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June 9, 2003

Director, Loan Making Division  
Farm Loan Programs  
USDA, Farm Service Agency  
STOP 0522  
1400 Independence Ave., SW  
Washington, DC 20250-0522

Dear Director:

Re: Comments on 2002 Farm Bill Regulations, 68 Fed. Reg. 17,316  
(April 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 17,316 (April 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.

NFFC appreciates the opportunity to comment on proposed changes to direct loan eligibility rules as they relate to farming experience and debt forgiveness caused by disaster, and on proposed changes to primary loan servicing rules, as they relate to servicing for Shared Appreciation amortized payment plans.

### **Comments Related to Loan Eligibility After Debt Forgiveness Resulting Directly and Primarily from a Major Disaster or Emergency**

#### **Maintain Loan Eligibility if Primary Loan Servicing was Applied for Within Three Years of Designation of the Disaster**

Three years is a reasonable amount of time for farm borrowers to have assessed the immediate and long-term consequences and made plans to recover from a major disaster or emergency. However, the proposed regulatory language should be changed to allow for continuing loan eligibility for farmers who have applied for loan servicing that ultimately resulted in debt forgiveness within three years after designation of the disaster, even if the restructuring had not been completed within three years after designation of the disaster, as well as for farmers who have actually received the debt forgiveness within three years. In some cases, resolving an application for primary loan servicing may take months or years, and borrowers should not be penalized for delays, if they have applied for primary loan servicing in a timely fashion.

#### **Clarify Timelines During Which Exception Will Apply**

In some cases, proposed changes appear to be consistent with Congressional directives contained in the Farm Bill, but using more precise language would enhance clarity of the rules for borrowers and the ease of administering the rules for the agency.

In sections 762.120(a)(2)(iii) and 1941.12(a)(8)(ii)(C), the following regulatory language was proposed:

Received debt forgiveness on not more than one occasion after April 4, 1996, resulting directly and primarily from a Presidentially-designated emergency for the county in which the applicant operates. Only applicants who were current on all existing direct and guaranteed FSA loans prior to the onset of a Presidentially-designated emergency and received debt forgiveness on that debt within three years after the onset of such emergency meet this exception. (*emphasis added*).

NFFC recommends that the word "onset" be clarified in the first instance, and replaced in the second. Clarification of the term "onset" could help provide adequate notice to agency employees and borrowers of when the rule applies. It would be helpful to include a definition of "onset" as the beginning of adverse weather conditions that resulted in a presidentially-designated emergency. The second appearance of the term "onset" would be made more clear and definite if it were replaced with the word designation.

These proposed changes would be consistent with the statute. The borrower's payment status should be measured at the onset of adverse weather conditions, because economic losses may correspond with the early stages of adverse weather conditions. Measuring the borrowers' status at the beginning of the disaster is consistent with Congress' intent that borrowers' whose debt forgiveness resulted primarily from emergencies and disasters

should continue to be eligible for direct operating loans. Substituting the word "designation" for the second proposed use of the word "onset" would provide a time frame that is easy to measure regardless of the type of disaster, and that is consistent with the Emergency Loan and Disaster Set-Aside programs, which measures the duration of program availability from the date of designation of the disaster. While in many cases, a disaster has an immediate adverse effect on a farming operation, in other cases, the adverse effects may take a substantial amount of time to make themselves fully known. The delayed and cumulative impacts of some types of disaster provide the argument for measuring the three-year span for applying for primary loan servicing from the date of designation of the disaster, rather than its onset.

