

without restriction or prior approval of the Administrator of the Rural Utilities Service (RUS). On June 29, 1989, RUS issued a final rule codifying this provision (at 54 FR 27325), and the provision became effective for all electric mortgages executed after July 31, 1989. Mortgages executed prior to that date contained a provision granting the Administrator the right to approve investments, loans and guarantees by the borrower once the aggregate of such investments, loans and guarantees reached 3 percent of total utility plant.

This proposed rule is intended to clarify RUS's policies and requirements regarding restrictions on borrower investments, loans and guarantees. Over the past several years borrowers have raised a number of questions about such issues as: Which investments, loans or guarantees are subject to RUS approval and which are excluded; the criteria used by RUS in approving an investment, loan or guarantee; whether RUS approval of an investment, loan or guarantee means that it is no longer counted in determining the ratio to total utility plant; whether RUS will approve an investment, loan or guarantee if the borrower is under the 15 percent limit; whether a borrower will be in default under its mortgage because net profits earned on its investments pushed its total above the 15 percent limit. This proposed rule attempts to resolve such questions.

RUS is also in the process of updating its mortgage and loan contract used with electric borrowers. RUS published a proposed mortgage for electric distribution borrowers on September 29, 1994 at 59 FR 49594. In that rule it is proposed that RUS controls over borrower investments, loans and guarantees be moved from the mortgage to the RUS loan contract. Such a move would have no effect on RUS's controls or their enforceability under the RUS mortgage.

The following discussion of the proposed rule published today focuses on the major provisions and more significant changes proposed to the existing regulation.

Section 1717.651 Policy

No change is proposed to this section. It would remain RUS policy that borrowers are encouraged to use their own funds to foster the economic development of rural areas, provided that such actions do not in any way put government funds at risk or impair the borrower's ability to repay its indebtedness to RUS and other lenders.

Section 1717.652 Definitions

Several changes are proposed to this section, mostly to accommodate changes proposed elsewhere in the rule. For example, definitions are added for "Default," "Equity," "Operating DSC," "Operating TIER," "Regulatory Created Assets," and "Total Assets." These relate primarily to proposed § 1717.655, under which borrowers that meet certain criteria would be exempt from RUS approval of investments, loans and guarantees.

Technical changes are proposed to the definition of "Own Funds." These are not intended to make any substantive change to what investments, loans and guarantees are or are not controlled by RUS. The proposed changes are intended to more closely reflect the approach actually used by RUS in monitoring investments, loans and guarantees. The current definition may give the erroneous impression that all cash deposits and other assets held by a borrower are first divided into "Own Funds" and "other funds" and that only "Own Funds" are subject to controls. In fact, all of a borrower's investments, loans and guarantees are subject to controls except those made under the 15 percent limit and those excluded under § 1717.654. The definition of "Own Funds" serves primarily to make clear that, for the purposes of the 15 percent exclusion, a borrower cannot treat funds lent by RUS as its "Own Funds".

In addition, four new terms would be defined: "Natural Gas Distribution System," "Solid Waste Disposal System," "Telecommunication and Other Electronic Communication System," and "Water and Waste Disposal System." Under proposed § 1717.654 investments by borrowers in these four types of community infrastructure located in the borrowers' service territories would be excluded from RUS control.

Finally, it is proposed that the current definition of "Invest" be supplemented by allowing borrowers to submit any proposed transaction to RUS for an interpretation of whether the action is an investment for the purposes of RUS controls.

Section 1717.653 Transactions Below the 15 Percent Level

Proposed paragraph (a) of new § 1717.653 is the same substantively as existing § 1717.653. It would continue to provide that a borrower in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreement with RUS would not need prior approval from RUS to make investments, loans and guarantees

up to the 15 percent level. For purposes of clarity, the proviso that the borrower must not be in default would be included at this point rather than in the definition of borrower, as in the existing rule. Similarly, a proviso would be included to make it clear that funds necessary to make timely payments of principal and interest on loans secured by the RUS mortgage would remain subject to RUS controls. This issue is currently addressed in the definition of "Own Funds" in the existing rule.

Proposed paragraph (b) is substantively the same as existing § 1717.654(b).

Proposed paragraph (c) is new, and is intended to clarify RUS policy that it will not "approve" investments, loans or guarantees made below the 15 percent level. In the past, some borrowers have sought to obtain RUS approval of transactions below the 15 percent limit and to have these transactions excluded when determining the aggregate amount of investments, loans and guarantees made by the borrower. Such approvals would not be consistent with the restriction imposed on RUS by section 312 of the RE Act. They also would not be consistent with protecting loan security since a borrower might seek approval and exclusion of low-risk transactions below the 15 percent limit in order to make room for high-risk transactions below the limit that would be immune from RUS review.

Section 1717.654 Exclusion of Certain Investments, Loans and Guarantees

Proposed paragraph (a) would remain substantively the same as existing paragraph (a). The exclusions set forth in proposed paragraph (b) are the same as those in existing paragraph (b)(2), except that it would be made clear that all investments made in the National Rural Utilities Cooperative Finance Corporation and the National Bank for Cooperatives would be excluded from RUS controls, as they are now under current RUS policy.

Certain other exclusions currently followed by RUS would continue. These include exclusions for any investment, loan or guarantee that the borrower is required to make by RUS or other USDA agency; investments included in an irrevocable trust for the purpose of funding post-retirement benefits of the borrower's employees; and reserves required by a reserve bond agreement or other legally binding agreement that are dedicated to making required payments on debt secured under the RUS mortgage, not to exceed the amount of reserves specifically required by such agreement.