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DEPARTMENT OF AGRICULTURE

Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency

7 CFR Part 1927

RIN 0575–AB52

Real Estate Title Clearance and Loan Closing

AGENCIES: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Rural Housing Service (RHS) and the Farm Service Agency (FSA), collectively hereafter referred to as ''agency,'' amend the Real Estate Title Clearance and Loan Closing regulation. This action makes loan closing procedures consistent with the private sector for commercial loans and makes loan closing requirements consistent with local laws and procedures that are typical in the area where an agency loan is made. The intended effect is to provide the public with easier and less costly access to agency programs.

EFFECTIVE DATE: April 22, 1996.

FOR FURTHER INFORMATION CONTACT: Walter B. Patton, Senior Loan Specialist, Rural Housing Service, USDA, Room 5334, South Agriculture Building, 14th and Independence Ave. SW, Washington, DC 20250, Telephone (202) 720–0099.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by OMB.

Paperwork Reduction Act

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control number 0575–0147, in accordance with the Paperwork Reduction Act of 1980. This final rule does not impose any new information collection requirements from those approved by OMB.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' It is the determination of the agency that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1949, Pub. L. 91–190, an Environmental Impact Statement is not required.

Intergovernmental Consultation

This regulation is an instructional procedure and is not covered by Executive Order 12372. Programs listed in the Catalog of Federal Domestic Assistance are as follows: Catalog Nos. 10.405, Farm Labor Housing Loans and Grants; 10.415, Rural Rental Housing Loans; and 10.416, Soil and Water Loans, are subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, 48 FR 29112, June 24, 1983). Catalog Nos. 10.404, Emergency Loans; 10.406, Farm Operating Loans; 10.407, Farm Ownership Loans; 10.410, Very Low to Moderate Income Housing Loans, and nonprogram loans are excluded from the scope of Executive Order 12372.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. In accordance with this rule: (1) all state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) pursuant to section 212 of the Department of Agriculture Reorganization Act of 1994, Public Law 103–354 (October 13, 1994), administrative appeal proceedings must be exhausted before bringing suit challenging actions taken under this rule.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulator actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the agency generally must prepare a written statement, including a cost-benefit analysis for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Discussion

On May 11, 1994, the Farmers Home Administration (FmHA) (predecessor to the Rural Housing Service and the Farm Service Agency), published a proposed rule with a request for public comments to revise 7 CFR part 1927, subpart B, ''Real Estate Title Clearance and Loan Closing.''

The agency received fifteen comments. Eight comments came from within the United States Department of Agriculture (USDA); six comments came from private practice attorneys, and one comment came from a title insurance company.

Those sections of the proposed regulation that are administrative in nature and apply only to administrative procedures within the agency have been removed from this document. These procedures are available from any agency office upon request.

The proposed rule discussed the need to make real estate title clearance and loan closing procedures more

compatible with the public sector requirements. Many of the comments addressed this desire.

The agency policy is that all loans be closed with the issuance of a title insurance policy except in those areas of the country where title insurance is unavailable. It is anticipated that in most states, attorneys will continue to close loans and be issuing agents of title insurance for a title insurance company instead of providing a title opinion. This provides better protection for both the agency and the borrower. When a title insurance company indemnifies the issuing agent attorney through the use of an indemnification agreement, the attorney will not be required to obtain a fidelity bond or errors and omissions insurance.

Comments and Other Significant Changes are Discussed Below

One respondent questioned the need for a title insurance company to provide an audited financial statement in order to show financial responsibility to the agency. We feel it is important that the agency can determine the financial responsibility of a title insurance company. We will allow each State Office to determine whether the State Agency which regulates title insurance companies requires sufficient proof of financial responsibility to meet this requirement, or if additional proof is necessary. If the State Office concludes that the State Insurance Agency provides sufficient assurance of financial responsibility of State regulated title insurance companies, no other minimal information will be required from the individual title insurance company.

One respondent questioned § 1927.59(a)(1) (i) through (iii), which states that title insurance will only be obtained for subsequent loans in certain situations. The recommendation was that title insurance should be required in all subsequent loan cases. It has been decided that title insurance or title opinions will be obtained unless the cost of title services is excessive in relationship to the size of the loan, the agency currently has a first mortgage security interest, the applicant has sufficient income to service all loans from the agency, the borrower is current on all existing agency loans, and the best mortgage obtainable adequately protects agency security interests.

A comment questioned the policy of not allowing the mention of the use of abstracts of title in any title opinions furnished to the United States Department of Agriculture (USDA). The agency does not prevent an attorney from using an abstract of title when preparing an attorney's opinion, but what the agency requires is the unqualified opinion of the attorney, not an opinion which passes the liability for an error from the attorney to an abstract company. Reviewing the abstract is a method an attorney can use to arrive at his or her opinion and it is not necessary on the face of the opinion to indicate the methodology by which the attorney arrived at the opinion. With the agency's policy shifting to the use of title insurance policies, instead of title opinions, this concern will be diminished. (This subject is not specifically addressed in this regulation and no change is being made.)

The recommendation to continue to have the attorney use Forms FmHA 1927–9, ''Preliminary Title Opinion,'' and FmHA 1927–10, ''Final Title Opinion,'' on title opinions for both loan closing and foreclosure proceedings when an attorney's opinion is used, is acceptable. The proposed regulation did not preclude this practice.

A comment was made suggesting that loan closing attorneys and title companies agree to indemnify the agency against any losses that occur as a result of mistakes. The agency does not agree with this suggestion. Title insurance will provide the agency with adequate coverage against any errors made by the title insurers. The agency will be a named insured on title insurance policies issued in conjunction with agency loans. In those areas where attorney's opinions will still be used, the agency is protected to a lesser extent by the attorney's malpractice insurance.

