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April 9, 2004

Ms. Carolyn Cooksie  
Deputy Administrator for Farm Loan Programs  
USDA/FSA/DAFLP/STOP 0520  
1400 Independence Avenue SW.  
Washington, DC 20250-0520.

Dear Ms. Cooksie:

Re: Comments on Proposed Rule — Regulatory Streamlining of the  
Farm Service Agency's Direct Farm Loan Programs, 69 Fed. Reg.  
6055 (February 9, 2004)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) and the Intertribal Agriculture Council (IAC) concerning the proposed rule entitled "Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs" published at 69 Fed. Reg. 6055-6121 (February 9, 2004).

NFFC represents 30 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.

IAC is a consortium of 64 Indian tribes that control about 80 percent of the Indian land base. Founded in 1987, IAC is dedicated to the pursuit and promotion of conservation, development, and use of Indian agricultural resources for the betterment of Indian people. IAC is currently recognized as the most respected voice within the Indian community and government circles on agricultural policies and programs in Indian country.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For almost two decades, 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.

### **General Comments About FSA's Streamlining Effort**

Through the direct loan program, the Farm Service Agency (FSA) is the lender of last resort to creditworthy family farmers who are unable to obtain financing from commercial sources at reasonable rates and terms. Congress has clearly articulated a policy of supporting the family farm system of agriculture through the FSA credit programs. See 7 U.S.C. §§ 1922, 1941, 2001.

NFFC and IAC support the impetus behind Agency efforts to reorganize its direct loan program rules in a more "orderly and logical manner." As specifically recommended by the USDA Civil Rights Action Team's 1997 report, such reorganization should make the program regulations more understandable and "easily accessible" to program participants.

However, as the prefatory remarks to this proposal expressly recognize, this proposed rule does more than merely consolidate and reorganize the hundreds of pages of direct loan program regulations. The Agency has also undertaken a sweeping streamlining of its program policies. During this comment period, program participants and others interested in the FSA direct loan programs have faced the daunting task of trying to take in the effects of those two quite different efforts. On March 29, 2004, NFFC submitted a request that the comment period for this proposed rule be extended for an additional 60 days. We understand that the Agency has committed to reopening the comment period for this proposal to allow additional time for the public to consider the proposed changes and submit comments. Given that the Agency itself spent years developing the proposed changes, it is appropriate for those affected to have a reasonable period in which to review and comment upon the proposal.

The prefatory remarks state that the Agency responded to the "challenge" of the National Performance Review initiative by "eliminating unnecessary procedural or internal requirements" and "adding flexibility to allow employees to address each customer's unique needs." While these steps might be considered laudable in the abstract, the reality is that proposed rule's move toward heavy reliance on internal agency handbooks and the vesting of broad discretion with local office employees present serious issues of concern for program participants.

### **Move Toward Reliance on Internal Agency Handbooks**

The stated intent of the proposed rule to allow the general public, including loan applicants and borrowers, to "more easily find needed information" is belied by the removal of significant substantive provisions from the rule language and the Agency's overt plan to rely heavily on internal handbooks for program administration. Although the Agency's prefatory remarks state that only procedures having "no impact on loan

applicants and borrowers" were removed from the reorganized rule, the reality is that the proposal leaves several areas where critical, substantive provisions have been removed and left unaddressed. This raises a fundamental challenge to the reorganized program regulations, as proposed.

First, meaningful notice-and-comment rulemaking, as prescribed by the Administrative Procedures Act, requires that all substantive program provisions affecting participants' rights be articulated by the agency in a proposed rule in sufficient detail to enable meaningful opportunity for comment, as well as to provide meaningful standards. Large areas of what are actually substantive provisions have been omitted from this proposal. The Agency presumably intends to incorporate these into its internal handbook, but this does not satisfy the APA mandate. The fact that notice-and-comment rulemaking seems burdensome does not excuse the Agency from its obligations. By omitting critical substantive provisions from the proposal, the Agency has denied the public the possibility of meaningful review of the proposed policy changes. The failure to disclose and invite comment on all of the program provisions also denies the Agency the benefit of cooperative, open feedback on its proposals that can identify problems and allow the Agency to efficiently make improvements, before the changes are put in place. Without that necessary input, the Agency risks facing waves of challenges when it attempts to implement undisclosed policy changes.