#### **"Current Status" is Too Strict a Standard to Serve as Proxy for Losses Directly and Primarily Caused By a Disaster**

The proposal to measure whether debt forgiveness primarily and directly caused by a disaster by considering whether the farmer was current admittedly has a certain appeal, in that it provides an easy-to-administer bright line. However, its adoption and enforcement would almost certainly exclude borrowers whose debt forgiveness was directly and primarily caused by a disaster. In many cases, borrowers affected by years of low prices and poor weather conditions are not able to make loan payments on the day they are due. Nonetheless, many of these borrowers ultimately do make the payment. It is highly speculative to say that a farmer who became one or more days late on a loan payment, and received a write-down following a disaster, would have had a debt forgiveness even if there had been no disaster. NFFC proposes that the regulation consider farmers who are not more than 30 days past due at the onset of the disaster for this exception. Only when a borrower is more than 30 days past due is he or she considered delinquent under applicable regulations.

#### **Comments Related to Farm Ownership Loans and Farming Experience**

In general, NFFC strongly supports the agency's efforts to broaden eligibility for farm ownership loans. Many new people, including those who grew up on farms and those who did not, will be needed to operate our nation's farms in the coming years, and it is good policy for our country to support and invest in their efforts.

#### **Look Beyond the Previous Five Year Period for the Required Farming Experience**

The primary rationale given for the proposal to require recipients of Farm Ownership loans to have participated in the business operations of a farm or ranch for at least 3 years out of the 5 years prior to the date of application is bringing farm ownership loan regulations into conformity with operating loan regulations. However, this reasoning is not persuasive, in light of the fact that the operating loan regulations were adopted prior to the 2002 Farm Bill. There is a great need to encourage new farmers, in the face of an aging farming population. Moreover, some people with farming experience that is further back in time may have gained experience in the intervening years that will prove valuable as they embark on a new farming operation: they may have been enrolled in educational

opportunities or have had management responsibilities in other sectors of the economy. Thus, it is not necessarily the case that the most recent farming experience is the best predictor of success.

Under section 1943.4 of the proposed rules, being raised on a farm will meet the definition of participating in the business operations of a farm. Recognizing the valuable training and experience inherent in being raised on a farm is an important step in the proposed rule, and one the NFFC strongly supports. However, the interaction with this definition with the requirement in proposed section 1943.12(a)(6) that the participation have taken place in 3 of the past 5 years needs to be clarified. If a young person grows up on a farm, finishes high school, and then goes to college full time in a four-year program, he or she should be eligible, by virtue of being raised on a farm, but the requirement of participation in 3 of the past 5 years seems to cast this in doubt. Now imagine another case, of a young person not raised on a farm, but who nonetheless works on a farm for several years following high school, with gradually increasing management responsibilities, and then goes to college full time in a four-year program. Even more clearly than for the young person who was raised on a farm and then attends college, the proposed requirement of three years of experience within the past five years would render this young person ineligible. The required three years of experience should not be limited to the previous five years.

FSA loan policy should encourage, not discourage, college attendance. In many cases, college students enrolled in agricultural programs will receive extensive borrower training. The conference committee for the Farm Bill indicated that the agency should give "considerable weight" to participation in borrower training. Under the proposed rule, other types of valuable experience, such as active military service, might also disqualify a potential borrower. The limitation on farming experience to the past five years should be dropped, and a more comprehensive examination of the applicant's participation in the farm should be undertaken.

### **Consider Findings of Discrimination by the Agency When Assessing Farming History**

The proposal to require recent farming history is an apparently race- and sex-neutral requirement that could be a barrier to farm ownership loan eligibility for women and people of color who were forced to leave farming as a result of discrimination, and thus do not have recent farming history. For example, a person who is a successful claimant in the *Pigford v. Veneman* class action settlement is entitled to priority consideration for one loan application, but must demonstrate that he or she is otherwise eligible for the loan. If the proposal is adopted with no changes, many farmers who have proven to a neutral fact-finder that they were discriminated against will nonetheless be unable to qualify for a loan as a direct consequence of the discrimination. The sizable population of potential borrowers with a finding of discrimination or pending discrimination claim would receive fairer consideration if the requisite farming experience did not have to be from the most recent five year period.

