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May 4, 2004

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

Dear Ms. Cooksie:

Re: Comments on Proposed Rule — Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs, 69 Fed. Reg. 6055 (February 9, 2004) (comment period reopened and extended on April 19, 2004 (69 Fed. Reg. 20,834)).

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

NFFC represents 30 grassroots farm and rural advocacy organizations in more than 30 states. The coalition was formed in 1986 to coordinate the efforts of a growing network of grassroots organizations concerned with maintaining a family farm system of food production. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming. NFFC has long been interested in USDA's implementation of farm credit, disaster assistance, and conservation programs.

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

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For almost two decades, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural credit and farm program issues.

Due to the length of these comments, we have organized them in the following manner for ease of reading:

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I. Comments About FSA's Streamlining Effort as a Whole

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

NFFC and IAC support the impetus behind Agency efforts to reorganize its direct loan program rules in a more "orderly and logical manner." As specifically recommended by the USDA Civil Rights Action Team's 1997 report, such reorganization should make the program regulations more understandable and "easily accessible" to program participants. However, as the prefatory remarks to this proposal expressly recognize, this proposed rule does more than merely consolidate and reorganize the hundreds of pages of direct loan program regulations. The Agency has also undertaken a sweeping streamlining of its program policies. During this comment period, program participants and others interested in the FSA loan programs faced the daunting task of trying to take in the effects of those two quite different efforts.

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

A. Removal of Regulatory Provisions Into Agency Handbooks

The stated intent of the proposed rule – to allow the general public, including loan applicants and borrowers, to "more easily find needed information" – is belied by the removal of significant substantive provisions from the rule language and the Agency's overt plan to rely heavily on internal handbooks for program administration. Although the Agency's prefatory remarks state that only procedures having "no impact on loan applicants and borrowers" were removed from the reorganized rule, this is simply not true. The reality is that the proposal leaves several areas of program administration where critical, substantive provisions have been removed and left unaddressed. This raises a fundamental challenge to the reorganized program regulations as proposed.

1. If the Intent Is to Bind the Public, the Standard Must Be Published

The Administrative Procedures Act, 5 U.S.C. §§ 552-553, requires that all substantive program provisions affecting participants' rights be articulated by the agency in a proposed rule in sufficient detail to enable meaningful opportunity for comment, as well as to provide meaningful standards. 5 U.S.C. § 552(a)(1)(D) requires that each federal agency "publish in the Federal Register for the guidance of the public ... substantive rules of general applicability ... and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 553(b) and (c) require agencies to provide notice of rule making in the Federal Register and allow the public to participate in the rule making by offering comment. Under § 552(a)(1): "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." (emphasis added)

There is no question that USDA is subject to these requirements. See *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 95 n. 5 (D.C. Cir. 2002) ("As the Department acknowledged, it has essentially waived [the] APA exemption.") (citing 36 Fed. Reg. 13804 (July 24, 1971) and *Rodwa*y v. USDA, 514 F.2d 809, 814 (D.C. Cir. 1975)). And there is no question that if the Agency wants to bind FLP applicants and borrowers to its policies and procedures, it must comply with the APA. Vietnam Veterans of Am. v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) ("[S]tatements whose language, context and application suggest an intent to bind agency discretion and private party conduct – the sort of statements requiring compliance with § 553 – will have that effect if valid; interpretive rules or policy statements will not, regardless of their validity. A binding policy is an oxymoron.").

Large areas of what are substantive provisions in current regulations have been omitted from this "streamlining" proposal. The Agency presumably intends to incorporate at least some of these into its internal handbooks, but this does not satisfy the APA mandate. As seen in *Hoctor v. U.S. Dep't of Agriculture*, 82 F.3d 165 (7th Cir. 1996), agency attempts to bind the public to policy statements promulgated without an opportunity for notice and comment are unlikely to withstand judicial review. Furthermore, where manual provisions do not simply provide guidance but instead dictate the outcome of eligibility for benefits, they are "void and unenforceable" if not promulgated in accordance with the APA's notice-and-comment requirements. *Harron v. Heckler*, 576 F. Supp. 218, 231, 232 (N.D. Cal. 1983). The defendant in *Harron*, the Secretary of Health and Human Services, had argued that her manual provisions did not have a substantial impact on the public

because they did not change existing rights and obligations. *Id.* at 232. The court rejected this argument outright, finding that the manual converted the "broad, essentially subjective standard...set forth in the governing state and regulations into a narrow, specific, objective standard amendable to wholesale application," barring program participants from putting forward any evidence aimed at satisfying the broader statutory standard. *Id.*

The fact that notice-and-comment rulemaking seems burdensome does not excuse the Agency from its obligations. In the words of Robert A. Anthony, Chairman of the Administrative Conference of the United States from 1974 to 1979:

> The costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply because an agency might lack adequate resources or prefer to direct them elsewhere. At worst, they are a price to be paid for lawfulness and openness and accountability in government....The recommended procedures will avert the imposition of needless cost and confusion upon the public, and will foster a more uniform and punctilious process of administration within the agencies. In short, if an agency wants to bind the public, it should do it right. It should not try to do it on the cheap or on the sly.

Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?," 41 Duke Law Journal 1311, 1379 (1992).

Rulemaking benefits both the Agency and program participants by improving the quality, credibility, and effectiveness of FSA decision-making processes. By omitting critical substantive provisions from the proposal, the Agency has denied the public the possibility of meaningful notice and review of the proposed policy changes. The failure to disclose and invite comment on all of the program provisions also denies the Agency the benefit of cooperative, open, informed feedback on its proposals that can identify problems and allow the Agency to efficiently make improvements, before the changes are put in place. Without that necessary input, the Agency risks facing waves of challenges when it attempts to implement undisclosed policy changes.

FSA borrowers have learned to rely on regulations as the primary source of the information they need to understand FLP programs and procedural rights. Once a rule is finalized, the Agency's reliance on internal handbooks for program administration will make it harder, not easier, for program participants to learn what the Agency expects of them and act accordingly. This is precisely the opposite of what both the CRAT recommendation and the National Performance Review initiative require. It is no solution for the Agency to suggest that handbooks can be viewed at local FSA offices. This is inadequate for many reasons: local FSA employees are already overburdened and cannot welcome the additional responsibility; in part due to being overburdened, local office employees do not always give the right information, and program participants must have direct access to complete, current program requirements; program participants in need of handbook information are often in dispute with the local FSA office and are justifiably leery of being forced to rely on that office for the information needed to advance their position; and, finally, the FSA office is often simply prohibitively inconvenient both due to distance and limited hours of availability.

Finally, it is imperative that program participants have immediate, convenient access to the information proposed to be included in whatever handbooks are developed. The prefatory remarks to the proposal state that handbooks will be "issued" simultaneously with the final rule. The rule

must not be finalized until the Agency is prepared to contemporaneously make all handbooks available on a publicly accessible Internet site. The guaranteed loan program handbook, 2-FLP, is currently available from the FSA web site, so the Agency clearly has the capacity to accomplish this posting. The Agency must also establish a procedure for getting subsequent amendments posted within a short period.

2. Examples of Missing Substantive Provisions

a. Supervised Bank Accounts

The proposed rule includes an entire subpart (Part 761, Subpart B) devoted to supervised bank accounts. Section 761.51(d) of that subpart goes so far as to lay out the requirement that a financial institution pledge collateral to the Federal Reserve Bank (or a correspondent bank) if funds for the account will exceed $100,000. Despite this level of detail on what would seem to be a purely procedural issue, the subpart provides absolutely no guidance as to when the Agency will use supervised bank accounts or when such accounts will be "no longer needed," as stated in proposed § 761.55(a). A lack of standards for supervised bank accounts is particularly alarming. Arbitrary use of the discretion to require such accounts has been a troubling practice nationwide, and has been particularly objectionable for African American farmers in the Southeast, as the Agency has recognized. Notice FLP-102, "Supervised Bank Accounts (SBA's)" (issued Dec. 20, 1999) (expired Oct. 1, 2000).

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

b. Post-approval of Disposition of Chattel Security

Another example of a critical substantive issue that is not addressed in the proposed rule is the standard for post-approval of a borrower's use of proceeds from chattel security. Proposed § 765.304 states that the borrower must "provide information" to enable the Agency to consider post-approval, but no standards are articulated. 7 U.S.C. § 1985(f)(2) mandates that FSA "shall release from normal income security ... an amount sufficient to pay for the essential household and farm operating expenses of the borrower, until such time as the Secretary accelerates [the] loan." 7 U.S.C. § 1985(f)(7)(A) requires the Secretary to issue regulations that "ensure the release of funds to each borrower." The statute does not limit the requirement to release for essential family living and farm operating expenses to those items listed on Form 1962-1 or any similar agreement between the Agency and the borrower. If the borrower disposed of normal income security and used the proceeds to pay essential living and operating expenses, FSA must release its security interest under this statutory provision even if the particular use of the proceeds was not listed in the agreement, and the rule must set out the standards for post-approval.

c. Agency Obligations to Encourage Applications and Provide Assistance

A number of key provisions in the current FLP rules related to interactions between Agency staff and the borrowers, applicants, and would-be applicants have been omitted in the proposal. Current 7 C.F.R. § 1910.3(a) provides that persons wishing to apply for an FLP loan will be encouraged to do so. This language, establishing an absolute right to file an application, is a critical, *substantive* provision that has been an important bulwark against discrimination and the vagaries of presumptions, politics, and personality.

