

Farmers' Guide to Disaster Assistance

Volume 5: Disaster Set-Aside Program

September 2019



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September 2019

Written and edited by Stephen Carpenter and Lindsay Kuehn

Copyedited by Wendy Reid

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Farmers' Legal Action Group, Inc.

6 West Fifth Street, Suite 650

St. Paul, Minnesota, 55102-1404



www.flaginc.org

lawyers@flaginc.org

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Farm Service Agency (FSA) Disaster Set-Aside

I. Introduction

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

A set-aside may be especially helpful to some farmers. For example, set-aside of an annual installment payment on an FSA loan may avoid a delinquency that would otherwise have made the farmer ineligible for a new FSA Operating Loan (OL).² If the farmer would still not be eligible for a new FSA loan or does not wish to take on more debt, a set-aside could allow the farmer to avoid delinquency or free up income that otherwise would have gone to pay existing direct FSA loans.

Rules for the Disaster Set-Aside Program come from several places. First, federal regulations set the policy.³ Second, FSA issues what it calls Handbooks that add details to the policy and describe how it is implemented.⁴

II. Loan Eligibility for Set-Aside

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

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

In general, annual installment payments on all types of FSA farm program loans may be set aside.⁵ These include FSA Farm Ownership (FO) loans, Operating (OL) loans, Soil and Water (SW) loans, Conservation Loans (CL), Emergency (EM) Loans, and others.⁶ FSA Youth Loans (YL) are not eligible for set-aside.⁷ Payments on FSA nonprogram (NP) loans may sometimes be set aside if the borrower also has farm program loans.⁸

The loan must have been outstanding at the time the disaster occurred in order to qualify for a set-aside.⁹

¹ 7 C.F.R. § 761.2, “Disaster Set-Aside”; 7 C.F.R. pt. 766, subpt. B (2019).

² Individuals who are delinquent on a federal debt are generally not eligible for new non-disaster loans or loan guarantees from FSA. See 7 C.F.R. § 764.101(f) (2019).

³ 7 C.F.R. § 761.2, “Disaster Set-Aside”; 7 C.F.R. pt. 766, subpt. B (2019).

⁴ The FSA handbook that governs the Disaster Set-Aside Program is called Direct Loan Servicing—Special and Inventory Property Management, 5-FLP (June 4, 2019). The most recent version was published on June 4, 2019. A downloadable copy of the handbook can be found here: <https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk>.

⁵ 7 C.F.R. § 766.51(a) (2019); Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019).

⁶ Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019). Other FSA loans eligible for set-aside include Economic Emergency (EE) loans, Softwood Timber (ST) loans, Recreation (RL) loans, and Rural Housing loans for farm service buildings (RHF).

⁷ Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019).

⁸ 7 C.F.R. § 766.51(c) (2019); Direct Loan Servicing Handbook, page 2-1, para. 41.A(d) (June 4, 2019).

⁹ 7 C.F.R. § 766.52(b)(1) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B (June 4, 2019).

B. Limitations on Loans Eligible for Set-Aside

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

1. No Set-Aside if Fewer Than Two Years Remaining on Loan

FSA will only set aside a loan installment if the term remaining on the loan extends at least two years from the due date of the installment being set aside.¹⁰ This means that one-year and two-year loans, and longer-term loans that are fewer than two years from the end of the repayment period, are not eligible for set-aside.

2. No Set-Aside if Loan Was Already Accelerated

FSA farm program loans that have been accelerated since the time of the disaster are not eligible for set-aside.¹¹

3. No Set-Aside if Loan Restructured Since Disaster

In order to be eligible for a set-aside, the farmer's debt must not have been restructured under the FSA loan servicing programs after the disaster occurred.¹² The loan may have been restructured before the disaster and still be eligible for a set-aside.

4. No Set-Aside of Deferred Loans

In order to be eligible for a set-aside, the farmer's debt must not be in deferral as a part of FSA loan servicing.¹³ Deferrals postpone payment of interest or principal or both.¹⁴ Payments may be deferred in whole or in part.

5. No Set-Aside of Costs Paid by the Government

Set-aside may not be used for costs, such as property taxes, that are the borrower's responsibility but that may have been paid by FSA in order to protect its interest in its collateral.¹⁵

6. No Set-Aside of Debt Settlement Adjustment Payments

If the farmer is paying FSA under a debt settlement adjustment agreement, the payments are not eligible for a set-aside.¹⁶

¹⁰ 7 C.F.R. § 766.52(b)(5) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B (June 4, 2019).

¹¹ 7 C.F.R. § 766.52(b)(4) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B (June 4, 2019).

¹² 7 C.F.R. § 766.52(b)(4) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B (June 4, 2019). This restriction applies to loan servicing under 7 C.F.R. pt. 766 (2019).

¹³ Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019).

¹⁴ For deferrals, see Direct Loan Servicing Handbook, exhibit 2, page 10, "Deferral," pages 4-51 to 4-53, paras. 159 to 161 (June 4, 2019).

¹⁵ 7 C.F.R. §§ 761.2, "Recoverable cost," 766.53(c) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F (June 4, 2019).