A comment was received debating the use of a title opinion versus title insurance, and the additional cost incurred if a title insurance company were to require a survey. Typically, the agency requires a survey unless the title insurance company provides survey coverage. The change to the regulation will give State Offices the authority to decide the form of title insurance certification and form of survey that is best for their state.

It was recommended that the definitions of ''approved attorney'' and ''approved title insurance company,'' be expanded to cross reference the provisions providing for approval. This recommendation was accepted.

It was pointed out that an ''issuing agent'' may or may not be a party who can perform closing services, depending on local law. This fact was incorporated.

It was pointed out that the reference to ''warranty deed'' in the definition of ''mortgage'' in § 1927.52 is somewhat confusing. This reference was removed.

It was suggested to expand the definition of ''quitclaim deed.'' The current method of conveying title by use of a quitclaim deed has not been a problem.

The Anti-Deficiency Act, 31 U.S.C. §§ 1512–1519, precludes Federal agencies from agreeing to expend federal funds in excess of an appropriation. The covenants in warranty deeds could commit the agency to expend funds in future fiscal years were a warranty to be breached. This would violate the Anti-Deficiency Act and, for this reason, the agency cannot use warranty deeds in conveying property to which it holds title. Therefore, no change was made.

It was pointed out that a closing protection letter need not be furnished when the loan closing is conducted in a branch office of the title insurance company. This was incorporated.

It was also pointed out that by saying a closing protection letter must provide equivalent protection of a ''professional liability and fidelity insurance policy,'' will create problems, because title insurance companies are prohibited by law from providing professional liability and fidelity insurance. This reference was removed.

It was pointed out that § 1927.54(d)(4) is not needed when a closing protection letter is provided. The paragraph stated, ''Title insurance company agrees that the title insurance company employee or closing agent who supervises the closing of the transaction will be authorized to receive funds and give receipts for the company's charges.'' This paragraph has been removed.

It was suggested that we remove what appears to be a mandatory requirement that an owner's title insurance policy be issued. In most instances, an owner should obtain an owner's policy of title insurance for the owner's protection and the agency will encourage but not require this. A correction was made to clarify this point.

It was pointed out that in some states only an attorney can prepare a deed. Therefore, a change was made that a closing agent can prepare a deed unless prohibited by law.

One commentor stated that the statement, ''Loan funds for the payment of a lien may be disbursed only upon the receipt of a discharge, satisfaction, or release,'' in § 1927.58(a), is impracticable. We agree with this perception; however, a completely satisfactory wording is impracticable. The word ''receipt'' is being changed to ''recording.'' We believe it is understood by closing agents that funds change hands and releases and recordings occur substantially simultaneously.

A comment was made that instead of ''recommending'' the use of title insurance, we should ''require'' its use unless prohibited by State law. If this were implemented, any deviation would need to be authorized by the Administrator. Since State laws vary greatly, it is important to give State Offices latitude in this regard. In some very rural areas of the country title insurance may be unavailable for logistical as opposed to legal reasons. This wording will remain unchanged.

The question was raised as to why the agency requires the borrower to receive a copy of the title opinion. It goes on to say neither the conventional nor the government mortgage market provides a title opinion to the borrower. The agency has a responsibility to provide supervised credit. It is important that all borrowers are aware of the terms and conditions of the title insurance commitment as well as the final title insurance binder. No change is made with regard to this comment.

A comment was made concerning ''a loan is considered closed,'' and ''the date of closing,'' and which definition is correct. The terms apply to two different events and are not meant to be the same. By definition ''closed loan'' is ''a loan is considered to be closed when the mortgage is filed for record.'' The date of closing is the date that the closing agent conducts the loan closing activity. No change was made.

It was commented that sometimes ''mortgagee's policy'' was interchanged with ''lender's policy.'' All references were changed to ''lender's policy.''

Concerning debarment or suspension, a comment was made that the proposed regulation implied that once a party was debarred or suspended they are always debarred or suspended. This was corrected by inserting the words ''is currently.''

A comment was made that the closing agent should not be required to determine the validity of the legal description, but rather should use the legal description provided by the survey or other legal document. It is part of the closing agent's duties to verify an accurate legal description. Using the survey or other recorded legal document is one way of meeting this requirement but the ultimate responsibility rests with the closing agent. No change has been made.

A comment was made that in one section we required the return of ''the final title opinion or policy of title insurance,'' within one day, while in another section it requires they be returned ''as soon as possible.'' The requirement is removed from the section requiring their return within one day.

It was recommended that § 1927.59(a)(iv) be clarified by changing the word ''additional'' to ''subsequent.'' This change was made.

A comment was made that we refer to a ''clear'' title while the conventional term is ''marketable.'' This change was made.

A comment was made that there are different definitions and examples of ''exceptions'' in various passages. These variations were corrected.

Two concerns were raised about the requirement that approved attorneys providing title opinions must have a $50,000 fidelity bond. The comment was that no other lender requires a fidelity bond and it results in increased cost to the borrower. We believe the continued requirement for a fidelity bond is necessary to protect these funds which are public monies. Therefore, this requirement will not be changed for closings where attorney opinions are obtained. In most cases where the party handling closing funds is covered by an acceptable closing protection letter, there will be no need for a fidelity bond.

A question was raised concerning the ''certification of title,'' and the business of insuring titles. It is not the intent of this regulation that attorneys insure titles. In most cases, the agency will obtain title insurance and in such cases the agency will look to the title insurance company, not the closing agent, if there is a defect in title. In those cases where an attorney's opinion is issued instead of title insurance, if the title opinion is defective, the agency will seek redress from the attorney who issued the opinion.