Just as critical are the many provisions of current FLP regulations ensuring that applicants and borrowers can claim assistance from Agency staff, for example: §§ 1910.3(c), 1910.4(b) – Agency staff will explain the programs available and "give whatever assistance is necessary" for the application; § 1924.56(b) – applicants and borrowers may get assistance from Agency staff with preparing their farm business plans; § 1943.11 – socially disadvantaged applicants "will be provided the technical assistance necessary when applying for FO loans or other assistance to acquire inventory farmland."

Understanding that borrowers are generally unfamiliar with administrative processes and need assistance from FSA regarding information and procedural issues, it is imperative that FSA provide adequate information in the regulations to facilitate a good working relationship with borrowers and assure that borrowers are treated fairly. Removing important information from the regulations is counterproductive to these goals and will result in confusion and poor working relationships with borrowers. FSA local offices also need clear direction to implement FSA loan programs.

Although it might seem like overkill to need the right to submit an application and obtain assistance from Agency staff as *regulatory* provisions, it is not. Insisting on these provisions as part of the rule does not mean that NFFC and IAC believe no Agency employee would act appropriately without a regulatory hammer. It means that *some won't, at least with respect to some farmers*. The regulations are for the outliers because *every* applicant and borrower is entitled to be treated appropriately, even if they have to rely on regulatory language to get it. For a farmer facing a hostile local office and no place else to go for the credit needed to keep an operation going, the existence of clear, objective regulations setting out the terms of the interaction between the two sides in the lending relationship is absolutely necessary. Even if all but one Agency office in the country would run like a dream without these provisions, they're necessary.

B. Increased Agency Employee Discretion

Like the extreme detail of the current direct loan program regulations, a lack of discretion for Agency staff under the direct loan program has a historical context, which must not be forgotten: chronic abuses of discretion resulting in extensive litigation and recurring congressional action. See, e.g., Coleman v. Block, 580 F. Supp. 194, 200 (D.N.D. 1984) ("The FmHA concedes that the liquidation decision rarely turns on whether the farmer is delinquent...Instead, the decision rests on a host of highly subjective factors...."). More recently, the plaintiff farmers in *Garcia v. Veneman* sought to certify a class of Hispanic farmers in a discrimination suit against USDA, alleging that they experienced disproportionate disqualification from FLP eligibility as a result of "unfettered, highly subjective decision-making" by Agency personnel. 211 F.R.D. 15, 21 (D.D.C. 2002).

Borrowers and loan applicants are justifiably wary of policy changes that would reopen areas of discretion that have been narrowed due to prior abuse. Of course there is a place for recognition of varying circumstances, but it is imperative that the Agency set meaningful parameters on any discretion. The Agency should be concerned with perceived differences as well as actual inconsistencies and should set out objective standards against which an employee's exercise of discretion in the direct loan programs can be measured. As the court in *Harris v. Marsh* observed,

> Particularly when vague, subjective standards are given to a large number of individuals to be applied in a wholly discretionary manner, with no systematic review to ensure fairness, the chances are substantial that conscious or unconscious racial bias on the part of some of those individuals will infect the selection process.

679 F. Supp. 1204, 1299 n. 154 (E.D.N.C. 1987).

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

Another area where the proposed rule gives unreasonably broad discretion to Agency employees is in loan approval conditions found at proposed § 764.401(b)(6) and (7). Proposed (b)(6) would permit loan denial because "the applicant's circumstances may not permit continuous operation and management of the farm." Loan denials based on purely subjective conjecture about what "may" happen are arbitrary and capricious. If the applicant meets the loan eligibility requirements, the loan should be made. The provision in proposed (b)(7) allowing denials if any "circumstances surrounding the loan" are "inconsistent" with federal law or "credit policies" is vague, without meaningful standards, and purports to tie loan approval to nonbinding Agency policies.

C. All Comments Should Be Posted on the FSA Website

The farmer credit programs administered by the USDA have been a topic of intense interest among farmers and ranchers for decades. For many farmers, ranchers, and farm organizations, this intense interest extends to a strong desire to review and analyze comments submitted on this and others rules published for public comment. Federal agencies, including USDA, are increasingly making documents relating to the rule-making process available on their websites. Publication on the website helps improve public access to and participation in the rule-making process.

NFFC and IAC urge the Agency to post all comments received on the proposed streamlining of the FLP regulations on its website. Under the E-Government Act of 2002, agencies "shall make publicly available online. . . all submissions" under APA notice-and-comment rule making, to the

extent practicable. 107 Pub. L. No. 347, § 206(d)(2)(A); 116 Stat. 2899 (2002) (codified at 44 U.S.C. § 3501 note). Several other agencies within USDA, for example, AMS and NRCS, have concluded it is practicable to post comments received during the rule making process on their websites, and have in fact posted public comments. NRCS has posted the literal thousands of comments it received on the proposed rule for the Conservation Security Program. NFFC and IAC believe that it would be both practicable and beneficial to post all FLP comments on the FSA website, and urge the Agency to do so for this and all subsequent comment periods. NFFC and IAC believe that many comments on the proposed rule are being submitted by e-mail and fax, which would make online posting relatively convenient.

II. Failure to Implement Statutory Requirements

This section the comments discusses the disturbingly large number of statutory provisions that are ignored or even contradicted by the proposed rule.

A. Loan Making

1. Definition of "Debt Forgiveness"

Debt forgiveness for FLP purposes generally includes all forms of reducing or terminating a loan that cause a loss to USDA. 7 U.S.C. § 1991(a)(12). Section 5310(b) of the 2002 Farm Bill, codified at 7 U.S.C. § 1991(a)(12)(B)(ii), provides that debt forgiveness specifically does not include any write-down of FSA debt received as part of the resolution of a discrimination complaint against the Secretary of Agriculture. This statutory change is in addition to the debt relief provisions of the consent decree in *Pigford v. Veneman*. The definition of "debt forgiveness" proposed at 7 C.F.R. § 761.2(b) must be amended to include this statutory exception.

2. Beginning Farmers and Ranchers Exempt from Term Limits

The 1996 Farm Bill technically exempted beginning farmers and ranchers from the direct OL loan term limit, but only so long as they had not operated a farm or ranch for more than five years. Because the five-year exception was less than the seven-year term limit, this exception had no practical effect and the term limit generally applied to all beginning farmers and ranchers.

Section 5101(1) of the 2002 Farm Bill, codified at 7 U.S.C. § 1941(c)(1)(A), removes the statutory language limiting the exception to beginning farmers and ranchers who have been in operation for no more than five years. Thus, the eligibility limits set out in 7 U.S.C. § 1941(c)(1)(B) and (C) no longer apply to any applicants who qualify as beginning farmers and ranchers. Since one can operate a farm or ranch for up to 10 years and still qualify for OL loans as a beginning farmer or rancher, the statutory changes makes the effective term limit on direct OL loan eligibility a maximum of 10 years. The OL eligibility provisions at proposed § 764.252, specifically the language in (d), must be amended to include this special eligibility for beginning farmers and ranchers.

7 U.S.C. § 1922(b)(1)(A) similarly exempts beginning farmers and ranchers from the FO term limit, as is reflected in current 7 C.F.R. § 1943.12(a)(8)(i). Since the 10-year limit on eligibility for new FO loans coincides with the 10-year limit on eligibility for status as a beginning farmer or rancher, the proposed rule at § 764.152(e)(2) is not unlawfully limiting, though it does fail to correctly state the statutory standard.

3. Automatic Waiver of OL Term Limit for Operations on Tribal Lands

Section 5101(2) of the 2002 Farm Bill, codified at 7 U.S.C. § 1941(c)(4) provides for two types of waivers of the direct OL loan term limit. The first type of waiver is available for farmers and ranchers whose land is subject to the jurisdiction of an Indian tribe. The second type of waiver is available on a case-by-case basis for farmers and ranchers who have unsuccessfully applied for commercial credit. Proposed § 764.252(f) properly states the standards for the second type of waiver. But proposed § 764.252(g) erroneously puts the burden on the applicant to "request" the second type of waiver. This fails to recognize and implement the key difference in the statutory language establishing these two waivers.

7 U.S.C. § 1941(c)(4)(B) provides that the Secretary "may" grant a waiver to applicants who have unsuccessfully sought commercial credit and meet the other criteria. However, 7 U.S.C. § 1941(c)(4)(A) requires that the Secretary "shall" waive the term limit for applicants on land subject to the jurisdiction of an Indian tribe if commercial credit is not generally available. In light of this mandate, it is improper for the Agency to propose to require applicants to request this type of waiver. Although applicants should of course remain free to make such requests on their own behalf, such waivers should be automatically implemented by the Agency when application materials indicate that the applicant qualifies.

