that provide farm-related services directly related to the on-farm operating needs of farmers and ranchers, as required by law.

The fact Congress did not include investment authorities along with references to financing and eligibility sections clearly reveals Congress never intended for FCA to construe its basic administrative provisions regarding investments as a gateway to creating a vast new financing plot aimed at camouflaging illegal activities under the umbrella of "investments."

Bonds versus Loans: To permit FCS lenders to purchase "debt securities" or "obligations" or "bonds" in the fashion proposed would allow FCSIs to circumvent current lending restrictions. There is nothing in the new guidance memo or the FCA's new proposed investment regulation that clarifies that these "investments" exclude commercial business loans, for example.

Further, **there is no explanation by FCA of the difference between a loan versus an "investment" that otherwise has the same characteristics as loans.** Therefore, FCA's case-by-case approval authority of investments appears to simply mean that FCS lenders seeking to make non-farm business, community or infrastructure loans could simply call these loans "investments," receive FCA approval for making these "investments," and then proceed to crowd out private sector, tax-paying community banks by utilizing the FCS's tax and funding advantages. This is detrimental to rural America.

A bond is: "A written and signed promise to pay a certain sum of money on a certain date, or on fulfillment of a specified condition. All documented contracts and loan agreements are bonds . . . a loan agreement is "a formal document that evidences a loan."[8] Further, another source defines a bond as "an instrument made by a government or corporation for the purpose of borrowing money."[9]

Black's Law Dictionary states: "A bond is a written promise to pay money . . . if a certain time elapses. The fact that an instrument is called a 'bond'' is not conclusive as to its character. It is necessary to disregard nomenclature and look to the substance of the bond itself. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money, at a definite time, with a stated interest, and it makes no difference whether a bond is designated by that name or by some other. There is no distinction between bonds and certificates of indebtedness which conform to all the characteristics of bonds."[10] (Emphasis added) A certificate of indebtedness is essentially a commitment by a borrower to repay a loan.

Bonds are essentially loans, as various sources state. For example: "A bond is essentially a loan (emphasis added) that the issuing organization takes from the investor who becomes the creditor of the issuing organization. In other words it is a debt, which the investor buys from the issuing organization and consequently becomes its creditor."[11]

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[8] See www.businessdictionary.com/definition/bond.html
[9] See http://ardictionary.com/Bond/6144
[10] See Black's Law Dictionary, 7th Edition, Pg 169.
[11] See http://finance.mapsofworld.com/bond

A loan is: "A transaction whereby an owner of property (lender) grants another party (borrower) to use the property for a specified length of time. The borrower promises to return the property (i.e. cash) and to pay a fee (interest) for its use. When the property is cash, the borrower signs a promissory note."

A debt security is: a form of debt financing and credit. The particular form of the contract does not make a "debt security" something other than a loan. In fact, a promissory note is just as much a debt security as other forms of commercial debt."[12] Thus a debt instrument, such as a bond, debenture, or promissory note is issued with a promise of repayment on a certain date at a specified rate of interest.

A debenture is: "A charge, claim, or lien on assets or property, usually as a result of a loan. Financing instruments are defined as: "A document such as a share certificate, promissory note, or bond, used as means to acquire . . . loan capital."[13]

An investment is: "money committed or property acquired for future income"[14] – exactly what lenders do when extending a loan. (Emphasis added as underlined text in preceding definitions)

Therefore, loans are not separable from bonds or the term "investments." FCA cannot rely on very general but limited wording to completely undermine the lending constraints of the statute. **Additional questions for FCA**: If bonds are essentially loans, this raises fundamental questions:

- How can the FCA insist that bonds are investments which are separate from the loan making limitations contained in the Act?
- How does FCA distinguish between loans and bonds?
- Further, where has FCA published this distinction and how has FCA communicated this distinction to FCS institutions?
- Has FCA sought to communicate this distinction to the general public to explain what if any limitations the agency envisions on the scope and eligibility parameters of the "other investments" requests? Given the fundamental importance of this issue, if FCA has not done so, why not?
- Is the FCA asserting it can act in a manner contrary to specific lending limitations within the law based on generalized wording pertaining to investments?

