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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1d

Rural Labor; Immigration Reform and Control Act of 1986

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule retains 7 CFR Part 1d, which defines fruits, vegetables, and other perishable commodities as prescribed by section 302(a) of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (hereinafter referred to as "the Act"). This final rule redetermines whether the commodity sod meets the definition of "other perishable commodities" promulgated at 7 CFR 1d.7, in light of the decision and remand of this issue to the Secretary of Agriculture from the United States District Court for the Northern District of Illinois in *Heriberto Morales, et al. v. Richard E. Lyng, et al.*, Civil Action No. 87-C-20522. This rule will assist the Immigration and Naturalization Service (INS) in determining the special agricultural workers to be admitted into the United States for temporary residence.

EFFECTIVE DATE: December 15, 1988.

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SUPPLEMENTARY INFORMATION:

Background

Section 302(a) of the Act states that "seasonal agricultural services" means "the performance of field work relating to planting, growing and harvesting of

fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." 8 U.S.C. 1160(h). This subsection requires the Secretary of Agriculture to publish regulations defining the fruits, the vegetables, and the other perishable commodities in which the field work related to planting, cultural practices, cultivating, growing and harvesting will be considered "seasonal agricultural services" for purposes of the Act.

On June 1, 1987, the United States Department of Agriculture (USDA) published its final rule defining the terms "fruits," "vegetables," and "other perishable commodities," as well as several other terms that were necessary to an understanding of the definition of "fruits," "vegetables," and "other perishable commodities."

In the final rule, USDA defined the term "fruits" as "the human edible parts of plants which consist of the mature ovaries and fused other parts or structures, which develop from flowers or inflorescence." 7 CFR 1d.5. The term "vegetables" is defined as "the human edible herbaceous leaves, stems, roots, or tubers of plants, which are eaten, either cooked or raw, chiefly as the principal part of a meal, rather than as a dessert." 7 CFR 1d.10. The term "other perishable commodities" is defined as "those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of seasonal field work, and have critical and unpredictable labor demands." 7 CFR 1d.7. "Critical and unpredictable labor demands" is defined to mean "that the period during which field work is to be initiated cannot be predicted with any certainty 60 days in advance of need." 7 CFR 1d.3. USDA explained that "critical and unpredictable labor demands" was defined to make it clear that the use of alien workers is predicated upon circumstances which create the critical, yet unpredictable demand for a labor force on short notice. 52 FR 13247 (April 22, 1987). An exclusive list of those commodities that were determined to be subject to critical and unpredictable labor demands was provided within the definition of "other perishable commodities," as well as a list of examples of commodities that were determined to be not subject to critical and unpredictable labor demands. 7 CFR 1d.7. Sod was listed as an example

of a commodity that was not a fruit or vegetable and was determined to be not subject to critical and unpredictable labor demands. *Id.*

On October 21, 1988, at 53 FR 41339-41342, USDA requested public comment on a proposed rule that reexamined whether the commodity sod meets the definition of "other perishable commodities," in light of the remand of those issues to the Secretary of Agriculture from the United States District Court for the Northern District of Illinois in *Heriberto Morales, et al. v. Richard E. Lyng, et al.*, Civil Action No. 87-C-20522 (hereinafter referred to as "*Morales v. Lyng*"). The comment period closed November 7, 1988. USDA received 68 comments on the proposed rule during the comment period. The comments received are discussed below.

Comments

All of the comments received in response to the October 21, 1988, proposed rule urged the inclusion of sod as an "other perishable commodity." Generally, commenters stated that the planting, cultural practices, cultivation, growing and harvesting of sod, while mechanized to some degree, were seasonal, labor intensive activities and were subject to critical and unpredictable labor demands. Most commenters claimed that the planting, mowing, weeding, irrigation and harvesting of sod are labor intensive activities which are unpredictable as to timing, critical as to need, and require the hiring of extra laborers to perform the activities. Many commenters added soil preparation, picking up rocks, netting, selection of sod pieces, rolling and stacking, and scrap removal as additional seasonal activities which were subject to critical and unpredictable labor demands. No commenter described any field work which is performed by a regular employee complement.

In *Northwest Forest Workers Association v. Richard E. Lyng*, 688 F. Supp. 1 (D.D.C. 1988) (hereinafter referred to as "*NWFWA v. Lyng*"), the United States District Court for the District of Columbia upheld the USDA definition of "other perishable commodities" as "those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of seasonal field work, and have critical and unpredictable labor

demands." *NWFWA v. Lyng*, 688 F. Supp. at 5-7. The court upheld also the USDA definition of "critical and unpredictable labor demands" to mean that the period during which field work was to be initiated cannot be predicted with any certainty within 60 days in advance of need. *Id.* USDA explained that "critical and unpredictable labor demands" was defined to make it clear that the use of alien workers is predicated upon circumstances which create the critical, yet unpredictable demand for a labor force on short notice. 52 FR 13247 (April 22, 1987). Thus, to meet the definition of "critical and unpredictable labor demands, the production of a commodity must be subject to a "critical" and "unpredictable" demand for a labor force on short notice. Because this rule must be applied by INS on a uniform basis to determine whether alien applicants may be admitted to the United States as special agricultural workers, this determination must be made on a commodity-by-commodity basis. Thus, USDA must examine the labor demands of each commodity on a national basis as a whole.

In the original final rule, USDA determined that sod production is not sufficiently "seasonal" within the meaning of the USDA definition. USDA defined "seasonal" as meaning "the employment pertains to or is of the kind performed exclusively at certain seasons or periods of the year." 7 CFR 1d.8. In the most recent proposed rule, USDA proposed to determine that sod production does not fall within the definition of "seasonal." 53 FR at 41340-41341 (October 21, 1988). USDA has determined that many operations with respect to sod production are performed generally on a year round basis and not "exclusively at certain seasons or periods of the year." However, upon review of the various operations with respect to sod production, USDA recognizes that certain other practices, at least in some areas, may be limited to certain seasons or periods of the year. Therefore, USDA has examined those operations which are limited, at least in some areas of the United States, to certain seasons of the year to determine whether such seasonal field work creates a critical and unpredictable labor demand for a labor force.

In determining whether a commodity meets the definition of critical and unpredictable labor demands, USDA must examine the degree to which the production of a commodity has been mechanized. There is a clear expression of congressional intent in the legislative history of the Act that the Special

Agricultural Worker (SAW) program was to include as "other perishable commodities" crops which "must be harvested by hand, thereby requiring a large number of workers on short notice," and not "where mechanical harvesters can be used * * *." 131 Cong. Rec. S11322 (September 12, 1985) (statement of Sen. Wilson); see also 131 Cong. Rec. S11325 (September 12, 1985) (statement of Sen. Hatch); 131 Cong. Rec. S11334 (September 12, 1985) (statement of Sen. Gorton); 131 Cong. Rec. S11344 (September 12, 1985) (statement of Sen. Evans); 131 Cong. Rec. S11537 (September 16, 1985) (statement of Sen. Gorton); 131 Cong. Rec. S11606 (September 17, 1985) (statement of Sen. Wilson); 131 Cong. Rec. S11607 (September 17, 1985) (statement of Sen. Gorton); H.R. Rep. No. 99-682, 99th Cong., 2d Sess., Part 1, July 16, 1986, at p. 85. Mechanization affects labor demands in that the more mechanized the production of a particular crop is, the less critical and the more predictable the labor demands are. Highly mechanized crops do not generally experience a critical need for a labor force or short notice.

In *Texas Farm Bureau, et al. v. Richard E. Lyng, et al.*, Civil Action No. M-88-095-CA (E.D. Tex. Sept. 28, 1988) (hereinafter referred to as "*Texas Farm Bureau v. Lyng*"), the United States District Court for the Eastern District of Texas upheld, *inter alia*, the USDA determination to exclude the commodity hay from the definition of "other perishable commodities" because its "labor requirements * * * have been largely met by the use of herbicides and mechanization." *Texas Farm Bureau v. Lyng*, slip op. at 14 (quoting 52 FR at 20374). As recognized by the court, USDA "considered a number of factors in determining whether a commodity had a critical labor demand. The factors included the nature and extent to which the field work activities utilized labor, the importance of the timing of these activities, [the] effect of a failure to perform these activities and the amount of labor needed." *Id.* at 15 (citations omitted). USDA determined that because hay was so largely mechanized, there is no real critical labor demands for large numbers of workers. *Id.* at 16. In addition, USDA determined that the timing of the harvest of hay is less critical than those commodities which would perish and become unmarketable altogether. *Id.* Thus, in that case the court approved of the USDA determination of the relationship between mechanization and criticality and predictability.

In the proposed rule USDA explained that it had determined that sod did not meet the definition of "other perishable commodities" because the production of sod is highly mechanized and does not involve critical and unpredictable labor demands. 53 FR 41339-41342 (October 21, 1988). USDA also determined that labor demands with respect to the production of sod are reasonably predictable more than 60 days in advance, and weather conditions do not create a critical need for additional labor significantly above the level than can be predicted months in advance. *Id.*

USDA found that many of the comments and sources are quite contradictory. For example, one sod commenter, a turfgrass science professor, stated "[t]he majority of sod operations use small walk-behind sodcutters, hand rolling or folding * * *." But another commenter wrote "[i]t is true that people no longer cut and hand roll sod * * *."

One commenter wrote "[netting] must be done without the use of tractors," while a published authority writes "[p]lastic netting can be installed by a [tractor] rig which rolls it out on top of a seeded field." A number of commenters stated that netting must be pegged down by hand labor, while an authority writes "[i]f the netting is laid perpendicular to the irrigation laterals, the pipe can serve as the anchor. Except in high wind areas, wooden pegs are probably not needed." [Turfgrass Sod Production, U. of California, Publication 21451, Stephen T. Cockerham, Superintendent of Agricultural Operations for the University of California, Riverside, 1988, pg 36].

Although it is widely recognized that mowing is done by machines, many commenters stated that mowing is an "extremely labor intensive activity" and involves "high levels of hand labor." Several commenters claim that "we must go back and pick up rocks that are laying on the ground * * * by hand by [sic] laborers." On the other hand, a published authority writes "[a] stone picking machine may be used for stone and rock removal * * *."

Many commenters claimed that it is impossible to predict the timing or the number of workers which would be needed for sod operations, while others stated in their original comments to the proposed rule published on April 22, 1987, "[b]ased on past experience, we can forecast our labor requirements both in terms of dates and number of workers." Some commenters claim "[s]od harvesting is where labor needs are most critical." However, a sod authority comments "[s]od producers

are not highly mechanized—just the cutting and stacking of sod * * *. One commenter stated "[i]n my previous letter of April 30, 1987, my statement regarding that 'labor requirements were predictable' was misconstrued. Based on today's letter, my labor demands are critical and unpredictable." Thus, not only were many of the comments inconsistent with published materials and expert opinions, many of the comments were inconsistent with the comments of other commenters and with comments received previously from some of the same commenters.

The comments indicate substantial confusion concerning whether sod production is highly mechanized as opposed to being a labor intensive operation requiring high degrees of manual labor. An official of one of the plaintiff sod producer organizations commented:

[W]e must perform a variety of activities, all of which require us to hire labor on short notice. The specific activities include preparation of the soil by plowing, disking (sic), chiseling, leveling, rotovating, culti-packing, and harrowing. We are also involved in planting seed, applying fertilizer and harvesting * * *. During the course of the season our work force varied between 18 and 37 seasonal workers.

In 1987, this same commenter wrote:

The sod industry has become quite mechanized over the past several years, but many operations such as irrigation, mowing, harvesting, chemical applications, etc. are still very hand labor intensive.

Many other commenters wrote:

Turfgrass sod production is an extremely labor intensive activity. Mowing, irrigating, fertilizing, planting, spot checking for weeds and foreign grasses and harvesting involve high levels of hand labor.

According to another commenter:

We then perform at least 14 tractor operations to get the crop planted. From planting until harvest begins 9 to 12 months later, we will perform at least 55 more tractor operations. The bulk of these is mowing. To market high quality turf, we must mow it 3 times per week in April, May, and June * * *. Sod harvesting is where labor needs are most critical.

These comments are typical of a large number of commenters which USDA believes confuse the relationship between mechanization and hand or manual labor, and labor intensiveness.

The following dictionary definitions are set out to clarify this confusion:

Manual labor: worked or done by hand and not by machine. [Webster's Ninth New Collegiate Dictionary, Merriam Webster, Inc. 1986].

Mechanize: to equip with machinery esp. to replace human or animal labor. [Webster's

Ninth New Collegiate Dictionary, Merriam Webster, Inc. 1986].

Mechanization: A term of very broad meaning, but essentially dealing with changes in the processes of production which result in the displacement of human labor or human skills by machine operations. [Robert's Dictionary of Industrial Relations, Revised Edition, The Bureau of National Affairs, 1971].

The "specific activities" cited by the commenters above, e.g., plowing, disking, chiseling, leveling, rotovating, culti-packing, and harrowing, are all mechanized operations. The planting of seed and the applying of fertilizer in sod operations also are mechanized operations. The "very hand labor intensive operations" of mowing and chemical applications are also performed by machines. All of the foregoing are clearly mechanized operations and, by definition, are not manual labor. The irrigation and harvesting of sod are also largely mechanized operations, although USDA recognizes that, in addition to machine operations, the use of manual labor may be associated with irrigation and harvesting operations. USDA recognizes also that it is sometimes necessary to spot spray herbicides in sod production, but weed and disease control is accomplished largely by spraying machines.

One authority on sod production provided detailed comments to USDA, which was endorsed by a number of other authorities:

While machines have been adapted to some of the operations on sod farms, sod production can not be described as a highly mechanized operation. The reason for this is the lack of sod producers' ability to accurately predict, 60 days in advance, what he will do and when he will need to do it, to produce his sod.

While USDA has determined that mechanization is a causal factor in creating predictability in terms of the number of workers needed and this determination was accepted in *Texas Farm Bureau v. Lyng*, USDA is unable to discern how the inability to predict the timing and need for future activities in sod production is a causal factor in promoting mechanization, or the lack thereof.

This commenter stated further:

As a result of partial mechanization, the unpredictability of seasonal activities has increased * * *. In fact, the use of the machine driven sod cutter * * * increases the hand labor complement because it can require more men be working to pick up the sod and stack it.

USDA is not persuaded that mechanization makes activities less predictable or increases the labor demands. Clearly the use of labor saving

machinery, such as the machine driven sod cutter, results in a reduced, rather than an increased, demand for labor to perform a comparable amount of work.

A paper apparently prepared especially as a vehicle for responding to the proposed rule was subscribed to by some authorities in the sod field. Apparently, some of these authorities did not understand the context of the regulatory framework in which the issues were being considered. One authority who endorsed the paper stated:

I don't agree with everything in * * * [the paper], but I do agree with the general tenor * * *. Compared to what it used to be, [sod] certainly is [mechanized]. Compared to tomatoes, celery, and other *mechanically* harvested, hand packed crops it isn't. The idea of any field crop being 'highly mechanized' is a delusion perpetuated by engineers and poorly informed casual observers." (Emphasis added).

Another authority who endorsed the paper cited in the above comment stated in his book:

Today, machinery is used to perform almost all turfgrass maintenance practices. [Turfgrass Science and Management, Robert D. Emmons, Delmar Publishers, 1984.]

As explained above, Congress intended the SAW program to include as "other perishable commodities" crops which "must be harvested by hand, thereby requiring a large number of workers on short notice," and not "where mechanical harvesters can be used * * *." 131 Cong. Rec. S11322 (September 12, 1985) (statement of Sen. Wilson).

In summary, although many of the commenters asserted that the production of sod is not largely a mechanized operation, many other commenters stated that sod production is largely a mechanized operation. The published authorities agree with the latter, that sod production is largely mechanized. Thus, after thoroughly reviewing all of the comments and available authoritative sources, USDA concludes that sod production is largely a mechanized operation.

USDA recognizes that while some manual labor is utilized in sod production activities, on the basis of the labor requirements indicated in the comments, USDA has determined that there is not a critical and unpredictable demand for a large number of manual laborers on short notice.

In reviewing the comments and other authoritative sources, USDA notes that while commenters cited the need for extra labor during the "high season," this season encompasses most of the year in all sod producing areas.

According to the American Sod Producers Association, the average sod farm of 125 to 199 acres requires 5 to 9 employees during the "high season," which is generally 9 months in the northern United States, and 3 to 5 employees during the "low season," which is generally 3 months. Other commenters that indicated the number of workers they require for sod production stated that they generally reduce their work force by half during the "low season." This pattern of employment does not indicate a critical and unpredictable demand for large numbers of workers. Rather, it indicates a reduction in employment during the "low season" and a return to the normal work complement during the "high season." USDA believes that the magnitude, labor intensity, criticality, and predictability of the employment pattern with respect to sod production do not constitute a critical, yet unpredictable demand for a large labor force on short notice. Despite this pattern of employment, many commenters argued that specific activities involved in sod production created critical and unpredictable labor demands.

