

hazards at the expense of the borrower. RUS believes, however, that it would be more appropriate to include such a provision in individual loan contracts.

Section 3.08 Restrictions on Additional Permitted Debt

Comments were received regarding two of the proposed restrictions on additional permitted debt: restricting unsecured debt to 15 percent of the borrower's net utility plant, and restricting any debt assumed as part of an acquisition to 90 percent of the net utility plant of the acquired company. Those who opposed restricting unsecured debt believed it was unnecessary and could limit interim construction financing. One commenter said the restriction was unnecessary if borrowers were required to maintain a minimum equity requirement. On the other hand, one regional borrower association said that: "The cooperatives applaud the amendments [proposals] regarding restrictions on additional permitted debt. The amendments make the requirements less restrictive and more conducive to today's utility environment."

In light of these comments, RUS has decided to move the restriction on issuing unsecured debt without mortgagee approval to the RUS loan contract and apply it only to borrowers with equity of less than 30 percent of total assets. Currently, only 9 percent of distribution borrowers have less than 30 percent equity and would thus be subject to this restriction.

The restriction limiting debt assumed through acquisitions to 90 percent of net utility plant of the acquired company (which was intended to mirror the test in sec. 2.01) was been dropped. Such debt would have to comply with Article II of the mortgage in order to be secured, and thus the proposed restriction is not needed.

Section 3.10 Limitations on Consolidations and Mergers

One commenter recommended that consolidations that don't meet the required financial ratios should have the opportunity to be approved by mortgagees on a case-by-case basis. This in fact is the intention of section 3.10 and language has been added to make that clear. Moreover, the required financial ratios have been revised consistent with the changes to the financial ratios in section 2.01 of the mortgage.

Section 3.12 Maintenance of Mortgaged Property

Most of the comments on this section focused on the professional engineer's

certification as to the condition of the borrower's property, which the mortgagees could require not more than once every 3 years. Some commenters said the certificate need not come from an independent professional engineer, but simply a professional engineer acceptable to the mortgagees. RUS has adopted this change.

One mortgagee argued that the proposed second certification and related remedial plan and process should be dropped since they detracted from the clear intent of the section and could weaken the provision. RUS agrees and has dropped these provisions. The section has also been modified to make it clear that the mortgagees may direct the mortgagor to make needed improvements in the maintenance and repair of the borrower's system based on any information available to the mortgagees, including the engineer's certification. The suggestion that "good utility practice" be changed to "prudent utility practice" has also been adopted.

Section 3.16 Limitations on Dividends, Patronage Refunds and Other Cash Distributions

CFC recommended that this provision be moved to the RUS loan contract. CoBank recommended that no restrictions be placed on distributions at or above 30 percent equity if the borrower is not in default, and that no distributions be allowed below 30 percent equity (after distribution), except for membership fees upon termination of membership. NRECA stated that the proposed provision (which was essentially the same as that in the existing mortgage) was too complicated, and that it should be simplified by having no restrictions on distributions above 27 percent equity (after distribution), and presumably allowing distributions below 27 percent equity only in the case of membership terminations. One borrower association proposed a fairly complicated scheme whereby different proportions of prior year's margins could be distributed depending on the level of borrower equity.

Based on these comments, RUS has decided to move this provision to its loan contract. In the proposed loan contract, the language of the provision would be simplified and greater latitude would be granted. Borrowers could make distributions without RUS approval provided that the borrower was not in default and equity after the distribution was equal to at least 30 percent of total assets (versus 40 percent in the existing mortgage). Below 30 percent equity, borrowers not in default could make distributions to the estates

of deceased persons without RUS approval. Also, between 20 percent and 30 percent equity (after distribution) borrowers could distribute up to 25 percent of last year's margins, including any distributions for estates. These changes would provide substantially greater latitude to most borrowers since 91 percent of distribution borrowers have equity of 30 percent or more.

Section 4.02 Acceleration of Maturity; Rescission and Annulment

Several comments were received suggesting clarifications or modifications of certain aspects of this section. Based on these comments, the following clarifications or modifications have been made:

A mortgagee who accelerates a note for a non-payment default (not just a payment default) must notify the other mortgagees.

A mortgagee who becomes aware that another mortgagee has accelerated its notes for either a payment or a non-payment default may in turn accelerate its own notes.

Two additional conditions have been added to those that must be met before mortgagees representing at least 80 percent of the outstanding secured debt may annul an acceleration by another mortgagee: all reasonable expenses of the mortgagee in connection with the acceleration must have been paid, and the annulment must be made before proceedings to foreclose the lien of the mortgage have commenced.

Opinions of Borrower's Counsel

Several comments were received concerning the number and nature of legal opinions called for in the proposed mortgage. The final mortgage published today requires fewer opinions, and the scope of some of the opinions has been narrowed in response to those comments. The topic of legal opinions from borrowers' counsels has been the subject of robust debate within the legal profession for several years, with no clear consensus emerging. It is doubtful that all of these concerns can be addressed to the satisfaction of the entire legal community.

List of Subjects in 7 CFR Part 1718

Administrative practice and procedure, Electric power, Electric utilities, Loan programs—energy, Loan security documents, Reporting and recordkeeping requirements, Rural areas.

For the reasons set out in the preamble, REA amends chapter XVII of title 7 of the Code of Federal Regulations by adding a new part 1718 to read as follows: