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March 10, 2003

Mr. Arthur Veldon Hall
Director, Farm Loan Programs
Loan Servicing and Property Management Division
USDA, Farm Service Agency
STOP 0523
1400 Independence Ave., SW
Washington, DC 20250-0523

Dear Mr. Hall:

Re: Comments on Proposed Rule to Eliminate 30-Day Past Due Period
for Purposes of Farm Loan Programs Account Servicing Policies, 68
Fed. Reg. 1,170 (January 9, 2003).

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on
behalf of the National Family Farm Coalition (NFFC) concerning the
proposed rule, published at 68 Federal Register 1,170 (January 9, 2003).

NFFC represents 34 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. NFFC has long been interested in USDA's implementation of farm
credit, disaster assistance, and conservation programs.

FLAG is a nonprofit, public interest law center dedicated to the
preservation of family farms. For over fifteen years, 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.

The Proposed Changes May Have Unintended Consequences that Harm the Very Farmers They are Intended to Help

In general, NFFC agrees that making write-downs available to financially
distressed farmers, without having to wait 31 days after a missed payment

to implement a write-down, could benefit some farmers. However, NFFC is concerned that the proposed "next day delinquency" could have unintended consequences that would bar farmers from participating in other FSA loan programs that could assist them in the period immediately following a missed payment.

NFFC supports the goal of making write downs available to farmers sooner, as expressed in the prefatory comments. However, we believe that the proposed rule must be more narrowly tailored to achieve this purpose and avoid unintended adverse consequences.

Delinquency Should Not be Redefined in Such a Way as to Render Farmers Who Would Currently Be Eligible for Farm Loan Programs Ineligible

The prefatory comments do not indicate that the proposed rule would affect a farmer's eligibility for other farm loan programs. This is an important concern that may not be apparent to readers of the proposed rule and prefatory comments who lack independent knowledge of FSA's Farm Loan Programs. In general, FSA may not make a new loan to a farmer who is delinquent on a federal debt. 7 U.S. Code § 3720B. NFFC acknowledges with appreciation that Farm Service Agency recently amended its emergency loan regulations, in keeping with Congress' intent that persons not be barred from eligibility for disaster loans due to delinquency on a federal debt. 67 Fed. Reg. 791(2002). However, FSA still may not make a direct operating loan to a farmer who is delinquent under any direct or guaranteed farm loan. 7 U.S. Code sec. 2008h(a); 7 C.F.R. § 1941.12(a)(9). Farmers who are delinquent on a federal debt also continue to be ineligible for guaranteed farm operating and farm ownership loans, as well as direct farm ownership loans. 7 C.F.R. §§ 762.120(b) and 1943.12(a)(9).

The current rule allows an important 30-day window between the time a farmer misses a payment and the time a farmer becomes delinquent. This window may provide enough time for a farmer to receive a farm operating or emergency loan, particularly if the farmer were able to complete loan application process prior to the payment due date. In some cases, receipt of one of these loans may be enough to help the farmer make it through a difficult time, which may have been caused by circumstances outside the farmer's control.

Presumably, the amount of time and resources expended by FSA in processing a loan application are significantly less than the time and resources that would be expended by FSA if these farmers were forced to apply for loan servicing because they had been rendered ineligible for most FSA loans. A farmer who received a primary loan servicing notice, and understood that the rights described therein must be exercised or be lost, would behave quite reasonably if he or she decided to focus on the primary loan servicing application, and abandon or decline to pursue any new loan applications. Preserving the 30-day window of eligibility for all FSA loans, prior to

declaring a farmer delinquent is in the best interests of FSA borrowers, and in the best interests of FSA.

The Proposed Changes Would not Bring About the Intended Result, Because Farmers Would Not Receive Timely Notice of the Availability of Primary Loan Servicing, Including Write-Downs

Congress has directed that farmers be provided with notice of primary loan servicing programs by certified mail when they are at least 90 days past due on a loan payment. 7 U.S.C. § 1981d; see also 7 C.F.R. § 1951.907(c). The proposed changes to the definition of "delinquency" will be of no benefit to farmers who are unaware of primary loan servicing in general, or write-downs in particular. Many farmers first learn of primary loan servicing programs through the notice required to be provided by FSA. Unless the rule requires that FSA provide notice to financially distressed borrowers, prior to the payment due date, the accelerated availability of write-downs will be of little utility to those farmers. At the same time, a requirement that notice be provided to financially distressed borrowers, or even to borrowers the day after a payment is missed, may well be impossible for FSA to administer.