The activities involved in planting of sod vary widely throughout the nation from re-establishment through rhizomes left in the soil following harvest to intensive land preparation and reseeding of a new crop. Similarly, the timing of planting varies widely. Some areas plant on a year round basis, some plant only in the spring and fall, some in the spring and early summer, some plant in the summer, and some utilize dormant planting in the winter. Many commenters contend that the timing of planting is critical and unpredictable while others stated that they are able to forecast with specificity the timing of planting, such as one commenter who stated that "[o]ur planting times are very short. We have about two weeks in late June and again about two weeks in late August, due to the very unpredictable weather conditions, to get our crops seeded." Some authorities find planting less critical and describe planting considerations in terms of it being "preferred" to plant during a certain season and that other times may be "less desirable."

USDA has determined that the planting of sod is not subject to critical and unpredictable labor demands because the planting of sod is largely mechanized. However, USDA recognizes that sod planting is part of an integrated process which may involve land preparation, planting, in some cases netting, and post-planting

irrigation. While some manual labor may be needed to pick up roots and rocks in some cases where not done by machine, land preparation activities do not have critical or unpredictable timing and are primarily mechanized operations.

Several commenters described a need for manual laborers to apply and peg netting. USDA recognizes that if netting is used it should be applied a relatively short time after seeding. However, netting is not critical because it is elective and most growers do not use it. Moreover, the grower has the option of delaying his seeding if he is not prepared to install his netting. In addition, the netting operation does not require a labor force on short notice. One commenter stated that 7 workers could do 20 acres per day. This indicates that the netting operation may be accomplished with the normal work complement.

Although many commenters stated that mowing is an "extremely labor intensive activity" and involves "high levels of hand labor," USDA notes that the scientific literature indicates clearly that mowing is a mechanized activity and does not require a large labor force on short notice. For example, one researcher found "[t]he most common size mower reported was the 5 gang, ground driven unit; however, units from 3-gang to 9-gang were reported." While USDA notes that the frequency of mowing will vary depending on weather conditions, mowing is generally performed by machine operators who are part of the normal work complement of a sod farm, and does not require a large number of workers on short notice.

Many commenters stated that fertilizing was "an extremely labor intensive activity" which "involve[s] high levels of hand labor." However, published authorities indicate that the application of fertilizer is generally a mechanized operation. One authority states, for example:

It is essential that the fertilization of sod be performed by machine or injection into an irrigation system in order to achieve uniform distribution. [Turfgrass: Science and Culture, James B. Beard (Michigan State University), Prentice-Hall, Inc., 1973, pg 450.]

Another authority states:

The majority of fertilizer used on turfgrass is in a dry or granular form. It is distributed with either a drop or rotary spreader. [Turfgrass Science and Management, Robert D. Emmons, Delmar Publishers, 1984.]

USDA has determined that fertilization is a mechanized activity and does not require a large labor force on short notice.

Many commenters described weed control as subject to "extreme labor intensity" which "requires extensive hand labor." One commenter, who submitted a paper written as a comment, describes weed control as:

Weed control in a sod field is a complicated and critical process * * *. Herbicides to control grass weeds are not readily available and are not completely effective. Grass weeds are generally controlled by intense and labor demanding practices * * *. Sod farmers * * * have to use hand laborers to manually apply non-selective herbicides on individual grass weeds in order to eliminate them.

Although some commenters indicated that they used hand labor to control weeds, another sod authority writes:

Most weeds * * * can be eliminated by fumigating * * *. Relatively simple machines can inject the fumigants and lay the tarp in one operation. Forty eight hours later the tarp can be removed and seed can be planted.

* * *

Under normal conditions, the sod grower can expect a fumigation to be effective for 4 to 6 years, sometimes longer, before pest population builds to problem proportions. [Turfgrass Sod Production, U. of California, Publication 21451, Stephen T. Cockerham, Superintendent of Agricultural Operations for the University of California, Riverside, 1988, Pg 30, 31].

In addition, USDA has been informed by an agronomist with a state University Department of Agronomy that "[t]here is little or no hand weeding" in sod production. USDA believes that weeds are generally controlled by the use of herbicides applied with machines. Subsequent re-infestations of weed pests may be dealt with on an ongoing basis by the normal work complement. Even in the worst possible case, a sod farm operated under generally accepted management practices should not experience sudden weed infestations, immediately prior to harvest, of critical proportions. However, even this de minimis case would be unlikely to constitute a critical demand for a labor force on short notice.

Several commenters described the need to control insect pests and disease on an immediate basis. One commenter describes this situation as:

A disease such as Pythium blight can destroy thousands of square meters of sod in less than 24 hours if not treated immediately. Disease control on a sod farm generally requires a highly mobile labor force to control turfgrass canopy humidity and soil moisture, such that the disease is suppressed and the need for chemical control is minimized. Last year alone, numerous cases of diseased sod resulting from infrequent mowing were reported to the University of Illinois. This is due to sod producer's inability to predict the

growth rate of grass and having too few seasonal laborers to meet the demand. (Emphasis added).

However, another sod expert has written:

For turfgrass disease to occur, there must be a virulent pathogen, susceptible turfgrass, and proper environmental conditions. Sod producers reported few incidents of turf diseases in 1976 and 1979. During the summer of 1980, an outbreak of gray leafspot was reported in St. Augustinegrass sod in south Alabama. Diseases did not appear to be a serious problem on most commercial turfgrass farms in the state. [Commercial Turfgrass Sod Production in Alabama, Alabama Agricultural Experiment Station, Auburn University, Gale A. Buchanan, Director, Bulletin 529, August 1981, pg 20].

USDA recognizes that insect infestations and the outbreak of disease may, in extreme circumstances, be critical. However, because such incidents are controlled by the application of chemicals by machine, they do not create a critical and unpredictable labor demand.

Several commenters stated that sod must be harvested at the optimum time and noted that various factors could cause delays in the field work performed by the sod industry. They argued that such delays created critical and unpredictable labor demands.

USDA has determined that each crop's optimum harvest period is of relatively long duration, thus militating against the creation of critical and unpredictable labor demands. The comments indicate that the harvesting period for sod is quite long, and that even if the harvest is delayed substantially, it nevertheless remains marketable at reduced quality. One commenter stated for example:

From the time of seeding, our sod takes a minimum of 9 months to prepare for sale, and if not sold within two years of seeding, is discounted in price and not classified by us as nursery sod.

While many commenters asserted that the harvesting of sod accounted for the greatest labor demand, one authority, while urging the inclusion of sod as an "other perishable commodity," stated that harvesting and stacking was the *only* mechanized activity in sod production. He contended that other machine operations such as "land preparation, seeding or sprigging, fertilization, and pest control" are labor intensive. Another authority found that:

[a]ll growers with more than 100 acres (in Alabama) used one or more tractor-mounted sod cutters. These machines cut, rolled, and palletized the sod in one operation.

Many commenters stated that because they were unable to forecast customer's

orders from day to day, that the harvesting of sod is critical and unpredictable. One authority commented that:

[f]ew farms cut enough sod on a daily basis to be able to support a full crew of laborers needed for harvesting * * * [T]he rate of harvest can not be spread out over a season or over a single day in order to keep a full crew busy.

The comment of the manager of a 900 acre sod farm which operates eight months of the year was typical of such comments, but provided somewhat greater detail:

Due to * * * extreme fluctuation[s] in weather conditions, our labor needs are *very* unpredictable * * *. [O]ur farm cannot predict with any certainty when field work is to be initiated 60 days in advance. We cannot even predict from one day to the next many times what our labor needs will be * * *. One day we might cut 100,000 or 200,000 square feet of sod and the next day or a few days none or very little at all * * *.

USDA notes that, assuming this farm harvests only half of its 900 acres each year, it would be necessary to harvest an average of 115,000 square feet per weekday. This suggests that the harvesting operation on this farm is largely a continuous operation. USDA also recalls that in 1987, this same commenter states:

Within reasonable limits, the seasonal nature of labor requirements are quite predictable. Based on past experience, we can forecast our labor requirements both in terms of dates and number of workers. These figures are predicated on sod harvesting requirements, nurturing [sic] of immature sod and preparation of new fields for future years' sod growth.

The manager of a 500 acre sod farm commented:

[T]o harvest sod, it takes a crew of four men about 8 hours/acre, or 32 man hours/acre * * *.

* * * * *

This year we employed about 35 total field laborers. Assuming that this grower harvests half of his 500 acres each year, his normal work complement could, if it were critical to do so, harvest the year's crop in 52 man days. It seems more likely that the limit of harvesting capacity in this case is the number of harvesting machines available rather than the amount of labor.

Three sod farmers who in 1987 commented "[b]ased on past experience, we can forecast our labor requirements both in terms of dates and number of workers" (emphasis added), stated in their comments in 1988:

I recall that in my past letter I stated that labor needs can be predicted in advance. This statement is true in the fact that we

know we will need laborers from March through November of each year. *But the number of workers depends upon the demand of the local market and also the weather conditions.*

In addition, some of the commenters who stated in 1987 that they could forecast their labor needs, stated in their most recent comments:

The comment in my letter to Mr. Lyng of May 4, 1987, about being able to forecast our labor needs for sod just meant that we have a general idea of how many workers we're going to need for the season. Any grower who can't do that is in bad shape.

Others stated:

In my previous letter of April 30, 1987, my statement regarding that "labor requirements were predictable" was misconstrued. Based on today's letter, my labor demands are critical and unpredictable.

In *Morales v. Lyng* the court noted that similar conflicting statements could be reconciled:

In short, all of the comments could be reconciled in a plausible fashion and interpreted to mean that: general seasonal demands of extra laborers are predictable, but often within seasonal parameters, the demand for extra field workers is unpredictable.

Slip op. at 6. These comments indicate that sod producers can, within reasonable limits, predict how many workers they will need during the "high season" and the "low season." The particular tasks that these workers may perform each day may not be predictable, but the need for a certain number of workers at certain times of the year may be predicted with reasonable certainty.

A sod authority states that:

Sod harvesting, however, is done only as long as it takes to fill that day's orders. With mechanization, the speed of harvesting has been increased. This * * * makes the scheduling of sod harvesting unpredictable * * *. [T]he timing of sod harvesting is critical. It must be done quickly, and usually in the morning, late afternoon, or on a cloudy day * * *. It must be done when the soil moisture is about 0.3 bars matric potential. Excess water will retain the heat from respiration, due to microorganisms, and results in cumbersome sod handling. It can take less than an hour for a pallet of sod to perish if the producer is not carefully monitoring the sod before and during harvest.

This indicates that harvesting generally is completed in much less than a day, freeing those workers to perform other tasks.

One of the few authorities who has published a description of the labor requirements of sod production found:

Farms having more than 100 acres were of sufficient size to require several laborers

throughout the production process. Therefore, once these growers found a reliable employee, they generally offered full time employment at a reasonable wage to ensure employment. [Commercial Turfgrass-Sod Production in Alabama, Alabama Agricultural Experiment Station, Auburn University, Gale A. Buchanan, Director, Bulletin 529, August 1981, pg 30].

USDA believes that sod producers do not limit workers to specific tasks, rather, workers are utilized to perform various tasks. Because producers need reliable employees, producers generally hire such workers on a full time basis as part of their regular work complement. This suggests that producers do not rely on large numbers of temporary workers to perform tasks such as sod harvesting.

Some harvesting machines cut, roll, and palletize the sod in one operation, while others require two manual laborers as "stackers". USDA believes that the stackers are usually part of the regular employee complement. One authority describes a typical harvest operation:

Throughout the morning, additional orders to be cut that day are taken to the sod harvest crew * * *. Harvest * * * seldom takes all day. When the stackers are finished with the harvest, they clean the harvester and take empty pallets to the harvest field for use the next day. Then they return to the production crew at their regular hourly rate of pay. (Emphasis added). [Turfgrass Sod Production, U. of California, Publication 21451, Stephen T. Cockerham, Superintendent of Agricultural Operations for the University of California, Riverside, 1988, pg 62].

USDA concludes that sod producers do not recruit an additional workforce each time an order is placed by a customer, particularly when the work must be done only in the morning or later afternoon. Instead, USDA believes sod producers make reasonably accurate forecasts, which can be made 60 days in advance of need, of the number of workers needed for a regular work complement adequate for their anticipated harvesting labor demands as well as other activities. This complement may be reduced during any historically slack period according to past experience. The members of the regular employee complement are not limited to certain specific jobs, but rotate among different jobs according to current need. Thus, for example, if not busy with the labor associated with harvesting activities, a worker could be engaged in weeding, picking up rocks, moving irrigation systems, etc. Conversely, workers normally engaged in other activities may be utilized for harvesting in the event of unusually heavy consumer demand.

Because sod is not harvested manually, the ability to accelerate

harvesting activity is limited by the capacity of the equipment available. The number of workers required to harvest sod is limited by the number of machine sod cutters available. In the event the total orders exceed the capacity of the mechanical harvesters, there is no indication that sod growers revert to the practice of hand cutting sod. Thus, the availability of an additional labor force would be of no value, and the harvesting of sod does not create a critical and unpredictable labor demand.

Many commenters stated fluctuating consumer demand made it impossible to forecast harvest requirements even from one day to the next. USDA believes that this condition, rather than creating a demand for a labor force on short notice, requires sod producers to maintain the necessary equipment and regular employee complement sufficient to meet anticipated consumer demand. Otherwise, the sod industry would have to have a pool of unemployed laborers on constant standby ready to work on a day to day basis. USDA does not believe that sod products have operated in that manner in the past, nor is the SAW program, which is not remedial, intended to enable them to do so in the future.

For these reasons, USDA concludes that the harvesting of sod does not create critical and unpredictable labor demands.

Many commenters indicated that they had employed undocumented workers in the past and have come to rely on such workers for much of their labor needs. As indicated clearly in the legislative history of the Act, the SAW program is not remedial and was not intended to legalize all undocumented alien agricultural workers.

Many commenters cited the need for irrigation as an example of a condition which caused critical and unpredictable labor demands. An official of the American Sod Producers Association claimed that:

It is my understanding that an entire sod field can be destroyed in hours or days from the point of seeding to harvest. Sod is extremely susceptible to the effects of too much or not enough rain and numerous varieties of weed, disease and insects. If the required field labor is not available to address these needs immediately, sod crops are lost.

USDA recognizes that many plants, including some sod, may drown or scald if inundated. However, such a criterion would be too broad to determine inclusion within the definition of seasonal agricultural services. USDA believes that if Congress had wanted such a universal criterion to be used they would have simply said that "all

crops" should be included. Moreover, USDA believes that under generally accepted farm management practices, such a flooding condition should only occur under extreme conditions or in the case of inadequate drainage or water management on a farm. In either case, damage which may occur in a matter of hours is not likely to be significantly alleviated regardless of labor availability.

The need for irrigation is quite varied and more difficult to analyze. There are many different types of irrigation systems whose labor requirements are quite varied. Irrigation during the establishment phase of sod production is customary and USDA does not believe that a prudent farmer would plant seed or sprigs unless he was prepared to irrigate. However, as explained above, the timing of the planting is not critical. Thus, the irrigation of new plantings is neither critical nor unpredictable. The pre-harvest irrigation of sod is similarly predictable and the consequences of not doing so is not critical to the plants. If the grower is unable to perform the pre-harvest irrigation, he has the opportunity to delay his harvest schedule. In the arid regions of the nation irrigation is performed on a regular and ongoing basis. Thus, the need for irrigation, while it could become critical, is not unpredictable in much of the nation. In some areas, irrigation due to a lack of rain can be expected less than a year. USDA recognizes that in some parts of the nation an unpredictable need for irrigation could develop as a result of drought. Such a condition may be met by several types of irrigation systems which do not require an additional labor force, by the use of the regular work complement, and by the rearrangement of other work schedules to accommodate the need to irrigate. The ability to irrigate may not be limited by the labor supply but the equipment available. USDA notes that following the record drought of 1988, which Congress deemed a national emergency for agriculture, only four commenters noted a crop loss; one of one percent, two of five percent (one of whose losses were new seedlings), and one of 21 percent. One of these commenters explained that the drought forced him to layoff workers rather than create a need for an additional work force on short notice:

[T]his summer lost 25 or 30 acres of sod because we couldn't irrigate enough. I couldn't afford to keep on the workers I let go just to do irrigating; there just wouldn't have been enough for them to do between moving

pipes * * *. I had to let the [4] part timers and two of the [9] full-timers go because of the drought. There just wasn't enough harvesting work to keep them. Even the crew I did keep I had to make work for * * *. The only reason I didn't let more of them go was because I was afraid I'd never be able to get them back.

The experience of this commenter suggests that even with the prospect of some crop loss, the need for irrigation may not always be economically justified when compared to wage costs. In such cases the need for labor cannot be reasonably held to be critical.

After carefully evaluating all of the above as well as all other comments received, USDA concludes that the irrigation requirements of the sod industry do not create a critical and unpredictable labor demand.

Some commenters stated that sod is highly perishable after harvest and must be installed within a few hours to two days of the time it is removed from the field. USDA recognizes this statement to be correct, however, the installation of harvested sod is not performed on agricultural lands and does not meet the definition of "field work".

Twenty-seven commenters asserted they would not have access to the H-2A Temporary Agriculture Worker program unless sod was considered to be an "other perishable commodity." There is not connection between the H-2A program and "perishable commodities". Moreover, sod producers can and do utilize the H-2A program to meet their labor needs.

