

## Chapter 8

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## Chapter 8

# Farm Service Agency (FSA) Disaster Set-Aside

### I. Introduction

The Farm Service Agency (FSA) Disaster Set-Aside Program allows FSA borrowers who are victims of a natural disaster to skip an annual installment payment on a direct FSA loan and instead move the payment to the end of the loan repayment period.<sup>1</sup>

A set-aside may be especially helpful to some farmers. For example, set-aside of an annual installment payment on an FSA loan may avoid a delinquency that would otherwise have made the farmer ineligible for a new FSA Operating (OL) loan.<sup>2</sup> If the farmer would still not be eligible for a new FSA loan or does not wish to take on more debt, a set-aside could still allow the farmer to avoid delinquency or free up income that otherwise would have gone to pay existing direct FSA loans. In addition, the program may ease the financial burdens on livestock producers who suffer income losses in a disaster but in many cases are not eligible for other USDA disaster programs.

In September 2003, FSA published a rule that made important changes to the Disaster Set-Aside Program (DSA).<sup>3</sup> The rule took effect on October 27, 2003. The most important change for borrowers was the shortened time during which borrowers who have missed a payment may apply for set-aside. Under the prior rule, set-aside was generally available to farmers who were one payment behind. Now, FSA borrowers must be less than 90 days past due at the time they apply for set-aside, and less than 165 days past due at the time the set-aside agreement is executed.<sup>4</sup>

The Disaster Set-Aside Program was also affected by a comprehensive reorganization and rewriting of the regulations for FSA's entire direct loan program, which took effect on January 1, 2008.<sup>5</sup> Although there were no changes to the content of the Disaster Set-Aside regulations, they were rearranged and moved to a new part of the Code of Federal Regulations, Subpart B of Part 761 of Title 7.

In addition to the changed regulations, FSA also issued a handbook setting out program requirements for state and county offices to use when handling loan servicing of FSA direct loans, including Disaster Set-Aside applications.<sup>6</sup> Farmers can request a copy of this handbook, called "Direct Loan Servicing—Special and Inventory Property Management," 5-FLP, from their local FSA offices, or download a copy from FSA's website at [www.fsa.usda.gov/Internet/FSA\\_File/5-flp.pdf](http://www.fsa.usda.gov/Internet/FSA_File/5-flp.pdf). Specific requirements for the Disaster Set-Aside Program are set out in Part 2 of the handbook.

## **II. Application Due Eight Months From Disaster Designation**

FSA regulations set out strict deadlines for set-aside applications. In general, farmers must request a set-aside from FSA within eight months of the date the disaster was designated.<sup>7</sup> The disaster designation may be a presidential disaster declaration or a designation by the Secretary of Agriculture or FSA Administrator.<sup>8</sup> The set-aside request must be made by all of the borrowers liable for the FSA debt.<sup>9</sup>

Borrowers who might be eligible for set-aside are supposed to be notified by FSA. The DSA Handbook states that at the beginning of every quarter, FSA offices will send notice to direct loan borrowers of the current disaster designations for the area, the availability of DSA, and deadlines for application.<sup>10</sup> FSA will not notify borrowers whose loans have been accelerated, whose loans have been restructured since the time of the disaster, or who are paying FSA under a debt settlement agreement.<sup>11</sup>

## **III. Loan Eligibility for Set-Aside**

FSA regulations set certain restrictions on which loans may have installments set aside.

## **A. All FSA Farm Program Loans Generally Eligible for Set-Aside**

In general, annual installment payments on all types of FSA farm program loans may be set aside.<sup>12</sup> These include FSA Farm Ownership (FO) loans, Operating (OL) loans, Soil and Water (SW) loans, Emergency (EM) loans, and others.<sup>13</sup> However, FSA Youth loans (YL) are not eligible for set-aside.<sup>14</sup> Payments on FSA nonprogram loans may sometimes be set aside if the borrower also has farm program loans.<sup>15</sup>

## **B. Limitations on Loans Eligible for Set-Aside**

In certain circumstances, payments on FSA farm program loans will not be eligible for a set-aside.

### **1. No Set-Aside If Fewer Than Two Years Remaining on Loan**

FSA will only set aside a loan installment if the term remaining on the loan extends at least two years from the due date of the installment being set aside.<sup>16</sup> This means that one- and two-year loans, and longer-term loans that are fewer than two years from the end of the repayment period, are not eligible for set-aside.

### **2. No Set-Aside If Loan Was Already Accelerated**

FSA farm program loans that have already been accelerated are not eligible for set-aside.<sup>17</sup>

### **3. No Set-Aside If Loan Restructured Since Disaster**

In order to be eligible for a set-aside, the farmer's debt must not have been restructured under the FSA loan servicing programs since the disaster occurred.<sup>18</sup> The loan may have been restructured before the disaster and still be eligible for a set-aside.

