

the original distress is cured. Any subsequent problem with the loan that causes the loan to meet the definition of a distressed loan requires the qualified lender to provide the borrower with a new distressed loan notice and opportunity to restructure, regardless of the number of times the loan was previously restructured.

The current notice requirement in existing § 614.4519(a) provides only two options, restructure or possible foreclosure. We propose in § 617.7425(b) to modify the 45-day notice to ensure that borrowers are informed that if they do not perform under the restructure, the qualified lender could proceed with foreclosure without further notification.

#### 5. May a Qualified Lender Propose Restructuring if the Borrower Did Not Submit an Application? [§ 617.7410(g)]

It is the borrower's responsibility to respond to the distressed loan notice by submitting an application for restructuring. Section 4.14A(d)(2) of the Act provides that nothing shall prevent a qualified lender from proposing an application for restructuring for an individual borrower in the absence of an application for restructuring from the borrower. We reaffirm that the qualified lender may submit a restructuring proposal for consideration if the borrower fails to do so. We believe that Congress provided this option as a means of ensuring that all borrowers are considered for a loan restructuring regardless of whether the borrower provides an application for restructuring.

We are proposing to move § 614.4516(c) into § 617.7410(g).

#### *What Is a Qualified Lender's Process When Determining Whether to Restructure or Foreclose? [§ 617.7415]*

Section 4.14A(e) of the Act and existing §§ 614.4517(a) and 614.4512(c) provide that certain factors should be taken into consideration when a qualified lender determines whether the cost of restructuring is equal to or less than the cost of foreclosure. The FCC commented that in calculating the cost of restructuring, a borrower's ability to perform under a restructuring plan is an integral, but not necessarily calculable, part of the analysis. The FCC went on to state that unrealistic borrower projections make calculating the cost of restructuring difficult, particularly when the regulations do not permit much analysis or questioning of the financial inputs provided by the borrower. We agree and propose in § 617.7415 regulatory amendments identified below to address the

responsibilities of both the borrower and the qualified lender in developing the restructuring plan.

#### 1. What Is the Process for Considering the Restructuring Application? [§ 617.7415(c)]

To develop the application for restructuring, the qualified lender and borrower should work together to determine the most realistic financial inputs. These inputs are the backbone of the application for restructuring. Because the Act requires a qualified lender to restructure the loan if the cost of restructuring is equal to or less than the cost to foreclose, it is imperative that the lender work with the most reliable inputs to determine the cost of restructuring. As such, we propose in § 617.7415(c) that when developing and negotiating the application for restructuring, the qualified lender may use benchmarks to determine the financial input costs and chattel security values if the borrower and lender are unable to reach agreement. Benchmarks may include the borrower's 5-year production average, averages in the county where the farming operation is located, or other such support. We expect the qualified lender and borrower to engage in good faith negotiations with the intended purpose of determining reasonable financial input costs for the borrower's operation. It is only when the borrower and lender are unable to agree on reasonable financial input values that the lender should look to benchmarks.

#### 2. What Criteria Does the Qualified Lender Use When Determining Whether To Restructure or Foreclose? [§ 617.7415]

Through our examination process and review of borrower complaints, questions have arisen about how qualified lenders apply the criteria in section 4.14A(d) and (e) of the Act. Specifically, many qualified lenders apply the criteria in paragraph (d) that the borrower must return to viability, as the controlling criterion. As a result, an application for restructuring may have been denied when the cost of restructuring was less than the cost of foreclosure. Although we believe a rule change is unnecessary, we are clarifying in § 617.7415(d) that section 4.14A(e) of the Act specifically requires the qualified lender to restructure the loan if the cost of restructuring is less than or equal to the cost of foreclosure.

This approach gives full meaning to section 4.14A and allows consideration of all relevant factors in evaluating a restructuring. We recognize this interpretation may result in approval of

an application for restructuring because it is the least cost option but unlikely to ultimately reestablish viability.

#### 3. May a Qualified Lender Include the Borrower's Performance Under a Previous Restructuring When Determining the Cost of Restructuring the Loan Again? [§ 617.7415(a)]

Section 4.14A(d)(1) of the Act provides criteria to consider when the qualified lender determines whether or not to restructure a loan. One of the criteria is the borrower's ability to work out of the existing financial difficulties. The Act balances Congress's desire for the System to assist borrowers and not cause financial harm to the qualified lender. The qualified lender should carefully consider the reasons why a prior restructuring was not successful when it analyzes whether a subsequent restructuring would make it probable that the borrower will become financially viable. If the qualified lender determines that deficient management by the borrower contributed to the current problem, then this deficiency should weigh heavily in the qualified lender's evaluation of the future viability of the borrower's operation. However, if the borrower's inability to perform under a prior restructuring was the result of a natural disaster, for example, and not management deficiencies, the qualified lender should take this into consideration when determining the likelihood that a new restructuring would be successful.

Although it is permissible for the qualified lender to analyze and quantify why prior restructuring efforts were not successful, the qualified lender is not permitted to include the costs of prior restructuring efforts in the cost of subsequent restructure requests.

#### 4. What Type of Foreclosure Action Should Be Used in Calculating the Cost of Foreclosure? [§ 617.7415(b)]

The FCC commented that we should specify whether the cost of foreclosure should be calculated based on a contested or uncontested foreclosure proceeding. We do not agree that we need to add this level of specificity. The cost of foreclosure varies on a case-by-case basis and, when calculating the cost of foreclosure, qualified lenders should have the flexibility to adjust the costs according to each situation.