It is Crucial that Current Timelines for Farmers to Apply for Primary Loan Servicing Under 7 C.F.R. part 1951 Not Be Shortened

As mandated by the statute, farmers generally have 60 days after receipt of the notice of availability of primary loan servicing to submit a completed application requesting primary loan servicing. 7 U.S. Code § 1981d(e). Many farmers scramble to gather the necessary information, explore the options, and make the important decisions entailed in a request for primary loan servicing within the allotted time. It is essential that farmers continue to have at least 60 days to make decisions about primary loan servicing.

Farmers Should Not be Forced to Apply for Primary Loan Servicing Programs at the Same Time They are Responding to Notices of Administrative Offset

The difficulty farmers have in completing the primary loan servicing packet within the allotted time could be exacerbated if they received the primary loan servicing packet immediately following a missed payment. Under current FSA practice, they may be confronted with collection activities under the Federal Debt Collection Improvement Act as soon as 30 days after missing a payment.

Congress has instituted certain procedural requirements prior to the collection of administrative offsets and institution of other federal debt collection practices. 31 U.S. Code § 3716. This process is often initiated soon after the missed payment has become delinquent, and farmers should be able to address questions such as whether they are in fact delinquent on a federal debt, and the amount of delinquency before being forced to make decisions related to primary loan servicing.

The regulations currently allow, but do not require, financially distressed borrowers to apply for primary loan servicing. This framework should be maintained.

Delinquency Should Not Be Redefined in Such a Way Authorize Farm Service Agency to Begin the Administrative Offset Process During the 30 Days Immediately Following a Missed Payment

Currently, FSA defines delinquent debts for purposes of administrative offsets as those payments that have not been paid within 30 calendar days after the due date. RD Instruction 1951-C § 1951.102(b)(6)(Nov. 26, 1986). This definition of delinquency is consistent with the definition of delinquency currently used in FSA farm loan program regulations. Federal government payments may play an essential part in a farmer's efforts to ensure the future viability of the farming operation, particularly in the period immediately following a missed payment.

Having a federal payment offset unexpectedly can be devastating to a farmer struggling to restructure his or her farming operation. The farmer may have already assigned those payments to a private creditor, or the farmer may need to use the funds from the payment to meet operating expenses to assure sufficient revenues to make the missed payment, qualify for a loan, or demonstrate feasibility.

To change the Farm Service Agency's longstanding practice of treating a loan payment as delinquent, and thus subject to initiation of administrative offset proceedings, would upset the settled expectations of farm borrowers. This is especially inappropriate in light of the fact that neither the proposed rule nor the prefatory comments even mentioned the potential effect of eliminating the 30 day past due period would have on administrative offsets. If instituting the proposed change would accelerate the administrative offset process, a proposed rule that gives adequate notice of this anticipated result should be published for comment.

The Consequences of this Proposal, Taken Together with Proposed Changes to the Disaster Set-Aside Program, Would Help Force Family Farmers off the Land

A pending proposal to change the Disaster Set-Aside program, if enacted as proposed, would exacerbate the unintended harms of this proposal. See 67 Fed. Reg. 41,869 (June 20, 2002). In particular, we note that under the current Disaster Set-Aside regulations, borrowers who are not more than one installment behind are eligible for the program. 7 C.F.R. § 1951.954(a)(4). The prefatory comments to the proposed amendments to the Disaster Set-Aside rule stated that FSA proposes to change the eligibility requirements so that, "DSA applications must be made prior to the borrower becoming delinquent on the loans." 67 Fed. Reg. 41,869, 41,871 (2002). However, the text of the proposed rule states that, "The borrower must be current on all FLP loans at the time the application for DSA is complete." See 67 Fed. Reg. 41,869, 41,871 (2002) (proposed to be codified at 7 C.F.R. § 1951.954(a)(5).

The proposed rule for Disaster Set-Aside, taken with the prefatory comments, were susceptible to more than one interpretation. The prefatory comments suggested that farmers who were "past-due" but not yet delinquent would be able to submit an application, but the actual text of the proposed rule was unclear, due to the failure to define the term "current" Farm Service Agency has not yet issued a final rule responding to comments received on the Disaster Set-Aside proposal.

This proposed rule to amend the definition of "delinquency" for purposes of primary loan servicing could contribute to resolving the confusion in the Disaster Set-Aside proposal, but the resolution would work to the farmer's disadvantage. If the two proposals were enacted as written, and if the definition of "delinquency" for purposes of primary loan servicing were borrowed to interpret use of the term in the Disaster Set-Aside regulations, farmers would no longer be able to apply for Disaster Set-Aside after the date of a missed payment, because they would be considered "delinquent." This is contrary to Congress' intent to offer broad relief to farmers suffering from natural disaster, as evidenced by the eight-month application period for Disaster Set-Aside. Missing one payment, especially if the farmer is less than 90 days behind, may have more to do with the timing of the disaster than with the overall financial health of the farming operation and its ability to recover.

Disaster Set-Aside has historically made it easier for farmers to pay their other creditors in a disaster year—making it more likely that they will be able to obtain credit in future years. It bears mentioning that these other creditors are often local. Disaster Set-Aside brings a rapid economic benefit to the community as a whole, so that the local banks, seed dealers, and implement suppliers are able to continue in business, as well as economic and mental health benefits to the farmer in improved relations with the people he or she sees every day.

In its formal comments to the proposed rule on Disaster Set-Aside, NFFC urged FSA not to enact the proposed changes. NFFC incorporates its August 19, 2002 comments (submitted on its behalf by Farmers' Legal Action Group, Inc.) on the Disaster Set-Aside proposed rule to its comments on this proposal. These comments provide a detailed analysis of why Disaster Set-Aside should be available to farmers who are not more than one payment behind. Re-defining delinquency to apply to a farmer the day after he or she has missed a payment could be used to render that farmer ineligible for Disaster Set-Aside. This would harm family farmers, instead of helping them, and we urge FSA not to enact the two rules as proposed.

A Perceived Need to Reconcile Definitions for FSA Farm Loan Programs with Definitions for FSA Farm Programs Should Not Control

The prefatory comments to the proposed rule suggest that part of the impetus for the proposed rule is a desire on the part of FSA to harmonize the definition of "delinquency" for purposes of FSA Farm Loan Programs and FSA Farm Programs. For Farm Program purposes, "Delinquent debt" is defined as debt that is not paid by the

date due. 7 C.F.R. sec. 1403.3. For Farm Loan Purposes, a "delinquent borrower" is currently defined as a borrower who has failed to make all or part of a payment which is due for 30 or more calendar days after the due date. 7 C.F.R. sec. 1951.906, "Delinquent borrower." It is not at all clear that there is a need to harmonize definitions across program lines. The marketing assistance loans and other loans on the Farm Program side are intended primarily as mechanisms to assist farmers in their marketing efforts and to increase the stability of market prices for major farm commodities. These are not primarily loans for the purpose of providing agricultural credit, and they should not drive the definition of key terms such as delinquency.

The primary intention of the Farm Loan Programs, however, is to serve as a lender of last resort and to keep family farmers on the land. 7 C.F.R. §§ 1941.2 and 1943.2. Over the years, Congress has repeatedly affirmed this mission. See, e.g., *Curry v. Block*, 541 Supp. 506, 509-511 (D.Ga. 1982). Currently, statements of this mission with particular regard to loan making and loan servicing may be found at 7 U.S.C. §§ 1981, 1981a, 1981d(e), 1994(d), and 2001(a). This history of Congressional attention shows that the priority of keeping family farmers on the land should take precedence when defining key terms such as delinquency for purposes of decisions related to agricultural credit.

The Definition of Delinquency for Purposes of Primary Loan Servicing Should Not Be Made Inconsistent with the Definition of Delinquency for Purposes of Guaranteed Loans

The guaranteed loan regulations use default as a synonym for delinquency or nonmonetary default, and indicate that it occurs when a payment is more than 30 days past due. 7 C.F.R. sec. 762.143. The definition of delinquency should not be changed in the primary loan servicing regulations in order to achieve uniformity with Farm Program regulations at the expense of creating differing definitions for "delinquency" in the primary loan servicing regulations and the guaranteed loan regulations. As is shown throughout these comments, the better rule is that delinquency be defined as occurring 30 days after the payment has become past due. It is the better rule because it provides greater opportunities for farmers to take steps to ensure the future viability of their farming operations and stay on the land.

The Stigma of Delinquency Could Undermine Farmers' Efforts to Get Back on Their Feet During the First 30 Days Following a Missed Payment

As indicated above, the first 30 days following a missed payment may be a sort of "golden hour" that affords the best opportunity for a financially distressed farmer to restructure his or her debts and restore the farming operation to a sound financial footing. (The "golden hour" is a medical term for the first hour after an injury, when medical intervention has the greatest chances of success.) Next day delinquency could impede the farmer's efforts in that critical 30 day period by attaching the

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stigma of "delinquency" prematurely. This may hamper their efforts to obtain or reschedule financing from private creditors.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/Jill E. Krueger

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