NFFC recommends that the proposed requirement that the required 3 years of experience be in the past 5 years be dropped. In the alternative, if the proposed rule language is adopted, NFFC recommends an exception for farmers with a finding of past discrimination by the agency.

### **Clarify What is Meant by Significant Responsibility for Day to Day Decisions**

For many loan applicants whose farming experience is on family farms, participation in the business operations of a farm or ranch will be demonstrated through working on a farm with significant responsibility for the day-to-day decisions for the year's complete production and marketing cycle, or not at all. Unlike farms with absentee owners, family farms are unlikely to completely relinquish operation and management of the farm to an employee. Accordingly, it will be very important for agency personnel and loan applicants to know where to draw the line between laborers and persons having "significant responsibility for day to day decisions" when evaluating farm ownership loan applications.

FSA is currently implementing the change in loan eligibility through FSA Notice FLP-256. FSA Notice FLP-256 says this:

Significant responsibilities include, but are not limited to,

- Decisions to cull livestock
- Selection of seed varieties and weed control programs
- Determination of whether equipment should be repaired or replaced
- Selection of input suppliers
- Selection of feeding programs or strategies

These responsibilities must be thoroughly documented to verify that the applicant participated in the business operation of a farm or ranch and did not function solely as a laborer.

For the most part, these examples are helpful, and the regulation would benefit from their inclusion in an illustrative, but not exhaustive, list. Because of the variety of types of farms and ranches applicants may have experience on, it is likely to be impossible to come up with an exhaustive list.

Many farm advocates report that understanding what documentation will satisfy eligibility requirements has been difficult in the past. NFFC recommends that the regulation describe the types of documentation that would be acceptable. For example, would an affidavit from the farm owner(s) attesting that the loan applicant actively participated in farm management discussions be sufficient to demonstrate "significant responsibility for day to day decisions?" Would an affidavit from one or more input suppliers stating that they had dealt with the loan applicant, who acted on the farm owner's behalf?

## **Comments Related to Servicing Shared Appreciation Agreements**

### **Support for Notice Provisions**

NFFC strongly supports proposed section 1951.907(e), under which the agency would provide delinquent nonprogram borrowers who have only a Shared Appreciation amortization agreement with 60 days' notice of their servicing options, with a reminder of the information needed and the last day it could be submitted after 30 days if the borrower had not yet requested servicing. Notice from the agency will be of great importance in alerting borrowers to the new servicing options for amortized Shared Appreciation payments.

### **Acknowledge Review Rights Prior to Liquidation**

At section 1951.909(c)(6), the proposed rule states that, "Borrowers who do not meet the eligibility or feasibility requirements of this section will be notified of the adverse decision, and the account will be liquidated according to subpart J of this part." The borrower of a nonprogram debt has the right to review of nonprogram decisions by the next level supervisor. 7 C.F.R. § 1951.454. The final rule should acknowledge that all reviews will be concluded prior to liquidation.

### **Make Other Loan Servicing Tools Available**

In section 5314, the Farm Bill authorized the use of "loan service tools" under 7 U.S.C. § 1991(b)(3). Loan service tools in U.S.C. § 1991(b)(3) include loan consolidation, rescheduling, reamortization, interest rate reduction (including the use of the limited resource program), deferral, set aside, and write down. NFFC urges the agency to adopt final regulations that provide for loan consolidation, rescheduling, interest rate reduction (including the use of the limited resource program), deferral, and set aside, in addition to reamortization for borrowers delinquent on a Shared Appreciation amortized payment. This could be accomplished quite easily by replacing the word "reamortized" in the second-to-last line of proposed section 1951.914(e)(11) with the word "serviced." All of the other loan servicing eligibility criteria contained in 1951.909 would remain in effect, and would operate, for example, to bar receipt of another write-down.