### **4. No Set-Aside of Costs Paid By the Government**

Since 2003, set-aside may not be used for costs, such as property taxes, that are the borrower's responsibility but that may have

been paid by FSA in order to protect its interest in its collateral.<sup>19</sup> FSA has taken the position that the failure to pay such “recoverable costs” must be addressed through primary loan servicing, rather than through set-aside.<sup>20</sup>

#### **5. No Set-Aside of Debt Settlement Adjustment Payments**

If the farmer is paying FSA under a debt settlement adjustment agreement, the payments are not eligible for a set-aside.<sup>21</sup>

### **C. If Loan Installment Has Previously Been Set Aside**

In general, the DSA regulations provide that only one unpaid installment for each FSA loan may be set aside.

In the past, FSA issued special interim rules allowing for set-aside of a second loan installment. Some farmers may still be carrying loans with two set-aside installments.

#### **1. Generally, Only One Installment Per Loan May Be Set Aside**

Under DSA regulations, the general rule is that if a loan installment is still set aside from a previous disaster, the loan is not eligible for another set-aside.<sup>22</sup> Other FSA loans held by the farmer, however, may still be eligible for set-aside.

##### **a. If Set-Aside Installment Paid in Full, Loan Will Be Eligible for Another Set-Aside**

If an installment is set aside, and then that installment is paid in full by the farmer, another installment on the loan may be set aside.<sup>23</sup> Once the set-aside installment has been paid in full, the set-aside will be canceled by FSA, and the loan may be considered for a set-aside in the future.

##### **b. If Set-Aside Installment Restructured Through Loan Servicing, New Loan Will Be Eligible for Set-Aside**

If an installment is set aside and the loan is then restructured through FSA primary loan servicing, the set-aside will be



canceled.<sup>24</sup> The farmer will then be able to request set-aside of an installment payment on the restructured loan.

## **2. Second Set-Aside No Longer Available**

In 1997, 1999, and 2000, FSA allowed farmers who already had postponed a loan installment under the Disaster Set-Aside Program to receive a second set-aside.<sup>25</sup> In each instance, FSA issued an interim rule making a specific, limited change to the general regulation that prohibits more than one set-aside on a single FSA loan.<sup>26</sup> On June 27, 2001, FSA issued an internal policy notice stating that second set-asides were no longer available.<sup>27</sup>

The DSA Handbook states that, in cases where multiple set-asides are still outstanding on an FSA loan, any payments received for the set-asides will first be applied to the oldest set-aside installment until it is paid in full.<sup>28</sup>

## **IV. Farmer Eligibility for Set-Aside**

In addition to satisfying the loan eligibility requirements discussed above, the farmer applying for set-aside must meet the following requirements.

### **A. Be a Direct FSA Borrower**

To be eligible for a set-aside, the farmer must have been a direct FSA borrower at the time the disaster occurred.<sup>29</sup> The loan must have been made already and not yet paid off.<sup>30</sup>

### **B. Operate in a Disaster Area**

In order to be eligible for a set-aside, the farmer must operate a farm or ranch in a disaster area.<sup>31</sup> This means that the operation must be located in a county officially designated as a disaster area or a county that borders on an officially designated disaster county.<sup>32</sup> The farmer must have been operating the farm at the time of the disaster.

### **C. Be Current or Less Than 90 Days Past Due on All FSA Loans When Applying for Set-Aside**

As mentioned earlier, the DSA rule published in 2003 narrowed the window of opportunity for farmers to apply for set-aside. Under the current rule, at the time the application for set-aside is completed, the farmer must be current or less than 90 days past due on *all* FSA farm program loans.<sup>33</sup>

### **D. Act in Good Faith With FSA**

Only farmers who have acted in good faith in their dealings with FSA are eligible for set-aside.<sup>34</sup>

#### **1. Defining Good Faith**

FSA loan program regulations include a specific definition of good faith. In general, according to FSA, a farmer has acted in good faith if he or she has provided “current, complete, and truthful” information and adheres to all written agreements with FSA.<sup>35</sup> This includes, for example, carrying out agreements that control the farmer’s use of security property and the proceeds from the sale of security property. If the farmer is unable to carry out the agreements for reasons beyond the farmer’s control, FSA will not consider this a failure to act in good faith.<sup>36</sup>

#### **2. Accusations of Fraud, Waste, and Conversion Require Written Legal Opinion**

If FSA denies a loan servicing request, including a set-aside application, because it claims that the farmer acted in bad faith by committing fraud, waste, or conversion of security property, FSA must support those allegations with a written legal opinion from USDA’s Office of General Counsel (OGC).<sup>37</sup> For example, if FSA believes that the farmer sold security property in violation of the security agreement, this may mean that FSA is actually accusing the farmer of an act of conversion. If FSA believes that the farmer converted security and wants to use this as a basis for claiming that the farmer has failed to act in good faith and is therefore

ineligible for DSA, FSA must back up this allegation of conversion with a written legal opinion from OGC.