4. Entity Eligibility – Must Be Engaged Primarily and Directly in Farming or Ranching

Statutory language authorizing the making of OL and FO loans to entities requires that those entities be "engaged primarily and directly in farming or ranching in the United States." See, 7 U.S.C. §§ 1922(a), 1941(a). Although this criterion is mentioned in the prefatory comments to the proposed rule in the discussion of the requirement that the farming or ranching operation be located in the United States (proposed § 764.102(b)(2)), the proposal fails to impose this entity eligibility requirement except in the definition of "Established farmer," a term used only in the EM loan program.

Current OL and FO regulations at 7 C.F.R. §§ 1941.12(b)(2), 1943.12(b)(2) erroneously state that it is the farmer and rancher entity owners who must be primarily and directly engaged in farming or ranching. But the statute can only be read to require that the entity *itself* must be primarily and directly engaged in farming or ranching to be eligible for FLP loans. It reads: the Secretary is authorized to make OL, FO, and EM loans to entities "that are controlled by farmers and ranchers *and* engaged primarily and directly in farming or ranching in the United States." This language excludes both entities whose primary activity is something other than farming and entities whose primary farming activities take place outside the United States, even if the specific operation for which a loan is sought is a farm in the U.S.

The general eligibility requirement at proposed § 764.101(j) must be amended by adding a new subparagraph (4) stating that "the entity must be engaged primarily and directly in farming in the United States."

5. FO Loan Applicants Must Have Participated in Farm or Ranch Business Operations for 3Years

7 U.S.C. § 1922(b)(1) requires that an FO loan applicant have participated in the business operations of a farm or ranch for not less than three years. Although proposed § 764.152(d) appears to be an attempt to implement this requirement, the proposed rule language is confusing and seems to omit

the key statutory requirement – "for at least three years." The three proposed subparagraphs are helpful to the extent they can be read to reveal the Agency's interpretation of what "participation in the business operations of a farm or ranch" means. The structure of (d) itself, however, does not fit. First, the proposed language refers to a supposed exception in paragraph (f) of 764.152, though there is no such exception there. (As discussed below, (f) is actually an exception to (e) and is best incorporated therein.) Thus, the opening clause of (d) should be deleted. The remaining flaws in (d) are that it fails to state the statutory requirement of three years of participation and it fails to state that the subparagraphs are elaborations on what it means to have participated in the business operations of a farm or ranch. NFFC and IAC recognize the recent promulgation of a final rule adopting this requirement into current 7 C.F.R. § 1943.12, and recommend that the language used there, including the addition of a definition of "participated in the business operations of a farm," be adopted. See 69 Fed. Reg. 5359 (February 4, 2004).

The requirement would then read:

> The applicant:
>
> ***
>
> (d) Must have participated in the business operations of a farm for at least 3 years out of the 10 years prior to the date the application is submitted;
>
> ***

NFFC and IAC commend the Agency for promulgating the final rule with the change from 3 of the prior 5 years to 3 of the prior 10 years. As NFFC stated in its June 9, 2003, comments on the proposed rule, a 5-year period of reference would have too narrowly restricted FO eligibility and would have unreasonably excluded many new farmers with varied, valuable experience including higher education and military service.

As NFFC also stated in its June 9 comments, many farm advocates report that it has been difficult for applicants to determine what types of documentation will satisfy FLP eligibility requirements. NFFC recommended that the "participated in business operations" eligibility provision describe the types of documentation that would be acceptable. For example, is the applicant's certification sufficient? Would it be sufficient to provide an affidavit from the farm owner(s) attesting that the applicant actively participated in farm management discussions to demonstrate "significant responsibility for day to day decisions?" What about an affidavit from one or more input suppliers stating that they had dealt with the applicant acting on the farm owner's behalf? The Agency did not respond to NFFC's comments when it promulgated a final rule on February 4, 2004. (69 Fed. Reg. 5259). NFFC and IAC reiterate here the concern that there needs to be some guidance on how this requirement will be satisfied and ask that the Agency be more forthcoming in this rule making process.

6. Specific EM Loan Hazard Insurance Provisions for Poultry Farmers

The 2000 Agricultural Risk Protection Act amended the hazard insurance section of the EM loan statute by making specific provisions for loans to poultry farmers to cover lost chicken houses and allow for rebuilding in accordance with current industry standards. 7 U.S.C. § 1961(b)(3). The

statute addresses cases where a farmer lost a chicken house for which there was no hazard insurance as well as cases where the hazard insurance carried on a lost chicken house is not adequate to cover the cost of rebuilding. These statutory provisions must be incorporated into proposed § 764.353(e).

7. Interest Rate Is Lower of That at Time of Loan Approval or Closing

7 U.S.C. § 1927a requires that the interest rate charged to FLP borrowers is the lower of the applicable interest rate at the time of loan approval or at loan closing, at the request of the borrower. This provision is reflected in the current regulations at 7 C.F.R. §§ 1941.18(a), 1943.18(b). Because the statute puts the burden on the borrower to request the lower rate, this option must be set out in the regulations at proposed §§ 764.154(a)(1) and 764.254(a)(1) and should be clearly offered on the loan application forms.

8. Authorization Since 1996 for Direct OL Lines-of-Credit

The 1996 Farm Bill authorized line-of-credit loans under the direct OL loan program. 7 U.S.C. § 1946(c). This has never been implemented. The Small Farms Commission Report, "A Time to Act," included a recommendation (1.14) specifically asking the FSA Administrator to "take immediate action" to implement this authority. The report stated:

> Line-of-credit loans should be used for all routine and recurring operating loans using either direct or guaranteed authorities and be targeted to small, beginning, or traditionally underserved farmers. This will extend production credit for a 5-year term without the need for re-application, enable production through good and bad years without interruption, and dramatically reduce staff work required to re-issue production loans yearly.

NFFC and IAC join the Small Farms Commission urging the Agency to immediately implement a line-of-credit OL loan program.

9. Notice of Loan Decision Within 60 Days

Under 7 U.S.C. § 1983a(a)(1), applicants have a statutory right to notice of FLP loan approval or disapproval within 60 days of submitting a complete application. If the application is disapproved, 7 U.S.C. § 1983a(a)(3) requires that the reasons for disapproval be included in this notice. Proposed 7 C.F.R. § 764.54(a) states that the application processing will be complete within 60 days, but fails to include the statutorily required notice to the applicant within those 60 days.

10. Waiver of Borrower Training Requirement

The language at proposed § 764.453(b)(2) for waiver of the borrower training requirement – "evidence which demonstrates to the Agency's satisfaction the experience and training necessary for a successful and efficient operation" – does not satisfy the statutory mandate at 7 U.S.C. § 2006a(f)(3) that the waiver criteria provide for consistent application nationwide. Nor does it address the direction of the 2002 Farm Bill conferees to establish "clear and transparent" criteria.

11. Appeals

Agency implementation of successful administrative appeals has been a source of friction between FSA and program participants for many years. In response to concerns that Farmers Home Administration program staff were refusing to implement appeal decisions in favor of borrowers,

Congress explicitly included a statutory implementation requirement when it created the new National Appeals Division. The NAD statute requires that when a final NAD appeal determination is returned to an agency, the head of the agency must implement the determination within 30 calendar days. 7 U.S.C. § 7000. "Implement" is defined in the NAD statute as taking "those actions necessary to effectuate fully and promptly a final determination of [NAD]." 7 U.S.C. § 6991(8) (emphasis added).

As the Agency must be aware, its position that it may require updated financial information from a successful guaranteed loan applicant was soundly rejected in First National Bank v. Glickman (Civil No. 5-97-CV-133-C). In that case, the court held that the Agency's demand for updated financial information after a successful appeal was "arbitrary, capricious and not in accordance with the law" and ordered the Agency to implement the NAD decision "on the basis of the facts existing at the time the application was made or the original adverse decision was issued."

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

Furthermore, 7 USC § 1983a(c) requires that "[i]f an application for a loan ... is disapproved by the Secretary" but the disapproval is reversed or revised in an administrative appeal or lawsuit, "the Secretary shall act on the application...within 15 days." Within those same 15 days, the Secretary must provide the loan applicant with "notice of the action." FLP applicants by definition have no other source of credit and are requesting credit that is necessary for their operations. Congress was clearly concerned that wrongfully denied loan applicants should not face further delays after a successful loan denial appeal and intended for these applicants to have essentially immediate relief. Proposed § 764.401(c) ignores the statutory mandate and purports to allow the Agency to demand what is in effect a new application. This is simply not permitted under the statute. Congress clearly directs the Secretary to *act* on the specific application that was earlier disapproved.

