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Mr. Dale Theurer
Credit, Travel, and Accounting Policy Division
Office of the Chief Financial Officer
United States Department of Agriculture
Mail Stop 9010
Room 3417 South
1400 Independence Ave., SW
Washington, DC 20250

Dear Mr. Theurer:

Re: Comments on Debt Management Proposed Rule, 68 Fed. Reg.
32,418 (May 30, 2003).

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the proposed rule to amend USDA debt collection regulations, published at 68 Federal Register 32,418 (May 30, 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 USDA debt collection practices.

Provide Notice for Every “Delinquency,” Even if the Delinquency Relates to a Debt with a Previously Corrected Delinquency

The language in proposed section 3.41(b)(4) states that there is only one chance for “any” of the notice and review opportunities “with respect to a particular debt.” This should be changed to “with respect to a particular delinquency.” A debtor who is brought current on a debt through collection (or by payment after the collection process commences) should not be denied the right to challenge collection related to subsequent, separate delinquencies. The questions of the amount of debt owed/delinquent, whether there is a delinquency at all, etc. will be different for the later delinquency and the debtor must be allowed to participate in the full process for each delinquency. This is of particular importance for debtors with installment notes.

Clarify Provisions Concerning Receipt and Delivery of Notices and Responses, Including the Manner of Delivery and How Days Will Be Counted

Numerous provisions concerning receipt and delivery of mandatory notices and debtor responses need to be clarified. For example, in proposed § 3.62(a), it is not clear what “delivered to the debtor” means. The phrase suggests that the notices will be personally served upon the debtor, or hand-delivered to the debtor (see proposed § 3.11(d)). Personal service seems needlessly costly, yet hand delivery or regular mail may not result in reliable evidence of delivery if questions should arise later. NFFC recommends use of a delivery service that provides dated return receipts. As proposed section 3.11(d) concedes, the date on a notice is not conclusive evidence of when the letter was sent or delivered. Another option would be to presume the date of delivery to be five days after the postmark date.

Similarly in § 3.62(f) when it says that evidence “may be submitted . . . within 10 calendar days . . .” the final rule should clarify whether this means the evidence must be postmarked by the debtor or received by the reviewer. Also this deadline is “. . . within 10 calendar days after the request for review is received” but it is unclear how the debtor is supposed to know when it is “received.” One way to address this difficulty would be to require that all evidence that the debtor wishes to submit be postmarked within 15 days after the postmark date of the request for review.

Review Use of Words of Authority

One general comment about the proposed rule relates to the use of the word “should” as a word of authority. It is unclear whether the word “should” is intended to have a binding effect, or whether it is intended to be merely precatory. Promulgating a rule with this kind of inherent uncertainty would be in no one’s interest—it means that farmers would not be able to plan, government employees would be confused, and USDA would likely have higher expenses related to resolving disputes.

In general, NFFC recommends that if USDA intends for a provision to be mandatory, the rules use the words “must” or “shall,” and that the word “may” be used to signal discretionary provisions. This would be consistent with basic principles of good drafting.

Clarify Action Regarding 1944 Act Authorities

The reasons contained in the prefatory comments for the proposal to remove the regulations implementing provisions of the 1944 Act relating to compromise, suspension, and termination of debts are not persuasive. USDA indicates in the prefatory comments that "the authorities provided in the 1944 Act" are being removed because they "would be rarely used, if ever." If these authorities might ever be used, even if "rarely," it is not appropriate to remove the regulations.

Even if the agency intends to remove these provisions, a more definite step reserving the right to act is needed. The prefatory comments state that "USDA has reserved the right to [take action] as otherwise authorized by law. . . ." This "has reserved" language suggests that the reservation actually was done somewhere else than the comment itself, but there is no indication of where that might have been. In any event, this type of reservation is most appropriately made in a published final rule, rather than in prefatory comments to a proposed rule. There is also a solitary quotation mark in the discussion that needs a companion.

Define Terms and Collect All Relevant Definitions in Definitions Section

In several instances in the proposed rule, terms are defined within the substantive rule, or are never defined at all. NFFC strongly urges that every important term used in the final rule be defined. In general, it would be appropriate to include the definition in proposed section 3.3.