Federal agencies' attempts to bind the public to internal policy statements and handbooks have been contentious. See, for example, Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?," 41 *Duke Law Journal* 1311 (1992); Robert A. Anthony, "'Interpretive' Rules, Rules and 'Spurious' Rules: Lifting the Smog," 8 *Administrative Law Journal* 1 (1994); and Christopher R. Kelley, "Notes on the USDA National Appeals Division Appeal Process," 1999, *Arkansas Law Notes* 61 (1999). And, as seen in Christensen v. Harris County, 120 S. Ct. 1655 (2000) and Hoctor v. U.S. Dep't of Agriculture, 82 F.3d 165 (7<sup>th</sup> Cir. 1996), agency attempts to enforce policy statements promulgated without an opportunity for notice and comment are unlikely to withstand judicial review when they affect the public's substantive rights.

Once a rule is finalized, the Agency's reliance on internal handbooks for program administration will make it harder, not easier, for program participants to learn what is required of them and act accordingly. This is precisely the opposite of what both the CRAT recommendation and the National Performance Review initiative require. It also raises due process considerations. It is no solution for the Agency to suggest that handbooks can be viewed at local FSA offices. This is inadequate for many reasons: local FSA employees are already overburdened and cannot welcome the additional responsibility; in part due to being overburdened, local office employees do not always give the right information, and program participants must have direct access to complete, current program requirements; program participants in need of handbook information are often in dispute with the local FSA office and are justifiably leery of

being forced to rely on that office for the information needed to advance their position; and, finally, the FSA office is often simply prohibitively inconvenient both due to distance and limited hours of availability.

Finally, it is imperative that program participants have immediate, convenient access to the information proposed to be included in whatever handbooks are developed. The prefatory remarks to the proposal state that handbooks will be "issued" simultaneously with the final rule. The rule must not be finalized until the Agency is prepared to contemporaneously make all handbooks available on a publicly accessible Internet site. The guaranteed loan program handbook, 2-FLP, is currently available from the FSA web site, so the Agency clearly has the capacity to accomplish this posting. The Agency must also establish a procedure for getting subsequent amendments posted within a short period.

### **Two Examples of Missing Substantive Provisions**

The proposed rule includes an entire subpart (Part 761, Subpart B) devoted to supervised bank accounts. Section 761.51(d) of that subpart goes so far as to lay out the requirement that a financial institution pledge collateral to the Federal Reserve Bank (or a correspondent bank) if funds for the account will exceed \$100,000. Despite this level of detail on what would seem to be a purely procedural issue, the subpart provides absolutely no guidance as to when the Agency will use supervised bank accounts or when such accounts will be "no longer needed," as stated in proposed § 761.55(a). A lack of standards for supervised bank accounts is particularly alarming. Arbitrary use of the discretion to require such accounts has been a troubling practice nationwide, and has been particularly objectionable for African American farmers in the Southeast.

Exacerbating this omission is a misleading discussion in the prefatory remarks justifying the removal of an existing provision ensuring that Operating Loan (OL) borrowers with supervised bank accounts will have at least \$5000 available in a non-supervised account for living and operating expenses. The remarks state: "the proposed rule only requires the use of a supervised bank account when 'special supervision is needed.' This is consistent with the Agency's policy of reducing the use of supervised bank accounts." However, this "special supervision" language appears nowhere in the rule. Instead, the proposed rule removes the protective provision for living and operating expenses and provides no standards for use of supervised accounts.

Another example of a critical substantive issue that is not addressed in the proposed rule is the standards for post-approval of a borrower's use of proceeds from chattel security. Proposed § 765.304 states that the borrower must "provide information" to enable the Agency to consider post-approval, but no standards are articulated.

### **Increasing Agency Employee Discretion Brings Risks of Disparate Treatment**

Like the extreme detail of the current direct loan program regulations, a lack of discretion for Agency staff under the direct loan program has a historical context, which

must not be forgotten: chronic abuses of discretion resulting in extensive litigation and recurring congressional action. Borrowers and loan applicants are justifiably wary of policy changes that would reopen areas of discretion that have been narrowed due to prior abuse. Of course there is a place for recognition of varying circumstances, but it is imperative that the Agency set meaningful parameters on any provision of discretion. The Agency should be concerned with perceived differences as well as actual inconsistencies and should set out objective standards against which an employee's exercise of discretion in the direct loan programs can be measured.