After thorough review of labor demands with respect to sod field activities from planting through harvesting, the comments received, the authoritative sources contained in the administrative record, and the record of *Morales v. Lyng*, USDA has determined that sod field work is not subject to critical and unpredictable labor demands. Thus, USDA has determined that sod does not qualify for inclusion as an "other perishable commodity."

Regulatory Impact

The Assistant Secretary for Economics has reviewed this rule in accordance with Executive Order No. 12291 and has determined that it is not a major rule. Under the framework of the Act, the Immigration and Naturalization Service (INS) will use this proposed rule to assist it in determining which special agricultural workers will be admitted into the United States for temporary residence. Thus, the primary benefits of this proposed rule are internal to the operation of the United States government.

This action, in and of itself, will not have a significant effect on the economy and will not result in a major increase in costs or prices for consumers, individuals, Federal, state, or local government agencies, or geographic regions; or have a significant effect on competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

This rule reexamines whether sod meets the definition of "other perishable commodities" for purposes of clarifying the term "seasonal agricultural services" as it relates to sod. The rule does not contain any compliance or reporting requirements, or any timetables. The rule will assist the INS in determining the special agricultural workers to be admitted for temporary residence. Thus, the rule, in and of itself, will have no significant effect upon small entities.

Paperwork Reduction Act

This rule does not require additional procedures or paperwork not already required by law. Therefore, the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3502, *et seq.*) are inapplicable.

National Environmental Policy Act

This rule will not have an impact upon the environment.

Good Cause for Making Rule Effective Less Than 30 Days After Publication

In its October 6, 1988, order, the United States District Court for the Northern District of Illinois in *Morales v. Lyng*, ordered the Secretary to publish this final rule by November 28, 1988. On November 23, 1988, the court extended this deadline to December 15, 1988. On the basis of this order, good cause is found to make this rule effective less than 30 days after publication in the Federal Register.

List of Subjects in 7 CFR Part 1d

Immigration, Rural labor.

Accordingly, Part 1d—Rural Labor—Immigration Reform and Control Act of 1986—Definitions is retained as promulgated.

Done at Washington, DC, this 13th day of December, 1988.

Richard E. Lyng,
Secretary of Agriculture.

[FR Doc. 88-28948 Filed 12-14-88; 8:45 am]

BILLING CODE 3410-01-M

FARM CREDIT ADMINISTRATION

12 CFR Parts 611, 612, 618 and 620

Organization; Personnel Administration; General Provisions; Disclosure to Shareholders

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA) Board adopts final regulations amendment 12 CFR Parts 611, 612, 618, and 620 which implement certain provisions of the Agricultural Credit Act of 1987 (1987 Act), Pub. L. 100-233. The amendments to Parts 611 and 618 are conforming changes which implement the statutory amendments that eliminated the Farm Credit District boards. Other amendments to Part 611 add regulations regarding eligibility of candidates for bank and association director positions; standards for the director election process; mergers of System institutions; stockholder reconsideration of previously approved mergers; contents of disclosure statements in connection with stockholder votes on the transfers of Farm Credit Bank (FCB) authorities to Federal land bank associations (FLBAs); and other procedures and provisions for disclosure requirements relating to mergers and reorganizations. Finally, regulations are added to Part 620 regarding disclosure requirements for candidates for bank directors.

EFFECTIVE DATE: These regulations shall become effective after the expiration of 30 days from publication during which either or both Houses of the Congress are in session. Notice of effective date will be published.

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SUPPLEMENTARY INFORMATION: On February 16, 1988, the FCA Board published an Advance Notice of Proposed Rulemaking requesting public comments on the implementation of the new authorities for institutions to reorganize contained in the 1987 Act (53 FR 4416). On June 6, 1988, the FCA Board published for comment proposed regulations to implement 1987 Act provisions regarding the election of

directors and candidate disclosure statements; transfers of lending authorities from FCBs to FLBAs; special reconsideration of mergers that occurred between December 23, 1985, and January 6, 1988; merger and reorganization proposals required by the 1987 Act; and, the new or amended disclosure and procedural requirements related to merger and reorganization proposals for banks and associations (53 FR 20637).

Included among the proposed regulations was a regulation which implemented section 411 of the 1987 Act, which requires FLBAs and production credit associations (PCAs) that share substantially the same territory to submit merger proposals to their stockholders. The FCA Board, taking into consideration the comments received on that regulation, determined that in light of the statutory deadlines applicable to section 411 mergers, there was a compelling need to adopt the final regulation related to those authorities as quickly as possible, since any delay could impede compliance with the statutory deadlines. Accordingly, on October 5, 1988, the FCA Board adopted a final regulation, 12 CFR 611.1145, which implements the section 411 merger authorities (53 FR 39079).

The FCA received comments on the remainder of the regulations from the Farm Credit Corporation of America (FCCA) on behalf of its member institutions, the FCB and Bank for Cooperatives (BC) of Texas, the Springfield FCB and BC, a senator on behalf of the PCA and FLBA of the Fourth District, the South Atlantic PCA, the Association Coordination Committee of the Third Farm Credit District, and the North Coast FLBA and North Coast PCA. All of the comments were analyzed and considered before adoption of the final rule by the FCA Board. After the expiration of the comment period, FCA also received additional comments from 1 bank and more than 30 associations that were specifically directed at the appropriate requirements for the official names of associations that have both short-term and long-term lending authority. These associations are referred to in these regulations as Agricultural Credit Associations (ACAs).

A. Eligibility for Membership on Bank and Association Board and Subsequent Employment

Section 611.310(a) of the proposed regulations would provide that no person is eligible for membership on the board of directors of a bank or association who has been, within 1 year preceding the date the term of office

begins, a salaried officer or employee of any Farm Credit institution. The FCCA commented that regulatory prohibitions against subsequent service are only appropriate when a person holds a position in which they are afforded the ability to subsequently secure the second position. Therefore, the FCCA recommended that the regulation include a 1-year prohibition against a senior officer of an institution becoming a director of such institution or a director of an institution from becoming an officer or employee of the same institution. In addition, the FCCA recommended that the regulation include a 1-year prohibition against a director of a bank becoming an officer of an affiliated association. The FCCA expressed the view that the regulation should not prohibit a person who has served as an officer or employee of an institution in one district from serving as a director of an institution in another district. The FCCA argued that it was not reasonable to presume that persons would conduct their activities for an institution in one district in a way that would be designed to promote their subsequent election to the board of directors of an institution in another district. The FCCA also stated that such subsequent election would be subject to numerous factors totally out of the control of an officer of an institution in a different district. Finally, the FCCA believed that there should be no regulatory prohibition, or waiting period, for any nonsenior officer who subsequently becomes a director of an institution.

The FCA Board disagrees with the position of the FCCA that there is no sound reason to apply regulatory prohibitions to all officers and employees of institutions and to apply the prohibition beyond district boundaries. The underlying policy in the regulation continues to reflect statutory requirements that previously applied to members of the board of directors of Farm Credit Districts. These requirements were contained in section 5.1 of the Act prior to its repeal by the 1987 Act. While this section was repealed in connection with the elimination of the district boards, there is no published legislative history indicating that Congress intended to refute the underlying policy bases for this prohibition. Taking into consideration these previous statutory requirements, the FCA Board determined that it would be in the best interests of all Farm Credit institutions and their stockholders to preserve these requirements in order to promote the highest standards of conduct for officers

and directors of Farm Credit institutions. These restrictions are necessary to minimize the potential for not only real, but also apparent, conflicts of interest that can arise when an officer or employee of a Farm Credit institution seeks to become a director of an institution, or when a director of an institution seeks to become an officer or employee of such institution. The FCA Board also believes that retention of these prohibitions is especially important during this critical transitional period during which significant reorganizations are taking place within the System.

The FCA Board agrees with the recommendation of the FCCA that a director of an FCB should be prohibited from subsequently serving as an officer or director of an association with which the FCB has a discount or agent relationship. The FCA Board agrees that there could be a significant potential for abuse if a bank director were able to obtain a position as an officer or employee of an association over which such director could have exerted considerable influence as a bank director. Accordingly, the final regulation has been amended to include this requirement.

The FCCA recommended that § 611.310(a) be expanded to prohibit a director of a bank or association from subsequently serving as an officer of a service corporation. The FCCA believes that such a prohibition would be consistent with the prohibition against the directors of banks or associations from serving as officers of other banks or associations. This comment raises a broader question as to the appropriate regulatory limitations for membership on the boards of directors of service corporations, and specifically whether the prohibitions in § 611.310 should be applicable to officers, employees, and directors of service corporations and what, if any, exceptions should be provided. The FCA Board determined that it would not be appropriate to amend this regulation to expand its applicability to service corporations in the absence of additional public comments on the specific issues raised by the FCCA and the broader question suggested by the comment. The FCA Board will address this issue during its normal regulatory review process and will propose, for public comment, amendments to the regulations as appropriate.

The FCCA observed that while § 611.310 contains many of the provisions previously contained in section 5.1 of the Act, it does not include the previous statutory prohibition

against officers or employees of FCA serving as directors of banks. The FCA Board notes that these regulations do not include such provisions since there are other Federal statutes and regulations which have restrictions on post-employment activities governing all Federal employees, including employees of the FCA. These authorities include 18 U.S.C. 207, 5 U.S.C. Appendix, and 5 CFR Part 737. FCA implementing regulations are contained in 12 CFR Part 601. In addition, section 5.8 of the Act contains restrictions on the post-employment activities of members of the FCA Board. The FCA will in the course of its normal regulatory review process, determine whether modifications or additions to those regulations are necessary and appropriate.

The FCCA recommended that § 611.310 be amended to prohibit a convicted felon or person who is mentally incompetent from becoming a director of a bank or association. The FCCA also recommended that this section be amended to clarify items which were left unclear in the proposed regulation and in repealed section 5.1 of the Act. Specifically, the FCCA sought clarification of when a person "becomes" legally incompetent and when a person is "finally" convicted of a felony. In addition, the FCCA expressed a view that § 611.310 is inconsistent in part with the section 5.65(d)(1) of the Act. The FCCA observed that while § 611.310(b) prohibits a person convicted of a felony from continuing to serve as a director, section 5.65(d)(1) would permit a person convicted of a felony involving dishonesty or a breach of trust to serve as a bank director, with the prior written consent of the FCA. The FCCA stated that the FCA regulations must acknowledge the existence of a statutory exception to the intended general rule that no convicted felon serves as a bank director.

The FCA Board disagrees with the FCCA's interpretation of section 5.65 of the Act. Prior to the enactment of section 5.65 of the Act, section 5.1 of the Act expressly prohibited a person from serving on a district board if the person had been convicted of a felony or adjudged liable in fraud. This express prohibition, which applied only to members of a district board, would have prohibited a person from being elected to such position if that person had been previously convicted, or would have prohibited such a person from continuing to serve on a board if such board member had been subsequently convicted.

Section 5.65 was enacted by the 1987 Act in connection with the establishment of the Farm Credit System Insurance Corporation. This section provides that it is unlawful, except with the prior written consent of the FCA, for any person convicted of any criminal offense involving dishonesty or a breach of trust to serve as a director, officer, or employee of any insured System bank. This section further provides that if any bank willfully violates that prohibition, such insured bank shall be subject to a penalty of not more than \$100 per day during which time the violation occurs. Section 5.65 applies not only to directors of institutions but also to their officers and employees, and imposes a penalty, not on the offending official, but rather on the institution.

By the adoption of 12 CFR 611.310(b), the FCA Board has determined that it will not provide its consent to the service of any convicted felon on the board of directors of a bank or association and this prohibition will apply for any felony conviction, including those involving dishonesty or a breach of trust. The FCA Board believes that this regulatory provision, which is similar to the one previously contained in section 5.1 of the Act, must be continued to ensure the integrity of and public confidence in the operations of Farm Credit institutions.

As a technical matter, the FCA Board concurs with the suggestion of the FCCA that § 611.310(b) be amended to clarify that a convicted felon is ineligible to be elected to a board. In addition, the FCA Board agrees that the use of the term "finally" for convictions should be deleted, consistent with the terminology used in section 5.65 of the Act. This will eliminate any possible ambiguity as to whether a person may run for election or continue to serve as a director following a conviction but prior to the exhaustion of all appeals. Once a person has been convicted, § 611.310 would prohibit such person from being elected or continuing to serve as a director. Such person's eligibility could only be returned if the conviction were overturned and the person subsequently acquitted or the charges dropped. The FCA Board agrees that there is some lack of specificity as to when a person "becomes" legally incompetent but that lack of specificity is inherent in the fact that there are numerous ways in which legal incompetence can be determined under the various State laws. The FCA Board does not believe it is necessary to clarify this provision at this time in the absence of any specific problems involving its interpretation.

B. Impartiality in the Election of Directors

Section 611.320 requires each bank and association to adopt policies and procedures which assure that elections of broad members are conducted in an impartial manner. The FCCA commented that it was unfair to expose an institution to civil money penalties or other legal actions for unfair electoral processes occurring despite the institution's reasonable effort to assure impartiality. Accordingly, the FCCA recommended that this section be amended to only require institutions to adopt policies and procedures "necessary to provide reasonable assurance that elections of board members are conducted in an impartial manner." The FCA Board agrees that institutions cannot be held accountable if parties beyond the control of the institution engage in unfair electoral processes. However, this regulation addresses the requirement that the institution must have policies, procedures and controls in place that, if adhered to, will assure that elections are conducted in an impartial manner. To clarify this point, the final regulation has been amended to require institutions to adopt policies and procedures "that are designed to assure that" the elections of board members are conducted in an impartial manner. The FCA will review those policies and procedures in the course of its normal examination process to determine if the regulatory requirements have been met. If, in the course of an election, an institution fails to adhere to or implement its policies and procedures, the FCA will consider any appropriate actions.

The FCCA also inquired why paragraphs (b) and (c) of § 611.320 are applicable to all Farm Credit institutions, including service corporations, while paragraphs (a), (d) and (e) are only applicable to banks and associations. The FCCA commented that all these paragraphs should be applicable to all Farm Credit institutions. The FCA Board agrees with the FCCA comment and notes that this omission was a technical error in the proposed regulation. As noted by the FCCA, § 611.320 replaces provisions previously contained in § 612.2200, which was applicable to all Farm Credit institutions including service corporations. The final regulation has been amended accordingly.

C. Confidentiality in the Election of Directors

Section 611.330 requires banks and associations to adopt policies and

procedures that assure confidentiality in the election of board members and prohibits the use of signed or otherwise voter-identifying ballots or proxy ballots. The FCCA commented that the regulation should clarify what must be held confidential. The FCCA also pointed out that the language of the Act regarding confidentiality of voting applies only to "lending institutions of the Farm Credit System," and not other institutions.

The FCA Board agrees with the FCCA's comment that the regulation should clarify what types of information and materials generated in the election process must be kept confidential. To address this issue the final regulation has been amended to specify the required scope of policies and procedures designed to maintain the confidentiality of the election process.

The FCA Board concurs with the observation of the FCCA that section 4.20 of the Act only addresses the confidentiality requirement for "lending institutions." However, the FCA Board, in the exercise of its regulatory responsibility, determined that a similar confidentiality requirement should be applicable to all Farm Credit institutions, including FLBAs which are not direct lenders, and service corporations. The Board believes that the stockholders of all institutions, whether those institutions lend or not, are entitled to the same level of confidentiality in the exercise of their voting franchise.

The FCCA also expressed the view that § 611.330 should provide for the release of election related materials in the event that an election is contested. The FCA Board notes that § 611.330(d) authorizes the FCA to require an institution to release election related materials. The principal circumstance under which this requirement would be imposed would be in the event an unsuccessful candidate contested an election by notifying the FCA. In light of the FCCA comment, the final regulation has been amended to specifically note that election materials may be released for review in the event of a contested election.

The North Coast FLBA and North Coast PCA commented that the prohibition against signed proxy statements in paragraph (b) was not consistent with the provision of paragraph (c) which permits a stockholder to revoke a proxy prior to balloting at a stockholders' meeting. The FCA Board understands the difficulty that arises in reconciling the statutory prohibition against the use of signed ballots with the need for stockholders to be able to revoke proxies, and the need

to identify stockholders in those situations where votes are weighed according to the stockholders equity ownership. Section 611.330 (b) and (c) set out procedures that will comply with the Act and still permit institutions to ascertain that votes are cast only by persons eligible to do so. To preserve a stockholder's right to withdraw a proxy vote, in accordance with section 611.330(c), the institution will have to retain all proxy ballots unopened until the stockholders who attend the annual meeting are given an opportunity to withdraw any proxy ballots that have been mailed.

D. Security in the Election of Directors

Section 611.340 requires banks and associations to adopt policies and procedures relating to the security of election-related material, and a required retention period for records, ballots, and other materials. The FCCA reiterated its comment made with respect to § 611.320 regarding the applicability of these requirements to all Farm Credit institutions, not just banks and associations. The FCA Board agrees with the comment of the FCCA for the reasons stated in response to the same comment regarding § 611.320, and the final regulation was amended to provide for its applicability to all Farm Credit institutions.