Clarify Meaning of Consumer Debt and Commercial Debt

Proposed section 3.12 is an example of occasions that give rise to NFFC's general comments regarding definitions and words of authority. That is, the regulations should define "consumer debt" and "commercial debt" so that potentially affected individuals and entities will understand where the boundaries between the two types of debt lie. Proposed section § 3.12(e) states that commercial debts are not required to be reported, but that they "should" be. This is likely to be confusing for potentially regulated parties and for the employees who will be charged with carrying out the regulations, and should be clarified. In addition, the final rule should make clear that the hearing, stay, and other pre-reporting protections in § 3.12 are also applicable to commercial debts, if those debts are to be reported.

Clarify the Parameters of "Collection Through Cross-Servicing"

Proposed § 3.30(a) suggests that "collection through cross-servicing" means something more than administrative offset or wage garnishment administered by the Department of Treasury. A regulatory section defining "collection through cross-servicing" and listing all examples would be extremely helpful. For example, it seems that when a debt is referred to Treasury for "cross-servicing" this means that Treasury becomes the agency responsible for any negotiation or settlement of the debt in addition to collection. It also seems to mean that the Department of Treasury becomes a sort of clearinghouse of information regarding all of the federal delinquencies and payment plans of any individual debtor.

Adopt a Definition for "Delinquent" that is Consistent with Current Regulatory Definitions Particular to FSA

Proposed section 3.3 would codify a definition for "delinquent" that is in conflict with the current Farm Service Agency interpretation of the term. This action is not compelled by either the Debt Collection Improvement Act of 1996 or by the Federal Claims Collection Standards (FCCS) promulgated by the Department of Treasury and Department of Justice. The Debt Collection Improvement Act, codified at 31 U.S.C. § 3701 *et. seq.*, does not define the word "delinquent." This proposed rule closely tracks the definition contained in the FCCS. See 31 C.F.R. § 900.2(b). However, the final rule need not hew so closely to the FCCS definition. The prefatory comments to the FCCS note that, "The revised FCCS provide agencies with greater latitude to adopt agency-specific regulations, tailored to the legal and policy requirements applicable to the various types of federal debt, to maximize the effectiveness of Federal debt collection procedures." 65 Fed. Reg. 70,390 (2000). Addressing the definition of delinquency in particular, the prefatory comments to the FCCS state that, "Agency-specific regulations may further clarify the definition of 'delinquency' as applicable to specific agency program requirements and particular types of debt." 65 Fed. Reg. 70,390, 70,391 (2000).

For many years, FSA has defined 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). Current Farm Service Agency regulations, at 7 C.F.R. section 1951.906, define "delinquent borrower" 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." While the Farm Service Agency (FSA) has proposed to re-define the definition of "delinquent," for purposes of primary loan servicing,¹ NFFC submitted comments opposing this re-definition, and no final rule has been issued. No proposals to change the definition with respect to guaranteed loans are pending. 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.

Changing the definition of "delinquent" would make it more difficult for financially distressed farmers to get back on their feet, since FSA generally may not make a new loan to a farmer who is delinquent on a federal debt. 7 U.S. Code § 3720B. 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 is often caused by circumstances outside the farmer's control.

¹ 68 Federal Register 1,170 (January 9, 2003).

Retain the 30-Day Past-Due Period Prior to Delinquency to Assist Farmers Recovering from Natural Disaster

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). But FSA has proposed changing the rule to state 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 (June 20, 2002) (proposed to be codified at 7 C.F.R. § 1951.954(a)(5)). NFFC submitted formal comments strongly recommending that the current rule, under which farmers are eligible if they are not more than one payment behind, be retained. As a less than optimal alternative, NFFC recommends that at least farmers who are up to 30 days past due be eligible for Disaster Set-Aside. This rule could be phrased as "The borrower must not be delinquent on any FLP loans. . . ." if the current definition of "delinquent" is retained.

Farmers who are behind on their loans due to natural disaster will have a difficult time getting back on their feet if they are ineligible for Disaster Set-Aside, and are subject to offset as soon as they miss a scheduled payment. The current rules for disaster set-aside and offset strike the appropriate balance between getting farmers back on their feet—especially during the first 30 days after a missed payment—and protecting the public fisc by offsetting payments to delinquent borrowers.

Coordinate Deadlines with Existing Loan Servicing Timetables

Despite increasing attention across the federal government to the importance of collecting on federal debts, the role of government agencies is only secondarily that of collection agencies. The primary intention of the Farm Loan Programs 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. Indeed, the Federal Claims Collection Standards explicitly acknowledge that the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over the FCCS. 31 C.F.R. § 900.4. This is consistent with the requirements of the Debt Collection Improvement Act. See 31 U.S.C. § 3711(g)(5).

