Regulations Finalize It—
What the ACA Giveth, the FACT Act Taketh Away

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The Spring 1991 issue of this newsletter contained an article which explained that Congress cut back FmHA's debt restructuring programs in Title XVIII of the 1990 Farm Bill,[1] which is referred to as the "FACT Act." The title of that article was "What the Ag Credit Act of 1987 Giveth, the 1990 Farm Bill Taketh Away."

FmHA has finally published regulations to implement the FACT Act.[2] This article reviews the statutory changes made by the FACT Act and explains how the new regulations implement those changes.

The explanations provided here are brief. For full details, review the regulations themselves.[3]

The changes break down into two main categories: general changes that apply as of November 28, 1990[4] (regardless of any debt restructuring application date), and changes that apply only to new debt restructuring applications. ("New" debt restructuring applications are applications filed on or after November 28, 1990.)

This article addresses changes in the direct loan program only. Changes in the guaranteed loan program will be explained in an upcoming edition of this newsletter.

General Changes

These changes apply as of November 28, 1990, regardless of the application date.

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1 Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624 (hereinafter the "FACT Act"). All references in this article to the FACT Act are to Title XVIII, unless otherwise noted. The bill is printed in the Congressional Record—House (Oct. 23, 1990); Title XVIII is printed at pages H. 11161-67.

2 57 Fed. Reg. 18612-81 (Apr. 30, 1992).

3 *See* footnote 2.

4 November 28, 1990, was the effective date of the FACT Act.

Net Recovery Value Buyout/Bad Faith

The Statute

Under the old statute,[5] a finding of bad faith did not affect a borrower's eligibility for a net recovery value buyout (NRVB). *Under the new statute*,[6] to be eligible for an NRVB, "the borrower must have acted in good faith with the Secretary in connection with the loan."[7] This section applies to offers of NRVB made before the FACT Act[8] if FmHA determined, before November 28, 1990, that "the borrower involved did not act in good faith with respect to the loan."[9]

There is an *exception* to this rule.[10] A determination of bad faith cannot be held against the farmer in this situation if:

1) The allegation of bad faith is based on the farmer having disposed of normal income security before October 14, 1988, without FmHA's permission; *and*

2) The farmer shows that the proceeds were used to pay "essential household and farm operating expenses"; *and*

3) The farmer would have been entitled to have the proceeds released according to the regulations that were in effect on November 28, 1990.

The Regulations

The regulations plainly state that to be eligible for a net recovery value buyout, the borrower must have acted in good faith.[11] The regulations put the following limits on bad faith findings in all situations:

1) A borrower is considered to have acted in good faith if the borrower has "demonstrated `honesty' and `sincerity' in carrying out the agreements set forth on the . . . 1962-1 [form] and other written agreements made with FmHA."[12]

2) Findings of a lack of good faith must be based on violations within the borrower's control.[13]

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5 The "old" law refers to the law before the enactment of the FACT Act.
6 FACT Act, § 1816(f) (codified at 7 U.S.C. § 2001(c)(6)(A)(i)(I) (West Supp. 1992)).
7 FACT Act, § 1816(f) (codified at 7 U.S.C. § 2001(c)(6)(A)(i)(I) (West Supp. 1992)).
8 That is, before November 28, 1990.
9 FACT Act, § 1816(f) (codified at 7 U.S.C. § 2001(c)(6)(A)(ii) (West Supp. 1992)).
10 FACT Act, § 1816(h) (codified at 7 U.S.C. § 2001(m) (West Supp. 1992)).
11 57 Fed. Reg. 18637 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(h)(4)(v)). *See also* 57 Fed. Reg. 18628 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.906 (definition of "good faith")). *See also* FmHA memo dated April 28, 1992, regarding FP 1951-S, Determinations of Bad Faith.
12 57 Fed. Reg. 18628 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.906 (definition of "good faith")).
13 *See* previous footnote.