One example of unfettered discretion in the proposal is the provision allowing the Agency to require "any additional information deemed necessary by the Agency to effectively evaluate the applicant's eligibility and plan of operation." (Proposed § 764.51(a)(13)). While there may be no "one-size-fits-all template" that suits every application, it is certainly the case that the Agency could identify general categories of information or otherwise indicate the types of information that may be sought and allow the public to comment on whether such information is appropriate for these programs. The alternative to unfettered discretion is not, as the prefatory remarks suggest, that the Agency would need to "identify every possible piece of information that could ever be needed and then require every applicant to provide that information." The agency should be able to identify the general types of information that might be required and thereby put some limits on what applicants might be required to provide.

Another area where the proposed rule gives unreasonably broad discretion to Agency employees is in loan approval conditions found at proposed § 764.401(b)(6) and (7). Proposed (b)(6) would permit loan denial because "the applicant's circumstances may not permit continuous operation and management of the farm." Loan denials based on purely subjective conjecture about what "may" happen are arbitrary and capricious. If the applicant meets the loan eligibility requirements, the loan should be made. Similarly, the provision in proposed (b)(7) allowing denials if any "circumstances surrounding the loan" are "inconsistent" with federal law or "credit policies."

### **Specific Policy Changes in the Proposed Rule**

#### **Definition of "Family Farm"**

The proposal adds an either-or maximum gross income level to the definition of "family farm." Some NFFC members have been told by local FSA offices that the rule will also be used to impose a \$10,000 minimum gross income level. NFFC and IAC do not understand the Agency to be proposing any minimum income level. In any case, such a limit is not authorized under the proposed rule language and is not supportable in practice. So long as a borrower otherwise satisfies the program eligibility requirements, there is no justification for a minimum income level.

NFFC also have concerns about how the maximum gross income level will affect currently eligible joint operations, particularly dairy operations.

The proposal also changes the current requirement that the farm "provide enough agricultural income by itself, including rented land, or together with any other dependable income" to pay expenses and maintain property to require that the farm "in a typical year generates net cash income that improves the family's standard of living." The prefatory remarks did not address this change, and it is not apparent what the change is intended to accomplish. Indeed, despite prefatory remarks that the income limit in the "family farm" definition is intended to make the standard more objective, this change makes the requirement much more subjective. The question whether a borrower can "pay expenses and maintain property" is much more objective than whether a borrower's "standard of living" is "improved."

#### **Definitions of "Agricultural Commodity" and "Noneligible Enterprise"**

In the past decade, Congress has demonstrated a clear interest in seeing USDA farmer programs made available to emerging crops as farmers innovate and attempt to find new ways to stay profitable. In light of this, the proposed definition of "agricultural commodity" is appropriately broad. It should follow, therefore, that any enterprise involving production of an "agricultural commodity" is eligible for direct loan assistance. That the type of enterprise is eligible does not mean, of course, that the application satisfies the other loan eligibility requirements, such as projecting a feasible plan. However, it is unreasonable and unnecessary for the Agency to use the "noneligible enterprise" definition to set up a second tier of inquiry for determining whether a particular crop or livestock enterprise is eligible for direct loan assistance. The proposed definition of noneligible enterprise attempts to exclude "exotic" and "non-farm animals" without defining what these categories mean.

#### **Reduction of Records Requirement From 5 Years to 3 Years**

The proposal to reduce the financial and production records requirement in loan making and loan servicing from five years to three years fails to incorporate the current provisions at 7 C.F.R. § 1924.56(b)(1) allowing for adjustment of production history to accommodate disaster yields. Section 1924.56(b)(1)(iii)(B) providing for exclusion of year with the lowest disaster year yield implements a statutory requirement set out in 7 U.S.C. § 1981e and a similar provision must be incorporated in any new rule. The Agency should also carry over the provision of § 1924.56(b)(1)(iii)(A) to allow substitution of county or state average yields for any years in which the borrower's disaster yields are lower than the average. Such substitutions are even more important when the production history is reduced to three years. The availability and terms of these or any other modifications to a program participant's production history are yet another example of the kind of substantive provisions that must be included in the rule language and cannot simply be relegated to an internal handbook. Given the short period of records to be used under the proposed rule, the Agency should also include a provision allowing adjustments to be made, or other years' records looked to, if the three most recent years of production are atypical due to circumstances beyond the producer's control.