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

12. Beginning Farmer Definition

Subparagraph (5) under the definition of "beginning farmer" in proposed § 762.1(b) reads: "Except for a direct OL applicant...." The word "direct" should be removed and the sentence should instead begin: "Except for an OL applicant...." The exception to this statutory requirement set out in 7 U.S.C. § 1991(a)(11)(F) explicitly covers both direct and guaranteed OL loans: "this subparagraph shall not apply to a loan made or guaranteed under subtitle B."

This same subparagraph also wrongly states the limit as being 30 percent of the "average" farm acreage" in the county. The statutory threshold is 30 percent of the "median" acreage of farms in the

county. Average and median are not synonyms, as the Agency should know. The rule must be corrected to reflect the actual statutory language.

B. Loan Servicing

1. Good Faith Test for Loan Servicing

Proposed § 766.104(a)(4) sets out the eligibility requirement for loan servicing that the borrower have "acted in good faith in accordance with the borrower's loan agreements." This proposal fails to include the statutorily mandated language that is part of current § 1951.906, "Good faith," namely that borrowers who disposed of normal income security before October 14, 1988, with out the consent of Secretary shall not be considered to have acted without good faith if the proceeds were used to pay essential household and farm operating expenses and the borrower would have been entitled to a release of income proceeds if later-adopted regulations had been in effect. 7 U.S.C. § 2001(l). This statutorily mandated clarification of the good faith test must be included in the final rule.

2. Loan Servicing Notice When Request for Release of Chattel Proceeds Is Denied

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

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

3. Notice of Appeal Rights in Restructuring Offer

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

notice of appeal rights must continue to be included in the restructuring offer. As a practical matter, as mentioned above, all parties are better off when issues are resolved earlier rather than later.

4. Agency Initiation of Mediation

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

7 U.S.C. § 2001(d)(2) requires that "[b]efore eliminating the option to use debt write-down" the Secretary "shall make a reasonable effort to contact the creditors of such borrower...and encourage such creditors to participate with the Secretary in the development of a restructuring plan for the borrower." The proposed rule fails entirely to incorporate this critical statutory *obligation* of the Secretary. Proposed § 766.106(b)(2)(i) purports to put the burden on the borrower to initiate a meeting of creditors once informed that a feasible plan cannot be developed. The statute clearly requires the Agency not only to contact the borrower's creditors but to *encourage* them to participate. Current 7 C.F.R. § 1951.909(h)(3)(i)(A) and (B) reflect this requirement by providing that if a borrower is unable to develop a feasible plan, the Agency will initiate and participate in mediation among the borrower's creditors in states with a USDA-certified mediation program "in an effort to obtain debt adjustment which would permit the development of a feasible plan of operation" and in states without USDA-certified mediation programs it will initiate a voluntary meeting of the borrowers' creditors. At a minimum, the Agency must continue this practice under the new rule. The Agency would certainly be failing to make the statutorily mandated *reasonable effort* to contact a borrower's creditors and develop a restructuring plan if it does not continue these established practices.

5. Combining and Dividing Inventory Property Parcels

Section 5308 of the 2002 Farm Bill, codified at 7 U.S.C. § 1985(c)(1)(iv), requires the Secretary to "maximize the opportunity" for beginning farmers and ranchers to purchase inventory property by combining or dividing parcels of property in inventory, as determined appropriate by the Secretary.

6. Foreclosure or Sale of Indian Trust Land Subject to Tribal Law

25 U.S.C. § 483a(a) states: "any land which is either held by the United States in trust for [individual Indian owners] or is subject to a restriction against alienation imposed by the United States . . . shall be subject to foreclosure or sale . . . in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located." Language confirming that legal foreclosure proceedings involving Indian land will take place in accordance with applicable tribal laws should be expressly incorporated into the FLP regulations.

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

7. Disposition of Inventory Land Within an Indian Reservation

7 U.S.C. § 1985(e)(1) sets out detailed requirements for the disposition and administration of inventory property within an Indian reservation where the borrower is the Tribe or a member of the Tribe, and explicitly states that such property may be handled only as provided therein. Subsections 1985(e)(1)(D)(ii), (iii), and (v) set out explicit requirements for written notice to Indian borrowers and Tribes. These statutory provisions must be incorporated into the new "streamlined" regulations, including the statutorily mandated notices to Tribes and Indian borrower-owners and the substantive standards for conveyance and disposition of covered properties.

Current 7 C.F.R. §§ 1955.9, 1955.66(d), and Exhibit B to Part 1955, subpart B, are imperfect regulatory implementation of these statutory directives. Current § 1955.66(d)(5) erroneously includes the phrase "if they are agreeable" with reference to the Department of the Interior's (DOI's) taking responsibility for certain inventory property. This language is contrary to the statutory mandate at 7 U.S.C. § 1985(e)(1)(A)(v), which states that FSA "shall" transfer to DOI inventory property which was originally held by an Indian borrower and is within the boundaries of a reservation and DOI "shall" administer the property for the benefit of the Tribe if the property is not sold to: (1) a member of the Tribe which has jurisdiction over the reservation where the property is located, (2) an tribal corporate entity, or (3) the Tribe itself. FSA does not have the option to refuse to transfer such property to DOI under any circumstances. Nor does DOI have the option to refuse to accept the transfer. The federal trust responsibility rests not only in DOI but in every agency of the federal government. Therefore, if DOI refuses to comply with the clear statutory mandate defining a specific trust responsibility in this instance, FSA has the obligation meet the federal government's statutorily defined trust responsibility by holding this property in trust for the tribe.

This form letter set out currently as Exhibit B to subpart B of Part 1955 should be included in the "streamlined" regulations after being revised to incorporate notice to the Tribe that has jurisdiction over the reservation where the property is located that if the property is not sold to (1) a member of the tribe, (2) a tribal corporate entity, or (3) the tribe itself, it must be transferred to DOI to be administered in trust for the tribe.

A form letter for providing the statutorily required notice to Indian borrowers and Tribes should also be incorporated into the regulations. The only way to ensure that each FSA office complies with the detailed statutory requirements for notice is to incorporate a form letter in the rules. This form letter must include notice of all of those items listed in the statute at 7 U.S.C. § 1985(e)(1)(D)(ii) and (iii) including, among the obvious listed items, an explanation that if the property is taken into FSA inventory and is not sold to (1) a member of the tribe which has jurisdiction over the reservation where the property is located, (2) a tribal corporate entity, or (3) the tribe itself, it must be transferred to DOI to be administered in trust for the tribe. Notice of this particular issue is required because the notice requirement in 7 U.S.C. § 1985(e)(1)(D)(iii)(1) references subparagraph A which includes the requirement for such transfer to DOI.

8. Homestead Protection

7 U.S.C. § 2000(c)(4)(B) requires that the current market value of the homestead property be "established by an independent appraisal ... by an appraiser selected by the borrower from a list of three...." In contrast, proposed § 766.155(c)(2) and (e) refer to appraisals "obtained" and "acquired"

by the Agency with no mention of the borrower's statutory right to choose the "independent" appraiser from among a list of three. Clearly the statute does not authorize the use of Agency employee appraisers for this purpose. The rule must be changed to reflect the statutory requirements.

Proposed § 764.152(b)(1) wrongly states that the Agency will provide notice of homestead protection rights "[a]fter the Agency acquires title to the property." 7 U.S.C. § 2000(c)(6) requires that the Agency notify an FLP borrower of the availability of homestead protection rights "[n]ot later than the date of acquisition of the property."

7 U.S.C. § 2000(c)(3) requires that if the Secretary effects the termination of a Homestead Protection lease due to the borrower-owner's failure to make timely rental payments, the borrower-owner must be afforded notice and appeal rights and the Agency must comply with all state and local laws governing residential eviction. These provisions must be incorporated into proposed § 766.155(d). They were part of § 1951.911(b)(8)(i)(C) until May 5, 1997, when they were removed without explanation.

The proposal to expand the Homestead Protection eligibility requirements to make the applicant responsible for making improvements and "replacing systems" during the lease term should not be adopted. These expanded provisions under § 766.153(b)(5) pose a risk of unreasonable financial burdens on Homestead Protection applicants that are not authorized by federal statute. The current eligibility requirement at 7 C.F.R. § 1951.911(b)(3)(vi) requires that the applicant demonstrate sufficient income to make rental payments and "maintain the property in good condition," as required by 7 U.S.C. § 2000(c)(1)(F). This language should be retained.

9.Graduation Notice

A provision must be added to proposed § 765.101(d) stating that the Agency will notify the borrower if it provides a prospectus to lenders to assess their interest in refinancing the borrower's loan(s). This notice is required by 7 U.S.C. § 1983a(f)(4)(B).

10. Responses to Loan Servicing Requests

The introductory paragraph in proposed § 766.106 should be expanded to include the statutory mandate that the Agency's response to a request for loan servicing will include documentation for the Agency's calculations. 7 U.S.C. § 2001(c)(4)(C). A borrower is entitled to notice within 15 days of a determination of ineligibility for loan servicing, and this notice must include the reasons for the determination and documentation of the calculations used to find the borrower ineligible. 7 U.S.C. § 2001(i).