3) All lack of good faith determinations will be adequately documented in the borrower's case file.[14]

4) Any allegations of fraud, waste, or conversion must be substantiated by a written legal opinion of the Office of General Counsel (OGC).[15]

5) A borrower will not be considered to lack good faith if "the sole basis for such determination was the disposition of normal income security prior to October 14, 1988[16] without FmHA's consent and the borrower demonstrates that the proceeds were used to pay essential family living and farm operating expenses that FmHA could have approved according to § 1962.17 [of the regulations]."[17]

Although the *statute* allows FmHA to rescind offers of NRVB which were made before November 28, 1990 in certain cases,[18] the *regulations* do not discuss rescinding NRVB offers that have already been made. Two FmHA unnumbered letters provide detailed discussions of the procedures for rescinding offers.[19]

Second Chance for Farmland Purchase

The Statute

The old rule was that if you had had a chance[20] to exercise leaseback/buyback rights before the Agricultural Credit Act of 1987 became law,[21] you could not have another chance after it became law. *The new statute*[22] creates an exception to the old rule. It says that, regardless of the farmer's history of leaseback/buyback attempts as of November 28, 1990, the farmer acquired the right to *purchase* the property under the terms offered in the leaseback/buyback program if:

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14 *See* footnote 12. (Therefore, if there is no documentation of the lack of good faith in the borrower's case file, the borrower can argue that there has been no official determination of bad faith and that, therefore, the allegation of bad faith cannot be held against him or her.)

15 *See* footnote 12. *See also* FmHA AN No. 2343 (1951) (Aug. 8, 1991) regarding information needed in determining lack of good faith of farmer program borrowers due to waste, fraud, or conversion.

16 October 14, 1988, was the effective date of the regulations that implemented the Agricultural Credit Act of 1987.

17 *See* footnote 12.

18 As explained above, the statute allows FmHA to rescind offers of NRVB made before November 28, 1990, in cases in which a determination of bad faith was made before November 28, 1990.

19 FmHA Unnumbered Letter dated November 30, 1990, regarding 1990 Farm Bill; FmHA Unnumbered Letter dated March 13, 1992, regarding consideration of primary loan servicing programs for both current and delinquent borrowers.

20 That is, either (a) you were given notice of your right to apply for the program but you failed to respond to the notice, or (b) you applied for the program, you were denied, and you never successfully challenged the denial.

21 The Agricultural Credit Act of 1987, Pub. L. No. 100-233, became law on January 6, 1988.

22 FACT Act, § 1813(d) (codified as a new statutory section at 7 U.S.C. § 1985(e)(1)(A)(iv)).

1) The property was acquired by FmHA before January 6, 1988; *and*

2) The farmer was leasing the land on November 28, 1990, or at any time during the year preceding November 28, 1990;[23] *and*

3) The farmer was (as of November 28, 1990) in the category of preferred buyers;[24] *and*

4) The land had not been conveyed (or contracted to be conveyed) before November 28, 1990.

If the farmer met those conditions, FmHA should have sent the farmer a notice making an offer during the 30-day period following November 28, 1990. That offer was to be held open for 90 days.

The Regulations

The regulations do not address this "second chance" program. They simply say that, "property acquired prior to January 6, 1988, will [be considered for leaseback/buyback rights] . . . only if the former owner/previous operator was not advised of his or her leaseback/buyback rights under FmHA's previous leaseback/buyback regulations."[25] The "second chance" program was explained in detail in an FmHA unnumbered letter.[26]

Sales Price for Inventory Land

The Statute

The old rule was that suitable inventory land was sold at the lowest of either the capitalization value[27] or the appraised market value of the land. *The new rule*[28] is that suitable farmland will be sold to buyers in the preferred categories[29] at a price not greater than the appraised market value.[30]

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23 The language is: "[Land] *that is* (or has been at any time during the 12-month period preceding the date of enactment of this clause) under lease . . ." (Emphasis added.) Because of the date limitations in the 30-day notice provision, it seems that "is" means "was as of November 28."