A question was raised with regard to the requirement that an approved attorney furnishing a title opinion must have at least a $250,000 errors and omissions insurance policy with a deductible not to exceed $5,000. The regulation will allow each State Office to establish the appropriate level of errors and omissions insurance coverage and the level of deductible, according to what is customary in the area and necessary for the protection of the agency. To the extent that real estate loans are closed using a title insurance policy with a closing protection letter covering the closing agent, concerns regarding fidelity bonds, and errors and omissions insurance coverage, are eliminated.

One respondent requested the reinstatement of Form FmHA 427–18, ''Fidelity Bond for Loan Closing Attorneys.'' It is felt that a surety company can provide verification of fidelity bond coverage without the agency developing a replacement form. In keeping with the Paperwork Reduction Act, this form will not be reinstated.

Four public comments encouraged the agency to require the adoption of title insurance policies. Two respondents said they would reduce their legal fees, as an accommodation to the purchaser, when title insurance policies are issued. We believe the proposed rule adequately addressed these comments and no changes will be required.

List of Subjects for 7 CFR Part 1927

Loan programs—Agriculture, Loan program—Housing and community development, Mortgages.

Therefore, chapter XVIII, title 7, Code of Federal Regulations is amended by revising part 1927 to read as follows:

PART 1927—TITLE CLEARANCE AND LOAN CLOSING

Subpart A—[Reserved]

Subpart B—Real Estate Title Clearance and Loan Closing

Sec.

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 42 U.S.C. 1480.

Subpart A—[Reserved]

Subpart B—Real Estate Title Clearance and Loan Closing

1927.51 General.

(a) *Types of loans covered by this subpart.* This subpart sets forth the authorities, policies, and procedures for real estate title clearance and closing of loans, assumptions, voluntary conveyances and credit sales in connection with the following types of Rural Housing Service (RHS) and Farm Service Agency (FSA) loans: Farm Ownership (FO), Nonfarm Enterprise (FO–NFE), Emergency (EM), Operating (OL), Rural Housing (RH), Farm Labor Housing (LH), Rural Rental Housing (RRH), Rural Cooperative Housing (RCH), Soil and Water (SW), Indian Land acquisition loans involving nontrust property, and NonProgram (NP) loans. This subpart does not apply to guaranteed loans.

(b) *Programs not covered by this subpart.* Title clearance and closing for

all other types of agency loans and assumptions will be handled as provided in the applicable program instructions or as provided in special authorizations from the National Office.

(c) [Reserved]

(d) Copies of all agency forms referenced in this regulation and the agency's internal administrative procedures for title clearance and loan closing are available upon request from the agency's State Office. Forms and title clearance and loan closing requirements which are specific for any individual state must be obtained from the agency State Office for that state.

1927.52 Definitions.

Agency. The Rural Housing Service (RHS) and Farm Service Agency (FSA) or their successor agencies.

Approval official. The agency employee who has been delegated the authority to approve, close, and service the particular kind of loan, will approve an attorney or title company as closing agent for the loans. If a loan must be approved at a higher level, the initiating office may approve the closing agent.

Approved attorney. A duly licensed attorney, approved by the agency, who provides title opinions directly to the agency and the borrower or upon whose certification of title an approved title insurance company issues a policy of title insurance. Approved attorneys also close loans, assumptions, credit sales, and voluntary conveyances and disburse funds in connection with agency loans. Approved attorney is further defined in § 1927.54(c).

Approved title insurance company. A title insurance company, approved by the agency, (including its local representatives, employees, agents, and attorneys) that issues a policy of title insurance. Depending on the local practice, an approved title insurance company may also close loans, assumptions, credit sales, and voluntary conveyances and disburse funds in connection with agency loans. If the approved title insurance company does not close the loan itself, the loan closing functions may be performed by approved attorneys or closing agents authorized by the approved title insurance company.

Borrower. The party indebted to the agency after the loan, assumption, or credit sale is closed.

Certificate of title. A certified statement as to land ownership, based upon examination of record title.

Closed loan. A loan is considered to be closed when the mortgage is filed for record and the appropriate lien has been obtained.

Closing agent. The approved attorney or title company selected by the applicant and approved by the agency to provide closing services for the proposed loan. Unless a title insurance company also provides loan closing services, the term ''title company'' does not include ''title insurance company.''

Closing protection letter. An agreement issued by an approved title insurance company which is an American Land Title Association (ALTA) form closing protection letter or which is otherwise acceptable to the agency and which protects the agency against damage, loss, fraud, theft, or injury as a result of negligence by the issuing agent, approved attorney, or title company when title clearance is done by means of a policy of title insurance. Depending on the area, closing protection letters may also be known as ''Insured Closing Letters,'' ''Indemnification Agreements,'' ''Insured Closing Service Agreements,'' or ''Statements of Settlement Service Responsibilities.''

Cosigner. A party who joins in the execution of a promissory note or assumption agreement to guarantee repayment of the debt.

Credit sale. A sale in which the agency provides credit to the purchasers of agency inventory property. Title clearance and closing of a credit sale are the same as for an initial loan except the property is conveyed by quitclaim deed.

Deed of trust. See trust deed.

Exceptions. Exceptions include, but are not limited to, recorded covenants; conditions; restrictions; reservations; liens; encumbrances; easements; taxes and assessments; rights-of-way; leases; mineral, oil, gas, and geothermal rights (with or without the right of surface entry); timber and water rights; judgments; pending court proceedings in Federal and State courts (including bankruptcy); probate proceedings; and agreements which limit or affect the title to the property.

Fee simple. An estate in land of which the owner has unqualified ownership and power of disposition.

FSA. The Farm Service Agency, an agency of the United States Department of Agriculture (and any successor agency). FSA is the successor agency for farm program loans of the former Farmers Home Administration.

General warranty deed. A deed containing express covenants by the grantor or seller as to good title and right to possession.

Indemnification agreement. An agreement that protects the agency against damage, loss, fraud, theft, or injury as a result of useful conduct or negligence on behalf of the issuing agent, approved attorney, or title company. This agreement may also be entitled closing protection letter, insured closing letter, insured closing service agreement, statement of settlement service responsibilities, or letters which provide similar protection.

Issuing agent. An individual or entity who is authorized to issue title insurance for an approved title insurance company.

Land purchase contract (contract for deed). An agreement between the buyer and seller of land in which the buyer has the right to possession and use of the land over a period of time (usually in excess of 1 year) and makes periodic payments of a portion of the purchase price to the seller. The seller retains legal title to the property until the final payment is made, at which time the buyer will receive a deed to the land vesting fee title in the buyer.

Mortgage. Real estate security instrument which pledges land as security for the performance of an obligation such as repayment of a loan. For the purpose of this regulation the term ''mortgage'' includes deed of trust and deed to secure debt. A real estate mortgage or deed of trust form for the state in which the land to be taken as security is available in any agency office, and will be used to secure a mortgage to the agency.

National Office. The National Headquarters Office of FSA or RHS depending on the loan program involved.

OGC. The Office of the General Counsel, United States Department of Agriculture.

Program regulations. The agency regulations for the particular loan program involved (e.g., subpart A of part 1944 of this chapter for single family housing (SFH) loans).

Quitclaim deed. A transfer of the seller's interest in the title, without warranties or covenants. This type of deed is used by the agency to convey title to purchasers of inventory property.

RHS. The Rural Housing Service, an agency of the United States Department of Agriculture, or its successor agency. RHS is the successor agency to the Rural Housing and Community Development Service (RHCDS) which was, in turn, the successor agency to the Farmers Home Administration.

Seller. Individual or other entity which convey ownership in real property to an applicant for an agency loan or to the agency itself.

Special warranty deed. A deed containing a covenant whereby the grantor agrees to protect the grantee against any claims arising during the grantor's period of ownership.

State Office. For FSA this term refers to the FSA State Office. For RHS this term refers to the Rural Economic and Community Development State Director.

Title clearance. Examination of a title and its exceptions to assure the agency that the loan is legally secured and has the required priority.

Title company. A company that may abstract title, act as an issuing agent of title insurance for a title insurance company, act as a loan closing agent, and perform other duties associated with real estate title clearance and loan closing.

Title defects. Any exception or legal claim of ownership (through deed, lien, judgment, or other recorded document), on behalf of a third party, which would prevent the seller from conveying a marketable title to the entire property.

Trust deed. A three party security instrument conveying title to land as security for the performance of an obligation, such as the repayment of a loan. For the purpose of this regulation a trust deed is covered by the term ''mortgage.'' A trust deed is the same as a deed of trust.

Voluntary conveyance. A method of liquidation by which title to agency security is transferred by a borrower to the agency by deed in lieu of foreclosure.

Warranty deed. A deed in which the grantor warrants that he or she has the right to convey the property, the title is free from encumbrances, and the grantor shall take further action necessary to perfect or defend the title.

§ 1927.53 Costs of title clearance and closing of transactions.

The borrower or the seller, or both, in compliance with the terms of the sales contract or option will be responsible for payment of all costs of title clearance and closing of the transaction and will arrange for payment before the transaction is closed. These costs will include any costs of abstracts of title, land surveys, attorney's fees, owner's and lender's policies of title insurance, obtaining curative material, notary fees, documentary stamps, recording costs, tax monitoring service, and other expenses necessary to complete the transaction.

§ 1927.54 Requirements for closing agents.

(a) *Form of title certification.* State Offices are directed to require title insurance for all loan closings unless the agency determines that the use of title insurance is not available or is economically not feasible for the type of loan involved or the area of the state where the loan will be closed. If title insurance is used, State Offices are authorized to require a closing protection letter issued by an approved title insurance company to cover the closing agent, if available. A closing protection letter need not be furnished when the closing is conducted by the title insurance company.

(b) *Approval of closing agent.* An attorney or title company may act as a closing agent and close agency real estate loans, provide necessary title clearance, and perform such other duties as required in this subpart. A closing agent will be responsible for closing agency loans and disbursing both agency loan funds and funds provided by the borrower in connection with the agency loan so as to obtain title and security position as required by the agency. The closing agent must be covered by a fidelity bond which will protect the agency unless a closing protection letter is provided to the agency. The borrower will select the approved closing agent. If title clearance is by an attorney's opinion, the agency will approve the attorney who will perform the closing in accordance with paragraph (c) of this section. The attorney will be approved after submitting a certification acceptable to the agency. If title certification is by means of a policy of title insurance, the title company which will issue the policy must have been approved in accordance with paragraph (d) of this section. A closing agent's delay in providing services without justification in connection with agency loans may be a basis for not approving the closing agent in future cases.

(c) *Approval of attorneys.* Any attorney selected by an applicant, who will be providing title clearance where the certificate of title will be an attorney's opinion, must submit an agency form certifying to professional liability insurance coverage. If the attorney is also the closing agent, fidelity coverage for the attorney and any employee having access to the funds must be provided. The agency will determine the appropriate level of such insurance. Required insurance will, as a minimum, cover the amount of the loan to be closed. The agency will approve the form stipulating the bond coverage. The agency will approve any attorney who is duly licensed to practice law in the state where the real estate security is located and who complies with the bonding and insurance requirements in this section. If the certification of title will be by means of title insurance, any attorney or closing agent designated as an approved attorney or closing agent by the approved title insurance company which will issue the policy of title insurance will be acceptable, and when covered by a closing protection letter, will not be required to obtain professional liability insurance or a fidelity bond. Each approved title insurance company may provide a master list of their approved attorneys that are covered by its closing protection letters to the State Office and, in such cases the attorneys are approved for closings for that title insurance company. Delay in providing closing services without justification may be a basis for not approving the attorney in future cases.

(d) *Approval of title companies.* A title company acting as a closing agent, or as an issuing agent for a title insurance company, must be covered by a title insurance company closing protection letter or submit an agency form certifying to fidelity coverage to cover all employees having access to the loan funds. The agency will determine the appropriate level of such coverage and will approve the form stipulating the bond coverage. Delay in providing closing services without justification may be a basis for not approving the company in future cases. Each approved title insurance company may provide a master list of their approved title companies that are covered by its closing protection letter to the State Office and, in such cases the title companies on the list are approved for closings for that title insurance company.

(e) *Approval of title insurance companies.* The agency will approve any title insurance company which issues policies of title insurance in the State where the security property is located if:

(1) The form of the owner's and lender's policies of title insurance (including required endorsements) to be used in closing agency loans are acceptable to the agency, and will contain only standard types of exceptions and exclusions approved in advance by the agency;

(2) The title insurance company is licensed to do business in the state (if a license is required); and

(3) The title insurance company is regulated by a State Insurance Commission, or similar regulator, or if not, the title insurance company submits copies of audited financial statements, or other approved financial statements satisfactory to the agency, which show that the company has the financial ability to cover losses arising out of its activities as a title insurance company and under any closing protection letters issued by the title insurance company.

(4) Delay in providing services without justification may be a basis for not approving the company.

(f) [Reserved]

(g) *Conflict of interest.* A closing agent who has, or whose spouse, children, or business associates have, a financial interest in the real estate which will secure the agency debt shall not be involved in the title clearance or loan closing process. Financial interest includes having either an equity, creditor, or debtor interest in any corporation, trust, or partnership with a financial interest in the real estate which will secure the agency debt.

(h) *Debarment or suspension.* No attorney, title company, title insurance company, or closing agent, currently debarred or suspended from participating in Federal programs, may participate in any aspect of the agency loan closing and title clearance process.

(i) *Special provisions.* Closing agents are responsible for having current knowledge of the requirements of State law in connection with loan closing and title clearance and should advise the agency of any changes in State law which necessitate changes in the agency's State mortgage forms and State Supplements.

(j) [Reserved]

§ 1927.55 Title clearance services.

(a) *Responsibilities of closing agents.* Services to be provided to the agency and the borrower by a closing agent in connection with the transaction vary depending on whether a title insurance policy or title opinion is being furnished. The closing agent is expected to perform these services without unnecessary delay.

(b) [Reserved]

(c) *Ordering title services.* Application for title examination or insurance will be made by the borrower to a title company or attorney. The lender's policy will be for at least the amount of the loan. The United States of America will be named as the insured lender.

(d) *Use of title opinion.* If a title opinion will be issued, a title examination will include searches of all relevant land title and other records, so as to express an opinion as to the title of the property and the steps necessary to obtain the appropriate title and security position to issue a title opinion as required by this subpart. The closing agent or approved attorney will determine:

(1) The legal description and all owners of the real property;

(2) Whether there are any exceptions affecting the property and advise the approval official and borrower of the nature and effect of outstanding interests or exceptions, prior sales of part of the property, judgments, or interests to assist in determining which exceptions must be corrected in order for the borrowers to obtain good and marketable title of record in accordance with prevailing title examination standards, and for the agency to obtain a valid lien of the required priority;

(3) Whether there are outstanding Federal, State, or local tax claims (including taxes which under State law may become a lien superior to a previously attaching mortgage lien) or homeowner's association assessment liens;

(4) Whether outstanding judgments of record, bankruptcy, insolvency, divorce, or probate proceedings involving any part of the property, whether already owned by the borrower, or to be acquired by assumption or with loan funds, or involving the borrower or the seller exist;

(5) If a water right is to be included in the security for the loan, and if so, the full legal description of the water right;

(6) In addition to paragraph(d)(2) of this section, if wetlands easements or other conservation easements have been placed on the property;

(7) What measures are required for preparing, obtaining, or approving curative material, conveyances, and security instruments, and

(8) That sufficient copies of these interests and exceptions are provided as requested by the approval official.

(e) *Use of title insurance.* When title insurance is to be obtained, the approval official will be furnished with a title insurance binder disclosing any defects in, exceptions to, and encumbrances against, the title, the conditions to be met to make the title insurable and in the condition required by the agency, and the curative or other actions to be taken before closing of the transaction. The binder must include a commitment to issue a lender policy in an amount at least equal the amount of the loan, except in instances where there may be an outstanding owner's policy in favor of the borrower. Not withstanding the provisions of this section, the instance of an assumption without a subsequent loan, the existing policy may be continued if the coverage meets or exceeds the assumption balance and the title company agrees in writing to extend coverage in full force and effect.

(f) [Reserved]

§ 1927.56 Scheduling loan closing.

The agency, in coordination with the closing agent, will arrange a loan closing and send loan closing instructions, on an agency form to the closing agent when the agency determines that the exceptions shown on the preliminary title opinion or title insurance binder will not adversely affect the suitability, security value, or successful operation of the property and all other agency conditions to closing have been satisfied.

§ 1927.57 Preparation of closing documents.

(a) *Preparation of deeds.* The closing agent, unless prohibited by law, will prepare, complete, or approve documents, including deeds, necessary for title clearance and closing of the transaction and provide the agency with the policy of title insurance or title opinion providing the lien priority required by the agency and subject only to exceptions approved by the agency. Agency forms will be used when required by this part.

(1) [Reserved]

(2) [Reserved]

(b) *Preparation of mortgages.* The closing agent will insure that all mortgages are properly prepared, completed, executed, and filed for record. Where applicable, the mortgages should recite that it is a purchase money mortgage. The following requirements will be observed in preparing agency morgages:

(1)–(8) [Reserved]

(9) *Alteration of mortgage form.* An agency mortgage form may be altered pursuant to a State Supplement having prior approval of the National Office, or in a special case, to comply with the terms of loan approval prescribed in accordance with program instructions. No other alterations in the printed mortgage forms will be made without prior approval of the National Office. Any changes made by deletion, substitution, or addition (excluding filling in blanks) will be initialed in the margin by all persons signing the mortgage.

(10) [Reserved]

(11) *Mortgages on leasehold estates.* When the agency security interest is a leasehold estate, unless State law or State Supplement otherwise provides, the real estate mortgage or deed of trust form, available in any agency office, will be modified as follows:

(i) In the space provided on the mortgage for the description of the real property security, the leasehold estate and the land covered by the lease must be described. The following language must be used unless modified by a State Supplement:

All of borrower's right, title, and interest in and to a leasehold estate for an original term of ____ years, commencing on _____, 19 ____, created and established by and between _____ as lessor and owner and ____ as

lessee, including any extensions and renewals thereof, a copy of which lease was recorded or filed in book ____, page ____, as instrument number ____, in the Office of the (e.g., County Clerk), for the aforesaid county and State and covering the following real property: _____.

(ii) Immediately preceding the covenant starting with the words ''should default,'' the following covenant will be added:

( ) Borrower covenants and agrees to pay when due all rents and any and all other charges required by said lease, to comply with all other requirements of said lease, and not to surrender or relinquish, without the Government's prior written consent, any of borrower's right, title, or interest in or to said leasehold estate or under said lease while this mortgage remains of record.

(12) *Mortgages on land purchase contract.* When the agency security interest is on a borrower's interest in a land purchase contract, OGC will provide language used to modify agency forms.

(13) [Reserved]

(c) [Reserved]

(d) *Preparation of protective instruments.* The closing agent will properly prepare, complete, and approve releases and curative documents necessary for title clearance and closing, in recordable form and record them if required.

(1) *Prior lienholder's agreement.* If any liens (other than agency liens or tax liens to local governmental authorities) or security agreements (hereafter called ''liens''), with priority over the agency mortgage will remain against the real property securing the loan, the lienholders must execute, in recordable form, agreements containing all of the following provisions unless prior approval for different provisions has been obtained from the National Office:

(i) The prior lienholder shall agree not to declare the lien in default or accelerate the indebtedness secured by the prior lien for a specific period of time after notice to the agency. The agreement must:

(A) Provide that the specified period of time will not commence until the lienholder gives written notice of the borrower's default and the prior lienholder's intention to accelerate the indebtedness to the agency office servicing the loan,

(B) Include the address of the agency servicing office,

(C) Give the agency the option to cure any monetary default by paying the amount of the borrower's delinquent payments to the prior lienholder, or pay the obligation in full and have the lien assigned to the agency, and

(D) Provide that the prior lienholder will not declare the lien in default for any nonmonetary reason if the agency commences liquidation proceedings against the property and thereafter acquires the property.

(ii) When the prior lien secures future advances, including the lienholder's costs for borrower liquidation or bankruptcy, which under State law have priority over the mortgage being taken (or an agency mortgage already held), the prior lienholder shall agree not to make advances for purposes other than taxes, insurance or payments on other prior liens without written consent of the agency.

(iii) The prior lienholder shall consent to the agency making (or transferring) the loan and taking (or retaining) the related mortgage if the prior lien instrument prohibits a loan or mortgage (or transfer) without the prior lienholder's consent.

(iv) The prior lienholder shall consent to the agency transferring the property subject to the prior lien after the agency has obtained title to the property either by foreclosure or voluntary conveyance if the prior lien instrument prohibits such transfer without the prior lienholder's consent.

(2) [Reserved]

(3) [Reserved]

(4) *Agreement by holder of seller's interest under land purchase contract.* If the buyer's interest in the security property is that of a buyer under a land purchase contract, it will be necessary for the seller to execute, in recordable form, an agreement containing all of the following provisions:

(i) The seller shall agree not to sell or voluntarily transfer the seller's interest under the land purchase contract without the prior written consent of the State Office.

(ii) The seller shall agree not to encumber or cause any liens to be levied against the property.

(iii) The seller shall agree not to commence or take any action to accelerate, forfeit, or foreclose the buyer's interest in the security property until a specified period of time after notifying the State Office of intent to do so. This period of time will be 90 days unless a State Supplement provides otherwise. The agreement shall give the agency the option to cure any monetary default by paying the amount of the buyer's delinquent payments to the seller, or paying the seller in full and having the contract assigned to the agency.

(iv) The seller shall consent to the agency making the loan and taking a security interest in the borrower's interest under the land purchase contract as security for the agency loan.

(v) The seller shall agree not to take any actions to foreclose or forfeit the interest of the buyer under the land purchase contract because the agency has acquired the buyer's interest under the land purchase contract by foreclosure or voluntary conveyance, or because the agency has subsequently sold or assigned the buyer's interest to a third party who will assume the buyer's obligations under the land purchase contract.

(vi) When the agency acquires a buyer's interest under a land purchase contract by foreclosure or deed in lieu of foreclosure, the agency will not be deemed to have assumed any of the buyer's obligations under the contract, provided that the failure of the agency to perform any such obligations while it holds the buyer's interest is a ground to commence an action to terminate the land purchase contract.

(5) [Reserved]

(6) [Reserved]

(e) [Reserved]

1927.58 Closing the transaction.

The closing agent will cooperate with the approval official, borrower, seller, and other necessary parties to arrange the time and place of closing. The transaction may be closed when the agency determines that the agency requirements for the loan have been satisfied and the closing agent or approved attorney can issue or cause to be issued a policy of title insurance or final title opinion as of the date of closing showing title vested as required by the agency, the lien of the agency's mortgage in the priority required by the agency, and title to the mortgaged property subject only to those exceptions approved in writing by the agency. The loan will be considered closed when the mortgage is filed for record and the required lien is obtained.

(a) *Disbursement of loan funds.* When the closing agent indicates that the conditions necessary to close the loan have been met, loan funds will be forwarded to the closing agent. Loan funds will not be disbursed prior to filing of the mortgage for record; however, when necessary, loan funds may be placed in escrow before the mortgage is filed for record and disbursed after it is filed. No development funds will be kept in escrow by the closing agent after loan closing, unless approved by the agency. Loan funds for the payment of a lien may be disbursed only upon the recording of a discharge, satisfaction, or release of prior lien interests (or assignment where necessary to protect the interests of the agency).

(b) *Title examination and liens or claims against borrowers.* If there are exceptions or recorded items which have arisen since the preliminary title opinion, the transaction will not be closed until these entries have been cleared of record or approved by the agency. The closing agent will advise the approval official of the nature of such intervening instruments and the effect they may have on obtaining a valid mortgage of the priority required or the title insurance policy to be issued.

(c) *Taxes and assessments.* The closing agent will determine if all taxes and assessments against the property which are due and payable are paid at or before the time of loan closing. If the seller and the borrower have agreed to prorate any taxes or assessments which are not yet due and payable for the year in which the closing of the transaction takes place, the seller's proportionate share of the taxes and assessments will be deducted from the proceeds to be paid to seller at closing and will be added to the amount required to be paid by borrower at closing. Appropriate prorations as agreed upon between the borrower and seller may also be made for taxes paid by the seller which are applicable to a period after the closing date, and for common area maintenance fees, prepaid rentals, insurance (unless the borrower is to obtain a new policy of insurance), and growing crops.

(d) *Affidavit regarding work of improvement.*

(1) *Execution by borrower.* If required by State Supplement, the closing agent will require that an affidavit regarding work of improvement, provided by the agency, be completed and executed when a loan is being made to a borrower who already owns the real estate to be mortgaged. This affidavit will be executed by the borrower at closing.

(2) *Execution by seller.* If required by State Supplement, the closing agent will require that an affidavit regarding work of improvement, provided by the agency, be completed and executed (including acknowledgment) by the seller when the agency is making a loan to a borrower to enable the borrower to acquire the property (including transfers). This affidavit will be executed by the seller at closing.

(3) *Legal insufficiency of affidavit form*. If the agency affidavit regarding work of improvement is not legally sufficient in a particular State, a State form approved by OGC will be used. A similar form that may be required by a title insurance company may be substituted for the agency form.

(4) *Recording.* The affidavit will not be recorded unless the closing agent deems it necessary and State law permits.

(5) *Delay in closing.* The loan will not be closed if, at the loan closing, the seller (in a sale transaction) or the borrower (in a nonpurchase money loan situation) indicates that construction, repair, or remodeling has been commenced or completed on the property, or related materials or services have been delivered to or performed on the property within the time limit specified in the affidavit, unless a State Supplement provides otherwise. The closing agent will notify the approval official, who will determine if the work of improvement could result in a lien prior to the agency lien. The State Office will, with the advice and concurrence of OGC, provide in a State Supplement the period of time to be used in completing the affidavit.

(e) [Reserved]

(f) [Reserved]

(g) *Return of loan documents to approval official after loan closing.* Within 1 day after loan closing, the closing agent will return completed and executed copies of the loan closing instructions, the executed original promissory note, and all other documents required for loan closing (except the mortgage), to the approval official. If the recorded mortgage is customarily returned to the borrower or closing agent after recording, then it must be forwarded to the approval official immediately.

(h) *Final title opinion or title insurance policy.* As soon as possible after the transaction has been closed.

(1) *Final title opinion.* The attorney will issue a final title opinion to the agency and the borrower on a form provided by the agency. Issuance of the final title opinion should not be held up pending the return of recorded instruments. If it is not possible for the final title opinion to show the book and page of recording of the agency security instrument, the words ''and is recorded'' in the final title opinion form provided by the agency office, may be deleted and the blank space completed to show the filing office and the filing instrument number, if available. Attached to the final title opinion will be required documents then available, including any which the approval official has furnished to the attorney which were not previously returned. The attorney will ensure that all recorded instruments are forwarded or delivered to the proper parties after recording. The certification of title will be forwarded for a voluntary conveyance.

(2) *Title insurance policy.* The closing agent will send or deliver the title insurance policy, with the United States listed as mortgage holder, to the approval official. The policy will be subject only to standard exceptions and those outstanding encumbrances, and exceptions, approved by the approval official. If an owner's policy of title insurance is requested, the closing agent will send or deliver it to the borrower. The closing agent will ensure that all recorded instruments are delivered or sent to the proper parties after recording.

(3) [Reserved]

(i) *Other services of the closing agent.*

(1) The closing agent will assist the approval official in preparing, completing, obtaining execution and acknowledgment, and recording the required documents when necessary. The closing agent will keep the approval official advised as to the progress of title clearance and preparation of material for closing the transaction.

(2) The closing agent will provide services for deeds in lieu of foreclosure as set forth in § 1927.62 of this subpart, and § 1955.10 of subpart A of part 1955 of this chapter.

§ 1927.59 Subsequent loans and transfers with assumptions.

Title services and closing for subsequent loans to an existing borrower will be done in accordance with previous instructions in this subpart, except that:

(a) *Loans closed using title insurance or title opinions.*

(1) Title insurance or title opinions will be obtained unless:

(i) The cost of title services is excessive in relationship to the size of the loan,

(ii) The agency currently has a first mortgage security interest,

(iii) The applicant has sufficient income to service the additional loan,

(iv) The borrower is current on the existing agency loan, and

(v) The best mortgage obtainable adequately protects the agency security interests.