Section 611.340 requires each institution to adopt policies and procedures that assure the security of ballots, proxy ballots, and records in the election of board members. The FCCA commented that the scope of coverage of this provision may be too narrow and may not include other election-related material such as "envelopes marked as part of the voting process." While it is clearly the intent of this provision to include all election records and related materials, the FCA Board is concerned that, as evidenced by the FCCA comment, this provision could be read too narrowly. Accordingly, the final regulation has been amended to require that policies and procedures address the security of "all records and materials related to the election of board members, including, but not limited to, ballots, proxy ballots, and other related materials."

Section 611.340(c) requires institutions to safeguard ballots and proxy ballots prior to and subsequent to an election. In addition, this section requires election records to be retained until the end of the director's term of office. The FCCA commented that the retention period was excessive, and recommended that the retention period be reduced to 1 year. The FCA Board disagrees that the retention period should be reduced. The

essential purpose of the retention period is to ensure that during any time a director is in office the institution or the FCA will have access to the election materials to resolve any questions that arise regarding the election of such director. The FCA Board also notes that the FCA used these procedures and this retention period when the FCA was responsible for conducting elections for district boards. While there is some recordkeeping and storage burden imposed, the FCA Board believes that this burden is minimal when compared with the benefits derived from having access to materials in the event of a challenge to procedures involved in the election of a board member.

Section 611.340(d) requires each institution to verify the validity of ballots before a public announcement is made of the election results. The FCCA inquired as to the scope of the verification requirement imposed in the regulation. The FCCA commented that verification should be a function of the tellers committee and that unless an election is challenged, no other party should be permitted to review the ballots. The FCCA also requested that the regulation be clarified to ensure that banks are not involved in association elections.

The FCA Board agrees that the only parties responsible for verifying the results of the election should be the tellers committee or a similar group, as provided for in the election procedures of the institution. To clarify this point, the final regulation has been amended to specifically require the institution to have election procedures which provide for the establishment of a tellers committee or other designated group of persons who are responsible for validating ballots and proxies and tabulating election results. The final regulation has also been reworded to clarify that each institution and its officers, directors, and employees are prohibited from making any public announcement regarding the results of an election before the tellers committee or other designated group has verified the results of the election. In response to the FCCA's final comment, the FCA Board notes that the regulation does not provide a basis for a bank to be involved in an association's election process and therefore no further amendment to the regulation is necessary.

E. General Statement on the Farm Credit System Organization

Part 611, Subpart D, contains only one section, § 611.400, which describes the organization of the Farm Credit

institutions in general terms. The proposed regulations would delete that section, which does not have any substantive effect, as part of a general reorganization of FCA regulations designed to eliminate duplicative, unnecessary, or redundant materials. The FCCA commented that § 611.400 should be retained since it provides a "more understandable and complete brief statement of the System's integral nature than any other single provision in the Act or regulations." The FCA Board does not agree with the need to retain this section or any other sections in the FCA regulations which serve no legitimate regulatory purpose. It is noted that there are various official and unofficial documents published by Farm Credit institutions and the FCA that contain general statements regarding the organization and operation of Farm Credit institutions. Those types of publications are informative and useful in providing the public with a general overview of the operations of Farm Credit institutions. The FCA Board believes there is no need to include those types of general provisions in the regulations since they have no substantive effect.

F. Transfers of Authorities From Banks to Associations

Sections 611.500-611.525 set forth the procedures and the approval and voting requirements for the transfer of certain authorities from FCBs to FLBAs under section 7.6 of the Act. The FCCA commented that most issues relating to transfers of lending authorities are common to sections 7.6 and 7.8 of the Act and section 411 of the 1987 Act and should be treated under a single comprehensive regulation. The North Coast expressed the contrary viewpoint, believing that the transfers of authorities under the various sections of the Act are dissimilar and should not be treated under the same regulation. The FCA Board continues to believe that these two types of asset transfers must be treated differently. The transfers and assumptions under section 7.6(a) of the Act are voluntary actions on the part of the stockholders of both the banks and associations that are parties to the transactions, while the transfers under section 7.8 of the Act and section 411 of the 1987 Act are required as the result of a merger between an FLBA and a PCA. Sections 611.500-611.525 prescribe the procedures to be followed and the disclosures required when transfers of lending authorities are voted on by stockholders in the absence of merger activity.

Both the FCCA and North Coast noted that the proposed regulation assumes

that when lending authority is transferred from a bank to an association that assets will also be transferred. The FCA Board notes that neither the Act nor the proposed regulation mandates a transfer of assets in connection with a transfer of lending authority. The FCA Board believes that the decision to transfer assets at the time lending authority is transferred is a matter that should be negotiated between the banks and associations involved, taking into consideration their respective needs and operating capabilities. To eliminate any confusion on this point, § 611.515(b)(6) and § 611.520 (a) and (b) have been amended to clarify this issue.

The FCCA expressed the view that § 611.505 should incorporate standards for FCA review and approval of proposals to transfer lending authority. Similar comments were made by the FCCA in responding to the FCA Board's Advance Notice of Proposed Rulemaking. Rather than include evaluative criteria in the regulations, the FCA Board continues to believe that each transaction should be evaluated according to the specific circumstances presented. As discussed in greater detail in response to the same comment regarding § 611.1010, this position is consistent with procedures used for many years in approving other types of corporate reorganizations.

The FCCA noted that § 611.510 authorizes each institution's stockholders to vote on the proposed transfer of authority "in accordance with the institutions' bylaws." The FCCA commented that the regulations should specify that when an association votes as a stockholder of the bank, it casts a number of votes equal to the number of the association's stockholders. The FCCA pointed out that these are the requirements contained in sections 5.17(a)(2), 7.0, and 7.12(a)(3) of the Act. The proposed regulation was silent on the issue of whether or not weighted voting is used in these circumstances and did not specify the voting requirements for association stockholders. The FCA Board agrees that the statutory requirements applicable to such votes clearly provide for weighted voting by associations, and to avoid any ambiguity the FCA Board has amended the final regulation to expressly restate those statutory requirements.

The FCCA suggested that the regulations regarding the transfer of authorities from banks to associations should address the question of approval at the bank level of loans to association directors and of certain large loans

based on a percentage of association capital. The FCA Board disagrees with the need for a new regulation to address this issue since 12 CFR 614.4470 currently specifies the approval requirements for director loans, employee loans, and certain large loans, and is applicable to all associations. The FCCA also suggested that the regulations should recognize the impact of transferred lending authority on the capital adequacy of the institutions involved. The FCA Board agrees that the effects of the proposed transaction on the capital adequacy of the institutions should be disclosed. The disclosure of such effects is provided for by the requirements of § 611.515(b) (3), (6), (10) and (12), and other regulations.

The FCA Board adopted two technical amendments recommended by the FCCA which provide for the adoption of resolutions "approving", rather than "proposing", the transfer of authorities, and require the bank and association to forward to the FCA a certified record of the stockholder vote rather than a certified copy of the adopted resolution.

The FCA Board disagrees with two other technical comments offered by the FCCA. The FCCA stated that regulations should require representations and warranties respecting the quality of any assets transferred to an FLBA. The FCA Board notes that the regulations do require the disclosure of the quality of any assets transferred but do not require any warranties regarding the quality of such assets. The extent and nature of warranties or representations, if any, regarding the quality of assets, must be agreed to by the parties in the plan of transfer. The FCA Board agrees that if warranties are given regarding the quality of assets, such warranties must be disclosed. Accordingly, § 611.520(b) was amended to include this requirement. The FCCA was also concerned that the regulation does not clearly establish that the board of directors of either the bank or the association could rescind the transfer under § 611.520. The FCA Board believes the context of the regulation in its entirety, and the specific language in question, make it clear that when either party rescinds its resolution of approval under the circumstances specified in the regulation the transfer will not be consummated. However, to eliminate any ambiguity regarding this point, the final regulation has been amended to specifically provide that the rescission of a resolution by the bank or the association will void the transfer.

G. General Authorities and Requirements Related to Bank Mergers, Consolidations and Charter Amendments

Section 611.1000 sets forth general requirements for the contents of bank charters and general authorities for obtaining amendments to charters. Section 611.1000(c) provides that the FCA may make changes to bank charters as may be necessary or expedient to implement the provisions of the Act. The FCCA commented that paragraph (c) should be revised to conform to the provisions of sections 1.3(b) and 3.0(a) of the Act, which provide that the authority of the FCA to amend charters may only be exercised in a manner "not inconsistent with the provisions of the Act."

It is noted that the specific statutory language which was advocated for inclusion by the FCCA has been deleted from the statute by the Agricultural Credit Technical Corrections Act of 1988, Pub. L. 100-399. However, the deletion of this statutory language does not affect the specific authorities of the FCA to amend bank charters which are contained elsewhere in the Act. For instance, section 5.17(a)(2) of the Act authorizes the FCA Board, after consultation with the boards of directors of the banks involved, to require two or more banks to merge if the FCA Board has determined that any one of such banks has failed to meet its outstanding obligations.

The FCA Board agrees that the FCA is only authorized to exercise functions provided for in the Act and is not empowered to take any action which is inconsistent with the Act. That limitation on FCA's powers is an implicit requirement in every section of the regulations governing FCA action and for that reason was not restated in the proposed regulation. However, in order to eliminate any concern regarding this matter the FCA Board amended the final regulation to include an appropriate limiting phrase in paragraph (c) to ensure that there is no misunderstanding regarding the authority of the FCA to amend charters of banks.

H. Bank Charter Amendment Procedures

Section 611.1010 sets forth the procedures to be followed in order for a bank to obtain amendments to its charter. Section 611.1010(a) lists the types of amendments that can be obtained to a charter of a bank. The FCCA commented that the regulation should include a fourth item providing for "any other change that is properly

the subject of a bank charter." The FCA Board agrees with this comment and the final regulation has been amended accordingly.

Section 611.1010(b) requires a bank seeking a charter amendment to submit an appropriate resolution of its board of directors, together with supporting documentation, to the FCA for preliminary approval. The FCCA commented that, as a technical matter, some charter amendments are not subject to stockholder approval and therefore this section should be clarified to provide that the submission to the FCA shall be "for preliminary or final approval, as the case may be." The FCA Board agrees with the need for this technical change and the final regulation has been amended accordingly.

Section 611.1010(c) provides for FCA review and approval of requests for charter amendments. The FCCA commented that the regulation should specifically require the FCA to "expeditiously" review materials and provide for "prompt" notice of any reasons for disapproval. In addition, the FCCA recommended that this section set forth the standards used by the FCA in reviewing the proposal. The FCA Board concurs with the intent expressed in the first comment but does not believe a specific amendment to the regulation is necessary. The FCA makes every effort to process charter amendments and any other documents requiring FCA action as expeditiously as possible and in accordance with any applicable statutory deadline. With regard to the second comment, the FCA Board does not agree with the need for, and does not see any benefit to be derived from, attempting to set forth specific standards for the review and approval of charter amendment applications. As a general matter, the FCA is charged with the administration of the Act and with promoting the safe and sound operations of Farm Credit institutions. In addition, the Act empowers the FCA to exercise certain specific authorities relating to the operations of Farm Credit institutions. It would not be possible or practical for the FCA to try to delineate all of the considerations that are involved in reviewing applications for charter amendments. Any attempt to do so would only create the false impression that the list was exhaustive. Rather, the FCA provides clear guidance to institutions regarding the requirements for obtaining specific types of charter amendments through detailed regulations regarding the contents of required documents relating to such matters as mergers and territorial adjustments. For these reasons, the FCA

Board believes that no change to the regulation is necessary or appropriate.

Section 611.1010(d) sets forth the requirements for stockholder approval of certain bank charter amendments. The FCCA made the same comment regarding voting requirements as was made with respect to § 611.510. For the same reasons set forth with regard to that section, the FCA Board agrees with the comment and has amended the final regulation accordingly.

I. Requirements for Merger or Consolidation of Banks

Section 611.1020 implements the provisions of sections 7.0 and 7.12 of the Act which provide for mergers and consolidations of banks. The FCCA stated that the regulation should be clarified "to provide for a section 7.12 merger of the Farm Credit Bank in one district with a merged Farm Credit Bank/bank for cooperatives in another district." The FCA Board disagrees with the need for the suggested change since § 611.1020(a) is merely an introductory provision which restates the statutory authorities under which bank mergers can occur and does not describe what types of mergers are authorized under the Act.

Section 611.1020(b) provides that banks proposing to merge or consolidate shall submit to the FCA the same documents that are required by 12 CFR 611.1122(a)-(e) and 611.1123, for mergers of associations. The FCCA stated that several of the requirements in the referenced sections applicable to associations would not apply to bank mergers, such as the requirement for FCB approval. To resolve the discrepancies, the FCCA recommended that the regulation be amended to require that the documents submitted in connection with the bank mergers shall be "substantially similar in format and content" to the documents itemized by regulations governing association mergers. The FCA Board agrees that there may be some provisions of the referenced sections relating to the bank review and approval of the association merger documents which are not applicable in the case of a bank merger. However, the documents submitted in connection with bank mergers must comply with the express requirements of those regulations rather than being "substantially similar" to the documents required by the regulations. The FCA Board notes that the ambiguity in the proposed regulations was caused by the inadvertent reference to § 611.1122(a)-(e), rather than § 611.1122(a) and (e). Accordingly, the FCA Board amended the final regulation to correct this

technical error, and in addition, to clarify that in reading those referenced sections, the term "bank" shall be substituted for the term "association."

Section 611.1020(d) sets forth the procedures for obtaining final approval of a bank merger and the required documents to be submitted to the FCA, including the requirement for submission of copies of the articles of association for the bank. The FCCA commented that the statutory provisions governing banks, unlike those governing associations, do not include references to articles of associations. The FCA Board agrees with the FCCA comment and has amended the final regulation to delete this requirement.

J. Board of Directors of an Agricultural Credit Bank

Section 611.1030 provides for the establishment of a board of directors of an agricultural credit bank (ACB), which is a bank formed by the consolidation of a Farm Credit Bank and a bank for cooperatives. The FCCA commented on the use of the term ACB and also made the same comment regarding the use of the term "agricultural credit association (ACA)." The FCCA assumed that the references to ACBs and ACAs were only generic references and did not require institutions to actually use those terms. Several other commenters expressed concern that the required use of a corporate name that did not permit immediate recognition of these entities as institutions of the Farm Credit System would negate much of prior years' public relations efforts to create name identification, as well as incur the cost of changing trademarks and other corporate identifications. The FCCA recommended that merged associations should have the option to use as their official name either "Farm Credit Services" together with an appropriate geographical designation, "Farm Credit Association" with an appropriate geographical designation, or some other appropriate name utilizing the word "association."

The FCCA correctly noted that the references to "agricultural credit association" and "agricultural credit bank" in these regulations, and in other regulations promulgated by the FCA to date, were used in order to ensure that one can identify the various regulatory requirements applicable to different institutions. It would be impossible to know whether a regulatory provision regarding, for instance, limitations on the terms of a loan, was applicable to PCAs, FLBAs or an association resulting from the merger of a PCA and FLBA unless the regulation used different

names to identify which associations were subject to that provision.

Thus, these regulations do not, by their terms, establish any requirements for the official names of associations. However, during the comment period on these regulations, the FCA Board has been required to review, for preliminary approval, certain proposed mergers of PCAs and FLBAs. Several of these merger proposals provided that the resulting association would be referred to as a "Farm Credit Association." The FCA Board advised these associations that the name "Farm Credit Association" could not be used since the inevitable use of the acronym "FCA" would be confused with the name of the agency. Since the Board did not have the opportunity to develop a comprehensive proposal regarding the official names of institutions in light of the 1987 Amendments, the FCA Board advised the merging associations that, consistent with these proposed regulations, they should use the name "agricultural credit association." Now, based on a thorough evaluation of this issue and the many public comments it has received, the FCA Board has addressed the questions regarding official names of banks and associations in a comprehensive manner.

With the exception of the provisions of section 413 of the 1987 Act regarding the National Bank for Cooperatives, the 1987 Act and the Act do not expressly require any of the various types of banks and associations to use a specific name in its official title. However, prior to the 1987 Act, the Act referred to each of the different banks and associations by using specific names such as "production credit association," "Federal land bank association," and "bank for cooperatives." Based on these statutory references, the FCA, in granting charters to institutions, has required that the official names of institutions include the appropriate name used in the statute. Thus, for instance, associations chartered under Title II of the Act were required to use production credit association as part of their official name.

Until a few years ago, banks and associations transacted business using only their official names to identify themselves. Then, an effort was undertaken to develop a common identifying name that could be used by any bank or association which would identify the institution's affiliation with other Farm Credit institutions. The name selected for this purpose was "Farm Credit Services." That name eventually came into use to a greater or lesser extent among institutions throughout the

country. The use of "Farm Credit Services" appears to have been particularly popular among associations operating under joint management because it enabled the two associations to be identified by a single name. FCA advised institutions that it did not object to an institution identifying itself through the use of this trade name, but that the use of the name in communications and official documents would have to be accompanied by the official name of the institution.