24 *See* the list at 7 U.S.C. § 1985(e)(1)(C), as amended by the FACT Act, § 1813(e). The list includes the immediate previous borrower-owner; if actively engaged in farming, the spouse, children, or stockholders of the immediate previous borrower-owner; the immediate previous operator; other operators of family-sized farms; and certain beginning farmers and ranchers.

25 57 Fed. Reg. 18640 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.911(a)).

26 FmHA Unnumbered Letter dated November 30, 1990, regarding buyback rights on farmer programs inventory property acquired prior to January 6, 1988.

27 That is, a value that reflects the average annual income that may be reasonably anticipated to be generated from farming the land.

28 FACT Act, § 1813(g) (codified at 7 U.S.C. § 1985(c)(2)(B)(ii) (West Supp. 1992)). (This statutory section is also amended by § 1813(e)(1) of the FACT Act.)

29 *See* footnote 24.

30 For all other sales, the price will be the fair market value as determined by bids after advertising or by negotiated sale.

The Regulations

The regulations state that the purchase price for farmland under the leaseback/buyback program is the appraised market value.[31] These regulations do not discuss the purchase price for inventory land outside of the leaseback/buyback program.

Declassification of "Suitable" Land

The Statute

The old rule was that inventory land that is classified as "suitable" retained a "suitable" classification for three years. If the three years passed and the land had not been purchased, the land could be reclassified as "surplus." *The new rule*[32] is that land retains a "suitable" classification for only one year.

The Regulations

The April 30 regulations do not discuss the classification of inventory land. Classification issues are discussed in interim regulations that were issued on May 7, 1992.[33]

Preference for Beginning Farmers

The Statute

The old rule was that when FmHA sold inventory farmland, there were certain categories of people who were supposed to be given preference if they wished to purchase the land. the old preferences are still in place. *The new rule*[34] simply inserts an additional preference[35] for "qualified beginning farmers or ranchers."[36]

The Regulations

The April 30 regulations do not discuss this new priority category. The beginning farmer and rancher preference is discussed in a different set of interim regulations that were issued on May 7, 1992.[37]

Implementation of Appeal Decisions

The Statute

The old statute was silent regarding implementation of appeals decisions. *The new law*[38] requires that county committee members and FmHA employees must implement appeals decisions within a reasonable period of time.

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31 57 Fed. Reg. 18643 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.911(a)(7)(ii)).

32 FACT Act, § 1813(a) (codified at 7 U.S.C. § 1985(c)(1) (West Supp. 1992)).

33 57 Fed. Reg. 19526-29 (May 7, 1992).

34 FACT Act, § 1813(e) (codified at 7 U.S.C. § 1985(c)(2) and § 1985(e)(1)(C) (West Supp. 1992)).

35 This preference is inserted *after* the old preference for "immediate previous operator" and before the old preference for other operators of family-sized farms.

36 The term "beginning farmer or rancher" is to be defined by FmHA in regulations. FACT Act, § 1814 (codified at 7 U.S.C. § 1991(a)(8) (West Supp. 1992)). The April 30 regulations do not contain a definition of "beginning farmer or rancher." *See* 57 Fed. Reg. 18627, § 1951.906.

37 57 Fed. Reg. 19520-25 (May 7, 1992).

38 FACT Act, § 1812 (codified at a new section, 7 U.S.C. § 1983b(e)(4) (West Supp. 1992)).

The Regulations

The regulations say that all appeal decisions must be implemented within 60 days.[39] The regulations define “implement” to mean “the next step in a loan processing or loan servicing action, required by FmHA regulations, that would occur had no adverse decision been made and appeal filed.”[40] A recent administrative notice (AN) provides that in most cases, FmHA cannot request or use updated information when implementing reversed appeal decisions.[41]

County Committee Makeup

The Statute

Under the old rule, only one FmHA-eligible farmer could serve on the county committee. This was a problem; farmers often complained that FmHA filled the appointed slot[42] with an FmHA-eligible borrower in order to ensure that an eligible borrower could not run in the election. *The new rule*[43] is that only one FmHA-eligible farmer may be *elected* to serve on the committee. Therefore, under the new rule, one FmHA-eligible farmer may be elected to the committee even if the appointed slot has already been filled by an FmHA-eligible farmer.

