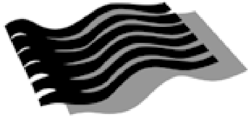
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January 10, 2000

Director, Farm Loan Programs
Loan Servicing and Property Management Division
United States Department of Agriculture
Farm Service Agency
STOP 0523
1400 Independence Avenue
Washington, DC 20250-0523

Dear Sir or Madam:

Re: Comments on Proposed Rule for Servicing Shared Appreciation Agreements, 64 Fed. Reg. 61221 (November 10, 1999)

Farmers Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the Farm Service Agency (FSA) proposed rule entitled "Farm Loan Programs Account Servicing Policies—Servicing Shared Appreciation Agreements" published at 64 Fed. Reg. 61221-61223 (Nov. 10, 1999).

NFFC represents grassroots farm and rural advocacy organizations in more than 30 states. The Coalition was formed in 1986 to coordinate the efforts of a growing network of grassroots organizations concerned with maintaining a family farm system of food production. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

FLAG is a nonprofit, public interest law center that is dedicated to the preservation of family farms. For more than a decade, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural credit and farm program issues.

Reducing the Interest Rate Charged on Amortized SAA Debt

We commend FSA for proposing to amend § 1951.914(e)(6) to reduce the rate of interest charged on SAA debt financed by the agency. As noted by the agency in the prefatory comments to the proposed rule, this change would benefit both the affected borrowers and the government by making SAA debt financing more feasible and reducing the threat of foreclosure or involuntary liquidation. This proposal acknowledges the severe financial pressure that SAA collection actions will put on borrowers who are already struggling to get by under extremely low commodity prices and who have no new income source for repayment of the SAA debt.

Deducting From Appraised Value the Amount Contributed by Capital Improvements

It is appropriate and just to deduct from the appraised value of the security property the amount contributed by capital improvements undertaken after the SAA was executed. Such deductions allow and encourage the development and maintenance of security property by not penalizing those borrowers who have undertaken such projects. This benefits both the borrower and the government through the increased value and, often, the increased earning capacity of the security property. Yet the language of the proposed change to § 1951.914(c)(1), along with certain of the agency's prefatory comments, severely restrict the good that can be achieved through the proposal. Both the scope and applicability of the proposed change must be expanded if the deduction is to be more than an empty promise for thousands of borrowers.

Defining "Capital Improvement"

The proposed new language for § 1951.914(c)(1) should be changed to expand the categories of capital improvements whose contributory value must be deducted from the appraisal. A great variety of improvements have been made by borrowers to their real estate which significantly contribute to the appraised value of the property, and there is no reasonable basis for the agency to limit the deductible improvements to "dwellings, barns, grain storage bins, and silos." Useful and necessary improvements can include many types of structures other than these.

Indeed, many of the improvements which can provide the greatest increase in value or earning capacity of property are not structures at all but are improvements to the farmland itself—such as tiling, irrigation, terracing, land waterways, shelter belts, and other conservation measures. Preparing and planting orchards, vineyards, and similar areas are other improvements which can contribute greatly to the value of security property. Certain fencing practices can also greatly improve the productivity and value of pasture land. The agency should not penalize borrowers who have taken on the expense and effort of any of these, or similar, improvements.

The agency should adopt rule language which would allow the greatest reasonable flexibility in identifying deductible improvements. Rather than an exclusive listing of eligible improvements, the rule could suggest categories of improvements with language indicating that the suggestions are not all-inclusive. Alternatively, the rule could use a generally applicable standard, such as allowing deduction of any improvement which is fixed to the real estate and whose cost was depreciable by the borrower.

Applicability of the Deduction

In the prefatory comments to the proposed rule, the agency proposes to limit the deduction's applicability to those borrowers who, at the time the rule is finalized, have not yet entered an "agreement" to pay the amount due. This position is indefensible. The deduction of property value attributable to capital improvements should be available to every borrower who has not yet paid his or her SAA debt.