### **E. Resolve Nonmonetary Defaults**

In order to be eligible for a set-aside, the farmer must resolve any nonmonetary defaults with FSA.<sup>38</sup> In general, actions that will be considered loan defaults are set out in the FSA loan documents that the farmer signs. A number of events can trigger a nonmonetary default. For example, if the borrower is no longer farming, has a prior lien foreclosure, has filed a bankruptcy petition, has failed to properly maintain chattel and real estate security, has not properly accounted for the sale of security property, or has failed to carry out any other agreement with FSA, the borrower may be in nonmonetary default.<sup>39</sup>

### **F. Not Ineligible Due to Federal Crop Insurance Violation**

A farmer will not be eligible for set-aside if he or she is disqualified due to a violation of federal crop insurance program requirements.<sup>40</sup>

### **G. Be Unable to Pay Expenses Due to Disaster**

A farmer will only be eligible for set-aside if, as a direct result of the disaster, the farmer does not have sufficient income to pay his or her expenses.<sup>41</sup> FSA regulations set out how this is to be determined.

#### **1. Expenses That May Be Taken Into Account**

The farmer must not have enough income to pay the following expenses: (1) family living and operating expenses, (2) debts to other creditors, and (3) debts to FSA.<sup>42</sup>

#### **2. Calculations Based on Records**

The determination that the farmer does not have sufficient income to pay his or her expenses is based on the farmer's actual production, income, and expense records from the disaster year and any other records FSA may require.<sup>43</sup>

### **3. Disaster Compensation Taken Into Account**

Any compensation the farmer receives for disaster losses is included when calculating whether he or she has sufficient income to pay expenses.<sup>44</sup> This may include insurance proceeds, condemnation awards, gifts, and any other compensation for loss.

### **4. Disaster Expenses Taken Into Account**

When determining whether the farmer has sufficient income to pay his or her expenses, FSA should consider any increased expenses incurred because of the disaster.<sup>45</sup>

### **5. Looks to Next Production and Marketing Period**

When determining whether the farmer has sufficient income to pay his or her expenses, FSA should consider any reduced production or increased expenses that the farmer expects to incur in the *next* production and marketing period as a result of the disaster.<sup>46</sup> For example, due to disaster losses, a farmer may face the expense of restocking a foundation herd, rebuilding a farm structure, or reestablishing a crop. Or a farmer may face decreased production in the following year due to damage to land, water resources, or livestock herds. These disaster-related expenses and production losses should be considered by FSA when determining the farmer's need for set-aside.

## **H. Show Feasible Plan for Next Production Cycle**

A farmer will only be eligible for set-aside if, when taking the set-aside into account, he or she can develop a feasible plan for the next production cycle.<sup>47</sup>

### **1. Expenses to Be Included**

The feasible plan must show that the farmer will at least be able to pay all essential family living expenses, all operating expenses and taxes due during the year, and scheduled payments on all debts.<sup>48</sup>

## **2. Provide Documentation to Support Plan**

The farmer must provide any documentation needed to support the plan.<sup>49</sup>

### **I. Be Current on FSA Loan Payments After Set-Aside**

After the scheduled installments are set aside, all of the farmer's FSA farm program and nonprogram loans must be current.<sup>50</sup>

### **J. Remain Eligible After FSA Approval**

If FSA approves the set-aside, that approval is contingent on the farmer remaining eligible for the set-aside until the FSA set-aside document is signed.<sup>51</sup> This means that the farmer's eligibility for set-aside could be jeopardized by any further delinquencies, nonmonetary defaults, bad faith actions, or the like during the period before the set-aside agreement is signed.

### **K. Sign Set-Aside Agreement Within 165 Days After Payment Due Date**

As noted above, the set-aside application must be completed within 90 days after the due date of the payment to be set aside.<sup>52</sup> Within 30 days after a complete set-aside application is submitted, FSA will determine if the borrower meets the requirements of the program.<sup>53</sup>

Once the farmer's loan is declared eligible for set-aside, the farmer has up to 45 days to sign the set-aside agreement.<sup>54</sup>

Before 2008, the DSA regulations stated that FSA could allow a longer period of time for a farmer to sign the set-aside agreement under extenuating circumstances, for example, where the approval was contingent on the farmer paying a portion of the loan with income that was not yet available.<sup>55</sup> The handbook states that exceptions to this 45-day limit may be requested, though this is no longer made explicit in the new rule.<sup>56</sup>

In any case, the possibility of an extension is limited by the requirement that the borrower must be less than 165 days past due when the set-aside agreement is signed.<sup>57</sup>

## **V. Amount of the Set-Aside**

Up to the full amount of the FSA loan installment can be set aside. The amount that will actually be set aside will depend on what the farmer is able to pay FSA and what the farmer needs to cover expenses and debt payments to other creditors.