Enactment of the 1987 Act, particularly the provisions authorizing the merger of unlike banks or associations, has caused the FCA to reevaluate its policies regarding the official names of institutions. This reevaluation was especially necessary in light of the growing public acceptance of the term "Farm Credit Services." The Board has concluded that institutions should have the maximum degree of flexibility possible in proposing official names for their institution and should not have to use trade names that are more commonly accepted than their official names. At the same time, the official name of an institution should always be one that can be readily identified by the public as belonging to an institution affiliated with the System. In addition, there must be a simple way for the public and the FCA to be able to identify the name as belonging to one of the various types of institutions regulated by the FCA. For instance, one must be able to know whether a bank can lend to cooperatives, like a bank for cooperatives, or whether an association can only make short-term loans, like a PCA.

The FCA Board has determined that each of these concerns can be addressed through a policy regarding official names that combines the authority to use historically accepted names with the emerging acceptance of the term "farm credit," together with an appropriate use of acronyms. This policy contains the following elements. The FCA Board will issue charters for institutions which contain the statutorily sanctioned names "production credit association," "Federal land bank association," "bank for cooperatives" and "Farm Credit Bank." If an institution requests an official name that does not incorporate one of those terms, the official name must include the acronym for the appropriate term after the name. For instance, the Production Credit Association of North Central Jersey could request a change in its name to "Farm Credit Services of North Central Jersey, PCA." The Board will also issue charters for institutions that contain the

name "agricultural credit bank," for a bank formed by the merger of an FCB and BC, the name "agricultural credit association," for an association formed by the merger of a PCA and FLBA, and the name "Federal land credit association" for an FLBA that has direct lending authority. If such an institution requests an official name that does not include the appropriate term, the name must be followed by the acronym "ACB," "ACA" or "FLCA." For instance, and FLBA that has acquired direct lending authority could use names such as "Farm Credit of Central City, FLCA," or "Federal Land Bank Association of Central City, FLCA."

As discussed above, the FCA Board has adopted this policy position at this time, which will be expressed in a formal policy statement, because of the numerous mergers and other reorganization proposals that are pending. The FCA has never promulgated specific regulations governing the names of institutions in the past since such matters have been addressed on an individual basis in connection with specific request for approvals. However, the Board is considering whether it would be beneficial to adopt comprehensive regulations in this matter which would provide general guidance to institutions. In the course of reviewing this matter, the Board will consider any views it receives from interested parties on the need for regulations regarding this topic.

K. Creation of New Associations

Section 611.1040 sets forth the requirements for the creation of new associations, including PCAs, FLBAs and ACAs. The FCCA commented that this section implies that ACAs do not have the authority to make long-term real estate loans and recommends that the regulation be amended accordingly.

Section 611.1040 merely identifies the procedural requirements necessary for obtaining charters for associations and is not an attempt to specify the various powers, duties, and authorities of those associations, which are matters addressed throughout other FCA regulations. For instance, the specific lending powers of associations, including ACAs, are addressed in a proposed regulation approved by the FCA Board on September 28, 1988 (53 FR 44438). However, to eliminate any ambiguity regarding the interpretation of § 611.1040, a technical amendment was adopted in the final regulation which deletes the reference to the authorities of ACAs.

L. Requirements for Mergers or Consolidations

The proposed regulation would amend § 611.1122(e) by requiring the inclusion of additional materials in the disclosure statement distributed to stockholders in connection with mergers. The FCCA questioned why 3-year financial projections should be mandatory, since it would be likely that there would be factors beyond the control of institutions that could have a material impact on those projections. The FCCA commented that if such projections are mandated, the agency should provide instructions regarding their preparation and, in addition, should provide a "safe harbor" rule which would protect an institution if the statement was prepared with a reasonable basis and was disclosed in good faith.

The FCA Board agrees with the FCCA comment and notes that the inclusion of 3-year financial projections in the disclosure statement distributed to stockholders was a technical error in the proposed regulation. The 3-year financial projections were not intended to be included under § 611.1122(e). They were intended to be supplemental material submitted to the affiliated banks and to the FCA as an aid in the approval of the merger proposal. The final regulation has been amended accordingly.

The FCA Board disagrees with the FCCA suggestion that the regulations governing the preparation of financial projections include a "safe harbor" rule to protect institutions in the event they may want to include this information in disclosure statements distributed to stockholders. As stated above, financial projections are required as additional material to be used by affiliated banks and the FCA to aid in the review and approval of merger proposals, not as disclosure documents to be distributed to stockholders. The FCA Board recognizes that other Federal regulators permit the inclusion of forward-looking financial information in stockholder disclosures, if prepared in accordance with rules governing their preparation and presentation. The Board is concerned that very little benefit, but much harm, could result from the inclusion of prospective financial statements in stockholder disclosures in such an unsettled and dynamically changing System environment as the current one, no matter how "reasonable" the assumptions or other basis used to prepare and present such projections. However, the Board believes the suggestion merits further study and will consider any comments or recommendations it receives on this

subject during its normal regulatory review process and will propose amendments to the regulations as appropriate.

M. Merger or Consolidation Agreements

The proposed regulations included amendments to § 611.1123 regarding the content of association merger agreements. Section 611.1123(a)(9) requires merger and consolidation agreements to include the capitalization plan and capital structure of the new institution and a statement that such plan would comply with all FCA regulations and be approved by the stockholders of the institution. The FCCA commented that the regulation appears to contemplate that the institution's capitalization plan, i.e., the board and management strategy for complying with the capital regulations, must be included in the bylaws and submitted for stockholder approval. The FCCA asserted that this is contrary to the requirements of section 4.3A of the Act, which does not require capitalization plans be included as part of the bylaws. The FCCA stated that section 4.3A only requires that the bylaws will "enable the institution to meet the capital adequacy standards." The FCCA asserted that an institution's capitalization plan is a key element of its business strategy and that requiring the institution's stockholders to approve the plan would be "intolerable."

The FCA Board agrees with the FCCA's comment that the Act does not require the institution to include its capitalization plan in the institution's bylaws and amended the final regulation to delete this requirement. However, the bylaws must comply with capitalization bylaw regulations at 12 CFR 615.5220-5240. The final regulation continues to require that the merger agreement include the capitalization plan of the resulting entity. This requirement is necessary to ensure that the parties to a merger agree on the capitalization plan which will be used by the institution to achieve its minimum capital standards. The FCA Board believes that the stockholders of the institutions involved in a merger must be provided access to this information in connection with their review of the disclosure documents to determine their position with respect to the merger. This regulation does not in any way alter the prerogative of the board of the new institution to make adjustments to its capitalization plan as it deems appropriate.

Section 611.1122(g) of the proposed regulations sets forth the procedures necessary to ensure that stockholders

can exercise their right to reconsider a vote. The FCCA commented that this section would have the effect of enabling the FCA to independently determine on what date a merger would be effective, and that such authority is not consistent with the provisions of section 7.9(b)(5) of the Act. That section provides that if a petition for reconsideration is not filed within 30 days following the notification of the merger vote, the merger shall be effective in accordance with the date specified in the plan of merger. The FCA Board agrees that the proposed regulation was subject to the interpretation advanced by the FCCA. Since that was not the intent of the regulation, it has been amended to address the concern. The intent of the proposed regulation was to ensure that the stockholders would be afforded the opportunity to file motions for reconsideration and to enable the FCA to process the documents and grant the final approval after the expiration of the reconsideration period. The proposed regulation was not intended to imply that the FCA could establish any effective date for a merger. However, there are instances in which the necessary documentation is not provided to the FCA in time to permit a final approval before the proposed effective date. The regulation must provide for this situation by enabling the FCA to delay the effective date when necessary. The FCA Board has amended § 611.1122(g) and added a new paragraph (k) which address these issues by providing that the effective date of a merger or consolidation shall be a date which is not less than 50 days after the date of mailing of the notification of results of the stockholder vote. This 50-day period takes into consideration the statutory 30-day waiting period, a period of 5 days from the date the notification is mailed to provide for delivery, and 15 days for FCA's reviews of the documents. If no petition to reconsider the vote is filed within 35 days after the date of mailing of the notification to stockholders, the merger or consolidation shall be effective upon final approval by the FCA on the date specified in the merger agreement, or at such later date as may be required by the FCA to grant final approval. For the same reasons, the FCA Board has amended § 611.505 (d) and (e) to provide the same requirements with respect to the effective dates for transfers of lending authority between FCBs and FLBAs.

Section 611.1123(c) authorizes stockholders to file a petition to reconsider a vote and further provides

that if such petition is approved by the FCA, a special stockholders meeting will be held to conduct the reconsideration vote. The FCCA sought a clarification of the extent of the "FCA's approval" of a stockholder petition and commented that such approval should be limited to determining whether the petition complies with statutory requirements. The FCA Board agrees that the FCA approval set forth in the proposed regulations is limited to determining whether the petition meets the requisite statutory standards and did not intend to expand such approval to other areas. In light of the FCCA comment, the FCA Board amended the final regulation to provide that FCA review of a stockholder petition is for the purpose of determining whether the petition complies with the requirements of section 7.9 of the Act.

Section 611.1123(c) provides that if a proposed merger is disapproved upon reconsideration by the majority of the stockholders of any one of the institutions that is a constituent to the merger, the merger shall not take place. The FCCA stated that this provision is inconsistent with section 7.9 of the Act. In support of its position, the FCCA stated that section 7.9(b)(4) of the Act provides that a majority of stockholders voting, in person or by written proxy, may disapprove a previously approved merger. The FCA Board notes that it was not intended that the proposed regulation establish a different standard than is specified in the statutes and has amended the final regulation to clarify this point.

The FCCA also commented that § 611.1123(c) purports to authorize all stockholders to vote on a reconsideration vote rather than limiting such voting to "stockholders eligible to vote." The FCA Board does not agree that this is a reasonable interpretation of the regulation. There are references to stockholder votes in numerous FCA regulations and in most instances the regulations do not repeat the words "stockholders eligible to vote." There is no need to continually restate this phrase because the Act and the bylaws of the institutions specify the voting eligibility requirements for stockholders. This section is not designed to, nor does it, confer eligibility to vote on stockholders who are not authorized to vote under the Act or the bylaws of the institutions.

The FCCA commented that the proposed regulations do not clarify what the effective date of a merger would be if a reconsideration vote were held and the merger were approved upon reconsideration. In response to this

comment, the Board notes that since the parties proposing the merger are responsible for proposing a merger date, it is assumed that they would also be responsible for proposing a second effective date for the merger after a reconsideration vote. For this reason, this matter was not specifically addressed in the proposed regulation. However, in light of the FCCA comment, the Board determined that this matter should be specifically addressed in the regulation. Accordingly, the final regulations include a new § 611.1122(k) which provides that if a petition for reconsideration is timely filed, the constituent institutions shall agree on a second effective date to be used in the event the merger or consolidation is approved on reconsideration. To ensure that the FCA has an opportunity to review the documents and grant final approval, the regulation further provides that such an effective date shall be not less than 15 days after the date of the reconsideration vote.

The FCCA commented that § 611.1123(c) does not clarify that only stockholders eligible to vote on a merger can be eligible to sign a reconsideration petition. The FCCA noted that the statute also does not clarify this point and requested that the FCA use its regulatory authority to address this concern. As discussed earlier, the FCA believes it is clear that when the statute and regulations refer generally to an event that requires stockholder approval, those statutory or regulatory authorities do not confer eligibility to vote on stockholders who are not otherwise eligible under the Act or the bylaws of the institution. Similarly, it would be incongruous to permit a stockholder to sign a petition for reconsideration if such stockholder were not eligible to vote on the merger or the reconsideration of the merger vote. However, the FCA Board believes that there may be some ambiguity regarding this question and has amended the final regulation to clarify that the petition must be signed by 15 percent of the stockholders who are eligible to vote of one or more of the constituent institutions.

N. Territorial Adjustments

Section 433 of the 1987 Act permits the stockholders of an FLBA or PCA whose chartered territory adjoins the territory of an FCB that the association is not affiliated with to petition the FCA to incorporate the petitioning association into the territory of the adjoining FCB. The FCA did not propose regulations governing this process because the statutory provisions are clear and the

FCA's existing regulation § 611.1124 adequately addresses the requirements for transfers of territory. Section 611.1124 sets forth the requirements and procedures to be followed in order for associations to modify charters for the purpose of transferring territories to other associations. In its comments, the Farm Credit Bank of Texas (Texas FCB) agreed that the requirements of section 433 of the 1987 Act are clear, and that § 611.1124 provides guidance for voluntary reassignment of an association to an adjoining FCB. However, the Texas FCB suggested that the FCA should clarify the extent to which the individual requirements of § 611.1124 apply to section 433 reassignments, and recommended a number of clarifying amendments to § 611.1124.

The FCA Board agrees that not all of the provisions of § 611.1124 apply to section 433 reassignments. The FCA Board notes, however, that the opportunity for an association to petition for a section 433 reassignment is a temporary one that will end on January 6, 1989. In light of this abbreviated timeframe, the FCA has provided requesting associations with specific instructions which clarify the applicability of the § 611.1124 requirements to section 433 reassignments. The FCA took into consideration the recommendation of the Texas FCB and other parties in developing those instructions.

O. Special Reconsideration of Mergers

Sections 611.1190 and 611.1191 provide for the reconsideration of the voluntary mergers and consolidations of associations that occurred after December 23, 1985 and prior to January 6, 1988. The proposed regulations provide that a reconsideration can be initiated by a stockholder petition or by the adoption of a resolution by the existing association board of directors. Petitions can provide for either the withdrawal of one or more predecessor associations from the current association, or for the general reorganization of an existing association that was formed by the merger of three or more predecessor associations. Director resolutions can provide for the adoption of a general reorganization of the existing association.

Section 611.1192 establishes that petitions must be signed by at least 15 percent of the voting stockholders of the existing association who were stockholders of each of the predecessor associations that seek to withdraw, or by 5 percent of the total number of voting stockholders of the existing association if the petition seeks a

general reorganization of the existing association that was formed by three or more predecessor associations. In their comments, the FCCA and South Atlantic PCA agreed that the board of directors should be authorized to adopt a resolution proposing a general reorganization, but expressed the view that no statutory basis exists for allowing 5 percent of the stockholders to seek a general reorganization of the existing association. The South Atlantic PCA went on to state its concern regarding the disruption to operations and added expense that would result from these special reconsideration petitions. The Fourth District PCA and FLBA commented that the 5 percent initiative was an arbitrary expansion of the specific criteria provided in the Act.

The FCA Board does not agree with the commenters that no basis exists for allowing 5 percent of the stockholders to seek a general reorganization of the existing association. The FCA has general rulemaking authority to ensure that the overall intent of the statute is given effect. Toward that end, the FCA Board has determined that it is appropriate to provide a mechanism by which the expression of a substantial interest among the stockholders of an existing association to reorganize their association can be realized. The FCA Board believes that if a substantial interest for reorganization exists among an existing association's stockholders, a petition of 5 percent of the total voting membership would give a more cost-effective and less disruptive mechanism for allowing the realization of that interest than by requiring the stockholders to file numerous petitions for the individual withdrawal of many associations from the merged associations. It is also noted that this 5 percent threshold only applies to an association formed by the merger of three or more associations. In those instances, the number of shareholders who have to sign such a petition would approximate the number of shareholders who have to sign a petition for the withdrawal of an association using the 15 percent requirement. The FCA Board also notes that a proposal to withdraw or reorganize, whether initiated by a 5 percent petition, a 15 percent petition, or the adoption of a resolution by the board of directors, can only be consummated if it is agreed to by a majority of the stockholders who would be served by the separating or reorganizing association.

Section 611.1192(c) requires each petition to describe the manner in which the existing association will be reorganized and the territory in which

each proposed separate association would operate. The FCCA suggested that the regulation should more clearly indicate what flexibility there is for petitions to create a new territory that is different from the territory of a predecessor association. The FCA Board believes that the present language addresses this concern by placing no limits on the flexibility that a petitioning group of stockholders has in proposing the new territories for the associations that would result from a reorganization of the entire association. However, the Board agrees that the regulation should clarify that, consistent with the intent of section 7.9 of the Act, when an association withdraws from a merged association, it will have the same territory it had prior to the merger.

Section 611.1192(d) requires a special reconsideration petition to be certified and forwarded to the FCA within 5 working days of its receipt by the association. The South Atlantic PCA expressed the view that since § 611.1193 requires the petition to be accompanied by the stockholder information statement and other documentation, 5 days is not sufficient time to complete the process. The FCA Board agrees with this concern, which resulted from the requirement in § 611.1193 that the petition be accompanied by the disclosure materials at the time it is filed with the FCA. To address this matter, § 611.1193 has been amended to provide that the association shall have 60 days after the filing of the petition to submit the disclosure materials and other documentation to the FCA for approval. The Board made a conforming change to § 611.1195 relating to the date of the stockholder vote.