11. Appraisal Disputes

Proposed § 766.115(a)(2) purports to interject a test of whether the borrower's appraisal differs from the Agency's appraisal by more than 5 percent before allowing the borrower to request a third appraisal, with the average of the two closest in value to be used in the restructuring process. 7 U.S.C. § 2001(c)(7)(B) authorizes no such threshold test. The statute states simply that "If the borrower, based on a separate current appraisal, objects to the decision of the Secretary regarding an appraisal, the borrower and the Secretary shall mutually agree, to the extent practicable, on an independent appraiser who shall conduct another appraisal of the borrower's property. The average

of the two appraisals that are closest in value shall become the final appraisal under this paragraph." The rule language must be changed to remove the unauthorized limitation on a borrower's right to have a third appraisal conducted. This must also be corrected in the borrower notices set out as appendices to proposed Part 766, subpart C.

III. Current Rule Language That Should Be Retained

A. Disaster Set-Aside Program (DSA)

The second sentence in current 7 C.F.R. § 1951.957(b)(7) should be retained in proposed § 766.59(c). This sentence reads: "If more than one installment is set-aside on the loan, payments will be applied to the oldest installment set-aside until paid in full, before applying payments to the second installment set-aside." Although second set-asides are not currently authorized, this language continues to be necessary because there are existing borrowers who have two set-aside installments obtained under earlier regulations. In the prefatory comments to the final DSA rule issued on September 5, 2003, the Agency recognized this situation and the need to retain the provision. 68 Fed. Reg. 55302.

The second sentence in current 7 C.F.R. § 1951.954(a)(2) should be retained in proposed § 766.52(a)(3). This sentence reads: "If all previously approved set-asides are paid in full, or cancelled through restructuring under subpart S [now subpart C] of this part, the set-aside will no longer exist and the loan may be considered for DSA." This language is necessary to clearly articulate a borrower's eligibility for a subsequent set-aside on the same loan if the current one is resolved.

The second sentence in current 7 C.F.R. § 1951.957(a)(2) should be retained in proposed § 766.57. This sentence, which reads: "Subject to § 1951.954(a)(6) [now § 766.52(a)(7)], the Agency may provide for a longer period of time under extenuating circumstances, such as where the Agency's approval is contingent upon the borrower paying a portion of the FLP payments from proceeds that may not be immediately available," is an appropriate and important elaboration of the Agency-created 45-day period for execution of a DSA agreement.

B. Emergency Loans

In response to an NFFC comment on the proposed EM loan rule published in the Federal Register on September 12, 2000, in the final EM loan rule the Agency included current § 764.8(j), which states: "The Agency may take a lien on Indian Trust lands as security provided that the requirements of § 1943.19(a)(7) of this title are satisfied." Proposed § 764.105(c), which would supercede current § 764.8(j) and apply to all FLP loans, erroneously states that the Agency will take security on "tribal real estate held in trust or restricted status." This language is improperly restrictive. As the Agency knows, Indian trust lands include not only tribal lands but also lands held in trust or restricted status for individuals. Proposed § 764.105(c) must be amended to state: "The Agency will take Indian Trust lands as security...."

Proposed § 764.105(c) also attempts to shortcut the provisions at current § 1943.19(a)(7), which are incorporated by reference in current § 764.8(j), and replace them with the statement "provided that the United States Bureau of Indian Affairs provides a title report and approves the lien." But current § 1943.19(a)(7)(i) requires the *applicant* to request the BIA to provide the title reports to FSA. If

FSA intends that it will continue to be the applicant's burden to pursue this step, it must be explicitly stated in the regulation.

In its comments on the proposed EM loan rule published in the Federal Register on September 12, 2000, NFFC raised the concern that livestock production losses were not adequately addressed by the rule. Prior EM loan regulations clearly contemplated providing assistance in certain circumstances to livestock producers for losses in production of milk and eggs, weight losses, reductions in natural increase of foundation herds, and so forth. 7 C.F.R. § 1945.163(a)(xvii). Although the prefatory comments to the proposed rule mentioned livestock production losses as losses covered by the rule (65 Fed. Reg. 54,974), the language of the proposed rule itself at 7 C.F.R. § 1945.55(e)(iii) referred only to "replacement livestock." This would seem to have required death or sale of the livestock before a producer would be eligible for EM loan assistance. Such a limitation is of particular concern to dairy producers who can face tremendous disaster-related losses in production without requiring "replacement" cattle. The proposed rule language also threatened to exclude poultry producers, who may be faced with vast production losses and/or death losses after a natural disaster but who, due to the specialized contracting relationships in that industry and some others, are not likely to show the expense of purchasing replacement birds. When the final rule as issued in January 2002, the loss calculation language at § 764.5(e)(1)(iii) had been changed to refer to "livestock and livestock products." NFFC commends the Agency for making the change and recognizing the needs of all livestock producers. However, it is beyond frustrating to see that proposed § 764.353(d)(3) once again refers to "replacement livestock" with no mention of livestock products. The rule must be changed *once again* to read "the value of livestock and livestock products" in order to assure that all livestock producers are covered by the rule.

The list of eligible uses for EM loan funds for physical losses to real estate fails to include the use covered by current § 764.3(a)(1)(v): "Replace land or water resources on the family farm which resources cannot be restored." Although not artfully worded, this eligible loan use is important and should be retained. If the Agency intends that this currently eligible loan use is incorporated into another item in the list at proposed § 764.351(a)(1), this intent should be made explicit.

Proposed § 764.351(a)(2)(v) should be amended to authorize payment of "essential farm operating and family living expenses" as is the case in current § 764.3(a)(2)(v).

There seems to be no logical reason for the distinction between proposed § 764.352(a) "Eligibility requirements" and proposed § 764.352(b) "Additional EM loan eligibility requirements." These should be combined in one list under § 764.352.

Proposed § 764.352(a)(6)(ii) should read "In the case of a loan of $300,000 or less...."

The concluding language in current § 764.4(b)(2)(iii), "...to harvested or stored crops, or to perennial crops," should be added to proposed § 764.352(b)(3). The Agency offered no explanation and there is no reasonable argument for eliminating this language from the rule.

Proposed § 764.354(a) should be amended to state that the EM loan rate will be the lower of the applicable rate at the time of loan approval or loan closing and in any event will not exceed 8 percent, as provided in current § 764.5.

The first sentence of proposed § 764.354(b)(3) should be amended to include the concluding language in the same provision of current § 764.7(c): "...except those expenses associated with establishing a perennial crop."

In its comments on the proposed EM loan rule published in the Federal Register on September 12, 2000, NFFC objected to rule language listing marketing contracts, hedging, and options as the apparently exclusive mechanisms through which FSA would allow applicants relying on repayment ability as security for a loan to address pricing risks. 65 Fed. Reg. 54973. NFFC noted:

> This ignores other price risk management tools available to producers, such as insurance, and unreasonably constrains producers' ability to choose the best tool for their situation. Smaller producers in particular may rely upon revenue insurance or other less administratively burdensome tools to address price risk in their operations. The proposed rule also ignores the fact that some producers, particularly poultry, dairy, and other livestock producers, will not have the same range of risk management options that the row crop producer might have. To acknowledge these differences and provide, at a minimum, an even playing field for limited resource applicants and smaller poultry, livestock, and dairy producers, the rule should not set out an exclusive list of risk management tools but should allow any price risk management strategy that adequately addresses the individual producer's risk.
>
> FSA should further consider the extent to which repayment ability is acting as security for an EM loan when reviewing the adequacy of the producer's risk management plan. If most of the security for an EM loan is provided by real estate or chattel property and the applicant's repayment ability provides only a small portion of the security, it would be improper for FSA to require the applicant to undertake a form of risk management whose costs to the producer outweigh the additional security for FSA.

In prefatory comments to the final EM loan rule, published on January 8, 2002, the sole Agency remark even touching on NFFC's comment was: "One comment was received recommending revenue insurance be included as a method of addressing price risk..." 67 Fed. Reg. 794. This is completely non-responsive to NFFC's concerns about the inappropriateness of an exclusive list of price risk management tools creating barriers for smaller producers, particularly smaller livestock producers.

C. Good Faith

The current regulatory definition of "good faith," found at 7 C.F.R. § 1951.906, expressly requires that allegations of fraud, waste, or conversion must be substantiated with a written legal opinion from the Office of General Counsel (OGC) when such allegations are used to deny a servicing request. Adopted in September 1988 as part of implementation of the Agricultural Credit Act of 1987, this crucial provision recognizes the seriousness of a lack-of-good-faith determination and helps ensure accountability in the FLP loan servicing decision-making process.

Because lack-of-good-faith determinations have grave consequences for the rights and interests of FLP borrowers, the requirement that allegations of fraud, waste, or conversions used to deny loan

servicing be supported by a written legal opinion from OGC must be retained in the regulation as a necessary procedural safeguard.