The Regulations

The April 30 regulations do not discuss county committee makeup.

Borrower Training

The Statute

Under the old statute, there was no general requirement for borrower training. *Under the new law*,[44] FmHA must contract to provide training to all borrowers[45] in “financial and farm management concepts associated with commercial farming.” The county committee can waive the training requirement for an individual borrower if the committee determines that the borrower “demonstrates adequate knowledge” in the areas described above. The borrower must pay for the training and may use FmHA operating loan funds for that purpose.

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39 The actual language is that, “[with minor exceptions], the decision maker shall, upon having a case returned pursuant to the decision of a hearing officer, State Director or Director, National Appeals Staff, implement the appeal decision reversing the adverse decision within 60 days of receiving the decision.” 57 Fed. Reg. 18623 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1900.59(d)).

40 57 Fed. Reg. 18623 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1900.59(d)).

41 FmHA AN No. 2526 (1900) (Apr. 27, 1992).

42 There are three positions on each county committee: two are elected and one is appointed.

43 FACT Act, § 1809 (codified at 7 U.S.C. § 1982(a)(4) (West Supp. 1992)).

44 FACT Act, § 1818.

45 This applies to all borrowers of farmer program direct loans and guaranteed loans.

The Regulations

Although the regulations discuss the need for increased borrower supervision and talk about instituting more frequent analyses of the borrower's finances, the regulations simply do not discuss the new statutory training requirement.[46]

New Applications

These changes apply only to *new* debt restructuring applications.[47]

Net Recovery Value Calculations

The Statute

Under the old statute, the net recovery value (NRV) of a loan was based on the appraised value of the collateral minus certain transaction costs. *Under the new law,*[48] the net recovery value is based on the appraised value of the collateral *plus the value of certain nonessential assets* minus transaction costs. According to the statute, assets are nonessential if:

1) They are not essential for necessary family living expenses; *and*
2) They are not essential to the operation of the farm; *and*
3) They are not exempt from judgment creditors or in a bankruptcy action under federal or state law.

The Regulations

The regulations make it clear that nonessential assets will be considered only in the context of *new* applications.[49] The regulations make the following points about nonessential assets:

1) The definition of nonessential assets in the regulations is very similar to the definition in the statute explained above.[50]
2) FmHA will not allow a write-down or a write-off (NRVB) of any portion of a debt that could be paid by liquidating or borrowing against nonessential assets.[51] (The "loan value" of assets is what you could get by borrowing against them.)

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46 57 Fed. Reg. 18623-26 (Apr. 30, 1992) (to be codified at 7 C.F.R. Part 1924, Subpart B, §§ 1924.59, 1924.60).

47 "New" applications are applications filed on or after November 28, 1990. 57 Fed. Reg. 18628 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.906 (definition of "new applications")).

48 FACT Act, § 1816(b) (codified at 7 U.S.C. § 2001(c)(2)(A) (West Supp. 1992)).

49 57 Fed. Reg. 18635 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(f). *See* footnote 47 for an explanation of "new" applications.

50 The definition is: "assets which FmHA does not have a lien on and which the borrower has an ownership interest in, that: (1) Do not contribute to a net income to pay essential family living expenses or to maintain a sound farming operation . . . ; and, (2) Are not exempt from judgment creditors or in a bankruptcy action." Each state office is to issue a supplement that explains state guidelines about judgment creditors and bankruptcy exemptions. 57 Fed. Reg. 18628 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.906 (definition of "nonessential assets")).

51 57 Fed. Reg. 18639 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(a)).

a) If the liquidation or loan value of the nonessential assets is sufficient to pay off the entire delinquency, the borrower is simply ineligible for primary loan servicing (including NRVB).[52]

b) If the liquidation or loan value of the nonessential assets is sufficient to pay off part but not all of the delinquency, FmHA will encourage (but not require) the borrower to sell the assets and apply the proceeds to the FmHA debt.[53] If the borrower does not do that, FmHA will add the liquidation or loan value of those nonessential assets into the NRV calculation.[54]

3) FmHA considers the *liquidation* value of the nonessential assets to be the same as the *loan* value of the assets.[55] FmHA refers to both of these as the "NRV" of the assets.

4) The NRV calculation for nonessential assets is different from the calculation for collateral. Some of the important differences are: (a) the regulations do not say how FmHA will calculate the transaction costs (for example, commissions and advertising costs); and (b) the NRV calculation will *not* include a deduction for holding the property in inventory,[56] because FmHA assumes that it will never actually take nonessential assets into inventory.[57]

NRV Buyout Recapture Agreement

The Statute

Under the old statute, the net recovery value buyout recapture agreement lasted two years and provided that the farmer must pay a fixed penalty[58] if he or she sold or conveyed the land for a profit within the two years. *The new law*[59] makes two major changes. First, under the new law, the duration of the recapture agreement is extended to ten years. Second, under the new law, the amount of the penalty is not fixed on the day of the buyout. Rather, the penalty is the difference between the net recovery value price that the farmer paid for the buyout and the fair market value of the property on *the day the farmer sold or conveyed it.*

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52 57 Fed. Reg. 18639 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(a)(2)).

53 57 Fed. Reg. 18639 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(a)(3)).

54 The effect of adding the value of those assets into the NRV calculation is that the borrower will have a higher threshold for achieving a feasible plan; if the borrower's plan is not feasible, he or she will have to pay a higher NRVB figure.

55 57 Fed. Reg. 18639 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(a)).

56 57 Fed. Reg. 18639 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(a)(1)).

57 *See* prefatory comments at 57 Fed. Reg. 18618, col. 3, (Apr. 30, 1992).

58 The penalty was the difference between the appraised market value and the net recovery value buyout price *on the day of the buyout.*

59 FACT Act, § 1816(f) (codified at 7 U.S.C. § 2001(d)(6) (West Supp. 1992)).

The Regulations

The regulations make the statutory changes explained above.[60] They make it clear that the new provisions regarding recapture agreements apply only to *new* applications.[61] They also make it clear that the maximum amount that can be recaptured is the amount of debt that was written off in the buyout. Note that even under the new recapture agreement, if the borrower has not sold or conveyed the property[62] as of the time when the agreement expires, the borrower does not have to pay any penalty.[63]

Debt Service Margin

The Statute

Under the old statute, when FmHA performed debt restructuring calculations to determine the amount that the farmer could pay on a restructured loan, FmHA based its figures on a 100-percent cash flow. *Under the new law,*[64] FmHA is supposed to assume that the farmer needs 105 percent of the amount indicated for payment of debt obligations.

Example: Suppose the farmer's cash flow shows that she needs $100,000 for family living and farm operating expenses and needs $40,000 for debt service. Under this new rule, FmHA would assume that the farmer needs $142,000 (because $42,000 is 105 percent of the amount needed for debt service).

This 105-percent debt margin is only supposed to be used when it will *help* the farmer. If the cash flow allows for a 105-percent margin, FmHA will use that figure to build in a small cushion for the farmer. But if the farmer's cash flow does not allow for the margin, the lack of margin cannot be used as a reason to deny debt restructuring.