Section 611.1192(e) provides that no petition will be considered by the FCA if filed later than 1 year from the effective date of the regulations. The South Atlantic PCA has assumed that the non-statutory initiatives included in the regulations on special reconsideration would also be limited to the 1-year period. The assumption made by the South Atlantic PCA is correct—no petitions would be considered by the FCA Board under Subpart O after the 1-year period. The FCA Board notes, however, that Subpart O only refers to special reorganization petitions or resolutions related to mergers or consolidations that occurred after December 23, 1985 and before January 6, 1988, and that the opportunity for association boards of directors to submit reorganization proposals to the FCA for review and approval in anticipation of stockholder votes is

neither limited nor removed by § 611.1192(e).

Section 611.1194 sets forth the procedures for FCA review and approval regarding special reconsideration requests. The FCCA commented that the FCA should incorporate standards for FCA review and approval. Rather than include evaluative criteria in the regulations, the FCA Board continues to believe that each transaction should be evaluated according to the specific circumstances presented. For the reasons set forth in response to the same comment regarding § 611.1010, the FCA Board believes that no change to the regulation is necessary or appropriate. The FCCA also commented that the term "promptly" be inserted to appropriately clarify each phase of the notification process. The FCA Board agrees with the intent expressed by the FCCA, but does not believe that a specific amendment to the regulation is required. The FCA makes every effort to process requests for approval and any other documents requiring FCA action as expeditiously as possible and subject to applicable statutory requirements.

Section 611.1195 sets forth the requirements for stockholder votes related to special reconsideration petitions or resolutions. The Fourth District PCA and FLBA and the FCCA expressed the view that Congress imposed a more stringent voting requirement for special reconsideration votes, which would require that a majority of all of the stockholders eligible to vote must approve the reconsideration, not just a majority of the stockholders voting on the proposal. The FCCA based its view on the fact that the specific language of the Act regarding the voting requirements on special reconsideration is somewhat different from the language used elsewhere in the Act concerning other stockholder votes. The FCA Board agrees with this comment and has amended the final regulation accordingly.

Section 611.1197 of the proposed regulations provides that the notice of meeting to consider and act upon petitions must be accompanied by an information statement that shall be prepared by the existing association with the assistance of the petitioners, or at their discretion, by the petitioners. The Fourth District PCA and FLBA, the FCCA, and the South Atlantic PCA commented that this section was unclear as to who would have the ultimate responsibility to prepare the notice and information statement. Each suggested that the existing association

should have the responsibility or, at least, the right to finally review and approve the documents before their submission to the FCA. The South Atlantic PCA expressed the view that the costs associated with conducting a stockholder meeting, such as the preparation of notices and disclosure materials, should be borne by the petitioners.

The FCA Board agrees with the commenters that the regulations should clarify who has ultimate responsibility and accountability for the notice, information statement and plan of reorganization submitted to the FCA for approval. However, the FCA Board recognizes that potential conflicts could surface between the existing association and the petitioning stockholders since a withdrawal action initiated by petitioners may not be supported by the board of directors of the existing association. For this reason, the FCA Board believes that the rights and interests of both parties must be treated as fairly and equitably as possible, while permitting petitioning stockholders their right to reconsider association mergers completed between December 24, 1985 and January 5, 1988. Accordingly, the FCA Board has determined that the petitioning stockholders must select a proposed initial board of directors who will be responsible for signing the notice, information statement, and plan of reorganization submitted to the FCA for approval. Additionally, the existing association must provide whatever assistance the petitioners may request to develop the aforementioned documents and to assure completeness and accuracy. Section 611.1193(a), and § 611.1197 have been amended to incorporate these requirements.

Regarding the issue of who should pay the costs incurred in connection with a special reconsideration, the FCA Board believes that the stockholders of the resulting association(s) should bear these expenses in those circumstances where a reconsideration vote is approved. However, in those situations where the reconsideration is disapproved, the FCA Board believes that the expenses involved must be borne by the existing association. The Board understands that the enactment of section 7.9 was motivated in part by a concern that shareholders of some former associations may have been unduly influenced to approve a merger proposal during the affected time period and that those shareholders should be given an opportunity to fully reconsider their earlier votes. The FCA Board believes that the only way to give full

effect to this right is for shareholders to be able to initiate a petitioning action without having to bear the expenses of the vote if the proposal to withdraw is defeated. The FCA Board also believes the existing association should view the payment of expenses noted above as the cost of doing business to retain the benefits it already enjoys. Additionally, the existing association will benefit materially if the predecessor association does not withdraw because it will have the opportunity to provide credit services to the borrowers of the predecessor association. Accordingly, § 611.1196 has been revised in its entirety to provide that, unless the parties to a reconsideration agree otherwise, the costs shall be borne by the existing association if the reconsideration is disapproved, or by the resulting association if the reconsideration is approved. In addition, a technical correction has been made in § 611.1193(b)(5) to include the provision relating to the notice of meeting that was previously contained in § 611.1196.

Section 611.1197 sets forth the requirements for an information statement to be prepared in conjunction with a special reconsideration petition. The FCCA suggested that the statement enumerating the advantages and disadvantages required by § 611.1197(b)(3) should address "anticipated" advantages and "potential" disadvantages. The FCCA also stated that the regulation should clarify whether each of the areas of advantages and disadvantages specified in the regulation must be addressed in the disclosure documents. The FCA Board agrees that the addition of descriptive modifiers such as "anticipated" and "potential" would enhance the understanding of the regulation's requirements and has amended the final regulation accordingly. In response to the FCCA's second comment, the FCA Board notes that the list of potential advantages and disadvantages was not intended to be exhaustive or mandatory, but only illustrative. The final regulation has been amended to clarify this point.

Section 611.1198 provides for the development of a plan of reorganization that shall accompany a petition for special reconsideration under Subpart O, and enumerates the requirements of the reorganization plan, including a provision for the distribution of assets and liabilities of the existing association and a description of the basis upon which the distribution is to be made. The FCCA and the South Atlantic PCA suggested that the regulation should be amended to provide more specific

guidance concerning the manner in which assets and liabilities will be valued and distributed, and the manner in which the parties should negotiate areas of dispute. The Board disagrees with the need for regulations addressing these concerns. As with the case of a merger, valuation methods and allocations of assets are matters that must be agreed to by the parties to the transaction. However, unlike a regular merger proposal, the Act gives the stockholders of petitioning associations the right to reconsider past mergers. If the existing association and the petitioning stockholders are unable or unwilling to agree to the essential terms for the reconsideration, the FCA Board may be required to determine whether one of the parties is attempting to preclude the other from exercising its statutory rights. The FCA Board hopes that this situation does not arise and encourages all parties to cooperate in giving maximum effect to the intent of Congress.

P. Disclosure Statement Requirement for Bank Director Candidates

Section 620.30 establishes the requirements for the preparation and distribution of disclosure statements regarding candidates for election to the board of directors of a bank. The FCCA commented that this section should be amended to clarify that it applies only to directors elected by stockholders, and not to the outside director elected by the other members of the board. The FCA Board agrees that this point should be clarified and has amended the final regulation accordingly. However, the FCA Board would encourage the elected directors of an institution to obtain the same type of information specified in § 620.30 regarding candidates for the outside director(s) position to assist them in selecting the best possible candidate for that position.

Q. Contents of Disclosure Statements

Section 620.31 sets forth the requirements for the contents of disclosure statements submitted to stockholders in connection with the election of bank directors. The FCCA agreed with the intent of the proposed regulation to make the disclosure requirements for bank director candidates consistent with existing disclosure requirements for association director candidates. To achieve that end, the FCCA commented that proposed § 620.31(d) does not include a provision comparable to § 620.3(j)(3)(i)(C). The FCA Board notes that the proposed regulation is consistent with § 620.3(j) since that section was amended on February 5,

1988 to delete the provision referenced by the FCCA (53 FR 3334). The FCCA also commented that proposed § 620.31(e)(1) is not consistent with § 620.3(k)(1) because it does not require disclosure related to "any corporation or business association of which (the candidate) was a senior officer at or within 2 years before the time of such filing," which provision is contained in the comparable § 620.3(k)(1). This was an inadvertent omission from the proposed regulation, and the final regulation has been amended to include this provision. The FCCA also commented that the proviso in proposed § 620.31(d)(2), which exempts from certain disclosure requirements directors who resign or whose term of office expires, would not be applicable to the disclosure statements required by this section. The FCA Board agrees that the proviso would not be operative within the context of the disclosure requirement contained in this regulation, and the final regulation has been amended to delete this inoperative language.

List of Subjects in 12 CFR Parts 611, 612, 618, and 620

Accounting, Agriculture, Archives and records, Banks, banking, Conflict of interests, Insurance, Organizations and functions (Government agencies), Reporting and recordkeeping requirements, Rural areas, Technical assistance.

For the reasons stated in the preamble, Parts 611, 612, 618 and 620 of Chapter VI, Title 12, of the Code of Federal Regulations are amended as follows:

PART 611—ORGANIZATION

1. The authority citation for Part 611 continues to read as follows:

Authority: Secs. 1.3, 1.13, 2.0, 2.10, 3.0, 3.21, 4.12, 4.15, 5.0, 5.9, 5.10, 5.17, 7.0-7.13; 12 U.S.C. 2011, 2031, 2071, 2091, 2121, 2142, 2183, 2203, 2221, 2243, 2244, 2252, 2279a-2279f-1; secs. 411 and 412 of Pub. L. 100-233.

Subpart A—[Removed and Reserved]

2. Part 611, Subpart A, consisting of § 611.100, is removed and reserved.

3. Part 611, Subpart C, consisting of §§ 611.310 through 611.340, is added to read as follows:

Subpart C—Election of Directors

Sec.
611.310 Eligibility for membership on bank and association boards and subsequent employment.
611.320 Impartiality in the election of directors.

Sec.
611.330 Confidentiality in the election of directors.
611.340 Security in the election of directors.

Subpart C—Election of Directors

§ 611.310 Eligibility for membership on bank and association boards and subsequent employment.

(a) No person shall be eligible for membership on a bank or association board who is or has been, within 1 year preceding the date the term of office begins, a salaried officer or employee of any bank or association in the System.

(b) No bank or association director shall be eligible to continue to serve in that capacity and his or her office shall become vacant if after election as a member of the board, he or she becomes legally incompetent or is convicted of a felony or held liable in damages for fraud.

(c) No bank director shall, within 1 year after the date when he or she ceases to be a member of the board, serve as a salaried officer or employee of such bank, or any association with which the bank has a discount of agent relationship.

(d) No director of an association shall, within 1 year after he or she ceases to be a member of the board, serve as a salaried officer or employee of such association.

§ 611.320 Impartiality in the election of directors.

(a) Each System institution shall adopt policies and procedures that are designed to assure that the elections of board members are conducted in an impartial manner.

(b) No employee or agent of a System institution shall take any part, directly or indirectly, in the nomination or election of members to the board of directors of a System institution, or make any statement, either orally or in writing, which may be construed as intended to influence any vote in such nominations, or elections. This paragraph shall not prohibit employees or agents from providing biographical and other similar information or engaging in other activities pursuant to policies and procedures for nominations and elections. This paragraph does not affect the right of an employee or agent to nominate or vote for directors of an institution in which the employee or agent is a voting member.

(c) No property, facilities, or resources of any System institution shall be used by any candidate for nomination or election or by any other person for the benefit of any candidate for nomination or election, unless the same property,

facilities, or resources are simultaneously available and made known to be available for use by all declared candidates.

(d) No director, employee, or agent of a System institution shall, for the purpose of furthering the interests of any candidates for nomination or election, furnish or make use of records that are not made available for use by all declared candidates.

(e) No System institution shall distribute or mail either directly or at the expense of the institution, any campaign materials for director candidates. Institutions shall request biographical information from all declared candidates who certify that they are eligible, restate such information in a standard format, and distribute or mail it with ballots or proxy ballots.

§ 611.330 Confidentiality in the election of directors.

(a) Each System institution shall adopt policies and procedures that assure that all information regarding how or whether individual stockholders have voted and all materials such as ballots, proxy ballots, election records, and other relevant documentation related to the votes of stockholders shall be held in strict confidence. Such information and materials shall not be disclosed to any person, except as required by the Farm Credit Administration in the event an election is contested, or otherwise.

(b) Except as provided in this paragraph, System institutions shall not use ballots or proxy ballots that must be signed by the stockholder or that contain an identifying character or mark that can be used to identify how an individual stockholder's vote is cast. Institutions may adopt procedures which require the stockholders to sign or otherwise verify their eligibility to vote on an envelope which contains a marked ballot in a sealed envelope. Institutions may also use signed proxy statements or eligibility certificates which will accompany a ballot or instructions on how to vote the proxy in a separate sealed envelope. Where the identity of the voting stockholders is necessary to determine the voting weight of ballots, the institution shall use a form of identity code on the ballot and shall require that the votes are tabulated by an independent party.

(c) When an institution receives a ballot by mail or at a meeting, the vote of such stockholder shall be final. When proxy voting is permitted, a stockholder voting by proxy may revoke the proxy prior to balloting at the stockholders meeting.

§ 611.340 Security in the election of directors.

(a) Each System institution shall adopt policies and procedures that assure the security of all records and materials related to the election of board members including, but not limited to, ballots, proxy ballots, and other related materials.

(b) Bank and association procedures shall assure that ballots and proxy ballots are provided only to stockholders who are eligible to vote.

(c) Ballots and proxy ballots shall be physically safeguarded before the time of distribution or mailing to voting stockholders and after the time of receipt by the banks and associations until disposal. Ballots, proxy ballots, and election records shall be retained until the end of the term of office of the director and promptly destroyed thereafter.

(d) The election procedures of each institution shall provide for the establishment of a tellers committee or other designated group of persons which shall be responsible for validating ballots and proxies and tabulating election results. An institution and its officers, directors and employees shall make no public announcement of the results of an election before the tellers committee or other designated persons have validated the results of the election.

§ 611.400 [Removed]

§ 611.1020 [Redesignated as § 611.400]

4. Part 611 is amended by revising the heading of subpart D, removing existing § 611.400, revising the heading of § 611.1020 of Subpart F and redesignating it as new § 611.400 of Subpart D to read as follows:

Subpart D—Rules for Compensation of Board Members

§ 611.400 Compensation of Bank Board members.

5. Part 611, Subpart E, consisting of § 611.500 through 611.525, is revised to read as follows:

Subpart E—Transfer of Authorities

Sec.

- 611.500 General.
- 611.501 Procedures.
- 611.505 Farm Credit Administration review.
- 611.510 Approval procedures.
- 611.515 Information statement.
- 611.520 Plan of transfer.
- 611.525 Stockholder reconsideration.

Subpart E—Transfer of Authorities

§ 611.500 General.

Each Farm Credit Bank or Agricultural Credit Bank is authorized, in accordance with § 7.6 of the Act, to transfer certain

authorities to Federal land bank associations. The regulations in this subpart set forth the procedures and voting and approval requirements applicable to such transfers.

§ 611.501 Procedures.

(a) The boards of directors of a bank and an association which seek to transfer authorities may adopt appropriate resolutions approving such transfer and providing for the submission of such a proposal to their respective stockholders for a vote.

(b) The resolutions accompanied by the following information shall be submitted to the Farm Credit Administration for review and approval:

(1) Any proposed amendments to the charters of the institutions;

(2) A copy of the transfer plan as required under § 611.520 of this part;

(3) An information statement that complies with the requirements of § 611.515;

(4) The proposed bylaws of the bank and the association, as applicable; and

(5) Any additional information the boards of directors wish to submit in support of the request or that the Farm Credit Administration requests.

§ 611.505 Farm Credit Administration review.

(a) Upon receipt of the board of directors resolution and the accompanying documents, the Farm Credit Administration shall review the request and either deny or give its preliminary approval to the request.

(b) If the request is denied, written notice stating the reasons for the denial shall be transmitted to the chief executive officer of the bank and the association who shall promptly notify their respective boards of directors.

(c) Upon approval of the proposed transfer of authorities by the stockholders as provided in § 611.510, the secretary of the bank and the secretary of the association shall forward to the Farm Credit Administration a certified record of the results of the stockholder votes.

(d) Each institution shall notify its stockholders not later than 30 days after the stockholder vote of the final results of the vote. If no petition for reconsideration is filed with the Farm Credit Administration in accordance with § 611.525, the transfer shall be effective on the date specified in the transfer plan, or at such later date as may be required by the Farm Credit Administration to grant final approval. Notice of final approval shall be transmitted to the institutions involved.

(e) The effective date of a transfer shall be a date which is not less than 50

days after the notification of the results of the stockholder vote. If a petition for reconsideration is filed within 35 days after the date of mailing of the notification of stockholder vote, the constituent institutions shall agree on a second effective date to be used in the event the transfer is approved on reconsideration. The second effective date shall not be not less than 15 days after the date of the reconsideration vote.

§ 611.510 Approval procedures.

(a) Upon receipt of approval of a resolution by the Farm Credit Administration, the bank and the association shall call a meeting of their voting stockholders. Each institution shall notify each stockholder that the resolution has been filed and that a meeting will be held in accordance with the institution's bylaws. The stockholders meeting of the bank and the association shall be held within 60 days of receipt of the approval from the Farm Credit Administration.

(b) The notice of meeting to consider and act upon the directors' resolution shall be accompanied by an information statement that complies with the requirements of § 611.515.