The definition of “good faith” must also continue to include statutory language that a borrower will not be considered to lack good faith if the sole basis for such a determination was the disposition of normal income security prior to October 14, 1988, without the Agency's consent if the borrower demonstrates that the proceeds were used to pay essential family living and farm operating expenses that could have been approved according to Agency regulations. 7 U.S.C. § 2001(l).

The inquiry into the borrower's honest and sincere effort to comply with all agreements with the agency that is contained in the current definition of good faith must be maintained. The concept of "good faith" is inherently one that deals with the borrower's state of mind. Without inquiring into the borrower's state of mind, the proposed definition of good faith fails to add a safe harbor for borrowers who may indeed have failed to comply with every aspect of every agreement with the agency, but whose failure was inadvertent and unintentional, and should not be a bar to eligibility for loan servicing. The instances where this distinction might make a crucial difference for farmers are legion. For example, a farmer may have – as one provision of extensive loan agreements – an agreement not to take on additional debt without agency approval. If this farmer refinances an existing debt to gain more advantageous terms, such as a lower interest rate, this may be a technical failure to comply with all aspects of all agreements. But the farmer--who probably did not see the refinance agreement as a new debt – was honestly and sincerely trying to comply with all agreements, and trying to improve the financial status of the farming operation, to the mutual benefit of the farmer and the Agency. Similarly, farmers occasionally make capital expenditures without prior Agency approval. While the Agency may appropriately seek to discourage such actions, it would be inappropriate to find that the farmer failed to act in good faith, if the farmer was acting with sincerity and honesty in an effort to manage the farm consistent with good management practices and his or her agreements with creditors, including FSA.

A definition of good faith that fails to allow for such inadvertent departures from the agreements with the agency fails to take adequate account of the borrower's state of mind. The proposed definition erroneously equates the borrower's *success* in complying with all agreements with the borrower's *effort* to comply with all agreements. The provisions of FSA loan agreements may be voluminous and complex, and the test of the farmer's good faith should be the honesty and sincerity of his or her effort to comply, not just the accuracy of his or her efforts to interpret and carry out the agreement.

D. OL Repayment Terms

Current 7 C.F.R. § 1941.18(b)(2) allows repayment schedules for annual operating OL loans to extend beyond 18 months when “marketing circumstances warrant.” The rule states that factors such as establishing a new enterprise, developing a farm, purchasing feed while feed crops are being established, marketing plans, and recovering from a disaster or economic reverses can be considered reasons for a longer repayment period. Current 7 C.F.R. § 1941.18(b)(4) sets out standards for when annual OL loans may be scheduled with equal, unequal, or balloon payments. These provisions allow critical flexibility for borrowers and yet ensure that the government is not facing unwarranted risk. These provisions should be incorporated into proposed § 764.254(b).

E. Credit History

Current 7 C.F.R. § 1910.5(c) sets out a list of circumstances that are not to be automatically taken as "unacceptable credit history." The list includes: foreclosure, judgment, or delinquent payments that occurred more than 36 months before application if there are no recent similar situations; FSA delinquencies resolved through loan servicing; isolated incidents of delinquent payments that do not represent a general pattern of unsatisfactory or slow payment; lack of credit history; recent bankruptcy, foreclosure, judgment, or delinquent payments if caused by temporary circumstances beyond the applicant's control or if the applicant refused to pay because of a justifiable dispute about goods or services; and non-payment of a debt due to circumstances beyond the applicant's or borrower's control. Although proposed § 764.101(d) includes the spirit of the current rule, by stating that "A history of failures to repay past debts as they came due when the ability to repay was within the applicant's control will demonstrate unacceptable credit history," this general statement is no substitute for the detailed list of reasonably objective standards in the current rule.

F. Miscellaneous

Proposed § 764.106(d)(2) is an unreasonable restriction on excluding a loan applicant's separate personal residence from security requirements. The language making this exception available in loan making only if other security – real estate, crops, and chattels – provides *150 percent or more* of the loan balance conflicts with the rule in proposed § 764.103(b) that adequate security (with a value of 100 percent of the loan amount) is mandatory but additional security *up to* 150 percent of the loan amount will only be taken "when available." The 150 percent or greater requirement is a reasonable limitation on the exception in the *loan servicing* provisions at proposed § 766.112(b)(4)(ii) because the security requirements for loan servicing are more demanding. But as the exception is written in the loan making provisions, it provides no exception at all. Current § 1943.19(c)(4) excepts an applicant's separate, personal residence when other security provides primary (now "adequate") security. This rule should be carried forward into § 764.106(d)(2).

Proposed §§ 764.106(e) and 766.112(b)(5) should be amended to exclude from security requirements "...special collateral accounts the [applicant/borrower] uses for the farming operation or necessary living expenses..." and "...personal vehicles necessary for family living or farm operating purposes...." This language, included in current §§ 1941.19(c)(5) and 1943.19(d)(4) and incorporated by reference in current § 1951.910(b)(4), is needed to identify the full extent of assets properly excluded under this section.

IV. Policy Changes in the Proposed Rule

A. Definition of "Family Farm"

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

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

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

B. Definitions of "Agricultural Commodity" and "Noneligible Enterprise"

In the past decade, Congress has demonstrated a clear interest in seeing USDA farmer programs made available to emerging crops as farmers innovate and attempt to find new ways to stay profitable. See, e.g., 2002 Farm Bill, § 10101; 1996 Farm Bill § 196(a)(2)(B). The Agency itself has recognized that FLP applicants and borrowers are "looking to new enterprises to take advantage of market niches and increase profitability" and that "denial of FSA assistance ... may prevent the applicant from making a positive change in their operation." Notice FLP-298, "Considering New Enterprises in Farm Plans," at para. 1.A. (April 1, 2003) (set to expire August 1, 2004).

In light of this, the proposed definition of "agricultural commodity" is appropriately broad. It should follow, therefore, that any enterprise involving production of an "agricultural commodity" is eligible for direct loan assistance. That the type of enterprise is eligible does not mean, of course, that the application satisfies the other loan eligibility requirements, such as projecting a feasible plan. However, it is unreasonable and unnecessary for the Agency to use the "noneligible enterprise" definition to set up a second tier of inquiry for determining whether a particular crop or livestock enterprise is eligible for direct loan assistance. The proposed definition of noneligible enterprise attempts to exclude "exotic" and "non-farm animals" without defining what these categories mean.

C. Reduction of Records Requirement From 5 Years to 3 Years

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

D. Graduation

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

E. Loan Servicing Eligibility

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

F. Unauthorized Assistance

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

If the borrower is without fault and is unable to repay the entire amount of unauthorized assistance in a lump sum, the remaining amount should be scheduled according to the borrower's repayment ability at program rates. The borrower should not be penalized with NP rates due to the Agency's error. There is no basis in such a situation for setting a maximum payment term or adding the vague "in the best financial interest of the Government" standard.

G. Youth Loans

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

H. Circumstances "Beyond the Borrower's Control"

NFFC and IAC support the proposal to expand the examples of circumstances "beyond the borrower's control" that can cause delinquency and to make explicit that the regulatory list is not

exhaustive. However, the proposed rule language at § 766.104(a)(1) does not seem to "clarify" that the list is inexhaustive. Indeed, the rule on its face seems to suggest that the list is exhaustive. More explicit language is needed in the rule to clarify that the list is not exhaustive.

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

I. Loan Funding

It is not appropriate for the Agency to give higher funding priority to *incomplete* loan applications as is contemplated in proposed § 764.55(a). The Agency should apply the rule set out in proposed § 764.53(a) – loans will be considered in the order received, based on the date the application was determined to be complete – regardless of whether there is a shortage of loan funds.

J. "Operating Plan" and "Farm Operating Plan" as Apparent Substitutes for Farm and Home Plan

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

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

This is but another instance where the "streamlining" of the rule as proposed would come at a high cost in lack of clarity and completeness. Provisions currently contained in 7 C.F.R. §§ 1924.55 and 1924.56 serve to address many of the disputes that have arisen over the years between borrowers and the Agency when developing a Farm and Home Plan for direct loan making and loan servicing. For example, current regulations provide that: FSA should work in close cooperation with the borrower in developing a Farm and Home plan; the Farm and Home Plan should be based on accurate and verifiable information; if the plan proposed by the borrower is changed by mutual agreement between FSA and the borrower, both parties should sign to indicate their agreement with the revisions; and, during the pendency of any appeal related to plan development, FSA must approve release of income from normal income security to meet essential farm operating and family living expenses.

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

with the final decision made by the borrower. At a minimum, the existing borrower protections must be retained.

L. Timeframes

In every place where it is not already clear, the rule language should expressly state that timeframes run from the time a notice is received by the borrower or applicant. In several places this is made clear, but in many more the vague "from notice" language is used. Given the short time frames and the critical work that often needs to be done in the time a borrower has, it is appropriate to have the countdowns not begin until the borrower has received the notice. Moreover, no other alternative is reasonable. The applicant or borrower has no control over whether a notice is will be sent out promptly.