The Regulations

The regulations make the statutory changes explained above.[65] They make it clear that the 105-percent margin will only be used when it will *help* the farmer.[66]

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60 57 Fed. Reg. 18648-49 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.913); 57 Fed. Reg. 18658 (Apr. 30, 1992) (to be codified at 7 C.F.R. Part 1951, Subpart S, Exhibit C-1—Net Recovery Buyout Recapture Agreement).

61 *See* footnote 47.

62 A potential problem is that the Agreement says that the penalty is triggered if the borrower sells or conveys *security* during the term of the recapture agreement. The question is whether FmHA intends to trigger the penalty upon the sale or conveyance of property which was not collateral for the original note but which was pledged as security for the recapture agreement. 57 Fed. Reg. 18658 (Apr. 30, 1992) (to be codified at 7 C.F.R. Part 1951, Subpart S, Exhibit C-1—Net Recovery Buyout Recapture Agreement, paragraph 3).

63 57 Fed. Reg. 18658 (Apr. 30, 1992) (to be codified at 7 C.F.R. Part 1951, Subpart S, Exhibit C-1—Net Recovery Buyout Recapture Agreement, paragraph 3).

64 FACT Act, § 1816(c) (adding a new section codified at 7 U.S.C. § 2001(c)(3) (West Supp. 1992)).

65 57 Fed. Reg. 18627 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.906 (definition of "feasible plan")).

66 *See* previous footnote.

Changes in NRV Buyout Recapture Agreement	Old Recapture Agreement	New Recapture Agreement
Amount of Penalty	Market value on the day of the NRV buyout minus the NRV buyout price.	Market value on the day the farmer sells or conveys the land minus the NRV buyout price.
When Penalty Amount Is Determined	On the day of the NRV buyout.	On the day the farmer sells or conveys the land.
Duration of Recapture Agreement	Two years.	Ten years.

Number of Write-Downs

The Statute

Under the old statute, there was no limit to the number of times a borrower could get a debt write-down. A borrower could go through debt restructuring and then, if that plan did not quite work, he or she could go through it again. *Under the new law,*[67] there is a limit. The general rule seems to be that, from here on out, there will be only one write-down for each farmer.[68] This law applies only to new applications.

The Regulations

The regulations make it clear that a borrower who submits a *new* application has a lifetime limit of one write-down. However, any write-down received *on an application submitted before November 28, 1990,* will not be counted towards this one-time limit.[69] Also, any write-downs received through bankruptcy will not be included in the lifetime limit.[70]

Limit On Amount of Debt Forgiveness

The Statute

Under the old statute, there was no limit on the amount of debt that could be written off or forgiven. *Under the new law,*[71] there is a limit of $300,000 of principal and interest forgiveness per borrower. The statute calls this a "lifetime limitation."[72]

The Regulations

The regulations make it clear that a borrower who submits a *new* application has a lifetime limit of $300,000 for a write-down and/or a buyout. However, the amount of any write-down or buyout that has resulted from any *application submitted before November 28, 1990,*

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67 FACT Act, § 1816(h) (at subs. "n") (codified at 7 U.S.C. § 2001(n) (West Supp. 1992).
68 The statutory language is extremely confusing.
69 57 Fed. Reg. 18634-35 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(e)(4)(ii)).
70 *See* previous footnote.
71 FACT Act, § 1816(h) (at subs. "p") (codified at 7 U.S.C. § 2001(p) (West Supp. 1992).
72 *See* previous footnote.

will not be counted towards the $300,000 limit.[73] Also, the $300,000 limit does not include any write-down received in bankruptcy, debt settlement, or through the conservation easement write-down program.[74]

Appraisals

The Statute

Under the old statute, if a farmer was dissatisfied with FmHA's appraisal, the farmer could have a second appraisal done by an FmHA-approved appraiser. Then, in an appeal, the hearing officer had an obligation to "consider" the second appraisal. *Under the new law*,[75] the farmer can object to FmHA's appraisal based on a current, separate appraisal. (This second appraisal does *not* have to be performed by an FmHA-approved appraiser.) Then the borrower and FmHA must negotiate to choose an independent appraiser to perform a *third* appraisal. The farmer and FmHA split the cost of the third appraisal. The final appraisal figure will be the average of the two appraisal figures that are closest in value.