(c) The proposal shall be approved if agreed to by:

(1) A majority of the stockholders of the bank voting in person or by proxy, with each association entitled to cast a number of votes equal to the number of its voting stockholders;

(2) A majority of the stockholders of the association voting, in person or by proxy;

(3) the Farm Credit Administration.

§ 611.515 Information statement.

(a) The bank and association shall prepare an information statement which will inform stockholders about the provisions of the proposed transfer of authorities and the effect of the proposal on the bank and the association.

(b) The information statement for each institution involved shall contain the following materials as applicable to the institution:

(1) A statement either on the first page of the materials or on the notice of the stockholders meeting, in capital letters and boldface type, that:

THE FARM CREDIT ADMINISTRATION HAS NEITHER APPROVED NOR PASSED UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION ACCOMPANYING THE NOTICE OF MEETING OR PRESENTED AT THE MEETING AND NO REPRESENTATION TO THE CONTRARY SHALL BE MADE OR RELIED UPON.

(2) A description of the material provisions of the plan under § 611.520

and the effect of the transaction on the institution, its stockholders, and the territory to be served.

(3) A statement enumerating the potential advantages and disadvantages of the proposed transfer including, but not limited to, changes in operating efficiencies, one-stop service, branch offices, local control, and financial condition.

(4) A summary of the provisions of the charter and bylaws following the transfer that differ materially from the charter or bylaws currently existing.

(5) A brief statement by the board of directors of the institution setting forth the board's opinion on the advisability of the transfer.

(6) A presentation of the following financial data:

(i) An audited balance sheet and income statement and notes thereto of the bank or the association, as applicable, for the preceding 2 fiscal years.

(ii) If the transfer of authority includes any material transfer of assets, a balance sheet and income statement of the bank and the association showing its financial condition before the transfer of authority and a pro forma balance sheet and income statement for the bank or association, as applicable, showing its financial condition after the transfer. The statements shall meet the following conditions:

(A) Such financial statements shall be presented in columnar form, showing the financial condition as of the end of the most recent quarter of the institution, and operating results since the end of the last fiscal year through the end of the most recent quarter of the institution.

(B) If the request is made within 90 days after the end of the fiscal year, the institution's financial statements shall be as of the most recent fiscal yearend.

(C) If the request is made within 45 days after the end of the most recent quarter, the institution's financial statements shall be as of the end of the quarter preceding the quarter just ended.

(D) If the request is made more than 45 days after the end of the most recent quarter, the institution's financial statements shall be as of the end of that quarter.

(E) The financial statements must be accompanied by appropriate notes, describing any assets being transferred and including data relating to nonperforming loans and related assets, allowance for loan losses, and current year-to-date chargeoffs.

(F) The amount and nature of start-up costs estimated to be associated with the transfer.

(7) A description of the type and dollar amount of any financial assistance that has been provided to the bank or the association, as applicable, during the past year; the conditions on which the financial assistance was extended, the terms of repayment or retirement, if any; and, the liability for repayment of this assistance by the bank or the association if the transfer were approved.

(8) A statement as to whether the bank or the association, as applicable, would require financial assistance during the first 3 years of operation, the estimated type and dollar amount of the assistance, and terms of repayment or retirement, if known.

(9) A statement indicating the possible tax consequences to stockholders and whether any legal opinion, ruling or external auditor's opinion has been obtained on the matter.

(10) A presentation of the association's interest rate and fee programs, interest collection policy, capitalization plan and other factors that would affect a borrower's cost of doing business with the association.

(11) A description of any event subsequent to the date of the last quarterly report, but prior to the stockholder vote, that would have a material impact on the financial condition of the bank or the association.

(12) A statement of any other material fact or circumstances that a stockholder would need in order to make an informed and responsible decision, or that would be necessary in order to provide a disclosure that is not misleading.

(13) A form of written proxy, together with instructions on its purpose, use and authorization by the stockholder. The proxy instructions must ensure the secrecy of the stockholder's ballot if the stockholder votes by proxy.

(14) A copy of the plan of transfer provided for in § 611.520 of this part.

(c) No bank or association director, officer, or employee shall make any untrue or misleading statement of a material fact, or fail to disclose any material fact necessary under the circumstances to make statements made not misleading, to a stockholder of the association in connection with a transfer under this subpart.

§ 611.520 Plan of transfer.

The transfer of authorities and assets, as appropriate, shall occur pursuant to a written plan which shall be agreed to by the bank and the association involved. The written plan shall include the following:

(a) An explanation of the value of the equity ownership as of the last monthend held by stockholders of the bank and the association and the impact, if any, of the transfer on the value of that equity.

(b) If the plan provides for a transfer of assets, a description of the terms and conditions upon which such transfer will occur, including, but not limited to, any warranties or representations regarding the value of such assets.

(c) A description of how the association would obtain loan funds after the transfer.

(d) A statement on how the expenses connected with the transfer are to be borne by the affected parties.

(e) A statement of any conditions which must be satisfied prior to the effective date of the transfer, including but not limited to approval by stockholders and approval by the Farm Credit Administration.

(f) A statement that prior to the effective date of the transfer the board of directors of the bank or the association may rescind its resolution and void the transfer, with the concurrence of the Farm Credit Administration, on the basis that:

(1) The information disclosed to stockholders contained material errors or omissions;

(2) Material misrepresentations were made to stockholders regarding the impact of the transfer;

(3) Fraudulent activities were used to obtain the stockholders' approval; or,

(4) An event occurred between the time of the vote and the transfer that would have a significant adverse impact on the future viability of the association.

(g) A designation of those persons who have authority to carry out the plan of transfer, including the authority to execute any documents necessary to perfect title, on behalf of the bank and the association.

§ 611.525 Stockholder reconsideration.

(a) Stockholders have the right to reconsider the approval of the transfer provided that a petition signed by 15 percent of the stockholders of either institution involved in the transfer is filed with the Farm Credit Administration within 35 days after the date of mailing of the notification of the final results of the stockholder vote required under § 611.505(d) and such petition is approved by the Farm Credit Administration.

(b) A special stockholders meeting shall be called by the institution to vote on the reconsideration following the Farm Credit Administration's approval of a stockholder petition to reconsider the transfer. If a majority of

stockholders of any institution involved in the transfer votes against the transfer, the transfer is not approved.

6. Part 611, Subpart F, consisting of §§ 611.1000 through 611.1040, is revised to read as follows:

Subpart F—Bank Mergers, Consolidations and Charter Amendments

Sec.

611.1000 General authority.

611.1010 Bank charter amendment procedures.

611.1020 Requirements for mergers or consolidations of banks.

611.1030 Board of directors of an Agricultural Credit Bank.

611.1040 Creation of new associations.

Subpart F—Bank Mergers, Consolidations and Charter Amendments

§ 611.1000 General authority.

(a) An amendment to a bank charter may relate to any provision that is properly the subject of a charter, including, but not limited to, the name of the bank, the location of its offices, or the territory served.

(b) The Farm Credit Administration may make changes in the charter of a bank as may be requested by that bank and approved by the Farm Credit Administration pursuant to § 611.1010 of this part.

(c) The Farm Credit Administration may, in accordance with the provisions of the Act, make changes in the charter of a bank as may be necessary or expedient to implement the provisions of the Act.

§ 611.1010 Bank charter amendment procedures.

(a) A bank may recommend a charter amendment to accomplish any of the following actions:

(1) A merger or consolidation with any other bank or banks operating under Title I or III of the Act;

(2) A transfer of territory with any other bank operating under the same title of the Act;

(3) A change to its name or location;

(4) Any other change that is properly the subject of a bank charter;

(b) Upon approval of an appropriate resolution by the bank board, the certified resolution, together with supporting documentation, shall be submitted to the Farm Credit Administration for preliminary or final approval, as the case may be.

(c) The Farm Credit Administration shall review the material submitted and either approve or disapprove the request. The Farm Credit Administration may require submission of any supplemental materials it deems

appropriate. If the request is for merger, consolidation, or transfer of territory, the approval of Farm Credit Administration will be preliminary only, with final approval subject to a vote of the bank's stockholders.

(d) Following receipt of the Farm Credit Administration's written preliminary approval, the proposal shall be submitted for approval to the voting stockholders of the bank. A proposal shall be approved if agreed to by a majority of the stockholders of each bank voting, in person or by proxy, at a duly authorized stockholder meeting with each association entitled to cast a number of votes equal to the number of the association's voting shareholders.

(e) Upon approval by the stockholders of the bank, the request for final approval and issuance of the appropriate charter or amendments to charter for the banks involved shall be submitted to the Farm Credit Administration.

§ 611.1020 Requirements for mergers or consolidations of banks.

(a) As authorized under sections 7.0 and 7.12 of the Act, a bank may merge or consolidate with one or more banks operating under the same or different titles of the Act.

(b) Where two or more banks plan to merge or consolidate, the banks shall jointly submit to the Farm Credit Administration the documents itemized in §§ 611.1122(a)(1)-(4), (6), (7), 611.1122(e), and 611.1123. In interpreting those sections, the word "bank" shall be read for the word "association."

(c) No bank director, officer, or employee shall make any untrue or misleading statement of a material fact, or fail to disclose any material fact necessary under the circumstances to make statements made not misleading, to any stockholder of the bank in connection with a bank merger or consolidation.

(d) Upon approval of a proposed bank merger or consolidation by the stockholders of each constituent bank, the following documents shall be submitted from the constituent banks to the Farm Credit Administration for final approval and issuance of the appropriate charters or amendments to charter:

(1) A certified copy of the stockholders' resolution, on which the stockholders cast their votes, from each constituent bank;

(2) A certification of the stockholder vote from the corporate secretary of each bank or from an independent third party;

(3) An Agreement of Merger or Consolidation duly executed by those authorized to sign on behalf of each constituent bank.

§ 611.1030 Board of directors of an Agricultural Credit Bank.

Each Agricultural Credit Bank formed by the consolidation of a Farm Credit Bank and a bank for cooperatives shall elect a board of directors of such number, for such term, in such manner, and with such qualifications, as may be required in its bylaws, except that at least one member shall be elected by the other directors, which member shall not be a director, officer, employee, or stockholder of a System institution. In electing such directors each association shall be entitled to cast a number of votes equal to the number of its voting stockholders.

§ 611.1040 Creation of new associations.

Any application for the issuance of a charter to a new production credit association or Federal land bank association shall meet the requirements of sections 2.0 or 2.10, respectively, of the Act. Any application for the issuance of a charter for an agricultural credit association shall meet the requirements of section 2.0 of the Act.

Subpart G—Mergers, Consolidations, and Charter Amendments of Associations

7. Section 611.1122 is amended by redesignating paragraphs (a)(5) and (a)(6) as paragraphs (a)(6) and (a)(7) and paragraphs (e)(11) through (e)(16) as paragraphs (e)(16) through (e)(21); adding new paragraphs (e)(11) through (e)(15); revising paragraph (g); and by adding new paragraphs (a)(5) and (k) to read as follows:

§ 611.1122 Requirements for mergers or consolidations.

* * * *

(a) * * *

(5) Two signed copies of the continuing or proposed Articles of Association;

* * * *

(e) * * *

(11) A management discussion and analysis of the financial condition and results of operation for the past 2 fiscal years for each constituent institution. This requirement can be satisfied by including the materials contained in the management discussion and analysis of each institution's most recent annual report.

(12) A discussion of any material changes in financial condition of each constituent institution from the end of

the last fiscal year to the date of the interim balance sheet provided.

(13) A discussion of any material changes in the results of operations of each constituent institution with respect to the most recent fiscal-year-to-date period for which an income statement is provided.

(14) A discussion of any change in the tax status of the new institution from those of the constituent institutions as a result of merger or consolidation. A statement on any adverse tax consequences to the stockholders of the institution as a result of the change in tax status.

(15) A statement on the proposed institution's relationship with an independent public accountant, including any change that may occur as a result of the merger or consolidation.

* * * *

(g) Upon approval of a proposed merger or consolidation by the stockholders of the constituent associations, a certified copy of the stockholders' resolution shall be forwarded to the Farm Credit Administration. Each constituent association shall notify its stockholders not later than 30 days after the stockholder vote of the final results of the vote. If no petition is filed with the Farm Credit Administration to reconsider the vote, upon final approval by the FCA, the merger or consolidation shall be effective on the date specified in the merger agreement or at such later date as may be required by the Farm Credit Administration to grant final approval. Notice of final approval shall be transmitted to the associations and a copy provided to the affiliated bank.

* * * *

(k) The effective date of a merger or consolidation shall be a date which is not less than 50 days after the date of mailing of the notification of the results of the stockholder vote. If a petition for reconsideration is filed within 35 days after the date of mailing of the notification of the stockholder vote, the constituent institutions shall agree on a second effective date to be used in the event the merger or consolidation is approved on reconsideration. The second effective date shall be not less than 15 days after the date of the reconsideration vote.

8. Section 611.1123 is amended by redesignating paragraph (a)(9) as paragraph (a)(11), adding new paragraphs (a)(9) and (a)(10), and by adding paragraph (c) to read as follows:

§ 611.1123 Merger or consolidation agreements.

(a) * * *

(9) The capitalization plan and capital structure for the new institution and a statement that the capitalization plan shall comply with applicable FCA regulations.

(10) Provision for the employee benefits plan, its subsequent continuation or adaptation by the board of directors of the proposed institution following the merger or consolidation.

* * * *

(c) Stockholders have the right to reconsider the approval of the merger provided that a petition signed by 15 percent of the stockholders eligible to vote of one or more of the constituent institutions is filed with the Farm Credit Administration within 35 days after the date of mailing the notification of the final results of the stockholder vote required under § 611.1122(g). The Farm Credit Administration will review the petition to determine whether it complies with the requirements of section 7.9 of the Act. Following a determination that the petition complies with the applicable requirements, a special stockholders meeting shall be called by the institution to reconsider the vote. If a majority of the stockholders voting, in person or by proxy, of any one of the constituent institutions that is a party to the merger vote against the merger, the merger shall not take place.

9. Subpart O, consisting of §§ 611.1190 through 611.1198, is added to read as follows:

Subpart O—Special Reconsideration of Mergers

Sec.	
611.1190	General.
611.1191	Petitions and resolutions.
611.1192	Requirements for petitions.
611.1193	Filing date—additional materials.
611.1194	Farm Credit Administration review.
611.1195	Stockholder vote.
611.1196	Payment of expenses.
611.1197	Information statement.
611.1198	Plan of reorganization.

Subpart O—Special Reconsideration of Mergers

§ 611.1190 General.

The regulations in this Subpart O implement the provisions of the Agricultural Credit Act of 1987 relating to special reconsideration of voluntary mergers and consolidations that occurred after December 23, 1985 and prior to January 6, 1988. The regulations establish the procedures for petitions, disclosures, and stockholder votes for reconsideration of such mergers and consolidations and, if approved by stockholders, for the establishment of

separate associations. The regulations shall apply to any request to reorganize an association that was created by merger or consolidation and became effective during the period, December 24, 1985 to January 5, 1988. For the purposes of this part, the term "merger" includes a merger or consolidation. The regulations in this subpart are applicable only to those associations that were created by the merger of two or more associations after December 23, 1985 and before January 6, 1988.

§ 611.1191 Petitions and resolutions.

(a) The voting stockholders of an association who were stockholders of a predecessor association may seek to have the stockholders reconsider their association's participation in such merger by filing a petition for reconsideration with the Farm Credit Administration. The purpose of the petition shall be either:

(1) The withdrawal of one or more predecessor associations from the existing association; or

(2) The general reorganization into two or more separate associations of the existing association that was formed by the merger of three or more predecessor associations.

(b) The board of directors of an association may adopt a resolution proposing the general reorganization of the association into two or more separate associations and the submission of such proposal to the stockholders for a vote.

§ 611.1192 Requirements for petitions.

(a) In order for a petition to be acted upon, the petition must be signed by 15 percent or more of the voting stockholders of the existing association who were stockholders of each of the predecessor associations that seeks to withdraw from the existing association, or 5 percent of the total number of voting stockholders of the existing association if the petition seeks to reorganize the existing association that was formed by the merger of three or more associations.

(b) Each petition shall include the signature, printed name and the full address of each voting stockholder on the petition. If the petition proposes the withdrawal of one or more predecessor associations, the association shall certify that the signatures on the petition are the signatures of persons who were voting stockholders of such predecessor associations and that such persons continue to have their farming operations in the territory that was served by the predecessor association. If the petition proposes the reorganization of the entire association, the association

shall certify that the signatures are from voting stockholders of the association.

(c) The petition shall describe the manner in which the existing association will be reorganized and the territory in which each proposed separate association would operate. In the case of a withdrawal of an association, the withdrawing association shall have the same chartered territory it had prior to the merger.

(d) The certification process shall be completed and the petition forwarded to the Farm Credit Administration within 5 working days of the date of its receipt by the association. The filing date of a petition or resolution shall be the date the petition or resolution is received by the FCA.

(e) No petition will be considered by the Farm Credit Administration if filed later than *(1 year after the effective date of this section)*.

§ 611.1193 Filing date—additional materials.