### **A. Set-Aside Amount Is Generally What the Farmer Cannot Pay**

In general, the amount set aside is limited to the amount of the loan installment that the farmer is unable to pay FSA from the production and marketing period in which the disaster occurred.<sup>58</sup> For example, if a farmer owes FSA a loan installment of \$20,000 and, because of the disaster, the farmer could only pay \$5,000 on the installment, the farmer could be eligible for a set-aside of \$15,000.

### **B. Set-Aside Amount When First Installment After Disaster Has Been Paid**

The set-aside program is generally intended to relieve the farmer from paying the first annual installment due after the disaster occurred.<sup>59</sup> In many cases, however, a disaster declaration is not issued, or farmers do not learn of the program, until after the next FSA installment has been paid, at the expense of paying other creditors or covering essential family living and operating expenses.<sup>60</sup>

Recognizing that payment of an FSA loan installment does not necessarily mean that the farmer was not adversely affected by the disaster, the set-aside rules provide that, if the first installment due on an FSA loan following the disaster has already been paid, the next scheduled installment may be set aside.<sup>61</sup> The amount set aside in such a case may not exceed the amount the farmer was unable to pay FSA

because of the disaster.<sup>62</sup> Farmers must pay any portion of the installment that they are able to pay.

### **C. No Balance May Remain Due on FSA Installment**

Any part of the FSA installment not set aside must be paid by the farmer by the time the set-aside agreement is signed by the farmer.<sup>63</sup> The amount of the set-aside is therefore the unpaid balance remaining on the FSA installment at the time the farmer signs the set-aside agreement.<sup>64</sup> This amount will include unpaid interest and any principal that would have been credited to the farmer's account if the installment had been paid on the due date.<sup>65</sup>

## **VI. Set-Aside Terms, Interest Accrual, and Security Requirements**

### **A. Set-Aside Installment Goes to the End of the Loan**

The amount set aside and interest accrued on any principal set aside will be due on or before the final due date of the loan.<sup>66</sup>

### **B. Interest Accrues on Principal That Is Set Aside**

Interest accrues on the principal portion of the loan installment that is set aside.<sup>67</sup> Interest does not accrue on the interest portion of the set-aside. Interest accrues on the set-aside loan principal at the same rate that is charged on the loan principal that is not set aside.<sup>68</sup>

### **C. Payments Go to Interest First**

Payments applied to the amount set aside are applied first to interest and then to principal.<sup>69</sup>

### **D. Payments Go First to First Set-Aside, Then Subsequent Set-Aside**

As mentioned earlier, if more than one installment was set aside on the loan, payments will be applied to the oldest set-aside installment

until that is paid in full before they will be applied to the second set-aside installment.<sup>70</sup>

### **E. No Additional Security Requirements for Farmers Who Are Current on FSA Debts**

Farmers who are current on their FSA debts at the time the set-aside agreement is signed are not required to put up any additional security to participate in the Disaster Set-Aside Program.<sup>71</sup> All existing security agreements between the farmer and FSA will remain in effect.

### **F. Additional Security Requirements May Apply for Farmers Who Are Not Current on All FSA Debts**

Farmers who are not current on all FSA debts at the time the set-aside agreement is signed may be required to provide additional security to FSA.<sup>72</sup> This applies even to farmers who were current on their debts at the time they applied for set-aside, if they missed a payment before the set-aside agreement was signed.

In general, a borrower who is not current on all FSA debts must provide the best lien obtainable on all assets.<sup>73</sup> However, there are several exceptions to this requirement, which also apply in FSA's other loan making and loan servicing programs.

#### **1. Exception: Lien Would Prevent Borrower from Obtaining Credit**

When doing so would prevent the farmer from obtaining credit from other sources, the farmer will not be required to provide the best lien obtainable on all assets as a condition of receiving set-aside.<sup>74</sup>

#### **2. Exception: Property May Have Significant Environmental Problems**

When the property could have significant environmental problems or costs, the farmer will not be required to provide a lien on the property as a condition of receiving set-aside.<sup>75</sup>



### **3. Exception: FSA Cannot Obtain a Valid Lien**

When FSA cannot obtain a valid lien, the farmer will not be required to provide the lien as a condition of receiving set-aside.<sup>76</sup>

### **4. Exception: Property Is Needed to Meet Essential Family Living and Farm Operating Expenses**

The farmer will not be required to provide the best lien available on certain types of property as a condition of receiving set-aside. This property includes subsistence livestock, cash, retirement accounts, household goods, small tools and equipment, and similar items.<sup>77</sup> Also excluded from the lien requirement are vehicles and collateral accounts used for the farming operation or for family living.<sup>78</sup>

## **VII. Interaction Between Primary Loan Servicing and Set-Aside**

The Disaster Set-Aside Program is not intended to replace or get around the regular FSA loan servicing programs.<sup>79</sup> Set-aside is designed to provide rapid relief for farmers facing a temporary inability to make their FSA loan payments. Loan servicing is intended to help farmers who are having longer-term problems meeting their FSA loan payment obligations and who need more extensive assistance. The two programs interact in the following ways.

### **A. Farmers Not Eligible for Set-Aside If Loans Have Been Restructured Since the Disaster Occurred**

As mentioned earlier, farmers are not eligible for set-aside if they have received loan servicing since the natural disaster occurred.<sup>80</sup>

### **B. Set-Aside Application Does Not Stop Clock on Deadline to Apply for Loan Servicing**

It is important for farmers to keep in mind that an application for set-aside will not stop the running of the time period to apply for loan

servicing assistance from FSA. If the time to apply for loan servicing runs out while the farmer is waiting to hear about his or her set-aside request, and the set-aside does not make the farmer current, FSA will consider that the farmer has waived his or her loan servicing rights.<sup>81</sup> This would likely only occur for a delinquency that existed before the disaster.

Under the current application and decision timelines for DSA, every farmer who applies for set-aside after a disaster-related delinquency should receive a decision on that application before the deadline to apply for loan servicing arrives.<sup>82</sup>

### **C. Farmer May Have to Accept Set-Aside Before Receiving Decision on Loan Servicing Application**

FSA's comments accompanying the first set-aside rule issued in 1994 indicated that farmers would have their choice between the loan servicing and set-aside programs.<sup>83</sup> The rule provided that once the farmer received the benefits of one of the programs, the application for the assistance not received would be automatically withdrawn.<sup>84</sup>

The DSA changes adopted in 2003 make it less likely that a farmer will have a choice between programs. This is because farmers must apply for set-aside before they are 90 days past due, but FSA is not required to send notice of primary loan servicing programs until 15 days after a farmer is 90 days past due; and then farmers have 60 days to submit the application after they receive it. Even if a farmer requested loan servicing materials before FSA was required to send them, and submitted the two applications (one for set-aside and one for loan servicing) to FSA at the same time, it is likely that FSA would decide the set-aside application before issuing a decision on the loan servicing application, because of the lesser paperwork and shorter deadline involved.<sup>85</sup> By the 45th day after the farmer received a decision approving set-aside, the farmer would have to accept or decline the set-aside assistance, whether or not the farmer had received a decision on loan servicing.<sup>86</sup>

This result seems somewhat inconsistent with the agency's warning that set-aside will not be used to "circumvent" primary loan servicing.<sup>87</sup> By setting such a narrow window for set-aside eligibility, FSA is likely pushing farmers to accept set-aside offers as a precaution before they know whether their pending loan servicing applications will be approved.

#### **D. Farmer May Seek Loan Servicing After Set-Aside If Facing Later Delinquency or Financial Distress**

Participation in the Disaster Set-Aside Program does not affect a farmer's right to receive FSA loan servicing later on. If, after receiving a set-aside, a farmer again becomes delinquent or experiences financial distress, his or her rights to loan servicing will be governed by the normal FSA loan servicing regulations.<sup>88</sup> FSA's comments accompanying the first set-aside rule state that a farmer may apply for loan servicing "at any time" after the set-aside agreement is signed.<sup>89</sup>

### **VIII. Cancellation and Reversal of Set-Aside**

A set-aside may be canceled and reversed by FSA in some situations.<sup>90</sup> Sometimes this could be beneficial for the farmer, by making him or her eligible for another set-aside. Sometimes, however, the cancellation and reversal could be detrimental to the farmer.

#### **A. When Loan Is Later Restructured**

If the total balance of the loan is later restructured with primary loan servicing, the set-aside may be canceled.<sup>91</sup> The amount previously set aside would then be wrapped into the new obligation. This new debt could be considered for set-aside in case of a future disaster.

#### **B. When Farmer Opt's for Current Market Value Buyout**

If the farmer becomes delinquent after the set-aside, he or she may be eligible to buy out the FSA loan for the current market value of FSA's security interests and any non-essential assets.<sup>92</sup> If the farmer pursues

a current market value buyout, the set-aside installment of any loan involved would be canceled under the buyout.<sup>93</sup>

### **C. When Farmer Was Not Authorized to Receive Set-Aside**

If FSA concludes that the farmer was not authorized to receive a set-aside but received it anyway, the set-aside will be reversed.<sup>94</sup> FSA must wait until the farmer's appeal rights are exhausted before actually reversing the set-aside.<sup>95</sup> After the set-aside is reversed, the payment terms of the original promissory note will be restored as if the set-aside had never been granted.

Depending on the circumstances for the reversal, a farmer who is financially distressed or delinquent after reversal of a set-aside should be able to apply for FSA primary loan servicing.

## **IX. Exception Authority**

The FSA Administrator may, in individual cases, make an exception to the regulations governing the set-aside program if the exception is consistent with the statute authorizing the program or other applicable law. To justify an exception, FSA must conclude that the strict application of the regulations would adversely affect the government's financial interest.<sup>96</sup>

## **X. Appeals of Set-Aside Decisions**

An adverse decision in the Disaster Set-Aside Program may be appealed.<sup>97</sup> An adverse decision may include, among other things, a determination that a farmer is not eligible for set-aside or set-aside of a smaller amount than the farmer requested.<sup>98</sup> A farmer may also appeal if FSA fails to make a decision on a set-aside application within 30 days after the complete application is submitted.<sup>99</sup>

USDA's National Appeals Division (NAD) handles set-aside appeals.<sup>100</sup> NAD regulations set out a structured appeals process with important deadlines and other requirements. For example, appeals must be filed with NAD within 30 days after the farmer receives notice of the adverse decision.<sup>101</sup>

## **XI. Discrimination Is Illegal**

FSA is prohibited by the Equal Credit Opportunity Act (ECOA) from discriminating against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the applicant's receipt of income from any public assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes the ECOA.<sup>102</sup> FSA is further prohibited by its own regulations from subjecting any person to discrimination in any program on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or the receipt of income from any public assistance program.<sup>103</sup>

## Chapter 8 Notes

- <sup>1</sup> 7 C.F.R. § 761.2, “Disaster Set-Aside”; 7 C.F.R. pt. 766, subpt. B (2008).
- <sup>2</sup> Individuals who are delinquent on a federal debt are generally not eligible for new non-disaster loans, loan guarantees, or loan insurance from any federal agency. See 31 U.S.C. § 3720B; 7 C.F.R. § 764.101(f) (2008). However, farmers who are delinquent on FSA loans are eligible for Emergency (EM) loans. See Chapter 7 for more information about EM loans.
- <sup>3</sup> 68 Fed. Reg. 55,299 (2003) (codified at 7 C.F.R. §§ 1951.951 *et seq.*).
- <sup>4</sup> Compare 7 C.F.R. § 1951.954(a)(4) (2003) with 7 C.F.R. § 766.52(a)(8), (b)(3) (2008).
- <sup>5</sup> 72 Fed. Reg. 63,242 (Nov. 8, 2007) (codified in various parts of 7 C.F.R. ch. VII).
- <sup>6</sup> The handbook, called “Direct Loan Servicing - Special and Inventory Property Management,” 5-FLP, was issued on December 31, 2007. The handbook is periodically updated with amendments as program policies change.
- <sup>7</sup> 7 C.F.R. § 766.54(a)(1) (2008).
- <sup>8</sup> 5-FLP Handbook, page 2-2, para. 42.A (Dec. 31, 2007).
- <sup>9</sup> 7 C.F.R. § 766.54(a)(2) (2008).
- <sup>10</sup> 5-FLP Handbook, page 2-2, para. 42.B (Dec. 31, 2007); 5-FLP Handbook, Exhibit 10 (April 8, 2008).
- <sup>11</sup> 5-FLP Handbook, page 2-2, para. 42.A (Dec. 31, 2007).
- <sup>12</sup> 7 C.F.R. § 766.51(a) (2008).
- <sup>13</sup> 5-FLP Handbook, page 2-1, para. 41.A (Dec. 31, 2007). Other FSA loans eligible for set-aside include Economic Emergency (EE) loans, Softwood Timber (ST) loans, Recreation (RL) loans, and Rural Housing loans for farm service buildings (RHF).
- <sup>14</sup> 5-FLP Handbook, page 2-1, para. 41.A (Dec. 31, 2007).
- <sup>15</sup> 7 C.F.R. § 766.51(c) (2008).
- <sup>16</sup> 7 C.F.R. § 766.52(b)(5) (2008).
- <sup>17</sup> 7 C.F.R. § 766.52(b)(4) (2008).

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- 18 7 C.F.R. § 766.52(b)(4) (2008). This restriction applies to loan servicing received under 7 C.F.R. pt. 766 (2008).
- 19 7 C.F.R. §§ 766.53(b), (c), 761.2, “Recoverable cost” (2008).
- 20 See 68 Fed. Reg. 55,299, 55,302 (2003) (prefatory comments). Presumably, a farmer who repaid any cost recoverable amount paid by FSA would be eligible for set aside. This could be an attractive option if the cost recoverable amount paid was small.
- 21 5-FLP Handbook, page 2-6, para. 45.D (Dec. 31, 2007). Debt settlement regulations for FSA farm loan programs are found at 7 C.F.R. pt. 1956, subpt. B (2008). See 7 C.F.R. § 766.102(c) (2008).
- 22 7 C.F.R. § 766.52(a)(3), (b)(6) (2008).
- 23 7 C.F.R. § 766.60(c) (2008).
- 24 7 C.F.R. § 766.60(a) (2008). For the applicable FSA loan restructuring regulations, see 7 C.F.R. pt. 766, subpt. C (2008).
- 25 See 7 C.F.R. § 1951.954(b)(2) (1998); 7 C.F.R. § 1951.954(b)(2) (1999); 7 C.F.R. § 1951.954(b)(2)(ii) (2000); and 7 C.F.R. § 1951.954(a)(1)(ii), (iii) (2001).
- 26 62 Fed. Reg. 41,251 (1997); 64 Fed. Reg. 392, 394 (1999); 65 Fed. Reg. 31,248 (2000).
- 27 Notice FLP-211, “Reminder of Elimination of Second Disaster Set-Aside (DSA) Authority,” 1.B (June 27, 2001).
- 28 5-FLP Handbook, page 2-11, para. 49.B (Dec. 31, 2007).
- 29 7 C.F.R. § 766.51(a) (2008).
- 30 7 C.F.R. § 766.52(b)(1) (2008).
- 31 7 C.F.R. § 766.52(a)(1) (2008).
- 32 7 C.F.R. § 766.52(a)(1) (2008).
- 33 7 C.F.R. § 766.52(b)(3) (2008).
- 34 7 C.F.R. § 766.52(a)(2) (2008).
- 35 7 C.F.R. § 761.2, “Good faith” (2008).
- 36 7 C.F.R. § 761.2, “Good faith” (2008).
- 37 7 C.F.R. § 761.2, “Good faith” (2008).
- 38 7 C.F.R. § 766.52(a)(6) (2008).

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- 39 7 C.F.R. § 761.2, “Default” (2008).
- 40 7 C.F.R. § 766.52(a)(7) (2008). The disqualification standards are set out at  
7 C.F.R. pt. 718 (2008).
- 41 7 C.F.R. § 766.52(a)(4) (2008).
- 42 7 C.F.R. § 766.52(a)(4) (2008).
- 43 7 C.F.R. § 766.52(a)(4)(i), (ii) (2008).
- 44 7 C.F.R. § 766.52(a)(4)(iii) (2008).
- 45 7 C.F.R. § 766.52(a)(4)(iv) (2008).
- 46 7 C.F.R. § 766.52(a)(5) (2008).
- 47 7 C.F.R. § 766.52(a)(5) (2008).
- 48 7 C.F.R. § 766.52(a)(5) (2008).
- 49 7 C.F.R. § 766.52(a)(5) (2008).
- 50 7 C.F.R. § 766.52(b)(2) (2008).
- 51 5-FLP Handbook, page 2-5, para. 45.A (Dec. 31, 2007).
- 52 7 C.F.R. § 766.52(b)(3) (2008).
- 53 7 C.F.R. § 766.55 (2008).
- 54 7 C.F.R. § 766.57 (2008).
- 55 See 7 C.F.R. § 1951.957(a)(2) (2007).
- 56 5-FLP Handbook, page 2-8, para. 46.B (Dec. 31, 2007).
- 57 7 C.F.R. § 766.52(a)(8) (2008). FSA has explained that the 165-day timeframe is  
based upon the time allowed for filing a completed application for loan  
servicing. 68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments).
- 58 7 C.F.R. § 766.53(a)(2) (2008).
- 59 7 C.F.R. § 766.58(a) (2008).
- 60 See 68 Fed. Reg. 55,299, 55,301-02 (2003) (prefatory comments).
- 61 7 C.F.R. §§ 766.53(a)(1), 766.58(b) (2008).
- 62 7 C.F.R. § 766.53(a)(2) (2008).
- 63 7 C.F.R. § 766.53(b) (2008). An earlier provision effective before January 5,  
1999, stated this requirement more explicitly. See 7 C.F.R. § 1951.954(b)(4)  
(1999).