(2) Title insurance or a final title opinion will not be obtained for a subsequent Section 504 loan where the previous Section 504 loan was unsecured or secured for less than $7,500 and the outstanding debt amount plus the new loan is less than $7,500.

(3) Loans closed using a new lender title insurance policy:

(i) Will cover the entire real property which is to secure the loan, including the real property already owned and any additional real property being acquired by the borrower with the loan proceeds.

(ii) Will cover the entire amount of any subsequent loan plus the amount of any existing loan being refinanced (if

the existing loan is not being refinanced, the new lender policy will insure only the amount of the subsequent loan).

(b) *Title services required in connection with assumptions.* These regulations are contained in part 1965, subparts A, B, and C, of this chapter as appropriate for the loan type.

§§ 1927.60–1927.99 [Reserved]

§ 1927.100 OMB control number.

The reporting requirements contained in this regulation have been approved by the Office of Management and Budget and have been assigned OMB control number 0575–0147. Public reporting burden for this collection of information is estimated to vary from 5 minutes to 1.5 hours per response, with an average of .38 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, Ag Box 7630, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB# 0575–0147), Washington, D.C. 20503. You are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Dated: February 25, 1996.

Jill Long Thompson,

Under Secretary, Rural Economic and Community Development.

Dated: February 28, 1996.

Eugene Moos,

Under Secretary, Farm and Foreign Agriculture Services.

[FR Doc. 96–6698 Filed 3–21–96; 8:45 am]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 212

[INS No. 1669–94]

RIN 1115–AD77

Waiver of Certain Types of Visas

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule amends the Immigration and Naturalization Service (the Service) regulations to permit district directors, in individual cases, to waive nonimmigrant visa or passport requirements under section 212(d)(4)(A) of the Immigration and Nationality Act (the Act), if satisfied that a nonimmigrant alien is unable to present these documents because of an unforeseen emergency. The rule clarifies that carriers are liable for fines imposed under section 273 of the Act for bringing nonimmigrants to the United States who do not have a valid passport or nonimmigrant visa, or border crossing identification card, even if a waiver of these documents is granted by the district director at the time of admission into the United States. This change was necessary to conform the language of the regulations with the statutory provision that imposes fine liability on a carrier which transports an alien to the United States without the proper documentation.

EFFECTIVE DATE: March 22, 1996.

FOR FURTHER INFORMATION CONTACT: Robert F. Hutnick, Assistant Chief Inspector, Inspections Division, Immigration and Naturalization Service, 425 I Street NW., room 7228, Washington, DC 20536, telephone number (202) 616–7499.

SUPPLEMENTARY INFORMATION: Section 212(d)(4)(A) of the Act allows the Attorney General to waive the requirement that a nonimmigrant alien be in possession of a visa or passport if he or she is unable to present the necessary documents due to an unforeseen emergency. Section 273(b) of the Act imposes a fine upon a carrier for violations of section 273(a) of the Act. Section 273(a) of the Act requires carriers bringing aliens into the United States to ensure that its passengers are in possession of a valid passport and unexpired visa, if a visa is required under the Act or regulations

The regulations at 8 CFR 212.1(g) had the unintended effect of relieving the carrier of fine liability if the district director granted a waiver of the passport or nonimmigrant visa requirement. In *Air BVI Ltd., Flight BL 410* (BIA Unpublished Decision No. SAJ 10/50.670, August 26, 1992), the Board of Immigration Appeals (the Board) characterized the regulation as creating a ''blanket'' waiver because of language in the regulation stated that ''a visa * * * is not required.'' The Board based its decision on whether an alien's admission with a waiver relieved the carrier of liability for a fine by interpreting the regulations in effect at the time involved. *Matter of Plane ''CUT–604''*, 7 I&N 701 (BIA 1958). If the regulations creates a blanket waiver, by stating that no visa is required, no fine liability is incurred by the carrier. By contrast, a regulation that provides for a discretionary waiver of the visa and passport requirements to be granted to a nonimmigrant on a case-by-case basis will not relieve the carrier of fine liability.

This rule removes the language, ''[a] visa and a passport are not required of a nonimmigrant'' so that even when the district director waives the documentary requirements in the exercise of his or her discretion, on a case-by-case basis, and admits such a nonimmigrant to the United States, such admission will not eliminate the carrier's fine liability for bringing that alien to the United States without proper documentation (*Matter of Plane ''CUT–604''*). The fine procedures at 8 CFR 280 remain applicable and require no change.

This rule further amends § 212.1(g) by removing the provision regarding waivers of the visa requirement granted pursuant to section 212(d)(4)(A) of the Act in the case of a national or resident of Cuba. This action is being taken because this provision is obsolete.

On April 14, 1995, at 60 FR 19001–19002, the Immigration and Naturalization Service (the Service) published a proposed rule with request for comments in the Federal Register, in order to correct this loophole in the regulations which allowed carriers to transport improperly documented aliens to the United States without incurring fines under section 273 of the Act. Interested persons were invited to submit written comments on or before June 13, 1995. The following is a discussion of those comments received by the Service and the Service's response.

Discussion of Comments on the Proposed Rule

The Service received four comments on the proposed rule. One commenter claimed the proposed change ''will have an effect repugnant to the intent of Congress, the existing regulation of the Attorney General and the intended effect of the current regulation.'' It must be emphasized that the Service policy of strictly enforcing the fine provisions of section 273 of the Act in appropriate cases is a continuation of a more than 70-year-old policy of carrying out Congress' intent to hold carriers responsible for passengers they have transported to the United States. The Board and the courts have consistently held that carriers must exercise reasonable diligence in boarding their passengers for transport to the United States and are subject to administrative fines for failure to do so, e.g., *Matter of*