(a) The persons who are designated as directors of the initial board(s) of directors of the resulting association(s) shall prepare the additional materials provided for in this section. The existing association shall provide such assistance to the initial board(s) as the initial board(s) shall reasonably request in the preparation of these additional materials. Not later than 60 days after the filing of a petition or resolution, the initial board(s) shall transmit the additional materials provided for in this section to the Farm Credit Administration.

(b) The additional materials submitted in connection with a petition or resolution shall include the following:

(1) The proposed charter for each of the separate associations and the proposed effective date of the withdrawal or reorganization;

(2) A statement of the reasons for the proposed reorganization of the existing association or the proposed withdrawal of one or more associations from the existing association;

(3) A copy of the reorganization plan as required under § 611.1198 of this part;

(4) An information statement that complies with the requirements of § 611.1197.

(5) A notice of meeting to act upon the petition or resolution.

(6) Any additional information that the petitioning stockholders or the board of directors wishes to submit in support of its request or that the Farm Credit Administration requests.

§ 611.1194 Farm Credit Administration Review.

(a) Upon receipt of the petition or resolution and the accompanying documents, the Farm Credit Administration shall review the request and either deny or give its approval to the request.

(b) If the request is denied, written notice stating the reasons for the denial shall be transmitted to the chief executive officer of the association who shall notify the board of directors and the stockholders of such denial.

(c) Upon approval of the proposed withdrawal or reorganization by the stockholders as provided for in § 611.1195, the secretary of the association shall forward to the Farm Credit Administration a certification of the stockholder vote and a signed copy of the Articles of Association.

(d) On receipt of the certification and Articles of Association as required in paragraph (c) of this section, the Farm Credit Administration shall issue charters or amended charters as are necessary to reflect the territory to be served by the resulting associations.

§ 611.1195 Stockholder vote.

(a) Upon approval of a petition or resolution by the Farm Credit Administration, the association shall call a meeting of its voting stockholders. The association shall notify each stockholder that a petition or resolution has been filed and that a meeting will be held in accordance with the association's bylaws. The stockholders meeting shall be scheduled for a date which is no later than 60 days after the date the Farm Credit Administration gives preliminary approval.

(b) In the case of a petition to withdraw from the existing association, ballots shall be sent to each stockholder of a existing association who would be a stockholder of one of a separate association. The petition, as it applies to each such separate association, shall be approved, by stockholders who vote in person or by proxy, if agreed to by a majority of the stockholders who would be served by the separate association.

(c) Approval of the resolution or petition to reorganize the entire association into two or more associations shall require the affirmative vote of a majority of the stockholders voting, in person or by proxy, of the existing association.

§ 611.1196 Payment of expenses.

(a) The expenses associated with the consideration of a petition or resolution will be borne as provided for in this section unless an agreement that

otherwise designates how these expenses will be paid has been agreed to by the parties, in which case that agreement will prevail.

(b) The expenses associated with the consideration of a petition or resolution to reorganize the existing association into two or more associations will be borne by the existing association.

(c) The expenses associated with the consideration to withdraw a predecessor association from the existing association will be borne as follows:

(1) If the petition is approved, the resulting association will pay the expenses associated with the petition and vote.

(2) If the petition is disapproved, the existing association will pay the expenses associated with the petition and vote.

§ 611.1197 Information statement.

(a) An information statement shall be prepared which discloses certain information regarding the existing association and (1) each association that is proposed to be withdrawn from the existing association, or (2) each association that would result from the total reorganization of the existing association.

(b) The information statement shall be certified as true, complete and accurate by the persons designated as directors of the initial board(s) of directors of the resulting association(s) and shall contain the following materials:

(1) A statement either on the first page of the materials or on the notice of the stockholders' meeting, in capital letters and bold face type, that:

THE FARM CREDIT ADMINISTRATION HAS NEITHER APPROVED NOR PASSED UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION ACCOMPANYING THE NOTICE OF MEETING OR PRESENTED AT THE MEETING AND NO REPRESENTATION TO THE CONTRARY SHALL BE MADE OR RELIED UPON.

(2) A description of the material provisions of the reorganization plan and the effect of the reorganization on each proposed association, their stockholders, and the territory to be served.

(3) A statement enumerating the anticipated advantages and potential disadvantages of the proposed reorganization which may include, but are not limited to, changes in operating efficiencies, one-stop service, branch offices, local control, financial condition, etc.

(4) A summary of the provisions of the charter and bylaws of the proposed association that differ materially from

the charter or bylaws of the existing association.

(5) A brief statement by the board of directors of the existing association setting forth the board's opinion on the advisability of the separation or reorganization.

(6) A presentation of the following financial data:

(i) An audited balance sheet and income statement and notes thereto of the existing association for the preceding 2 fiscal years.

(ii) A balance sheet and income statement of the existing association showing its financial condition before the separation or reorganization and the pro forma balance sheet and income statement of each proposed association showing its financial condition which meet the following conditions:

(A) The financial statements of the existing and each proposed association (collectively, "constituent financial statements") shall be presented in columnar form, showing the financial condition as of the end of the most recent quarter of the existing association, and operating results since the end of the last fiscal year through the end of the most recent quarter of the existing association.

(B) If the request is made within 90 days after the end of the fiscal year, the constituent financial statements shall be based on the most recent fiscal year-end financial statements of the existing association.

(C) If the request is made within 45 days after the end of the most recent quarter, the constituent financial statements shall be based on the financial statements of the existing association as of the end of the quarter preceding the quarter just ended.

(D) If the request is made more than 45 days after the end of the most recent quarter, the constituent financial statements shall be based on the financial statements of the existing association as of the end of that quarter.

(E) The financial statements must be accompanied by appropriate notes, including data relating to nonperforming loans and related assets, allowance for loan losses, and current year-to-date chargeoffs.

(7) A description of the type and dollar amount of any financial assistance that has been provided to the existing association during the past year; the conditions on which the financial assistance was extended; the terms of repayment or retirement, if any; and the liability for repayment of this assistance by the existing and proposed associations if the withdrawal or reorganization were approved.

(8) A statement as to whether the proposed association would require financial assistance during the first 3 years of its operation as a new association, the estimated type and dollar amount of the assistance, and terms of repayment or retirement, if known.

(9) A statement indicating the possible tax consequences to stockholders and to the proposed associations, and whether any legal opinion, ruling or external auditor's opinion has been obtained on the matter.

(10) A presentation of each proposed association's interest rate and fee programs, interest collection policy, capitalization plan and other factors that would affect a borrower's cost of doing business with the association.

(11) A description of any event subsequent to the date of the last quarterly report, but prior to the stockholder vote, that would have a material impact on the financial condition of each proposed association as of its effective date.

(12) A statement of any other material fact or circumstance that a stockholder would need in order to make an informed and responsible decision, or that would be necessary in order to provide a disclosure that is not misleading.

(13) A form of written proxy, together with instructions on its purpose, use and authorization by the stockholder. The proxy instructions must ensure the secrecy of the stockholder's ballot if the stockholder votes by proxy.

(14) A copy of the plan of reorganization provided for in § 611.1198 of this part.

(c) No bank or association director, officer, or employee shall make any untrue or misleading statement of a material fact, or fail to disclose any material fact necessary under the circumstances to make statements made not misleading, to a stockholder of the association in connection with a reorganization under this subpart.

§ 611.1198 Plan of reorganization.

(a) The withdrawal of an association or other reorganization under this subpart shall occur pursuant to a written plan. There shall be a written plan of reorganization for each association to be withdrawn from an existing association or each association to be created by the complete reorganization of an existing association.

(b) A written plan shall include, but not be limited to, all of the following provisions:

(1) The proposed Articles of Association which shall contain the following:

(i) The proposed name and headquarters of the association.

(ii) The territory to be served by the association.

(iii) The purposes for which the association is being formed.

(iv) The powers and authorities to be exercised by the association in carrying out its functions under Title II of the Act.

(v) A statement which shall provide that the corporate existence of the association shall commence upon issuance of its charter by the Farm Credit Administration and shall continue until dissolved in accordance with the Act.

(vi) The signatures of those persons who choose to establish the association and a statement signed by each such person establishing eligibility to borrow from the association in which such person will become a stockholder.

(2) As an attachment to the Articles of Association, the proposed bylaws of the new association.

(3) An explanation of the value of the equity ownership as of the last monthend held by stockholders of the existing association who would be served by the proposed association.

(4) A statement on the formula for the retirement and transfer of stock, participation certificates and equities held by stockholders of the existing association who would become stockholders of the proposed association, and the issuance of an equivalent amount of stock, participation certificates and equities by the proposed association to its stockholders.

(5) A provision for the distribution of assets and liabilities of the existing association and a description of the basis upon which the distribution is to be made to the proposed association.

(6) A statement on how the expenses connected with the reorganization are to be borne by the affected parties in accordance with § 611.1196.

(7) The names of the persons who will serve as the initial board of directors until the first annual meeting of stockholders following the reorganization. Any director of an existing association who is eligible to serve as a director of the proposed association may be designated as a member of the initial board of directors for a period not to exceed his or her current term, after which he or she must stand for reelection.

(8) A statement of any conditions which must be satisfied prior to the effective date of the proposed reorganization, including but not limited

to, approval by stockholders and issuance of a charter by the Farm Credit Administration.

(9) A statement that prior to the effective date of the reorganization, the petitioning stockholders may withdraw their petition or the board of directors of the existing association may rescind its resolution, with the concurrence of the Farm Credit Administration, on the basis that:

(i) The information disclosed to stockholders contained material errors or omissions;

(ii) Material misrepresentations were made to stockholders regarding the impact of the reorganization;

(iii) Fraudulent activities were used to obtain the stockholders' approval; or,

(iv) An event occurred between the time of the vote and the reorganization that would have a significant adverse impact on the future viability of the proposed association.

(10) A designation of those persons who have authority to carry out the plan of reorganization, including the authority to execute any documents necessary to perfect title, on behalf of the proposed association.

PART 612—PERSONNEL ADMINISTRATION

10. The authority citation for Part 612 continues to read as follows:

Authority: Secs. 5.9, 5.17; 12 U.S.C. 2243, 2252.

Subpart B—Standards of Conduct for Directors, Officers and Employees

11. Section 612.2200 is removed and reserved.

§ 612.2200 [Removed and reserved]

PART 618—GENERAL PROVISIONS

12. The authority citation for Part 618 continues to read as follows:

Authority: Secs. 1.5, 1.11, 1.12, 2.2, 2.4, 2.5, 2.12, 3.1, 3.7, 4.12, 4.13A, 4.25, 4.29, 5.9, 5.10, 5.17; 12 U.S.C. 2013, 2019, 2020, 2073, 2075, 2076, 2093, 2122, 2128, 2182, 2200, 2211, 2218, 2243, 2244, 2252.

13. Subpart D consisting of § 618.8100, and Subpart E consisting of § 618.8160 are removed and reserved.

Subpart D—[Removed and reserved]

Subpart E—[Removed and reserved]

PART 620—DISCLOSURE TO SHAREHOLDERS

14. The authority citation for Part 620 is revised to read as follows:

Authority: Secs. 5.17, 5.19; 12 U.S.C. 2252, 2254; sec. 424 of Pub. L. 100-233.

15. Subpart D, consisting of §§ 620.30 through 620.32, is added to read as follows:

Subpart D—Bank Director Disclosure Requirements

Sec.

620.30 Disclosure statement for bank director candidates.

620.31 Contents of disclosure statements.

620.32 Prohibition against incomplete, inaccurate, or misleading disclosure.

Subpart D—Bank Director Disclosure Requirements

§ 620.30 Disclosure statement for bank director candidates.

Each bank shall adopt policies and procedures that assure that a disclosure statement is prepared by each candidate for election by the stockholders to the bank board. The banks shall provide a form providing for the information required and distribute or mail copies of completed and signed disclosure statements to stockholders with the election ballots. No person may be a candidate for bank director who does not make the disclosures required by this subpart.

§ 620.31 Contents of disclosure statements.

Disclosure statements shall include the following information:

(a) A statement of the institution's policies, if any, on loans to and transactions with directors of the bank.

(b) Candidate's name, residential address, business address if any, citizenship, business experience during the last 5 years including principal occupation and employment during the last 5 years, a list of any business entities on whose board of directors the candidate serves and state the principal business in which the entities are engaged, and any information pertinent to the creation of a nepotistic relationship upon election to the bank board.

(c) Transactions other than loans. The disclosure statement should describe briefly any transaction or series of transactions other than loans that occurred since the last annual meeting between the bank and the candidate, any member of the immediate family of such person, or any organization with which such person is affiliated, the nature of the person's interest in the transaction, and the terms of the transaction. No information need be given where the purchase price, fees, or charges involved were determined by competitive bidding or where the amount involved in the transaction (including the total of all periodic

payments) does not exceed \$5,000, or the interest of the person arises solely as a result of his or her status as a stockholder of the institution and the benefit received is not a special or extra benefit not available to all stockholders.

(d) Loans to director candidates.

(1) To the extent applicable, state that the bank has had loans outstanding during the last full fiscal year-to-date to the candidate, his or her immediate family members, and any organizations with which such persons are affiliated that:

(i) Were made in the ordinary course of business;

(ii) Were made on the same terms, including interest rate, amortization schedule, and collateral, as those prevailing at the time for comparable transactions with other persons.

(2) To the extent applicable, state that no loan to a candidate, or to any organization affiliated with the candidate, or to any immediate family member who resides in the same household as the candidate or in whose loan or business operation the candidate has a material financial or legal interest, involved more than the normal risk of collectibility;

(3) If the conditions stated in paragraphs (d) (1) and (2) of this section do not apply to the loan(s) of the candidates or organizations specified therein with respect to such loans, state:

(i) The name of the candidate to whom the loan was made or to whose relative or affiliated organization the loan was made;

(ii) The largest aggregate amount of each indebtedness outstanding at any time during the last fiscal year;

(iii) The nature of the loan(s);

(iv) The amount outstanding as of the latest practicable date;

(v) The reasons the loan does not comply with the criteria contained in this section;

(vi) If the loan does not comply with this section, the rate of interest payable on the loan and the repayment terms;

(vii) If the loan does not comply with this section, the amount past due, if any, and the reason the loan is deemed to involve more than a normal risk of collectibility.

(e) Involvement in certain legal proceedings. The disclosure statement should describe any of the following events that occurred during the past 5 years and that are material to an evaluation of the ability or integrity of the candidate:

(1) A petition under the Federal bankruptcy laws or any State insolvency law was filed by or against, or a receiver, fiscal agent, or similar officer was appointed by a court for the

business or property of the candidate, or any partnership in which the candidate was a general partner at or within 2 years before the time of such filing, or any corporation or business association of which the candidate was a senior officer at or within 2 years before the time of such filing;

(2) The candidate was convicted in a criminal proceeding or is a named party in a pending criminal proceeding (excluding traffic violations and other misdemeanors);

(3) The candidate was the subject of any order, judgment, or decree, not subsequently reversed, suspended, or vacated, by any court of competent jurisdiction, permanently or temporarily enjoining or otherwise limiting the candidate from engaging in any type of business practice.

§ 620.32 Prohibition against incomplete, inaccurate, or misleading disclosure.

No employee or director or candidate for director of the bank shall make any disclosure to stockholders with respect to an election that is incomplete, inaccurate, or misleading. When any such person makes disclosure, that, in the judgment of the Farm Credit Administration is incomplete, inaccurate, or misleading, whether or not such disclosure is made pursuant to this subpart, the Farm Credit Administration may direct such institution or person to make such additional or corrective disclosure as is necessary to provide stockholders with full and fair disclosure.

Dated: December 8, 1988.

David A. Hill,

Secretary, Farm Credit Administration Board.

[FR Doc. 88-28760 Filed 12-14-88; 8:45 am]

BILLING CODE 6705-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Monensin

AGENCY: Food and Drug Administration.
ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Elanco Products Co. providing for safe and effective use of a Type A medicated article containing monensin in manufacturing a Type C feed. The feed

will be used as a supplement to the total ration to improve the feed efficiency of mature reproducing beef cows.

EFFECTIVE DATE: December 15, 1988.

FOR FURTHER INFORMATION CONTACT:

Jack C. Taylor, Center for Veterinary Medicine (HFV-126), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-5247.

SUPPLEMENTARY INFORMATION:

Elanco Products Co., a Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, is sponsor of NADA 95-735. The NADA currently provides for use of a Type A medicated article containing 60 grams of monensin (as monensin sodium) per pound in manufacturing Type C medicated feeds for the following production claims: (1) Improved feed efficiency for feedlot cattle fed in confinement for slaughter (50 to 360 milligrams of monensin per head per day), and (2) increased rate of weight gain for pasture cattle—slaughter, stocker, feeder, and dairy and beef replacement heifers weighing more than 400 pounds (50 to 200 milligrams of monensin per head per day). The firm has filed a supplemental NADA providing for addition of a third production claim to the labeling of the Type A article. The supplement would permit manufacture of a Type C medicated feed (25 to 400 grams per ton) which when used to supplement (50 to 200 milligrams of monensin per head per day) the total ration of reproducing beef cows, will improve their feed efficiency.

The supplemental NADA is approved and 21 CFR 558.355 is amended by adding a new paragraph (f)(3)(vi) to reflect the approval. The basis for the approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch