AgSouth Farm Credit, ACA
Loans for land, farms and homes

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Via e-mail to reg-comm@fca.gov

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

RE: Proposed Rule – Organization; Definitions; Eligibility Criteria for Outside Directors (12 CFR Parts 611 and 619)
RIN 3052-AC97

Dear Mr. Mardock:

AgSouth Farm Credit, ACA ("AgSouth") appreciates the opportunity to submit comments to the Farm Credit Administration ("FCA") in response to the notice published in the Federal Register on August 24, 2018, requesting comments on proposed amendments to the regulations on the Organization, Definitions, and Eligibility Criteria for Outside Directors (the "Proposed Rule"). AgSouth has a strong interest on behalf of its stockholders to maintain high standards of impartiality and independence in the operation and function of its board of directors and to pursue necessary and appropriate steps to ensure the safety and soundness of the Farm Credit System (the "System").

AgSouth has concerns that the Proposed Regulations, as currently drafted, are overly broad in potential application, create significant administrative costs, and pose a threat to the identification and qualification of appropriate candidates to fill the important positions created and intended by the FCA regulations. AgSouth would like to further indicate its general support of the Farm Credit Council's comments on the Proposed Rule and the comments of AgFirst Farm Credit Bank.

Definitions (Proposed § 611.220(a))

Borrower (Proposed § 611.220(a)(2))

The proposed definition of Borrower should be clarified to limit application to current Borrowers. When defining "Borrower," the proposed Regulation uses the word "has" in the following context: "to which an institution *has* made a loan or a commitment to make a loan [emphasis added]" and "to whom an institution *has* made a lease or a commitment to make a lease [emphasis added]." Such a definition would appear to apply to all individuals and entities

who have ever had a loan, a pending loan, a lease, or a pending lease, regardless of whether the loan or lease has expired or been satisfied or was ever even consummated. The application of such a broad exclusion would serve to unnecessarily diminish the pool of potential candidates for outside director positions. AgSouth requests amending the language to limit application to current or pending lending or lease relationships.

Controlling Interest (Proposed § 611.220(a)(3))

The Supplementary Information to the Proposed Rule related to a "controlling interest" states "[t]he proposed rule would not limit employees of entity borrowers or affiliated organizations from consideration as an outside director." Proposed § 611.220(a)(3), however, provides that a "controlling interest" includes "an individual that, directly or indirectly, or acting through or in concert with one or more persons: …(iii) Has the power to exercise a controlling influence over the management of policies of such entity." Given the potential for issues related to whether an employee of an entity potentially has the "power" provided for in proposed § 611.220(a)(3)(iii), we request that § 611.220(a)(3)(iii) be amended to read as follows: "(iii) Has the power to exercise a controlling influence over the management of policies of such entity; provided, however, such limitation shall not apply to an individual acting in the capacity of officer or employee of an entity." Without such clarification, the impact of the regulation would be overly burdensome and broad and would create undue hardship on an institution in its attempt to identify and qualify appropriate outside director candidates.

Immediate Family Member (Proposed § 611.220(a)(5))

The application of the proposed term "immediate family member" would be unduly burdensome and would create an undue hardship on an institution in its attempt to identify and qualify appropriate outside director candidates. Specifically, the proposed regulation would prevent an individual from serving as an outside director if a member of their "immediate family" is a director, officer, employee, agent, stockholder, or borrower of any system institution throughout the country. AgSouth is particularly concerned with the inclusion of "in-laws" in the proposed definition. This concern is magnified when applying this definition in conjunction with the term "agent." For example, potential outside director candidates would be eliminated from consideration if an "in-law" acts as an agent for any Farm Credit institution, regardless of proximity. This application is too restrictive and overly broad in that it potentially covers individuals who are remote to the potential candidate and the involved institution. "Agents" could include large companies with offices nationwide, and it is unreasonable to disqualify a potential candidate because a distant or unfamiliar in-law might work for such an agent in a role unrelated to Farm Credit. AgSouth requests that references to "in-laws" be removed from the definition of "immediate family member."

In the alternative, AgSouth suggests that the definition of "immediate family member" should be limited to individuals or "family members" who reside in the same household, conduct business jointly or in partnership, and / or are otherwise involved in coordinated or combined financial obligations. The proposed definition, as drafted, is too far-reaching and results in

eliminating too many potential candidates. The definition should be restricted to cover familial relationships that could genuinely create a potential for a conflict of interest, as contemplated by discussion in the Supplementary Information to the Proposed Rule, focusing on whether "the outside director [can] adequately fulfill the intended independent role of an outside director."