Memorandum and Current Regulatory Proposal Lack Explanation of Overall Scope: There appears to be a wide chasm between the memorandum's open-ended references to

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[12] Dictionary of Finance and Investment Term, 7th Ed., (2006), p.164.
[13] See www.businessdictionary.com/definition/loan-capital.html
[14] See http://www.businessdictionary.com/definition/investment.html

"businesses, communities, and infrastructure" and the proposed regulation's statement that FCA will approve "other investments" at the request of FCSIs.

FCA Memorandum Broader than Original/Withdrawn Proposal: In the withdrawn Rural Community Investments proposal, FCA stated its proposal would allow FCS lenders to "invest" in "health care services, infrastructure, quality-of-life projects" and "other economic opportunities."[15] FCA also mentioned general business investing/lending as a permissible activity even though Congress firmly rejected authorizing such activities during deliberations on the 2008 Farm Bill.

Although the FCA's 2008 proposed rule made brief references to addressing needs of "rural development projects", "other economic development initiatives", "start-up businesses," and "rural entrepreneurs," FCA did not clearly reveal to the public and to Congress that the proposal allowed extensive financing of both small and large businesses. Further, FCA did not release detailed information on the types of projects being funded by FCS and the FCSIs financing those projects. This raised questions regarding the FCA's willingness to provide transparency normally expected of a federal agency accountable to the public. Therefore we ask FCA to respond to the following questions:

- AgStar's pilot project advertised "AgStar Rural Finance" as "working for rural communities and businesses." AgStar advertised financing for "*businesses including light manufacturing and non-agriculture businesses*" and for "housing, including multi-family, low-to-moderate income, apartment complexes, cooperative or senior housing." These activities are not authorized by the Act. Would FCA consider eligible for approval an investment request that allowed these activities if the conditions and information requested in the memorandum and the pending proposed rule were adequately fulfilled?

- Greenstone FCS, serving Michigan and Northeastern Wisconsin, explained in advertising that they were "now able to provide financing for rural community businesses and organizations through its Agriculture & Rural Community (ARC) Bond Program." Greenstone added, "The ARC Bond Program offers flexible terms and conditions structured *to meet your business / organizational needs . . . Financing under this program can be provided for either public or private businesses.*" Greenstone concluded that it will extend credit to "entrepreneurs to help finance the businesses of today and tomorrow." Would FCA consider eligible for approval investment requests that allowed these activities if the conditions and information requested in the memorandum and the pending proposed rule were adequately fulfilled?

- Farm Credit Services of Mid-America advertised: "You may not be actively involved in farming, but farm or land ownership *entitles you* to borrow from FCS for many purposes." Mid-America advertised that these purposes include: *restaurants, inns, manufacturing facilities, commercial buildings, vet clinics, and road graders/contractors.*

[15] FCA Press Release, NR-08-06 (05-08-08); FCA Adopts a Proposed Rule to Authorize FCS Institutions to Make Rural Community Investments; Pg 1

(Emphasis added) Would FCA consider eligible for approval investment requests that allowed these activities if the conditions and information requested in the memorandum and the pending proposed rule were adequately fulfilled?

- Additionally, there was no mention in the previous/now withdrawn 2008 proposal of businesses or other financial transactions needing to be agriculturally oriented versus what FCA stated in its previous Memorandum (Investments in Rural America—Pilot Investment Programs, 01/11/2005) when it listed as eligible "agricultural enterprises" and "agribusinesses". Is it FCA's intention to allow any type of business financing to be eligible for approval if the conditions and information requested in the memorandum and the pending proposed rule were adequately fulfilled?

- If FCA intends to allow financing of "investments" for businesses, does FCA intend to limit those activities to businesses that derive a majority of their income from agriculturally related activities? If so, how will FCA count or classify such income streams?