Example: Suppose FmHA's first appraisal is $180,000, the farmer's independent appraisal is $130,000, and the third appraisal (done by the appraiser chosen by FmHA and the farmer) is $150,000. The two appraisal figures that are closest together are the $130,000 and $150,000 figures; the average of those two figures is $140,000. Therefore, $140,000 is the final appraisal figure.

Technically, this new appraisal law applies only in the debt restructuring process.

The Regulations

The regulations state that FmHA is using the new appraisal mechanism explained above only in the context of *new* applications for debt restructuring.[76]

For *matters outside of the debt restructuring process*, borrowers are left with the old appraisal system. In that system, a farmer who wishes to contest an appraisal must request that the FmHA state director review the appraisal.[77] If the state director review does not resolve the matter, the farmer will be sent a letter that explains his or her appeal rights.[78]

For *old applications for debt restructuring*, borrowers have the old appraisal system with one minor change. That system provides that a borrower may appeal the appraisal without prior state director review. As part of the appeal, the borrower may submit an independent appraisal conducted by an appraiser from an FmHA-approved list.[79] The borrower pays the cost of the independent appraisal. The independent appraisal will be "considered" by the appeal officer.[80] The minor change to that system is that now, under

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73 57 Fed. Reg. 18634-35 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(e)(4)(iii)).
74 *See* previous footnote.
75 FACT Act, § 1816(g) (codified as a new section at 7 U.S.C. § 2001(c)).
76 57 Fed. Reg. 18638 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(i)(4)).
77 57 Fed. Reg. 18622-23 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1900.53(b)).
78 *See* previous footnote.
79 57 Fed. Reg. 18638 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(i)(3)).
80 *See* previous footnote.

the new regulations, if the borrower's appraisal and FmHA's appraisal differ by not more that 5 percent, the borrower must choose one of those appraisals as binding, and there can be no further appeal about the appraisal issue.[81]

For *new applications for debt restructuring*, the borrower may use the process described in the paragraph above[82] or may use the new *negotiated* appraisal process.[83] In this new procedure, the borrower obtains an independent appraisal at his or her own expense. The appraiser does *not* need to be on FmHA's list of qualified appraisers (although the appraiser and the appraisal report must meet certain standards). If FmHA's appraisal and the borrower's appraisal differ by 5 percent or less, the borrower must choose one of those appraisals as binding, and there can be no further appeal about the appraisal issue. If the appraisals differ by more than 5 percent, the borrower must choose a third appraiser to begin the system described in the statutory section above.[84]

Eligibility for Leaseback/Buyback

The Statute

Under the old statute, good faith was not an eligibility criterion for the leaseback/buyback program. *Under the new law,*[85] good faith is a criterion.

The Regulations

The regulations apply the good faith criterion to all *new* applications for leaseback/buyback.[86] Specifically, the good faith criterion applies to:

1) Applicants who first applied for primary loan servicing on or after November 28, 1990; and,

2) Applicants who are former borrowers/owners who first applied for leaseback/buyback on or after November 28, 1990, without first applying for primary loan servicing.