Eligibility, Number and Term (Proposed § 611.220(b))

The Supplementary Information for proposed 611.220(b) suggests that this proposal is applicable only to candidates/nominees as specified in the following statement: "We propose modifying the existing outside director eligibility criteria in § 611.220(a) by expanding the list of persons who would be excluded from nomination for an outside director's seat." Further, existing § 611.220(a)(1) applies the eligibility requirements to "candidates for an outside director position." However, the language in proposed § 611.220(b)(1) would govern eligibility "to serve, *and continue serving* [emphasis added]." Additional confusion is created by proposed § 611.220(b)(1)(i) which specifically refers to a "candidate."

AgSouth believes the "continue serving" language in the proposed regulation creates confusion, and would potentially require the removal of a sitting outside director in the event a relationship is no longer allowed. The impact of this provision would be disruptive to the appropriate and timely conduct of business. Given the statutory and regulatory requirements that all System institution boards must have outside directors, in the event sitting outside directors are deemed ineligible to serve, a removal would throw into question the board's ability to vote and take action during the period required to identify and qualify a new outside director. Furthermore, should it be determined that this new rule applies to sitting outside directors, questions arise with regard to the necessity of a new reporting process for such outside directors. AgSouth requests clarification regarding the application of the Proposed Rule to sitting outside directors and, if the rule is deemed applicable to sitting outside directors, the appropriate process for boards to take action during the interim period required to identify and qualify a new outside director. In addition, AgSouth requests clarification with regard to whether the outside director would be granted the opportunity to resolve the conflict to avoid disqualification.

Proposed § 611.220(b)(1)(i)

Proposed § 611.220(b)(1)(i) also creates cause for concern with regard to application and potential confusion. The proposed regulation provides:

> No candidate for an outside director position may be a director, officer, employee, agent, stockholder, or borrower of an institution in the Farm Credit System or be an immediate family member of any of the above. An outside director candidate or an immediate family member of such candidate must not have a controlling interest in: (A) An entity that borrows from a System institution; or (B) An affiliated organization of a System institution.

As an initial matter, the Proposed Rule's use of the terms "be," "must not have" and "borrows" suggest application only to existing relationships. As previously discussed, with regard to the

proposed definition of "borrower," we note the apparent inconsistency of application within the Proposed Rule, and AgSouth requests clarification that past relationships are not contemplated. Specifically, we request that this section and the definition of "borrower" be amended to stipulate that only existing relationships are considered for purposes of the Proposed Rule. In the alternative, we request that application to past relationships should be restricted to a specific, reasonable timeframe (such as within the prior five years). Absent such a clarification or qualification, the application of the Proposed Rule would be unduly burdensome in its elimination of a broad pool of potential candidates.

AgSouth understands and appreciates the intent related to the inclusion of "agent" in the Proposed Rule, but we note the lack of an accompanying new defined term for "agent." Rather, "agent" is defined in § 612.2130(a), and the Supplementary Information to the Proposed Rule consistently refers to the definitions in § 612.2130. Based on this understanding, we are left to assume that § 612.2130(a) would provide the governing definition of the term "agent." If this is the case, then construction of the term "agent" may be problematic due to the pending SOC Proposed Rule. As currently proposed, the SOC Proposed Rule would greatly increase the scope of agents, potentially including cyber/technology service providers, and many other institution vendors. This concern over the meaning of "agent" is magnified when coupled with the new definition of "immediate family member," as the combined impact of these definitions would be substantial. We have serious concerns regarding the impact of this potential broad "agent" rule, particularly on rural territories that have fewer options with regard to service providers and vendors. Use of this broad construction of the term "agent" for purposes of outside directors would be too far-reaching and would create an undue hardship on institutions in their attempt to identify and qualify outside directors.

Should the prohibition related to immediate family members of agents, stockholders, and borrowers of the institution remain in the Proposed Rule, AgSouth requests language clarifying a "to the best of the outside director's knowledge" or a "knows or has reason to know" standard. Without some form of qualification, the proposal as currently drafted would create an impossible hardship on institutions and the candidates themselves. For example, an outside director candidate cannot be expected to know the intricacies of every relationship of his or her "immediate family members," and especially in their role as a potential "agent."

