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USDA Advisory Committee on Small Farms

Dear Advisory Committee Members:

Re: Concerns of Small Farmers With FSA Shared Appreciation Agreements

At the request of Debbie Morgan of Archie, Missouri, Farmers' Legal Action Group, Inc. (FLAG) submits these comments to the Advisory Committee on Small Farms setting out some of the many troubling issues facing small farmers holding Farm Service Agency (FSA) Shared Appreciation Agreements (SAAs).

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 across the nation through public education initiatives, litigation, administrative proceedings, and technical assistance involving agricultural credit and farm program issues.

Through its publications, trainings, and involvement in litigation related to FSA (formerly FmHA) programs, FLAG has become known to many farmers across the country as a resource for information and assistance with FSA credit programs. In that role, FLAG has been an organization that many, many farmers have turned to for help with problems related to SAAs. Over the past 18 months, FLAG has received scores of calls from farmers, farm advocates, and rural attorneys reporting numerous problems with FSA's efforts to enforce and collect under SAAs. Although the reports have come from all over the country—literally from coast to coast—they are remarkably consistent. A listing of the most commonly reported problems is as follows.

Piecemeal Policy Development Brings Inequitable Treatment

FSA has repeatedly changed its rules and policies regarding SAAs without applying the new rules equitably. Long before the first ten-year SAA expirations began in late 1989, FSA should have developed a consistent

and fair policy for enforcement and collection of the agreements. Instead, the agency's SAA policy has trickled out, piecemeal, in the midst of ongoing SAA collection actions. Because of this, similarly situated individuals are not treated alike, creating widespread confusion, frustration, and a sense of injustice among farmers.

The first farmers who faced recapture at the end of their ten-year SAA term were only offered 30 days to apply for financing at FSA's nonprogram rate. Some months later, FSA announced a suspension program that allowed some farmers to obtain up to a three year suspension of their SAA debt. While this is a good program, those farmers who were forced to deal with their SAA debt or sell out before the suspension program was announced were understandably upset at FSA's delayed response to the needs of farmers struggling under the financial burden of SAA recapture.

Similarly, as discussed below, FSA has issued a proposed rule that may provide some relief for farmers being doubled charged for the value of capital improvements made during the term of the SAA. By the time the rule is finalized, however, many or even most farmers will have been forced to make other arrangements. And, these farmers' SAA debt will include the same capital improvements that FSA may well decide to deduct in the future. FSA could resolve these problems by suspending enforcement and collection actions until it has fully developed a fair assessment and collection process, but instead the agency has insisted on pushing ahead and "learning" from the mistakes it makes at individual farmers' great expense.

Farmers Required to Pay Twice for Improvements

The SAA provision was included as part of the debt restructuring process under the 1987 Ag Credit Act in order to prevent farmers from receiving a windfall if debt restructuring was based on low valuation and the farmer later transferred the property at a high value or the farmland significantly appreciated over a ten-year period. In the current SAA recapture calculation, however, it is FSA who is in many cases receiving the windfall. In calculating "appreciation" for recapture purposes, FSA is including all capital improvements made by the farmer during the ten-year SAA, comparing the value of the land at the time the SAA was signed with the value of the land, plus any capital improvements, at the end of the SAA term. This is a tremendous shock and burden to farmers who, for example, have installed irrigation or drainage systems at great expense or have built new farm buildings or even homes on the property since the SAA was signed. For the most part these improvements will have been financed with additional credit or a significant amount of off-farm work. The farmers will generally have had to obtain FSA approval for the improvements. Nevertheless, they are now asked to, in effect, pay twice for the improvements they have made. FSA's policy creates the inexplicable result that borrowers who have done nothing to enhance the value of their farms or improve FSA's security interest are rewarded, while borrowers who have improved their farms and enhanced FSA's secured position are penalized.

In November 1999, FSA issued a proposed rule that would allow for deduction of certain, limited improvements, but the rule itself is too little, too late. There is no indication from the agency when the rule might become final, and even then it would allow only deduction of a

“dwelling, barn, grain storage bin, or silo.” Any other improvements made by farmers during the term of their SAAs would be ineligible for deduction under the rule. This result is all the more galling to farmers given Secretary Glickman’s announcement in March of 1999 that deductions for capital improvements would be available under SAAs. Rather than immediately implementing this policy change through directives to local offices to change their appraisal procedures, FSA took another eight months to issue a proposed rule offering limited deductions. As the agency is well aware, a large percentage of SAAs will have matured between the time of the Secretary’s March 1999 announcement and the eventual issuance of a final rule, and for these farmers no benefit will be had.

This issue could have been and still could be easily resolved by a change in policy on FSA’s part to provide that capital improvements made during the SAA term will be deducted from the appraised value at the time of recapture. There is no statutory or regulatory requirement that FSA include capital improvements when calculating appreciation, therefore a policy change providing for deductions of such improvements could be made effective immediately.

Farmers Effectively Unable to Challenge Appraisals Despite Serious Problems

The SAA appraisal process is cumbersome, and it is frequently impossible for farmers to successfully challenge FSA’s appraised value despite what the farmer (and his or her own certified appraiser) see as clear errors. Under the SAA, there must be a comparison of the value of the land at the time the SAA was signed with the value of the land at the triggering event, namely, the expiration of the SAA term. Under current FSA rules, FSA appraises the property at the end of the SAA term and uses this appraisal to arrive at the amount of appreciation.

There have been many problems with the quality of FSA appraisals in several states. The farmer can obtain his or her own appraisal and challenge the FSA appraisal, but it is difficult and expensive to do so. FLAG has received numerous reports of errors that are as obvious as appraising the wrong property, computation of the wrong number of acres, and comparable property values that are in error. Despite the obviousness of these errors, farmers who are unable to afford the expense of an independent certified appraisal to submit to the National Appeals Division (NAD) or who lack the sophistication to argue their case are finding FSA’s appraisal upheld.

There are other serious road blocks along the way of an appraisal appeal, such as:

FSA will attend mediation sessions if the farmer seeks to mediate the value, but in Minnesota and numerous other states, farmers have reported that FSA refuses to consider changes to its appraisal value and refuses to have the appraiser attend the mediation session, thus rendering mediation futile.

Farmers in some areas report that local farm appraisers (who often do contract work for FSA as well) are afraid to “go up against” FSA in an appraisal battle. This leaves farmers without the expert assistance that NAD requires for an appraisal appeal.

If the farmer does appeal the appraisal to NAD, NAD is constrained in what it can do. If it finds the FSA appraisal defective, NAD has taken the position since April of 1999 that it only has the power to remand the issue to FSA for a new appraisal. NAD is acting under the belief that it does not have the power to accept a farmer's appraisal as the correct valuation. This has the potential of creating a "revolving door" of agency appraisals and greatly increasing the farmer's cost of pursuing an appeal.

As noted above, the FSA appraisal does not make any deductions for capital improvements that the farmer has made during the SAA term. FLAG has received reports from farmers who built a new barn, a new home, or who irrigated their land during the SAA term—and who all now have significant SAA debts to pay primarily because of their capital improvements. NAD has refused to reverse FSA on the issue of capital improvements, correctly holding that it does not have the power to overturn agency regulations.

Many farmers are finding their FSA appraisal to show tremendous appreciation—some as much as 300%—due to development pressures or competing non-agricultural uses for the property. Farmers are often certain, however, and claim they can prove that their original appraisals for the SAAs were targeted to agricultural use or income generation only, and they claim that FSA is comparing apples to oranges when calculating appreciation from agricultural use 10 years ago to "highest and best" use now. This is another issue in which FSA need not take the "farmer hostile" policy position that it has, but farmers can find no remedy. NAD is unwilling and unable to hear challenges to FSA's appraisal policies and most farmers are without the resources to pursue judicial review of their cases.

Misinformation from FSA Denies Farmers' Appeal Rights

In an issue that is not limited to SAA cases but that has appeared most often there, a number of farmers from several states report that participation in mediation of their SAA disputes has effectively resulted in loss of their appeal rights—rights which would have to be exhausted if the farmer were ever to be able to seek judicial review. What has occurred is that, after attending a mediation session with a farmer over the SAA issues, or during the mediation session itself, FSA has advised the farmer that he or she has 30 days after mediation within which to appeal the decision to NAD. This advice directly contradicts the NAD regulations which provide that the 30-day period runs from the date of the original adverse decision, not from the conclusion of mediation. Under the NAD rules, mediation tolls the running of the 30 days, but does not start it over again.

Farmers who have relied on the erroneous advice from FSA are having their later appeals denied by NAD for untimeliness. Because they have not exhausted their appeal rights, they cannot seek any judicial review of the SAA issues, no matter how persuasive their case may be. Although this problem of FSA's making could be corrected by FSA through issuing new adverse decisions to these farmers and allowing them their appeal rights, FSA has refused to do so. Although FSA has now issued a notice to its local offices that is supposed to correct

this error with regard to future cases, the farmers who received and relied upon FSA's erroneous advice in the past have no recourse.

General Misinformation Regarding Terms of SAAs

Some farmers recall the time that they signed the SAA and report that their local FSA officials assured them that as long as they continued farming, the SAA would not be enforced against them. As it was explained to some farmers, the SAA was only to be triggered if they ceased farming or sold the underlying real estate. FSA takes the position that the SAA is triggered at the end of the ten year SAA term, regardless of whether the farmer is still farming the property. Nevertheless, it appears that many farmers were genuinely misled about what they were asked to sign. Farmers may have difficulty achieving a judicial remedy for this problem, and the circumstance further undermines farmers' trust in their government and in the fairness of the process.

I hope that this discussion of common issues arising in our conversations with farmers facing SAAs will be of assistance to the Committee as you consider the needs of small farmers and appropriate responses from USDA. It is important to keep in mind that the farmers experiencing the problems discussed here are generally already in a state of financial, and often emotional, distress and are not able to retain legal counsel and other assistance needed to challenge FSA's actions.

If I can provide any additional information or be of any assistance regarding SAA issues or any other question, please do not hesitate to contact me.

Sincerely,

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By facsimile