The agency's intent to make these deductions available was announced by Secretary Glickman in March of 1999. As FLAG argued in a letter to the Deputy Administrator for Farm Loan Programs dated March 29, 1999, the agency could have immediately issued a policy directive explaining that, in the context of SAAs, appreciation does not include the value of improvements made after an agreement was executed. The agency's current position that appreciation includes capital improvements is a *policy* position, not a regulatory one; the SAA rules have never included a definition of "appreciation." Because there is nothing in either the statutory or regulatory authority concerning SAAs that conflicts with the agency's stated intention to allow the deductions, there is no need for notice-and-comment rulemaking to implement this policy change.[1]

Rather than immediately implement its announced policy change, however, the agency took no action to implement the change until it issued the proposed rule discussed here, some eight months after the Secretary's announcement. Even viewed optimistically, the final change will be months more coming and, as written, will not be available to the thousands of borrowers whose SAAs mature in the interim or have already matured since March of 1999. As the agency is well aware, a large percentage of SAAs have already matured and more will mature in the coming months while this proposal is pending. Having made the decision that these

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1 The response FLAG received from the Deputy Administrator incorrectly asserted that the regulations must be revised before deduction for improvements could be allowed. That no such regulatory change is in fact required is evidenced by the failure of the proposed rule to delete any regulatory language that would disallow such deductions. If the agency will continue to assert that its current position of including improvements in determining SAA appreciation is a *regulatory* requirement, the citation for this requirement should be provided.

deductions are proper and serve the best interests of both the borrowers and the government, it is unreasonable and unnecessary for the agency to take the position that the deductions will only become available when the agency gets around to issuing a final rule.

For the majority of borrowers, the SAA recapture notice comes as a financial burden they are ill-equipped to face. Until April of 1999, borrowers facing recapture had 30 days to pay the SAA debt in full, enter a repayment agreement, or face collection action. In April, the agency created the suspension program in recognition of the tremendous financial burden borrowers were facing, the current economic crisis in agriculture limiting borrower income, and the serious threat of widespread liquidation. Even the suspension program, however, only provides one additional option for a borrower facing SAA recapture: sign an agreement stating that you owe the amount claimed and receive an interest-bearing suspension of payment.

While the suspension program has been a benefit for those many borrowers unable to pay or finance the SAA debt, it has not and was not designed to address borrowers' concerns about the amount of recapture claimed. Suspension agreements, therefore, should not bar borrowers from the benefit of the *agency's* changed position on valuation. The agency is well aware that a borrower with limited financial resources who made capital improvements during the term of an SAA has no recourse to seek a reduction in appraised value. That borrower is coerced into signing a suspension agreement to avoid delinquency, collection, and, ultimately, liquidation. The borrower cannot reasonably be said to have freely *agreed* to the amount claimed by the agency, he or she simply takes the least painful option available, however unjust it may be. Similarly, before the suspension program was developed borrowers may have entered repayment agreements for amounts including capital improvements because they had no way to challenge the included value and no other means available to avoid liquidation.

Thus, before and after the suspension program was created, borrowers facing SAA recapture have had no choice but to sign, in a very short period, whatever agreement was available to avoid the threat of imminent collection action and the loss of their home and livelihood. The distress and duress faced by borrowers whose SAAs have come and will come due before a final deduction rule is finalized should not be the basis for denying them the benefit of a deduction the agency deemed proper almost one year ago. Such a result would be all the more unjust and unreasonable since the agency could have immediately implemented the deduction for capital improvements through a policy notice rather than lengthy notice and comment rulemaking.

Notice of Appeal Rights

Whatever the agency's final determination of the scope and applicability of the final capital deductions rule, an adequate and complete explanation of appeal rights should be provided in any notice sent to borrowers.

Thank you for your consideration of these comments.

Sincerely,

Karen R. Krub
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Farmers' Legal Action Group, Inc.
Direct Internet: kkrub@flaginc.org

By facsimile and electronic mail