### **Graduation**

The Agency should modify the proposed rule provisions related to graduation requirements to clarify that a borrower will not be considered "failing" to graduate, and therefore in non-monetary default, unless the borrower is actually able to obtain commercial credit but refuses to do so. The Agency's simple "belief" that commercial credit would be available cannot be sufficient. The Agency should also incorporate into proposed § 765.101(e)(1) the current rule provision that the borrower may "for good cause" obtain a reasonable amount of additional time to apply for commercial credit.

### **Appeals**

Agency implementation of successful administrative appeals has been a source of friction between FSA and program participants for many years. In response to concerns that Farmers Home Administration program staff were refusing to implement appeal decisions in favor of borrowers, Congress explicitly included a statutory implementation requirement when it created the new National Appeals Division. The NAD statute requires that when a final NAD appeal determination is returned to an agency, the head of the agency must implement the determination within 30 calendar days. 7 U.S.C. § 7000. "Implement" is defined in the NAD statute as taking "those actions necessary to effectuate fully and promptly a final determination of [NAD]." 7 U.S.C. § 6991(8) (emphasis added).

As the Agency must be aware, its position that it may require updated financial information from a successful guaranteed loan applicant was soundly rejected in First National Bank v. Glickman 1998 U.S. Dist. LEXIS 22433 (N.D. Tex. Apr. 3, 1998). In that case, the court held that the Agency's demand for updated financial information after a successful appeal was "arbitrary, capricious and not in accordance with the law" and ordered the Agency to implement the NAD decision "on the basis of the facts existing at the time the application was made or the original adverse decision was issued."

The proposed rule provision that purports to allow the Agency to require successful appellants to provide new financial information is contrary to the congressional mandate, as reemphasized in First National Bank, that the applicant's or borrower's case should proceed after a successful appeal from the point at which the adverse decision was made. The NAD statute rejects precisely the "revolving door" policy that the proposed rule attempts to adopt.

The proposed rule provision that purports to require a successful annual Operating Loan appellant to demonstrate that it is possible to produce a crop in the same production cycle indefensibly approximates a proposed policy that such applicants can never overcome adverse Agency decisions, even if successful before NAD.

### **Loan Servicing Notice When Request for Release of Chattel Proceeds Is Denied**

The current regulatory provision requiring notice of loan servicing programs when a borrower's request for release of chattel security proceeds is denied should be retained.

Federal law requires the Agency to send a borrower the notice of loan servicing before taking any collection action. 7 U.S.C. § 1981d(d)(3)(F). The Agency's refusal to release proceeds from the sale of chattel security is properly considered a collection action. Providing such notice also furthers the Agency's espoused goals of making the programs, including the loan servicing programs, more easily accessible and putting the "customer" first. Notice of loan servicing at this stage also benefits the government by ensuring that the borrower is apprised of the opportunity to address his/her financial distress or delinquency as early as possible.

To the extent the reference in the prefatory remarks to proposed § 766.101's continuing the "policy" of notifying financially distressed and delinquent borrowers is intended to suggest that the explicit requirement is not needed because the Agency will already be sending the notice to borrower's whose release requests are denied, the suggestion fails. In the interest of clarity and consistency the rule should continue to explicitly state that denial of a release for chattel security proceeds will be a trigger for sending the notice of loan servicing programs.