Over the years, Congress has repeatedly affirmed the mission of the Farmer's Home Administration, now the Farm Service Agency. 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 over debt collection activities. But in many cases, USDA need not go so far as to accord precedence to loan making and loan servicing, so much as to coordinate debt collection with loan making and loan servicing activities.

FSA regulations require that a "Notice of Availability of Loan Servicing Programs" be sent when a borrower is 90 days past due on scheduled loan payments or when FSA finds the borrower in non-monetary default.² Borrowers have 60 days to respond to the FSA notice.³

USDA's regulations governing debt collection activities should take into account the fact that an application for loan servicing may be outstanding in the days following a missed payment. In many of these cases, it will not be an efficient use of government resources to refer the debt to Treasury as soon as the debts are over 180 days past due, as would be required under proposed § 3.11(b)(7) and § 3.31(c), because the delinquency may be resolved, and the debt restructured, within the context of loan servicing. The regulation should be amended to require referral to Treasury—if needed—following a final agency determination on any application for loan servicing.

Several other proposed regulations should be amended to allow for improved coordination with loan servicing timetables. The Debt Collection Improvement Act requires notice that referral may be made "not less than 60 days" after the notice is sent. 31 U.S.S. § 3711(e)(1)(C). Under the proposed rules, reporting would take place 60 calendar days after the delinquency, which would not even go to the end of the farmer's period for submitting an application for primary loan servicing. The proposed regulation, § 3.12(a)(1), having to do with reporting to credit reporting agencies should be amended to require reporting after resolution of any outstanding application for loan servicing. Nothing in the Act bars a reasonable delay pending the outcome of a loan servicing application.

Likewise, under proposed § 3.17(d), USDA would charge a 6 percent penalty on debts delinquent more than 90 days, but implementing this in cases that may soon be resolved in loan servicing seems costly and inefficient. Proposed section 3.12(a)(1) may be largely inapplicable to most cases involving farm loans, since it governs in cases involving "consumer debt" but to the extent that it would govern, it should be coordinated with loan servicing timetables. In all of these cases, the proposed provisions would be improved by adding a phrase stating that implementation shall occur after all pending loan servicing applications have been resolved. This would have the additional benefit of creating an incentive for the Farm Service Agency to resolve these applications expeditiously.

Allow for the Nature of Installment Loans in Collection Actions

Proposed § 3.16 should distinguish between missed payments in which the missed payment constitutes the entirety of the debt, and cases where it represents only one missed installment. When this provision speaks of collecting the total amount of the debt in one lump sum, or within three years if possible, it would be more precise to speak of "the debt or missed installment payment."

² 7 C.F.R. § 1951.907 (2003). The notice and attachments can be found at 7 C.F.R. pt. 1951, subpt. S, exh. A (2003).

³ 7 C.F.R. §§ 1951.907(e)(1), 1951.908(b) (2003).

Set Strict Guidelines for When Additional Security May Be Required

In general, most farm loan program debts are already adequately secured, and no extra security will be needed to assure the government of adequate protection. The final § 3.16(c) should give guidance with respect to the types of cases in which taking additional security would be appropriate.

Coordinate Deadlines for All Debt Collection Review Processes

Without explanation, proposed § 3.42(c) gives two different deadlines for requests under the different review processes – 30 days for review of proposed collection by non-centralized administrative offset and 60 days for review of proposed collection by centralized offset. Differing deadlines are likely to lead to confusion among debtors as well as agency employees. A uniform 60-day deadline should be adopted.

Synchronize and Coordinate Timelines for Review and Related Activities

Proposed § 3.42(b) and (c) would only give the debtor 20 days to submit a repayment plan but 30 days to submit a request for review. The final rule should allow debtors who seek review to submit a repayment plan if their challenge to the debt or to the amount of the debt is unsuccessful. Fairness and government efficiency demand that a debtor who sincerely but unsuccessfully opposes the validity of the debt should be granted a reasonable period after the review decision is issued to submit a repayment plan. Because farmers may need to seek professional financial advice to create a repayment plan, a minimum of 30 days is reasonable.

In the alternative, if the final rule retains the proposed 20- and 30-day deadlines for repayment plans and requests for review, respectively, it should advise debtors whether it is possible to submit them simultaneously or submit a second while the first is still pending. The short timelines proposed foreclose the possibility that a debtor might receive an answer on review during the time to submit a repayment plan. Under the proposed rule, debtors may feel constrained to waive their right to seek review of the underlying debt if they would wish to enter into a repayment plan should the existence and amount of the debt be confirmed. Debtors should not be forced to choose between these two options.