For example, proposed § 766.113(b) states that the borrower has 90 days "from the date of Agency notification" to pay the buyout amount. The statute mandates that the borrower has until 90 days from *receipt* of the buyout notification from the Agency to pay the buyout amount. 7 U.S.C. § 2001(c)(6)(C).

M. Leased Land

The use of leased land is a critical component of family farm agriculture. This can be especially true for beginning farmers and farmers in areas where there is a limited sales market. Indeed, proposed § 764.151(b) expressly contemplates the use of FO loan funds on leased land in certain circumstances. Given the Agency's recognition that it is appropriate to make FO funds available to tenant-operators in some cases, it is unreasonable for the Agency to remove the provision at current § 1965.13(e)(4)(iii) that allows a borrower to use up to $10,000 from the sale of real estate security to develop land not owned by the borrower. The prefatory comments state that this change was made because it is "not prudent" to release security proceeds to develop land on which the Agency does not have a lien. But proposed § 764.103(b)(1)(ii) explicitly authorizes the Agency to accept security interests in "property not owed by the applicant," including leases that provide a mortgageable value. Given this option, it is unreasonable for the Agency to completely eliminate tenant-operators' ability to use security proceeds to improve their leased land.

N. Appraisals

In prefatory comments to the final rule issued on February 4, 2004, the Agency had the temerity to state that its current appraisal requirements "have not caused any problems." 69 Fed. Reg. 5261. It is fortunate that the comments were written, since one cannot imagine such a statement being made with a straight face. As the Agency *must* know, over the past several years its appraisal requirements and policies have been the focal point of lawsuits across the country and scores of administrative appeals. They prompted a statement from the conference committee on the 2002 Farm Bill that the committee "expect" the Secretary to review USDA appeal procedures regarding SAA appraisals and "establish policies that will result in the use of the most accurate appraisal of assets." The committee specifically mentioned the possibility of using independent appraisals provided on appeal by a borrower, if the appraisal is consistent with federal standards. The Small Farms Commission chimed in as well, stating in Policy Recommendation 1.21 of its 1998 "Time to Act" report that the FSA Administrator should issue a national policy directive that "all FSA appraised values for land, equipment, and chattel shall always be based on current agricultural use, not other potential

development; that farmers shall be provided with copies of appraisals and supporting documents within 5 working days of completion of the appraisal; that appraisal reports shall be appealable decisions; and the proper method of contesting an appraisal shall be the existing formal USDA appeal process."

One key appraisal issue touched on earlier in these comments is the Agency's increasing use of "licensed FSA staff appraisers" who are full-time Agency employees. The USPAP Ethics Rule states that "[a]n appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests." Use of appraisals by persons who are presumably solely dependent upon FSA for their income, jeopardizes the "impartiality, objectivity, and independence" of the appraisers. While some bias on the part of appraisers on behalf of the parties who have retained them is a perennial feature of disputes about the value of property, it is heightened to an unacceptable level when the appraiser is not an independent entity, but a dependent government employee. It is not possible for an appraiser to perform an appraisal with independence, even by USPAP standards, when the appraiser is the full-time agent and employee of the client. It is almost impossible for an employee of an agency to claim impartiality in relationship to that agency. The USPAP Ethics Rule places the burden upon the appraiser to demonstrate this "impartiality, objectivity, and independence." The Agency should immediately begin reversing its move toward in-house appraisers.

Agency appraisals have been most problematic in the area of Shared Appreciation Agreements. Neither the SAA agreement nor the governing statute nor regulations provides a definition of "appreciation" as the term is used in 7 U.S.C. § 2001. This would raise no problems if the Agency simply applied a fair reading to the term. In the absence of any language suggesting otherwise, borrowers who entered SAAs were entitled to conclude that the term "appreciation" in the SAA would have its everyday meaning, the increased value of the property over time. In order to ensure that only the change in value over time is being measured, true appreciation in value can only be determined if the same process and the same variables are considered when value was determined at the inception of the agreement. To do otherwise, the Agency would compare apples to oranges. Current FSA regulations require that "the value of the real estate security at the time of maturity of the [SAA] shall be the appraised value of the security at the highest and best use . . . ." 7 C.F.R. § 1951.914(c)(1). This approach is a change from how SAA appraisals were conducted at the inception of the agreements. That the changed regulations have been applied not just to new SAAs, but to already-existing SAAs is an unlawful alteration of a key term of the agreements.

In *Hall v. Glickma*n, a Mississippi federal district court reviewed SAA recapture in the context of appraisals of property containing timber. The court held that the initial agency appraisal approach must be consistent with the timber valuation reported in the final appraisal, otherwise FSA is not comparing "apples to apples." No. 3:99-CV-171BN, slip op. at 25 (D. Miss. July 19, 2000). The Hall court found that FSA's "SAA calculation method" failed to properly determine appreciation. *Id.*

In *Evans v. Veneman*, a Colorado federal district court held that examining the agricultural value of a secured property when determining a SAA recapture amount is the proper appraisal approach. No. 99-M-2331 at 9 (D. Colo. August 29, 2001)(unpublished). The Evans court stated that the testimony before it was "consistent with the FSA's March 1989 appraisal which reflected the agricultural

value of the [farmers'] property. Moreover, consideration of the farm's [rural residential] development potential is inconsistent with the purpose of the shared appreciation agreement[,] which is to keep farmers on the farm. 7 U.S.C. §2001 (a)(2)." *Id.* This reasoning is correct, and should be accepted by the Agency.

USPAP does not demand a highest and best use appraisal approach. USPAP allows appraisal clients, such as the Agency, to identify "the intended use of the appraiser's opinions and conclusions" and to "identify the characteristics of the property that are relevant to the purpose and intended use of the appraisal . . . ." USPAP Standard 1-2 (b) & (e) (2003). The Agency is therefore free under USPAP to identify any "relevant" characteristics in appraisals conducted for loan servicing purposes, including determination of appreciation under SAAs. Given the agency's statutory mandate to implement loan servicing programs in such a way that keep borrowers farming "to the maximum extent possible," 7 U.S.C. § 2001(a), it is unreasonable for the agency not to advise its appraisers that the value of the security property when used for production agriculture is "relevant to the purpose and intended use of the appraisal." Note that in requiring the Agency to use the loan servicing tools to the "maximum extent possible," rather than, for example, "as practicable," the statute sets a very high standard of service to farm borrowers for the Agency.

In addition, USPAP requires only that the "scope of work necessary to complete" the appraisal be identified to ensure that the "resulting opinions and conclusions" are "credible in the context of the intended use of the appraisal." USPAP Standard 1-2 (f) & (g) (2003). The context here is a federal program designed to minimize government losses while keeping farmers and ranchers on the land. 7 U.S.C. § 2001(a). Therefore under USPAP, the Agency may request a final SAA appraisal report focused on agricultural use. An agricultural use appraisal approach allows the Agency to both minimize government losses and ensure that farmers stay on the land to the maximum extent possible.

Furthermore, USPAP's Supplemental Rule, allows "government agencies, government sponsored enterprises, or other entities that establish public policy" to issue "supplemental standards applicable to assignments prepared for specific purposes or property types...." USPAP Supplemental Rule (2003). (Additionally, comments to this rule state "the purpose of the SUPPLEMENTAL STANDARDS RULE is to provide a reasonable means to augment USPAP with requirements that add to the requirements set forth by USPAP.") The Supplemental Rule also provides FSA with the ability to request an SAA appraisal approach based on agricultural value that takes into account FSA's duty to minimize government losses and ensure farmers stay in operation to the maximum extent possible.

Because appraisals that determine value at the highest and best use do not compare "apples and apples," and because they find inflated real estate values, proposed § 761.7 fails to meet the statutory mandate to utilize loan servicing programs "to the maximum extent possible" to facilitate keeping borrowers on the farm or ranch. 7 U.S.C. § 2001(a). These are not borrowers out to enrich themselves by selling land for development soon after receiving a government write-down. These are farmers committed to staying on the land, and the statute requires that programs be designed to facilitate that commitment to the maximum extent possible. The proposed regulation falls short of that requirement, by failing to take advantages of specifications for appraisal practices that are possible within USPAP.

V. Errors, Inconsistencies, and Ambiguities in the Proposed Rule

A. Guaranteed Loan Appeals

The Agency should take the opportunity presented by this rulemaking to correct a substantive error in the guaranteed loan regulations. Current § 762.104(a) incorrectly states that a guaranteed loan applicant or borrower and lender must jointly execute a request for review of an adverse agency decision. Although accurate when that rule was first issued in February 1999, this subsection has been wrong since June 23, 1999, when the final rules of procedure for the National Appeals Division were issued. 64 Fed. Reg. 33,367. The requirement that a borrower and lender jointly request review was expressly disavowed in the prefatory remarks to the final NAD rule: "USDA is striking the requirement in the definition of 'participant' in Sec. 11.1 of the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers." 64 Fed. Reg. 33,370. Although frustrated that § 762.104 has not been corrected in the almost five years since the policy changed, NFFC and IAC are confident that the Agency will finally bring its program regulations in line with the NAD rule at this time.