#### **Notice of Appeal Rights in Restructuring Offer**

The proposal to omit notice of appeal rights from restructuring offers and to instead "consolidate" the borrower's appeal rights in the subsequent notice of intent to accelerate is contrary to law and must be withdrawn. Federal law requires the Agency to provide program participants with written notice of their appeal rights within 10 working days after an adverse decision is made. 7 U.S.C. § 6994. The Agency does not have the discretion to delay and "consolidate" appeal rights with a subsequent adverse decision. The justifications presented in the prefatory remarks for this change are ill considered. Failure to provide appeal rights with a restructuring offer will not result in "more timely processing of a borrower's request for loan servicing." Although the "consolidated" appeal rights would speed the resolution of delinquent accounts, that would not begin to justify denying a borrower full, prompt notice of appeal rights, even if that notice were not required by statute. The notice of appeal rights must continue to be included in the restructuring offer. As a practical matter, as mentioned above, all parties are better off when issues are resolved earlier rather than later.

#### **Agency Initiation of Mediation**

The Agency should continue to initiate mediation when a borrower is unable to develop a feasible plan in loan servicing. The proposed rule steps back and only provides notice of mediation rights along with notice of intent to accelerate. Mediation among all of the borrower's creditors is a critically important, proven tool for resolving financial distress and delinquency. Borrowers' typical ignorance of mediation along with the shock and distress accompanying receipt of an acceleration notice leave little opportunity for a borrower to take advantage of the nominal mediation rights in the acceleration notice. The Agency's initiation of mediation begins a process that benefits all.

### **Loan Servicing Eligibility**

The proposed rule uses language in the eligibility requirements for loan servicing that is subjective, susceptible to abuse, and likely to be the subject of many challenges. In proposed § 764.101(d) the rule states that the Agency will determine whether the applicant will make a "sincere effort to repay the loan" and will "devote the effort required" to carry out the loan terms. Both of these requirements are too subjective to provide reliable standards. The requirement that the borrower deal in good faith should satisfy the intent of the subsection.

### **Good Faith**

The definition of "good faith" should continue to include the explicit requirement (now found in 7 C.F.R. § 1951.906) that allegations of fraud, waste, or conversion must be substantiated by the Agency with a written legal opinion from the Office of General Counsel (OGC) when such allegations are used to deny a loan servicing request. The definition of "good faith" must also continue to include statutory language that a borrower will not be considered to lack good faith if the sole basis for such a determination was the disposition of normal income security prior to October 14, 1988, without the Agency's consent if the borrower demonstrates that the proceeds were used to pay essential family living and farm operating expenses that could have been approved according to Agency regulations. 7 U.S.C. § 2001(l).

### **Unauthorized Assistance**

The proposed handling of unauthorized assistance is unreasonably burdensome for situations where the borrower is entirely without fault. As defined in the proposed rule, "unauthorized assistance" includes loans, loan servicing, and interest rates "which the Agency obligated from the wrong appropriation or fund" and those which were "not processed and approved [or made] in accordance with all Agency procedures and requirements." In all cases where unauthorized assistance resulted from Agency or guaranteed lender error, particularly those in the previous sentence which are so completely outside the borrower's control, it is capricious for the Agency to propose that there should be any limiting factors on allowing the borrower to repay the unauthorized assistance as his/her cash flow permits. Despite the casual statement in the prefatory remarks, it does matter whether the borrower or the Agency was at fault for the unauthorized assistance.

If the borrower is without fault and is unable to repay the entire amount of unauthorized assistance in a lump sum, the remaining amount should be scheduled according to the borrower's repayment ability at program rates. There is no basis in such a situation for setting a maximum payment term or adding the vague "in the best financial interest of the Government" standard.

### **Youth Loans**

NFFC and IAC urge the Agency to continue to make Youth Loans available on the same terms as they are currently. Youth Loans are a vital source of opportunity and skills training, particularly in many minority farmer communities. The link to agriculture through supervision by 4-H, FFA, and similar farm-related organizations is sufficient to ensure that the projects are appropriate for the program.

### **Circumstances "Beyond the Borrower's Control"**

NFFC and IAC support the proposal to expand the examples of circumstances "beyond the borrower's control" that can cause delinquency and to make explicit that the regulatory list is not exhaustive. However, the proposed rule language at § 766.104(a)(1) does not seem to "clarify" that the list is inexhaustive. Indeed, the rule on its face seems to suggest that the list is exhaustive. More explicit language is needed in the rule to clarify that the list is not exhaustive.