Servicing using a variety of tools is both technically within the agency's authority and wise as a matter of policy. Had Congress intended to limit the servicing tools available to borrowers delinquent on a Shared Appreciation amortized payment, the Farm Bill could have referred specifically to 7 U.S.C § 1991(b)(3)(A), but instead Congress referred to section 1991(b)(3) generally, and therefore all of the tools, except write-down, should be made available.

Many farmers were taken by surprise by the agency's claims for recapture of the Shared Appreciation Agreements. Many FSA employees and former FSA employees have acknowledged that they advised farmers that the agreements would "go away" if they kept farming for ten years. Though FSA's present official position on

recapture has been upheld in the courts, there is no denying that Shared Appreciation Agreements impose a substantial hardship upon farmers, and that for many farmers, those hardships were magnified by inconsistent and inaccurate information from agency employees. The ultimate goal of the primary loan servicing program, of which Shared Appreciation Agreements and amortized Shared Appreciation payment plans are outgrowths, is keeping family farmers on the land. Making all existing servicing tools (with the exception of write-downs) available to these farmers is a lawful and appropriate way to accomplish the underlying purpose of the program.

### **Adopt Regulations to Accurately Appraise Farmland Subject to Shared Appreciation Agreements**

In the conference committee report on the 2002 Farm Bill, the committee expressed its strong expectation that USDA would review appeal procedures regarding Shared Appreciation Agreement appraisals and "establish policies that will result in the most accurate appraisal of assets." The committee specifically mentioned the possibility of using independent appraisals provided on appeal by the borrower, if the appraisal is consistent with the Uniform Standards of Professional Appraisal Practices.

NFFC recognizes that the proposed rule as published in the Federal Register did not address appraisal issues at the close of a Shared Appreciation Agreement. However, the linkage between the two issues is clearly acknowledged by the Farm Bill conference committee report. The appraisal issue is inseparable from the servicing issue, as the need for servicing may be driven by unreasonable and inaccurate appraisals. Additional savings may accrue to the agency, as more accurate appraisals lead to fair and reasonable recapture amounts and a corresponding reduced need for servicing.

NFFC urges the agency to act in compliance with the conference committee's expectations, and publish regulations related to Shared Appreciation Agreement appraisals for comment. Concerns about the accuracy of appraisals related to Shared Appreciation Agreements continue to be a significant problem for farm borrowers. These concerns spill over and undermine confidence in USDA generally, as farmers go through appeals, and even when the farmer demonstrates to the NAD hearing officer that his or her appraisal is more accurate, the case is merely remanded to FSA. As a matter of policy, it would be better to allow the use of the farmer's appraisal. The use of the tools listed in 7 C.F.R. § 1951.909(i)(3) when determining the amount of shared appreciation should also be revisited. Allowing the use of the farmer's appraisal and of tools such as the five percent rule and negotiation of the appraisal to resolve appraisal disputes would ensure that the most accurate appraisal value is used to determine shared appreciation, encourage farmer confidence in the fairness and efficacy of the administrative appeals system, and conserve agency resources by preventing successive rounds of preparing and

contesting an appraisal on the same piece of land. Such a policy would help hold agency appraisers accountable.

In addition to changing FSA appraisal rules to utilize appraisals submitted by the farmer if a NAD Hearing Officer finds the agency appraisal inconsistent with USPAP standards in order to determine the recapture amount, the agency should adopt rules requiring that land subject to a shared appreciation agreement be appraised as agricultural land. The practice of appraising land that may have been farmed for generations as land suitable for development is irreconcilable with the mission of FSA of keeping farmers on the land and preserving farmland for agricultural production. This inconsistency with the statutory mission of FSA has been recognized in federal court (see *Evans v. Veneman*, No. 99-M-2331 (D. Col. Aug. 29, 2001)) and should be corrected with a regulation stating that land subject to a shared appreciation agreement must be appraised as agricultural land for purposes of determining the amount of recapture due.

Thank you for your consideration of these comments.

Sincerely,

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