In addition, the nature of these requirements would appear to be beyond the FCA's scope and intended purpose as the impact would involve requiring loan and employment reporting for individuals not otherwise connected with the System (i.e., "family members" of potential candidates). The resulting public perception might be that the System is overly restrictive, which could further diminish the pool of interested candidates.

With regard to the prohibition related to "affiliated organizations" in proposed § 611.220(b)(1)(i)(B), System institutions will be forced to develop processes for identifying and maintaining a list of any and all such organizations. This information then will need to be shared with outside director candidates for consideration during the nominations process, and sitting outside directors also would be required to review this information for continued eligibility.

In addition, with regard to the administrative burdens and costs associated with the application of the Proposed Rule, AgSouth asserts that it is impractical for a System institution to be expected to know or learn whether an outside director candidate "exercises controlling influence over the management of policies" (proposed § 611.220(a)(3)(iii)) of an "affiliated organization." Even more burdensome, AgSouth cannot be expected to determine whether an "immediate family member" exercises this level of influence. Finally, AgSouth asserts that it would be impossible for a System institution to verify any of this information, particularly given situations where the other involved entity will not share employment information with a System institution. These points further illustrate that System institutions will face undue hardships and administrative costs associated with instituting and maintaining necessary and appropriate reporting and verification processes to satisfy the requirements of the Proposed Rule, particularly with regard to implications associated with the interplay of "family members," "control," and "affiliated organizations." As a result, AgSouth requests that further consideration be given to the overall impact of proposed § 611.220(b)(1)(i)(B) given the impact of the overly broad defined terms and the inability for System institutions to satisfy the potential requirements. We further request confirmation that the institution will not be required to verify such information, and instead will be able to rely on self-disclosure as part of an annual certification process similar to that provided for by the standard of conduct rules.

Compliance Date

As the Proposed Rule comingles applicability of candidate eligibility with current director eligibility, AgSouth would appreciate clarification on the expectation for handling sitting directors following implementation of the final rule. AgSouth would request that the FCA consider a "grandfather clause" applicable to current sitting outside directors until their current term expires. In addition, we again note the overlap and interplay of the Proposed Rule with the SOC Proposed Rule, to include references in the Proposed Rule's Supplementary Information to definitions in § 612.2130(c) that are currently proposed to be amended. Given the direct ties between the two proposals, we would request that the effective date of the Proposed Rule be delayed until the SOC Proposed Rule has been finalized.

General Considerations

AgSouth notes that the issues raised above would require an additional and much more in-depth reporting process for outside directors than a stockholder-elected director. These requirements seem to conflict with the ongoing emphasis in other FCA regulations and guidance that outside directors should not be treated differently than stockholder-elected directors. We also note that the Proposed Rule is silent with regard to reporting frequency and request more guidance and clarification in this regard.

As previously discussed, System stockholders do not have the same material financial investments in Association stock that a stockholder of a public corporation might, and the board of directors of System institutions are not comprised primarily of executive managers or others traditionally deemed "insiders" by public corporations. As a result, the concerns with regard to outside directors of public corporations are not the same as those for System institutions.

Furthermore, in many cases System territories have smaller pools of outside director candidates who are both able and willing to make a meaningful difference in helping elected directors with oversight of critical areas like legal, financial, technology, and/or human resources. The impact of the Proposed Rule serves to shrink this available pool to an unmanageable and unsustainable degree.

Conclusion

Identifying and qualifying outside director candidates of the highest quality and ability is a priority for AgSouth. While we agree with the intent and objectives of the Proposed Rule to strengthen the safety and soundness of System institutions and to strengthen the independence of System institution boards, the Proposed Rule imposes significant administrative burdens as well as challenging identification and qualification issues for System institutions. Institutions will ultimately be responsible for vetting the independence of potential candidates and sitting outside directors using the criteria set forth in the final rule. The more reasonable the criteria the more effective and efficient that vetting process will be. Furthermore, the Proposed Rule will not only result in increased administrative costs, but also severely limit the pool of directors who may be willing to bring their expertise to the board of AgSouth.

We respectfully ask that the FCA consider AgSouth's comments to revise the Proposed Rule to reduce unnecessary administrative burdens and clarify responsibilities and requirements so that we are not hindered in the advancement of the mission of the Farm Credit System to provide financing to our rural and agricultural communities. Again, we sincerely thank you for the opportunity to constructively comment on the Proposed Rule.

Respectfully submitted,

AgSouth Farm Credit

Jimmy Carter
Chairman of the Board Directors

Pat Calhoun
Chief Executive Officer & President