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

B. Errors in Recodification of Current EM Loan Regulations

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

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

As was true of the prior EM loan proposed rule, the eligibility requirement in proposed § 764.352(a)(7) regarding prior debt forgiveness misstates the date on which the debt forgiveness trigger sets in. The proposed rule states that an applicant must not have had more than one occasion of debt forgiveness <u>before</u> April 4, 1996, nor at any time <u>on or after</u> April 4, 1996. The statute,

however, provides that an applicant may have had one occasion of debt forgiveness on or before April 4, 1996, but none after April 4, 1996. 7 U.S.C. § 2008h(b)(2)(B).

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

C. Ambiguity in Recodification of Disaster Set-Aside Regulations

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

D. Proposed Language for Loan Servicing Notices

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

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

E. Definition Inconsistencies and Other Problems

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

Because of the consolidation of current rules, proposed § 761.2(b) includes definitions for "essential family household expenses" (used exclusively for EM loans), "essential family living and farm operating expenses," and "family living expenses." Due to the plethora of related definitions, the proposed rule language is unclear in a number of places. Most importantly, the list of authorized loan uses for the Operating Loan program at proposed § 764.251(c) includes "family subsistence," a term that is not defined at all.

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

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

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

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

F. Phantom Loan Eligibility Requirement

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

G. Statutory FO Eligibility Requirements and Transition Rule Not Clear

Proposed § 764.152(e) and (f) set out the relevant eligibility requirements in an unnecessarily complicated structure. For (e), the language of subparagraph (1) “has never received a direct FO loan” is unnecessary because everyone who qualifies under that language would also satisfy subparagraph (2) “must not have had direct FO loans outstanding for more than a total of 10 years.” That is, if the applicant has never received a direct FO loan, then by necessity he or she cannot have had direct FO loans for more than 10 years. Subparagraph (1) is not only redundant; it is also confusing and should be eliminated.

Subsection (f) is a confusing restatement of the statutory transition rule at 7 U.S.C. § 1922(b)(3). This transition rule is not an independent eligibility requirement for direct FO loans. Instead, it provides an exception to the general 10-year limit (restated in subsection (e)) to ease the impact of the limit for borrowers who already had FO loans when the limit was enacted. The limit and transition rule are as follows: The general rule is a lifetime maximum of 10 years of direct FO loans. (7 U.S.C. § 1922(b)(1)(C)). Exception #1: Borrowers who had five or more years of outstanding direct FO loans as of April 4, 1996, including an outstanding loan on that date, were eligible for new direct FO loans through April 4, 2001. (7 U.S.C. § 1922(b)(3)(A), (C)). Exception #2: Borrowers who had less than five years of outstanding direct FO loans as of April 4, 1996, including an

outstanding loan on that date, are eligible for new direct FO loans through April 4, 2006. (7 U.S.C. §1922(b)(3)(B), (C)).

The statutory eligibility requirement can be clearly and completely set out by stating:

> The applicant:
>
> (e) And anyone who will sign the promissory note must not have had direct FO loans outstanding for more than a total of 10 years before the date that the new direct FO loan is closed. However, if the applicant had direct FO loans outstanding for less than five years on April 4, 1996, the applicant will be eligible for new direct FO loans through April 4, 2006.

H. Notices of Loan Servicing Programs

The information in the paragraph under the heading "Property Restrictions and Easements" in the homestead protection section of the proposed borrower notices is not included in proposed Part 766, subpart D. It should be added there.

The item in the proposed borrower notices, "How to Get Copies of Agency Handbooks and Forms," must also state that the borrower may obtain copies of Agency *regulations* upon request. 7 U.S.C. § 1981d(b)(5).

Under the heading "Negotiation of the Appraisal" in the three appendices to proposed Part 766, subpart C, is the statement "Negotiated appraisals are not appealable...." There is no statutory basis for this statement and it should be removed. If it is not removed, the notice must inform the borrower that the Agency's determination that negotiated appraisals are not appealable is itself appealable to the NAD Director. 7 U.S.C. § 6992(d).

Under the same heading is the statement: "If you request negotiation of the appraisal prior to requesting an appeal, the 30-day time period for requesting an appeal will be temporarily suspended. If negotiation of the appraisal fails to resolve your dispute with the Agency, only the balance of the 30-day time frame will remain to request an appeal on issues other than the negotiated appraisal." There is no statutory or regulatory basis for this statement and it should be removed.

I. Miscellaneouss

Prefatory comments state that the proposed rule will "clarify" how a borrower may appeal NRCS technical determinations related to a conservation contract application "by stating that such appeals will be handled in accordance with 7 CFR part 780." But proposed § 766.110(l) instead states that the "appeal process at 7 CFR part 614 must be followed." Which is correct? If Part 614 is the correct provision, which subpart applies?

The Agency may not discriminate on the basis of religion in the administration of the FLP programs. In the list in subparagraph (3) of the definition of "essential family living and farm operating expenses" in proposed § 761.2(b), the word "church" should be changed to "religious" to avoid even a perceived bias in favor of Christianity over other religions.

It is impossible to determine from context what “such loans” in subparagraph (5)(ii) in the definition of “established farmer” in proposed § 761.2(b) refers to. The sentence should be reworded to clarify what loans are being referred to.

It is not appropriate for the definition of “restructuring” in proposed § 761.2(b) to state simply “see primary loan servicing programs” because the term is also used extensively in the guaranteed loan regulations at Part 762, to which are not governed by the primary loan servicing regulations.

The definition of “working capital” in proposed § 761.2(b) should be amended to include the words “paying for,” or similar language, so that it reads “*Working capital* is cash available to conduct normal daily farming operations including but not limited to paying for feed, seed, fertilizer, pesticides, farm supplies, cooperative stock, and cash rent.”

Wherever a section of CONACT is cited, such as in proposed § 761.209, the corresponding U.S. Code section should be used instead, or in addition. Because USC citations are much more straightforward and easier to find, this change will make the references much more meaningful to the public.

It is confusing for the loan approval process provisions (proposed Part 764, subpart I, § 764.401) to be located apart from the loan application process provisions (proposed Part 764, subpart B). The entire loan approval process must be complete, and notice provided to the applicant, within the 60-day period referenced in proposed § 764.54(a). See 7 U.S.C. § 1983a(a)(1).

The phrase “economically feasible” in proposed § 764.108(b) is ambiguous and should be replaced. That a borrower is able to afford insurance does not make it reasonable to do so. Clearer language can be found in current § 1941.88(c), which states that chattel security need only be covered by hazard insurance if such insurance is readily available and the cost of the insurance does not exceed its benefit.

In proposed § 764.252(b), “CONACT” should be “the Act.” Even better, this provision could simply refer to “debt forgiveness on all or a portion of any direct or guaranteed loan made under the authority of the Act,” and omit the restatement of the definition of “debt forgiveness.” This section should also include language, found in current § 1910.5(c), that a borrower may revive loan eligibility by repaying a prior debt forgiveness and removing the loss to the Secretary. This “cure” provision should also be explicit in the new rule.

Proposed § 764.252.(c)(3) erroneously states that the one-time debt forgiveness exception for disasters is only available if the county where the applicant operates was included in the designation. As the Agency recognized in the final loan eligibility rule issued February 4, 2004, disaster areas include both primary and contiguous counties. 69 Fed. Reg. 5260. The rule must be changed to include contiguous counties.

The introductory paragraph in proposed § 766.104(a)(1) is unnecessarily convoluted, and therefore confusing, combining both “due to circumstances beyond the borrower’s control” and “as a result of one of the following circumstances....” The same statement can be made more succinctly, e.g.: “The borrower is unable to make scheduled payments because of reduced repayment ability due to circumstances beyond the borrower’s control, namely: (i) Illness, injury, or death of a borrower....”

The same problem is present in each of the borrower notices in the three appendices to proposed Part 766, subpart C, in subparagraph (a) under eligibility for primary loan servicing.

There is no context for the two subparagraphs under proposed § 766.153(b)(1). Both subparagraphs address entity borrowers, but there is no introductory test setting up how they apply, how they relate to the main paragraph in (b)(1), or how they relate to each other.

The word "employees" in subparagraph (5)(iii) in the definition of "established farmer" in proposed § 761.2(b) should be changed to "employs."

Subparagraph (2) under the definition of "normal production yield" in proposed § 761.2(b) is confusingly worded and doesn't parallel the other two items in the list. It currently reads: "*Normal production yield* as used in 7 CFR 764 for EM loans is: ....(2) The applicant's own production records or the records of production on which FSA farm program payments are made...." The construction "yield is ... records" is flawed. Subparagraph (2) should begin: "The yield derived from the applicant's own production records...." Also, the current definition at 7 C.F.R. § 764.2 clearly indicates that the FSA farm program payment records will only be used to determine normal production yield if the applicant's own records are not available. That is, it sets up a clear priority between the two different types of records. Proposed subparagraph (2) does not indicate any priority.

Thank you for your consideration of these comments.

Sincerely,

/s/

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