

those loans that Farm Credit banks fund or discount.

During this rulemaking, the FCA received numerous comments from existing and potential OFIs and a Farm Credit bank that borrower rights are a significant disincentive to the success of this program. Borrower rights are a statutory requirement for OFIs; therefore, the FCA cannot repeal § 614.4560(d).

Recently, a Farm Credit bank and some of its affiliated OFIs asked the FCA to reconsider its interpretation of section 4.14A(a)(6)(B) of the Act. The FCB and its OFIs interpret section 4.14A(a)(6)(B) to mean that borrower rights apply to OFI loans only during the time they are actually pledged as collateral to the funding bank. Under this interpretation, OFI loans would be exempt from most borrower rights requirements because many of these rights apply before or after the time an OFI's loans are actually pledged to the FCB or ACB. Examples of borrower rights that usually apply before an OFI actually pledges loans to a Farm Credit bank are: (1) Most EIR disclosures; (2) written notice that the borrower's credit application has been denied; and (3) appeals of adverse credit decisions to the lender's credit review committee. An example of a right that applies when a loan is no longer pledged to a System bank is the right of borrowers under section 4.14A of the Act to restructure distressed loans. Borrowers usually seek to restructure a distressed loan after the Farm Credit bank instructs the OFI to remove it from collateral. Under the suggested interpretation, section 4.13A of the Act would be the only borrower rights provision of the Act that would always apply to OFI borrowers. This provision enables System and OFI borrowers to obtain copies of: (1) All loan documents they sign or deliver; (2) loan appraisals on their assets that the lender uses in making credit decisions; and (3) the lender's articles of incorporation and bylaws.

The FCB and its affiliated OFIs advocate an interpretation of section 4.14A(a)(6)(B) of the Act that emphasizes the timing of certain events over how an OFI loan is funded. However, our analysis leads us to conclude that Congress intended section 4.14A(a)(6)(B) of the Act to apply whenever an OFI uses a Farm Credit bank rather than another source (such as deposits or other lines of credit) to fund the borrower's loan. Originally, the provisions of the Act that govern EIR disclosures, written notice of credit denials, and appeal of adverse credit decisions only applied to Farm Credit banks and associations that operate

under title I or II of the Act. The 1987 Act amended these statutory provisions so these rights and protections would also apply to OFI borrowers.⁹ The 1987 Act also added section 4.14A to the Act so that farmers, ranchers, and aquatic producers and harvesters¹⁰ who borrowed from either the FCS or an OFI would have the right to restructure distressed loans.¹¹ These statutory amendments clearly demonstrate that Congress intended to grant OFI borrowers whose loans were funded by a Farm Credit bank all of the rights and protections described above, regardless of when certain events occurred.

The FCB and its OFIs believe that Congress's use of the word "pledged" in section 4.14A(a)(6)(B) indicates that borrower rights apply only during the period of time when an OFI loan serves as collateral for the Farm Credit bank loan. However, they are reading the word "pledged" out of context with the rest of the statute. Section 4.14A(a)(6) refers to "loans discounted or pledged under section 1.7(b)(1)" of the Act. However, section 1.7(b)(1) of the Act describes the services that Farm Credit banks are authorized to provide certain FCS associations and OFIs, not the timing of when such associations and OFIs pledge collateral to the bank. Therefore, the term "pledged" in section 4.14A(a)(6)(B) covers those loans that a Farm Credit bank funds under its authority in section 1.7(b)(1), not the time when such loans are pledged.

For these reasons, OFIs must comply with borrower rights on all loans that they fund or discount through a Farm Credit bank. Borrower rights, however, do not apply to loans that an OFI funds through other sources. Thus, OFIs that always use the funding or discounting services of a Farm Credit bank to make all of its short- and intermediate-term agricultural and aquatic loans must comply with all borrower rights requirements.

Some flexibility may exist, however, for those OFIs that actually use several sources of funding, including Farm Credit banks, to make loans to farmers, ranchers, and aquatic producers and harvesters. In some cases, an OFI

genuinely may not know how it will fund a particular borrower's loans until after closing. In such cases, an OFI may decide not to give the borrower an EIR disclosure, written notification about the denial of credit, or the right to appeal the credit denial to a credit review committee because the OFI plans to use deposits or another line of credit to fund the borrower's loan. If the OFI subsequently decides to draw on its credit line with its Farm Credit bank to fund this loan, borrower rights would apply to all future actions on this loan. For example, a borrower who did not receive an EIR disclosure at closing would be entitled to an EIR disclosure at a later date if the OFI funds or discounts the loan with the Farm Credit bank and then adjusts the borrower's interest rate. The OFI must also give the borrower written notice and the right to appeal adverse credit actions to a credit review committee once it funds or discounts a seasoned loan with a Farm Credit bank. OFIs must also honor the rights of borrowers to restructure distressed loans even if the Farm Credit bank removed such loans from collateral after their credit quality declined. Once a Farm Credit bank funds or discounts a loan, borrower rights attach to it for the duration of the loan. This is the same approach that the FCA follows for loans that FCS institutions sell to non-System lenders.¹²

The FCA proposes a technical correction to § 614.4560(d). Currently, this provision erroneously states that section 4.36 of the Act applies to all loans that an OFI funds or discounts through an FCB or ACB. In fact, the plain language in section 4.36 of the Act states that the right of first refusal applies only to the borrowers of FCS institutions that operate under title I or II of the Act. As a result, OFIs are subject to some, but not all, of the regulations in subpart N of part 614. Accordingly, the FCA proposes to omit the reference to section 4.36 from § 614.4560(d) and to further amend this regulatory provision so it refers to §§ 614.4516, 614.4517, 614.4518, and 614.4519, which are the only regulations in subpart N of part 614 that apply to OFIs.¹³

4. Equitable Treatment

In 1998, the FCA adopted § 614.4590, which requires Farm Credit banks to treat OFIs and FCS associations

⁹ Pub. L. 100-233, Sections 103, 104, 105, and 106, 101 Stat. 1568, 1579-81 (January 6, 1988).

¹⁰ Borrower rights do not apply to loans that are subject to the Truth-in-Lending Act, 15 U.S.C. 1601 *et seq.* The Truth-in-Lending Act applies to consumer credit. Non-farm rural home loans and consumer loans to farmers are subject to the Truth-in-Lending Act, not the borrower rights provisions of the Act. See Act, §§ 4.13 and 4.14A(a)(5). Also, borrower rights do not apply to loans that the ACB makes under title III of the Act. See Act §§ 4.14A(a)(6)(A).

¹¹ Pub. L. 100-233, Sections 102, 101 Stat. 1568, 1574 (January 6, 1988).

¹² 12 CFR 614.4336.

¹³ The FCA recently proposed to move all borrower rights regulations to part 617. See 68 FR 5587, February 4, 2003. If the FCA adopts this change the final OFI rule will revise the cross-references to borrower rights regulations in § 614.4560(d).