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- <sup>64</sup> 7 C.F.R. § 766.53(b) (2008).
- <sup>65</sup> 7 C.F.R. § 766.53(b) (2008). This amount also takes into consideration any payments applied to principal and interest since the installment due date.
- <sup>66</sup> 7 C.F.R. § 766.59(b) (2008).
- <sup>67</sup> 7 C.F.R. § 766.59(a)(1) (2008).
- <sup>68</sup> 7 C.F.R. § 766.59(a)(1) (2008). For farm program loans with limited resource interest rates, any changes in the limited resource interest rates will affect the interest rate charged on the principal that is set aside.
- <sup>69</sup> 7 C.F.R. § 766.59(c) (2008).
- <sup>70</sup> 5-FLP Handbook, page 2-11, para. 49.B (Dec. 31, 2007).
- <sup>71</sup> 7 C.F.R. § 766.56 (2008).
- <sup>72</sup> 7 C.F.R. § 766.56 (2008).
- <sup>73</sup> 7 C.F.R. § 766.56 (2008). A best lien will most likely be required from all obligors on the loan if the borrower is a farming entity. See 7 C.F.R. § 766.112(a) (2008).
- <sup>74</sup> 7 C.F.R. § 766.112(b)(1) (2008).
- <sup>75</sup> 7 C.F.R. § 766.112(b)(2) (2008). This exception refers to environmental problems as described in 7 C.F.R. pt. 1940, subpt. G (2008).
- <sup>76</sup> 7 C.F.R. § 766.112(b)(3) (2008).
- <sup>77</sup> 7 C.F.R. § 766.112(b)(4) (2008).
- <sup>78</sup> 7 C.F.R. § 766.112(b)(4) (2008).
- <sup>79</sup> 7 C.F.R. § 766.51(b) (2008). For the regulations governing FSA loan servicing, see 7 C.F.R. pt. 766, subpt. C (2008).
- <sup>80</sup> 7 C.F.R. § 766.52(b)(4) (2008).
- <sup>81</sup> See 59 Fed. Reg. 53,079, 53,081 (1994) (prefatory comments).
- <sup>82</sup> This is true because the farmer must apply for set-aside before he or she is 90 days past due, and FSA must determine whether the farmer is eligible within 30 days. 7 C.F.R. §§ 766.52(b)(3), 766.55 (2008). This means that farmers should receive a decision on set-aside eligibility when they are less than 120 days past due. Under the loan servicing timeframe, FSA notifies borrowers of loan servicing options 15 days after they are 90 days past due, and then the borrower has 60 days to submit a complete application.  $15 + 90 + 60 = 165$ . See

68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments). Thus, a farmer who is denied set-aside should still have time to apply for loan servicing, provided the delinquency occurred after the disaster.

<sup>83</sup> See 59 Fed. Reg. 53,079, 53,080 (1994) (prefatory comments).

<sup>84</sup> See 7 C.F.R. § 1951.957(a)(2) (2003).

<sup>85</sup> 7 C.F.R. § 766.55 (2008) (set-aside applications to be decided upon within 30 days after FSA receives a completed application); 7 C.F.R. § 764.53(c) (2008) (loan servicing applications to be decided within 60 days after FSA receives a completed application).

<sup>86</sup> 7 C.F.R. § 766.57 (2008).

<sup>87</sup> 7 C.F.R. § 766.51(b) (2008).

<sup>88</sup> 7 C.F.R. § 766.60(a) (2008).

<sup>89</sup> 59 Fed. Reg. 53079, 53,081 (1994) (prefatory comments).

<sup>90</sup> 7 C.F.R. § 766.60 (2008).

<sup>91</sup> 7 C.F.R. § 766.60(a) (2008).

<sup>92</sup> 7 C.F.R. § 766.133(a) (2008).

<sup>93</sup> 7 C.F.R. § 766.60(b) (2008).

<sup>94</sup> 7 C.F.R. § 766.61 (2008).

<sup>95</sup> 7 C.F.R. § 766.61 (2008).

<sup>96</sup> 7 C.F.R. § 766.401 (2008). Either the FSA State Executive Director or the Deputy Administrator for Farm Loan Programs may approve an exception. An FSA State Director's request for an exception and any supporting documentation must explain the adverse effect and proposed alternative courses of action, and to show how the adverse effect will be eliminated or minimized if the exception is granted. 5-FLP Handbook, page 1-6, paras. 4.A. and 4.B. (Dec. 31, 2007).

<sup>97</sup> An "adverse decision" is defined as

an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations

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or within a reasonable time if timeframes are not specified in such statutes or regulations.

7 C.F.R. § 11.1, “Adverse decision” (2008).

<sup>98</sup> 7 C.F.R. § 11.3 (2008).

<sup>99</sup> 7 C.F.R. § 766.55 (2008); 7 C.F.R. § 11.1 “Adverse decision” (2008) (stating that an adverse decision includes the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations).

<sup>100</sup> 7 C.F.R. pt. 11 (2008).

<sup>101</sup> 7 C.F.R. § 11.6(b)(1) (2008). For a detailed discussion of NAD procedures, see *USDA’s National Appeals Division Practice and Procedures* by FLAG attorney Karen Krub, available at [www.flaginc.org/topics/pubs/arts/NADarticle\\_NatlAglawCtr2003.pdf](http://www.flaginc.org/topics/pubs/arts/NADarticle_NatlAglawCtr2003.pdf), or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, MN 55101; or by electronic mail at [lawyers@flaginc.org](mailto:lawyers@flaginc.org).

<sup>102</sup> Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, Title V, 88 Stat. 1500 (current version at 15 U.S.C. §§ 1691-1691f).

<sup>103</sup> 7 C.F.R. pt. 15d (2008).