

FLAG



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September 26, 2005  
**Via Facsimile and Electronic Mail**

Mr. H. Talmage Day  
Appeals and Litigation Staff  
Farm Service Agency  
United States Department of Agriculture  
1400 Independence Avenue, SW.,  
STOP 0570  
Washington, DC 20250-0570

Dear Mr. Day:

Re: Comments on Interim Final Rule for Farm Service Agency Appeal  
Procedures, 70 Fed. Reg. 43,262 (July 27, 2005)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the interim final rule entitled "Appeal Procedures," published at 70 Fed. Reg. 43,262-43,270 (July 27, 2005).

NFFC represents 30 grassroots farm and rural advocacy organizations serving 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 and the administrative review procedures available to participants in those programs.

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 and the administrative review processes for these programs.

### **The Informal Appeals Process – Need for Clear Language re Participants’ Choices**

NFFC strongly supports the stated goal of the interim final rule to “maximize the opportunity for resolution” of disputes arising from FSA adverse decisions. While NFFC may disagree with FSA’s contention in the prefatory remarks that “only the most difficult” cases proceed to review by the National Appeals Division (NAD), NFFC supports FSA’s continuing to provide the opportunity for several levels of intra-FSA review of agency adverse decisions. FSA understandably prefers to see disputes resolved within its informal process, and this process is certainly beneficial in cases where internal corrections and/or clarifications can resolve a dispute.

NFFC is quite concerned, however, that the interim final rule does not clearly state that the informal process is *optional*. With one exception, program participants who prefer to proceed directly to a NAD appeal have the right to do so. The NAD statute makes clear that an agency’s pre-NAD informal hearings are to be held “at the request of the participant,” and participants “shall be offered the right to choose” mediation where it is available. 7 U.S.C. § 6995. The statute makes none of these processes mandatory. The NAD Rules of Procedure do impose a requirement for mandatory informal review of adverse FSA *non-credit* decisions “issued at the field service office level by an officer or employee of FSA, or by any employee of a county or area committee”; such decisions must first be reviewed by the responsible county or area committee before the participant may appeal to NAD. 7 C.F.R. § 11.5(a). However informal review of adverse credit decisions, mediation, and all informal review steps above the level of the county or area committee remain entirely optional under the NAD Rules of Procedure. 7 C.F.R. § 11.5(a), (b).

The first section of the interim rule addressing “available” procedures, § 780.6, sets out three different lists of procedures, depending on the type of decision made. Lacking any language to indicate the relationship of the various procedures to one another, the section implies that the sequence of procedures is the order that they must be pursued. However, mediation is listed before “appeal to NAD” for two of the decision-types and after “appeal to NAD” for the third. Not only does this wrongly imply in at least one instance that mediation is available after an appeal to NAD, it also suggests that there is only one point in the FSA informal appeals process where mediation is available.

Moreover, while a careful reading of the interim final rule reveals that FSA recognizes that a participant may appeal to NAD without first seeking reconsideration or any review by the state committee, this information is hidden in language about a participant’s

rights to those processes being “waived.”<sup>1</sup> Similarly, a participant’s right to seek mediation without recourse to other informal review processes and a participant’s right to proceed to a NAD appeal without mediating the dispute are both buried in the interim rule language.<sup>2</sup>

It is imperative that FSA provide clear communication about which aspect of the informal appeals process is required before proceeding to a NAD appeal (i.e., review by the county or area committee of *non-credit* decisions issued by subordinate personnel) and what order the process must follow (to the extent that order is significant). There are, of course, sequencing requirements inherent in the process, e.g., one cannot seek “reconsideration” by a decisionmaker before one has sought review by that decisionmaker. However even these requirements can and should be spelled out clearly in the rule. Although the interim rule drafters no doubt believed that they addressed these issues, the answers, if they are there at all, are buried in sections addressing procedural requirements and are not accessible to a reader with questions like: Can I seek mediation before appealing to the county committee? After? Do I have to seek reconsideration by the county committee before going to the state committee?

The rule must include clear, direct statements about when the various procedures are available. An example would be the omitted language from former § 780.7(e) “Nothing in this part prohibits a participant from filing an appeal of a final decision of the county committee with NAD in accordance with the NAD regulations.” Similar clarifying language would be: “A program participant may seek mediation of an adverse decision at any point in the process up until a hearing in a NAD appeal of the decision.”<sup>3</sup> NFFC strongly urges that FSA revise § 780.6 (and related language in other sections) to more clearly state the optional nature (with one exception), required sequence (as applicable), and inter-relationship of the informal appeal procedures under Part 780. The need for clearer, more direct statements applies not only to program participants, but

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<sup>1</sup> Section 780.7(b)(3) states that “A participant’s right to request reconsideration is waived if, before requesting reconsideration, a participant ... (3) Has appealed to NAD.” Section 780.10(b) states that “A participant’s right to appeal a decision to a State committee is waived if a participant has appealed the adverse decision to NAD before requesting an appeal to the State Committee.”