Proposed § 765.202(a)(2) should be clarified to state that borrower failure to keep agreements will be considered when making eligibility determinations only when the failure is "for reasons not beyond the borrower's control." As stated in the prefatory remarks discussing proposed § 762.203, the Agency's concern when determining eligibility for loan and servicing requests is reasonably limited to failures that are not beyond the borrower's control.

### **Homestead Protection Eligibility**

The proposal to expand the Homestead Protection eligibility requirements to make the applicant responsible for making improvements and "replacing systems" during the lease term should not be adopted. These expanded provisions under § 766.153(b)(5) pose a risk of unreasonable financial burdens on Homestead Protection applicants that are not authorized by federal statute. The current eligibility requirement at 7 C.F.R.

§ 1951.911(b)(3)(vi) requires that the applicant demonstrate sufficient income to make rental payments and "maintain the property in good condition," as required by 7 U.S.C. § 2000(c)(1)(F). This language should be retained.

### **Timeframes**

In every place where it is not already clear, the rule language should expressly state that timeframes run from the time a notice is received by the borrower or applicant.

### **Errors/Inconsistencies/Omissions in the Proposed Rule**

#### **Guaranteed Loan Appeals**

The Agency should take the opportunity presented by this rulemaking to correct a substantive error in the guaranteed loan regulations. Current § 762.104(a) incorrectly states that a guaranteed loan applicant or borrower and lender must jointly execute a request for review of an adverse agency decision. Although accurate when that rule was first issued in February 1999, this subsection has been wrong since June 23, 1999, when

the final rules of procedure for the National Appeals Division were issued. 64 Fed. Reg. 33,367. The requirement that a borrower and lender jointly request review was expressly disavowed in the prefatory remarks to the final NAD rule: "USDA is striking the requirement in the definition of 'participant' in Sec. 11.1 of the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers." 64 Fed. Reg. 33,370. Although frustrated that § 762.104 has not been corrected in the almost five years since the policy changed, NFFC and IAC are confident that the Agency will finally bring its program regulations in line with the NAD rule at this time.

Similarly, it should be understood that the "except as provided in 7 CFR 762" language of proposed § 761.6 can only be referring to § 762.104(b), which states that a borrower may not appeal a decision of a lender. In no other sense does Part 762 provide an exception to the general statement in § 761.6 that a guaranteed loan applicant or borrower or lender may request an appeal or review of an adverse agency decision in accordance with Parts 11 and 780. The "and lender" should therefore be changed to "or lender" to clarify that there is no joint request obligation.

#### **Recognition of Tribal Authority**

The rule should be comprehensively amended to reflect recognition of Indian reservations as political subdivisions where appropriate and recognition of tribally chartered business entities on par with state chartered entities.

#### **Errors in Recodification of Current EM Loan Regulations**

In the process of recodifying the current EM loan regulations, numerous errors were made. Most significantly for the EM loan program, the proposed § 764.352(b)(1) states that the EM loan application must be received by the Agency within "eight months after the date the designated or declared disaster occurred..." This is wrong. The current EM loan rule § 764.4(b)(1) correctly states that the EM loan application must be received by the Agency within "8 months after the date the disaster is declared or designated...." This error must be corrected.

Similarly, this proposed rule perpetuates an error that NFFC commented on for the September 2000 proposed EM loan rule and that was expressly corrected in the final EM loan rule issued in January 2002. Proposed § 764.352(a)(7) states that EM loan applicants "must not have received debt forgiveness from the Agency on more than one occasion before April 4, 1996, or any time on or after April 4, 1996." As the Agency acknowledged in the prefatory remarks to the January 2002 final EM loan rule, this is wrong. ("One commentor pointed out that the proposed rule was inconsistent with § 373(b)(2) of the Act (7 U.S.C. 2008h(b)(2)) regarding when an applicant who has received debt forgiveness is eligible for an Emergency loan. This error is corrected in § 764.4(a)(10) of the final rule." (67 Fed. Reg. 793)).

As was true of the prior EM loan proposed rule, the eligibility requirement in proposed § 764.352(a)(7) regarding prior debt forgiveness misstates the date on which the debt

forgiveness trigger sets in. The proposed rule states that an applicant must not have had more than one occasion of debt forgiveness before April 4, 1996, nor at any time on or after April 4, 1996. The statute, however, provides that an applicant may have had one occasion of debt forgiveness on or before April 4, 1996, but none after April 4, 1996. 7 U.S.C. § 2008h(b)(2)(B).

The proposed rule cuts the eligibility period by one day, April 4, 1996, and it is clear that Congress intended that any debt forgiveness received on this day not be counted against a borrower. The proposed rule should (once again) be corrected to accurately reflect the statutory language.

### **Ambiguity in Recodification of Disaster Set-Aside Regulations**

Proposed § 766.52(a)(7) changes the language in current § 1951.954(a)(6) from “the borrower must not be 165 or more days past due when Exhibit A of Agency Instruction 1951-T (available in any FSA office) is executed” to the “borrower must not become 165 days past due before DSA is complete.” While the form designation for the DSA agreement will understandably change, the phrase “DSA is complete” is unclear. The rule should be changed to continue to use execution of the DSA agreement as the benchmark.

### **Proposed Language for Loan Servicing Notices**

In all three of the loan servicing notices in the proposed rule, under item (h), “Reconsideration, Mediation, Negotiation, and Appeal Rights,” the final sentence is nonsensical and should be deleted. What is the meaning of stating that mediation, negotiation, and appeal rights will be provided “when required to insure that you are given the reasons for the Agency decision.” The sentence is apparently a statement that the review rights will be provided when they are required to be provided, but such a tautology is obviously superfluous. The opening statement – that review rights will be provided “if the Agency makes an adverse decision” – conveys the message that is intended.

Language from FSA 2505 under (i), “Acceleration and foreclosure,” to the effect that the borrower “may apply or reapply for debt settlement even if you applied before and were denied.” should also be included in Form 2503.

### **Definition Inconsistencies and Other Problems**

On April 4, 2004, the Agency issued a final rule eliminating the 30-day past due period before considering a borrower delinquent. 69 Fed. Reg. 5264. NFFC and IAC presume that the Agency intends to incorporate this change into the definition of “delinquent borrower” at proposed § 761.1(b), which currently is defined as “a borrower with any portion of a payment to the Agency that is at least 30 days past due.”

Because of the consolidation of current rules, proposed § 761.2(b) includes definitions for “essential family household expenses” (used exclusively for EM loans), “essential

family living and farm operating expenses,” and “family living expenses.” Due to the plethora of related definitions, the proposed rule language is unclear in a number of places. Most importantly, the list of authorized loan uses for the Operating Loan program at proposed § 764.251(c) includes “family subsistence,” a term that is not defined at all.

The terms “immediate family” and “immediate family member” are used repeatedly throughout the proposed rule text in important eligibility provisions, but are not defined. The term “family members” is ambiguously defined as “immediate members of the family residing in the same household.”

When used in the rule at proposed §§ 764.351(a)(2)(iii) and 764.353(d)(5), the term “household items” is qualified by the modifier “essential,” but the term is already defined to include only “essential” household items.

Combining definitions from all of the FSA loan programs in proposed Part 761 results in ambiguous and erroneous definition meanings for the guaranteed loan program. As is true under the current rule at § 762.102(b), under proposed § 761.1(b), “applicant” as used in Part 762 is the lender requesting the loan guarantee and “loan applicant” is the term to be used for the producer seeking the guaranteed loan. However, other proposed Part 761 definitions use “applicant” exclusively. When used in the guaranteed loan program, then, most of these definitions don’t make sense because they put the lender (as “applicant”) in the producer’s place. This must be clarified.

The terms “active borrower” and “commercial classified account” are included in the proposed definitions, but are not used anywhere in the proposed rule text.

### **Use of “Operating Plan” and “Farm Operating Plan” as Apparent Substitutes for Farm and Home Plan**

For decades, the accounting system used by FSA direct loan borrowers has been the Farm and Home Plan. Without explicit comment or discussion, the proposed rule would all but eliminate reference to this system from the direct loan program regulations. Indeed, the Farm and Home Plan appears in the proposed rule only as an entry in the list of “forms, documentation, and information need to apply” in the loan servicing notices set out in the appendices to subpart C of proposed part 766.

The proposed rule uses the terms “operating plan” and “farm operating plan” as apparent substitutes for Farm and Home Plan. However, the proposed rule fails to define either term – or even to indicate whether “operating plan” and “farm operating plan” refer to the same thing – and gives no guidance as to whether they differ from the current Farm and Home Plan.

This is but another instance where the “streamlining” of the rule as proposed would come at a high cost in lack of clarity and completeness. Provisions currently contained in 7 C.F.R. §§ 1924.55 and 1924.56 serve to address many of the disputes that have arisen

over the years between borrowers and the Agency when developing a Farm and Home Plan for direct loan making and loan servicing. For example, current regulations provide that: FSA should work in close cooperation with the borrower in developing a Farm and Home plan; the Farm and Home Plan should be based on accurate and verifiable information; if the plan proposed by the borrower is changed by mutual agreement between FSA and the borrower, both parties should sign to indicate their agreement with the revisions; and, during the pendency of any appeal related to plan development, FSA must approve release of income from normal income security to meet essential farm operating and family living expenses.

In contrast, the proposed rule has little to say about the crucial process of formulating the farm operating plan. The borrower's right to formulate the operating plan for the farm must be reaffirmed and protected in the reorganized direct loan program regulations. It is imperative that the operating plan be one of the borrower's own choosing, informed by the expertise of FSA loan officials, but with the final decision made by the borrower. At a minimum, the existing borrower protections must be retained.

#### **Phantom Loan Eligibility Requirement**

Twice in the prefatory remarks there occurs the statement that "[o]ne general loan eligibility requirement is that the applicant will honestly endeavor to carry out the conditions of the loan." There is no such eligibility requirement in the proposed rule language, nor should there be one. In prefatory remarks accompanying the final EM loan program regulations issued in January 2002, the Agency acknowledged a comment objecting to an "honestly endeavor" requirement as lacking any objective criteria. The Agency "agree[d] that this should not be included as a separate eligibility criteria and removed the proposed requirement from the final rule." The Agency noted that instead the Agency would determine "whether the applicant has dealt with the Agency in good faith which includes providing current, complete, and truthful information to the Agency and fulfilling its obligations to other Federal agencies and third parties." (67 Fed. Reg. 793).

#### **All Comments Submitted Regarding the Proposed Streamlining of Farm Loan Programs Should Be Posted on the FSA Website as They Are Submitted**

The farm loan programs administered by the USDA have been a topic of intense interest among farmers and ranchers for decades. This intense interest extends for many farmers, ranchers, and farm organizations to a strong desire to review and analyze comments submitted on this and others rules published for public comment.

Federal agencies, including USDA, are increasingly making documents relating to the rule-making process available on their websites. Publication on the website helps improve public access to and participation in the rule-making process.

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NFFC/IAC

NFFC and IAC urge the Agency to post all comments received on the proposed streamlining of the FSA Farm Loan Programs on its website. Under the E-Government Act of 2002, agencies "shall make publicly available online. . . all submissions under 553(c) of Title 5, United States Code. 107 Pub. L. No. 347, Section 206(d)(2)(A); 116 Stat. 2899 (2002). See also 44 U.S.C. § 3501note (Federal Management and Promotion of Electronic Government Services). The statutory provision of the Administrative Procedure Act referred to concerns notice-and-comment rulemaking. The Act allows for some agency discretion in determining whether online publication is "practicable."

NFFC and IAC believe that many comments on the proposed rule are being submitted by e-mail and fax, which would make online posting relatively convenient. Several other agencies within USDA, for example, the Agricultural Marketing Service, have concluded it is practicable to post comments received during the rule-making process upon their websites, and have in fact posted public comments. The Natural Resources Conservation Service is in the process of posting thousands of comments regarding its proposed rule for the Conservation Security Program on its website. The comments are being posted at <http://www.nrcs.usda.gov/programs/csp/comments.html>. NFFC and IAC believe that it would be both practicable and beneficial to post all FLP comments on the FSA website, and urges the Agency to do so for this and all subsequent comment periods.

Thank you for your consideration of these comments.

Sincerely,

s/Karen R. Krub

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