Proposed § 3.80(b) appears to force precisely that choice upon debtors in the salary offset context. The proposed rule states that a debtor may submit a repayment agreement if “the employee has not disputed [the debt’s] existence or amount.” Such a rule would chill employees’ exercise of their right to seek review of the amount or existence of the debt. It could also leave employees who question the debt in a worse position than those who do not. If the intention is to discourage meritless requests for review, it ought to be more narrowly tailored. As proposed, the section makes no distinction between those with legitimate concerns and those with frivolous challenges, and broadly punishes them all. Federal employees, as all debtors, should be afforded the opportunity to enter into a repayment plan after a review of the existence and amount of the debt, if the debt is found to exist.

Adopt Regulations Consistent with the Act with Respect to the Statute of Limitations

The Debt Collection Improvement Act sets forth a straightforward statute of limitations period of 10 years for administrative offset. 31 U.S.C. § 3716(e). The regulations should not muddle this limitations period with qualifiers that seem likely to confuse many employees and debtors, yet are unlikely to apply in any cases. Proposed § 3.40(e) should be amended to remove the “unless” phrase, leaving determinations regarding any possible tolling of the statute of limitations to the courts.

Another area of potential confusion with respect to statutes of limitations in the proposed rule may be found in proposed § 3.47. This proposed rule suggests that “flagging” a potential pension recipient’s account before the 10-year limitations period has passed will satisfy the requirement. But the DCIA states that administrative offset is not available for a claim that has been outstanding for more than 10 years. 31 U.S.C. § 3716(e). This clear limitations period may not be evaded by “flagging” a potential payment recipient’s account; if the claim has been outstanding for more than 10 years at the time the debtor becomes eligible for the payment, no offset may be taken.

Provide for Review of Denial of a Proposed Repayment Plan

Denial of a repayment proposal would seem to be an “adverse agency decision” appealable to NAD. This should be explicitly acknowledged in the final rule.

Exempt All Farm Disaster Payments from Offset

One final respect in which NFFC urges USDA to take advantage of this opportunity to adopt agency-specific debt collection regulations is to exempt all payments whose purpose is to help farmers and ranchers to recover from natural disaster from administrative offset. The farmers and ranchers served by USDA are typically affected by natural disasters at an even deeper and more lasting level than citizens served by other federal agencies, since both their residence and source of livelihood are affected when disaster strikes, and both emotional and financial ties keep them on one homestead.

The Debt Collection Improvement Act of 1996 gives the Secretary of Agriculture the discretion to exempt certain payments from offset if offset would “tend to interfere substantially with or defeat the purposes of the payment program”. 7 U.S.C. § 3716(c) (3) (B). This authority is codified in current USDA regulations at 7 C.F.R. § 3.23(b) (3) (2003), and may appropriately be exercised to exempt disaster payments from offset. Indeed, this discretion has been exercised frequently in the recent past.

Adopting a general policy that exempts all federal disaster assistance targeted toward farmers and ranchers from offset would dramatically improve the ability of farmers and ranchers to make plans to restore the economic viability of their operations. When decisions regarding offset are made on a program-by-program basis, as they are now, sometimes with the exempt status of a given type of assistance changing from year to year, farmers who fall behind on their debts are unable to manage their farms with confidence about the resources that will be available to them. A consistent general policy would mean that as soon as Congress appropriates funds for disaster assistance, farmers and ranchers would have some idea of

whether they could reasonably expect to receive assistance and to have the opportunity to determine how to apply the assistance in order to restore the economic viability of their farms and ranches.

Under proposed section 3.31(b)(6), certain classes of debt may be exempt from the required referral to the Treasury Department for cross-servicing, based upon a determination by the Treasury Secretary. This proposed rule is difficult to understand in at least two respects. First, it is hard to understand why the exemption is limited to an exemption from referral for cross-servicing, rather than an exemption for certain debts from all offsets, including internal administrative offset. Second, it is hard to understand why the Treasury Secretary should determine these class-based exemptions from referral to the Treasury, before the referrals would ever be made. NFFC recommends that the final rule include both a general exemption for payments to assist farmers and ranchers hit by natural disaster, and a provision recognizing the Secretary of Agriculture's authority to exempt other types of payment from offset.

A Few Technical Amendments

On page 32,422 in proposed § 3.11(b)(6)(v) the word "collection" should be "collect."

In proposed § 3.62(g)(2)(ii) it seems that ". . . must *present* by a preponderance of the evidence. . . ." should be ". . . must prove by a preponderance of the evidence. . . ."

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

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