<sup>2</sup> Section 780.7(b)(1) states that “A participant’s right to request reconsideration is waived if, before requesting reconsideration, a participant ... (1) Has requested and begun mediation of the adverse decision.” Section 780.10(c) states that “If a participant requests a mediation ... before a request for an appeal to the State Committee has been acted upon, the appeal to the State Committee will be deemed withdrawn.” And Section 780.9(a) states that “Any request for mediation must be submitted ... before any hearing in an appeal of the adverse decision to NAD.”

<sup>3</sup> This is a modification of language already in the interim rule at § 780.9(a), but the changes are significant. First, there is the information that mediation is available at various points (though no more than once for any decision) in the informal process. Second the ability to request mediation is stated concretely, i.e., “...participant may seek mediation...,” rather than leaving questions about what else might be required as in the current “[a]ny request for mediation must be submitted....”

also to agency personnel who are implementing the rule. And these are not hypothetical concerns. NFFC has already heard reports of local offices advising farmers that they must exhaust all of the informal appeals procedures under the new interim rule before they can request a NAD appeal. In at least one instance, a local office has attempted to require mediation of a dispute when the farmer sought to appeal directly to NAD.

As a final point, with respect to the clarity of § 780.6, NFFC notes that the language “for covered programs administered by FSA for CCC” in § 780.6(a) is meaningless to anyone outside the agency. “Covered programs” is not defined in the interim rule. The program designation in § 780.6(c) is similarly cryptic. While it is understandable that FSA is hesitant to list specific program names that would have to be updated and amended, the interim rule language fails to provide any guidance to program participants as to which list of “available” procedures might be applicable to a given non-credit program. The language should be amended to give at least some guidance to program participants. For example, it might indicate the general category of programs covered, e.g., conservation, and give the names of one or more representative programs included in the category.

### **Resistance to Full and Prompt Implementation of Final NAD Decisions Is Contrary to Statutory Mandate**

As the agency is no doubt aware, the creation of an independent National Appeals Division as part of the Department of Agriculture Reorganization Act of 1994 was a product of apparent failings in the internal appeals processes of FSA’s predecessors – FmHA and ASCS. One of the most problematic issues for program participants was obtaining implementation of a favorable appeal decision. Aware of this problem, Congress included language in the new NAD statute specifically addressing implementation, requiring that

[o]n the return of a case to an agency pursuant to the final determination of [NAD], the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination.

7 U.S.C. § 7000. The NAD statute defines “implement” to mean

those actions necessary to effectuate fully and promptly a final determination of [NAD] not later than 30 calendar days after the effective date of the final determination.

7 U.S.C. § 6991(8).

The section of the interim rule addressing implementation states simply that “[t]o the extent practicable” FSA will implement an administrative decision within 30 calendar days after it becomes final. § 780.16. NFFC is amazed to learn that the agency believes it can impose a “to the extent practicable” qualification on a *statutory mandate* that it *shall* take within 30 calendar days “those actions necessary to effectuate fully and promptly” a final NAD determination. The agency cannot plausibly hang such an open-ended qualification as “to the extent practicable” on the truism, referenced in the

prefatory remarks, that “sometimes” implementation will depend on the availability of funds. Certainly funds can be so limited, and, in such cases, NFFC expects that FSA will do what it would have done had funds been unavailable at the time of an original, favorable decision: put the program participant’s name next on the list of those who will receive a loan or other benefit when funds become available.

Similarly, FSA’s prefatory remarks that implementation is “understood” to require that the next step in the case will be initiated within 30 days, “but not necessarily completed” are directly contrary to the express *statutory mandate* that an agency *shall* within 30 days take the actions necessary to *fully* and promptly effectuate the decision. It is a “settled principle of statutory construction that [one] must give effect, if possible, to every word of [a] statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983). And Congress is presumed to “intend[] the words in its enactments to carry ‘their ordinary, contemporary, common meaning.’” *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). It is nonsensical and disingenuous for the agency to read a *statutory* definition of “implement” which uses the words “fully and promptly” and conclude that it is “understood” that this means the action need not be completed. “Fully” can mean nothing else. The prefatory remarks must be repudiated as contrary to the explicit requirements of the NAD statute.

### **Changes to Mediation Procedures Undermine Program Effectiveness, Create Confusion**

As the prefatory remarks acknowledge, mediation is a useful tool for resolving issues arising in FSA adverse decisions. Mediation programs across the country have helped program participants and agency officials work together to resolve disputed issues and reach agreement about going forward. Although the interim rule helpfully includes a more detailed discussion of FSA’s mediation procedures than was part of the prior Part 780, the interim rule includes a number of provisions that NFFC believes are contrary to the purposes of mediation and will needlessly confuse and/or discourage program participants.

#### *FSA’s Bar for “Good Faith” Participation Set Too Low*

The prefatory remarks state FSA’s beliefs that effective mediation of program disputes does not require the attendance and participation of an agency representative with final decision-making authority and that including such persons would be “impractical” and “unworkable” in many situations. Indeed, in the end, FSA undertakes to do no more than “endeavor” to ensure that the agency representative has “appropriate knowledge” of the legal requirements of the program(s) at issue. These remarks are troubling in many respects.

First, in the interest of “effective mediation of agency program disputes,” responsible allocation of government resources, and respect for the program participant and mediator, it would seem that FSA could do better than to merely “endeavor” to send agency representatives with “appropriate knowledge.” NFFC contends that a *commitment* to send an agency representative thoroughly familiar with the program(s)

at issue is a minimum standard for considering the agency to be participating in mediation "in good faith."

Second, FSA's assertions that sending final decision-makers to represent FSA in mediations would be impractical or unworkable are belied by the experiences of mediation programs in various states who have found creative ways to make those mediations work. Advances in telecommunications technologies have dramatically changed the way people "gather" and will continue to facilitate what once seemed "impractical."

FSA's assertion that the presence of a final decision-maker is not necessary for "effective" mediation is contradicted by the continuing requirement at § 780.9(d)(4) that any agreement reached must be returned to FSA for review and final approval. If, as FSA argues, mediation agreements affecting FSA programs "must be feasible and consistent with statutory and regulatory requirements and FSA's generally applicable interpretations of them," the need for final review and approval can only mean that FSA does not trust that the representatives it *will* send will be able to determine feasibility and/or consistency with the agency's own requirements. How can FSA possibly consider itself to be in "good faith" working toward "effective" mediation if it chooses to send the message to program participants (and mediators) that their time is worth so little that the agency will risk sending representatives whom it cannot trust to know the programs well enough to make a decision? And these are the persons whom program participants must trust to relay their proposals? In addition to feeling devalued, how can the program participant not question whether his or her case is actually being heard?

Moreover, the interim rule says nothing about timeframes for such final approval, nor about what happens if final approval of a mediation agreement is denied. Will the mediation resume, with direction from the final decision-maker about what the impediments were to approval? Or will the agency consider the mediation "unsuccessful," despite the fact that those actually participating reached an agreement? Given the requirement that an issue may only be mediated once, due process would require that the mediation resume.

#### *Interim Rule Improperly Vests SEDs With Power to Determine When Mediation "At an Impasse"*

Section 780.9(h) states that mediation will be considered at an end on the date set out by the mediator or mediation program, or "when the participant receives written notice from the State Executive Director that the State Executive Director believes the mediation is at an impasse...." FSA provides no explanation for this rather remarkable language. Rather than allow the neutral to determine when the parties have reach an impasse, FSA seeks to make that decision for itself, despite being an interested party in the mediation and despite the limitation that the program participant would then be barred from mediating the issue in the future. This cannot in any sense be said to satisfy basic standards of due process. NFFC assumes that this language was included due to FSA's belief that some mediation programs are too slow to terminate mediation when the parties are at a stalemate. However, if FSA is having problems with a mediation program, those problems are between FSA and the program and must be resolved between them,

without impinging on individual participants' mediation rights. The determination of when mediation is at an impasse must be made by the mediator.

*Clarification Needed on Relationship Between Mediation and Other Informal Procedures*

The interim rule omits language found in the old rule – 7 C.F.R. § 780.6 – that states how pursuing mediation will affect a program participant's rights to seek other forms of informal review. The stay of the period to request a NAD appeal while mediation is open is codified in the NAD Rules of Procedure, but what about the informal review procedures? That is, if a program participant requests mediation 20 days after receiving an adverse decision from the county committee, and mediation is unsuccessful, what time is left to seek review by the state committee?

The use of the word "withdrawn" in §§ 780.7(d) and 780.10(c) is similarly confusing. It is not clear whether "withdrawal" means that that level of review would remain available if mediation proves unsuccessful, or would be considered waived. This must be clarified. And, if the agency's position is that the review is waived, this must be explicitly set out in both the rule and in the notice of appeal rights. NFFC urges FSA to give the broadest possible interpretation on behalf of program participants attempting to exercise their review rights, and simply hold a review request in abeyance until mediation is either settled or terminated. This relieves the program participant of the risk of missing a deadline for a type of review that had already been requested.

*Confidential Nature of Mediation Must Be Clarified*

The interim rule includes a definition of "confidential mediation," stating that this is "a mediation process in which neither the mediator nor parties participating in mediation will disclose to any person oral or written communications provided to the mediator or in confidence...." § 780.2. By including this definition, the interim rule implies that some mediations will be confidential, as defined here, and some will not. However, the interim rule provides no guidance as to when confidential rather than non-confidential mediation would be used, nor who will decide. NFFC supposes that the intent is that all mediations of FSA programs will be "confidential mediations." Section 780.9(e) would seem to support this, though the "consistent with the purposes of the mediation" language in that section is a different standard than that in the definition. This must be clarified.

If all mediations are to be "confidential mediations," the definition should be dropped and the language therein should be incorporated into § 780.9(e) so that it is clear that there is only one type of mediation, a confidential one. Language must also be added to advise program participants as to their obligations and rights with respect to the confidentiality of the process and what confidentiality means for the agency representative(s).

If there are intended to be both confidential and non-confidential mediations, the rule must clarify that and indicate what the bases for making the distinction will be and how the distinction will be triggered, along with defining the obligations and rights of the parties. At a minimum, NFFC insists that it cannot be on FSA's initiative alone that an individual mediation is deemed confidential.

### *Requirements for Requesting Mediation*

FSA Notice APP-42, issued on September 19, 2005, reveals that FSA is intending to centralize mediation requests through the state offices, rather than have program participants contact the mediation programs directly. NFFC questions the efficiency of adding another step in the process and funneling requests for a neutral mediation service through the agency with whom the participants seek to mediate. In addition to adding complications and risk of error, this seems certain to have a chilling effect on program participants who are too intimidated by or frustrated with agency personnel to submit any kind of request to FSA. Opportunities to resolve disputes are certain to be lost, and there has been no suggestion of what is to be gained, other than more paperwork. NFFC urges FSA to continue the practice of directing program participants to contact mediation programs directly to request mediation services. Of course, NFFC expects that state-specific adverse decision letters will continue to include the direct contact information for the state mediation program, if available.

### **Prohibition on Personal Recordings Unwarranted**

Section 780.13(a) prohibits program participants from making personal electronic recordings of "any portion of a hearing or other proceeding" under the appeal procedures. Section 780.13(b) provides that program participants may request that a verbatim transcript be made the official record of a proceeding – with the participant paying for the cost of the service and providing a free copy to FSA. Given that there can be no question that a participant's personal recording could be considered the official record of a proceeding, NFFC cannot identify any purpose that might be served by the interim rule's prohibition on personal recordings. The prefatory remarks make no mention of the provision. With FSA's uneven history of participants who experienced perceived and actual mistreatment by agency personnel, it can do no good to impose a rule that sends a message to the public that FSA personnel are willing to go "on the record" only if a participant is willing and able to pay out an exorbitant amount for a transcription service.

### **Notice of Adverse Decision Within 10 Working Days Required by Statute**

As FSA acknowledges in the prefatory remarks, the governing statute "requires" written notice of an adverse decision to the program participant within 10 working days. 7 U.S.C. § 6994. There is no authority for FSA to simply "endeavor" to meet this requirement "to the extent practicable." § 780.15(a). The language must be changed to provide that notice will be made within 10 days.

### **Interim Rule Arbitrarily Truncates Time Period for Requesting Informal Review**

Section 780.15(b) and (c) of the interim rule state that a program participant's written request for review or mediation must be *received* within 30 days of the participant's receipt of the written decision notice. Section 780.15(e)(2) states that a decision "or other notice" is deemed received "7 calendar days following deposit for delivery by regular mail." It is inconceivable that FSA would be attempting to limit participants' time period to post a request for review or mediation to 23 days (30 days less 7 days after placing it in the mail). At a minimum, FSA must confirm that the 7-day posting period for

determining receipt applies to notices *from* FSA to participants, but is not included when calculating the period in which a participant must submit a request.

Moreover, the use of *receipt* to determine the end of the 30-day period for a participant to request review or mediation is inappropriate and highly susceptible to abuse. Participants have no ability to even learn when a request is “received” by the agency, let alone prove or disprove it. NFFC strongly recommends that FSA retain the time limitation language from the prior rule, namely that

[a] request for reconsideration or an appeal of a decision shall be *filed* within 30 days after written notice of the decision which is the subject of the request is mailed or otherwise made available to the participant. A request for reconsideration or appeal shall be considered to have been “filed” when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is *postmarked*.

7 C.F.R. § 780.8(a) (2005) (emphasis added). The same rule should also apply to mediation requests. The postmark-date requirement is clear and readily verifiable. Participants can reasonably be expected to know and demonstrate (if needed) when a request was mailed. For participants’ review and/or mediation rights to be determined by when a federal agency (which is likely to be in an adversarial position) sorts its mail is completely arbitrary and cannot be said to provide due process. One modification that would be warranted would be to allow for filing a request by facsimile or electronic mail as those mechanisms become available for these procedures.

Moreover, the adoption of the “receipt” test for requests *by* participants from its origin in provisions governing the giving of notice to participants completely mistakes the purpose of the test. The goal is to ensure that program participants have a given period – 30 days – in which to review an adverse decision, consider their options, and make a choice about how to proceed. A window of “7 calendar days following deposit” is intended to ensure that none of that period is lost to days while the decision is in the mail on the way to the participant. Similarly, basing the end of the period on personal delivery or postmark ensures that none of that period is lost to days while the decision is in the mail *from* the participant. Neither FSA nor the mediation program faces a set period in which it must act after receiving the request, so there is no justification for a time rule that would “protect” their time while penalizing the participant.

The form language set out in APP-42 is better than the interim rule in this regard, referring to “filing” a review request within 30 days and “submitting” a mediation request within 30 days, but neither term is clearly defined, so the ambiguity remains. The language must be amended to provide a full 30-day period for participants to consider and submit review and/or mediation requests. The agency’s form letter(s) must then be changed to reflect the rule language and unambiguously inform program participants of the requirements for satisfying the 30-day limit.

### **Appeal Rights Must Be Provided for “Corrections”**

Section § 780.3(a) reserves authority for the agency to “correct all errors.” The interim rule states that “appropriate notice” of such corrections will be furnished. NFFC reminds FSA that any “correction” which changes a program participant’s level of benefit (or overall eligibility) would be considered an “adverse decision” under the NAD statute and this Part 780, and appeal rights must be provided. 7 U.S.C. § 6991(1); 7 C.F.R. § 780.2, “Adverse decision.”

### **Improper Use of “May” Where Agency Action Required**

In § 780.7(a) the interim rule states that a request for consideration must be submitted according to instructions that “may be” in the adverse decision notice. The NAD statute *requires* that program participants be informed of their appeal rights along with the notice of an adverse decision. 7 U.S.C. § 6994. The interim rule repeats this, with the unlawful qualification discussed above, at § 780.15(a). A notice of appeal rights must necessarily inform the program participant how those rights may be exercised, therefore there is no authority for FSA not to include clear, complete instructions in the adverse decision notice. Section 780.7(a) must be changed to read that the notice *will* include such instructions.

### **Use of Undefined Terms**

In § 780.9(g)(3) the interim rule states that FSA “may” give notice to “interested parties and third parties whose interests are known to FSA.” The interim rule does not define “interested parties” or “third parties.” The NAD Rules of Procedure define these terms at 7 C.F.R. § 11.15, but that provision is not incorporated by the interim rule here. FSA must either incorporate the NAD definitions or itself define what it intends by those terms. Regardless of the definition, it is inappropriate for the rule to state that such parties “may” be given notice. Notice of, and presumptive right to observe and/or participate in, a mediation cannot be something that is arbitrarily provided. Either those parties are so defined that they *must* be notified of the mediation, or they should not be addressed by the rule at all.

### **Clear, Complete, and Accurate Notices to Program Participants Are of Paramount Importance**

The effectiveness of FSA’s informal appeals process depends on a program participant’s understanding of how to access that process and the participant’s belief that the process will be fair. NFFC cannot state strongly enough how important it is that notices to program participants regarding informal appeal, mediation, and NAD appeal rights be clear, complete, and absolutely accurate. Notices must be written so that a program participant can understand all of the review opportunities available, the requirements for pursuing each, and the effect of pursuing one opportunity on another/others (i.e., waiver, delay, tolling, starting over).

NFFC does not suggest that composing the necessary notices is an easy undertaking, but it is absolutely necessary. If adverse decision notices give participants an incomplete or erroneous understanding of their appeal rights, many are going to be blindsided by

unanticipated time limits, waivers of rights, and missed opportunities. Not only would this be a denial of participants' due process rights, the resulting resentments, suspicions, and pessimism will raise serious concerns about the entire process.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/ Karen R. Krub

Karen R. Krub

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cc: Kathy Ozer, NFFC