The regulations say that a prior determination of bad faith that formed the basis for a denial of primary loan servicing is binding for purposes of the leaseback/buyback determination and is not appealable. There is one exception to this rule: bad faith determinations made prior to November 28, 1990, that were based on the disposal of normal income security without permission may be disregarded in certain situations.[87]

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81 57 Fed. Reg. 18638 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(i)(3)(v)).
82 Prefatory comments, 57 Fed. Reg. 18613, col. 1.
83 57 Fed. Reg. 18638 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(i)(4)).
84 57 Fed. Reg. 18638 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(i)(4)(ii)).
85 FACT Act, § 1816(e) (codified at 7 U.S.C. § 1985(e)(1) (West Supp. 1992)).
86 57 Fed. Reg. 18641 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.911(a)(4)(i)).
87 The regulations state that if the bad faith determination "was based on the sole fact that the borrower disposed of normal income security before October 14, 1988, without FmHA consent, and it has been determined the [sic] proceeds were used for essential household and farm operating expenses of which the borrower would have been entitled to a release of income proceeds in accordance with § 1962.17(b)(2)(iii) and [Part 1962, Subpart A, Exhibit E], such a

Liquidation of Assets

The Statute

Under the old statute, a farmer was not required by statute to liquidate nonessential assets as a condition to receiving debt restructuring. *The new law*[88] on this point did not become effective until FmHA issued final regulations to implement that section of the law.[89] The new law provides that the farmer cannot receive debt forgiveness on any portion of the debt that he or she could pay by liquidating nonessential assets (as defined on page 5).

The Regulations

The regulations' treatment of non-essential assets is explained in the section above concerning NRV calculations.

Additional Issues

There are many additional troubling issues in the regulations that do not seem to stem from specific provisions in the FACT Act. The two most alarming issues are explained below.

Pledging Assets for Write-Downs

FmHA will now require that the borrower grant FmHA a security interest in ***additional*** property as a condition of debt write-down.[90] The regulation is worded loosely enough to allow FmHA to require that the borrower grant a security interest in almost all of his or her essential and nonessential assets.[91]

Pledging Assets for Getting a Loan

FmHA issued a set of final regulations regarding loan making on April 30, 1992. These regulations are separate from the interim final rules regarding loan servicing that are

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lack of good faith determination will not be binding for a leaseback/buyback application filed on or after November 28, 1990." 57 Fed. Reg. 18641-42 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.911(a)(4)(i)(A)).

88 FACT Act, § 1816(h) (at subs. "o") (codified at 7 U.S.C. § 2001(o) (West Supp. 1992).

89 FACT Act, § 1861(b)(3). Those regulations were issued on April 30, 1992. *See* 57 Fed. Reg. 18639-40 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910).

90 57 Fed. Reg. 18635 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(e)4)(viii)).

91 The language is, "[In order to get a write-down of FmHA loans, the] [b]orrower must agree to a lien on certain assets as provided in § 1951.910 of this subpart, including nonessential assets where the NRV of these assets was not paid to FmHA." 57 Fed. Reg. 18635 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.909(e)4)(viii)). The regulations at § 1951.910 go on to say, "Delinquent borrowers must pledge certain assets, essential and nonessential, unencumbered to FmHA as security in accordance with [§ 1943.19, § 1941.19, and § 1945.164] . . . at the time FmHA loans are restructured." 57 Fed. Reg. 18640 (Apr. 30, 1992) (to be codified at 7 C.F.R. § 1951.910(b)). The regulations in the 1940 series, which were cited above, were amended by a final rule issued on April 30, 1992 (57 Fed. Reg. 18674-81) that allows FmHA to take "the best lien obtainable on all assets owned by the applicant" in the loan-making process.

discussed above. According to these new regulations, *FmHA will now require that a borrower grant FmHA a security interest in **almost all** of his or her assets in order to get an FmHA loan.*[92]

Conclusion

Comments are due on most of these regulatory provisions[93] on or before June 29, 1992. It is important that farmers, advocates, and lawyers analyze the problems that will arise from these regulations and submit written comments by the deadline.

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92 These regulations are *final* rules. 57 Fed. Reg. 18674-81 (Apr. 30, 1992) (to be codified at 7 C.F.R. §§ 1941.19, 1943.19, 1943.69 and 1945.169).

93 Comments are due on all of the provisions that fall within 57 Fed. Reg. 18612-71 (Apr. 30, 1992).