- Does FCA believe the agency is allowed to approve requests by FCS lenders to make loans/investments in non-agricultural businesses?

- What instances of legislative history and statutory changes can FCA cite to support the agency's position that the limited, general wording referencing FCA's approval of investments authority allows FCA to authorize virtually any type of business investment or other investment activity outside of the law's lending constraints?

- How does FCA envision ensuring these approved "investments" do not take away from loans of community banks or displace community banks vital role of sustaining local economic activity in rural America?

Conclusion: The broad reach of the FCA's memorandum and current proposal does not explain specifically what types of activities would be financed. Further, the brief reference to the FCA approving "other investments" at the request of FCSIs glosses over the extent to which FCA is allowing FCSIs to engage in businesses financing, and community and infrastructure financing not supported by the Act.

FCS lenders, as GSEs, were NEVER intended to be generalized creditors serving a very broad and essentially unlimited array of borrows for an essentially unlimited range of credit purposes. That is the role of the nation's community banks. FCA is trying to usurp the role of other financial institutions (i.e. community banks) on behalf of the greed and profit desires of FCS lenders and their CEOs.

Questions Regarding FCA Investment Memorandum and Proposed Investment Regulation

QUESTIONS

Given the statement by the FCA Chairwoman there has not been **ANY** expansion of lending authorities via FCA regulations (June 25, 2014 hearing) and given the primary expansion of the Act has been the inclusion of RBIC authority, we ask FCA:

- Does the memorandum envision continuing the limitations on FCS's ability to provide credit to businesses for which FCS sought legislative authority?
- If so, why is this not made clear in the memorandum's wording?
- If not, under what authority is FCA expanding FCS's ability to extend credit to businesses for these purposes when Congress refused to authorize these activities for FCSIs?
- Does the FCA interpret its case-by-case investment authority as allowing FCA to approve allowing a broad range of "investments" with businesses that are outside the scope of the lending parameters of the Act?

Additional questions for FCA: If bonds are essentially loans, this raises fundamental questions:

- How can the FCA insist that bonds are investments which are separate from the loan making limitations contained in the Act?
- How does FCA distinguish between loans and bonds?
- Further, where has FCA published this distinction and how has FCA communicated this distinction to FCS institutions?
- Has FCA also sought to communicate this distinction to the general public to explain what if any limitations they envision on the scope and eligibility of the "investment" requests they envision? Given the fundamental importance of this issue, if FCA has not done so, why not?
- Is the FCA asserting it can act in a manner contrary to specific limitations of the law based on generalized wording?

Questions to Understand the Scope of FCA's Memorandum & Proposed Rule:

- AgStar's pilot project advertised "AgStar Rural Finance" as "working for rural communities and businesses." AgStar advertised financing for "*businesses including light manufacturing and non-agriculture businesses*" and for "housing, including multi-family, low-to-moderate income, apartment complexes, cooperative or senior housing." These activities are not authorized by the Act. Would FCA consider eligible for approval an investment request that allowed these activities if the conditions and information requested in the memorandum and the pending proposed rule were adequately fulfilled?

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- What instances of legislative history and statutory changes can FCA cite to support the agency's position that the limited, general wording referencing FCA's approval of investments authority allows FCA to authorize virtually any type of business investment or investment activity outside of the law's lending constraints?

- How does FCA envision ensuring these approved "investments" do not take away from loans of community banks or displace community banks vital role of sustaining local economic activity in rural America?

Additional Questions

- Why does the FCA's IM or proposed investment authority not reference the RBIC authorities as a permissible source of investments for FCSIs?

- Will income from these investments that are tied to real estate or mortgages be tax exempt?

- Where on FCA's website will the public be able to access a list of the approved investment projects; the names of associations operating these projects and a description of the projects?

- If such information is not made available online, how will the public or individuals who are not part of the System be able to learn about the activities and characteristics of the "other investments" approved by the FCA?

- If such information is not publicly available, on what basis could FCA honestly claim that the agency is not running a secretive and illegal investment scheme that reaches far beyond the constraints of the law?