¹⁶ Direct Loan Servicing Handbook, page 2-6, para. 45.E (June 4, 2019). Debt settlement regulations for FSA farm loan programs are found at 7 C.F.R. pt. 1956, subpt. B (2019). See 7 C.F.R. § 766.102(c) (2019).

C. If Loan Installment Has Previously Been Set Aside

In general, only one unpaid installment for each FSA loan may be set aside.¹⁷

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

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

Under the regulations, the general rule is that if a loan installment is still set aside from a previous disaster, the loan is not eligible for another set-aside.¹⁸ Other FSA loans held by the farmer, however, may still be eligible for set-aside.

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

Once a set-aside installment has been paid in full by the farmer, the set-aside will be canceled by FSA, and the loan may be considered for a set-aside in the future.¹⁹

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

If an installment is set aside and the loan is then restructured through FSA primary loan servicing, the set-aside will be canceled.²⁰ The farmer will then be able to request set-aside of an installment payment on the restructured loan.

2. Two Set-Asides Active for Same Loan at Same Time Not Available

In years past, FSA sometimes allowed farmers who had an outstanding installment set-aside from a previous disaster to receive a second set-aside on the same loan.²¹ At present, however, second set-asides are not available.²²

¹⁷ 7 C.F.R. §§ 766.52(a)(3), (b)(6) (2019); Direct Loan Servicing Handbook, pages 2-5 and 2-6, para. 45.A(3) (June 4, 2019).

¹⁸ 7 C.F.R. § 766.52(a)(3), (b)(6) (2019); Direct Loan Servicing Handbook, page 2-5, par. 45.A(3), and page 2-6, para. 45.B(6), 45.C (June 4, 2019).

¹⁹ 7 C.F.R. § 766.60(c) (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

²⁰ 7 C.F.R. § 766.60(a) (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019). For the applicable FSA loan restructuring regulations, see 7 C.F.R. pt. 766, subpt. C (2019).

²¹ See, for example, 7 C.F.R. § 1951.954(b)(2) (1998); 7 C.F.R. § 1951.954(b)(2) (1999); 7 C.F.R. § 1951.954(b)(2)(ii) (2000); and 7 C.F.R. § 1951.954(a)(1)(ii), (iii) (2001). In each instance, FSA issued an interim rule making a specific, limited change to the general regulation that prohibits more than one set-aside on a single FSA loan. 62 Fed. Reg. 41,251 (1997); 64 Fed. Reg. 392, 394 (1999); 65 Fed. Reg. 31,248 (2000).

²² Notice FLP-211, "Reminder of Elimination of Second Disaster Set-Aside (DSA) Authority," 1.B (June 27, 2001) (expired). In cases where multiple set-asides—granted under prior regulations—are still outstanding on an FSA loan, any payments received for the set-asides will first be applied to the oldest set-aside installment until it is paid in full, and then applied to the more recent set-aside. Direct Loan Servicing Handbook, page 2-11, para. 49.B (June 4, 2019).

III. Farmer Eligibility for Set-Aside

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

A. Be a Direct FSA Borrower

To be eligible for a set-aside, the farmer must have been a direct FSA farm loan borrower at the time the disaster occurred.²³ This means the farmer's FSA loan must have already been made and not yet paid off at the time of the disaster.²⁴

B. Operate in a Disaster Area

In order to be eligible for a set-aside, the farmer must operate a farm or ranch in a disaster area.²⁵ The farm or ranch must be located in a county officially designated as a disaster area or a county that borders an officially designated disaster county. The farmer must have been operating the farm or ranch at the time of the disaster.²⁶

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

At the time the application for a set-aside is completed, the farmer must be current or less than ninety days past due on all FSA farm program loans.²⁷

D. Not More Than 165 Days Past Due When Deferral Finalized

The farmer must not become 165 days past due on payments before the set-aside is finalized by FSA.²⁸

E. Act in Good Faith With FSA

Only farmers who have acted in good faith in their dealings with FSA are eligible for a set-aside.²⁹

1. Defining Good Faith

FSA loan program regulations include a specific definition of good faith. In general, according to FSA, a farmer has acted in good faith if he or she has provided "current, complete, and truthful" information when applying for FSA assistance.³⁰ Good faith

²³ 7 C.F.R. § 766.51(a) (2019); Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019).

²⁴ 7 C.F.R. § 766.52(b)(1) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B(1) (June 4, 2019).

²⁵ 7 C.F.R. § 766.52(a)(1) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(1) (June 4, 2019).

²⁶ Under the regulations, farmers who rent out their land base for cash are not considered to be operating the farm. 7 C.F.R. § 766.52(a)(1) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(1), Exhibit 2, page 21, "Operator" (June 4, 2019).

²⁷ 7 C.F.R. § 766.52(b)(3) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B (June 4, 2019).

²⁸ 7 C.F.R. § 766.52(a)(8) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(8) (June 4, 2019). For FSA purposes, that means that form FSA-2501 must be executed.

²⁹ 7 C.F.R. § 766.52(a)(2) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(2) (June 4, 2019).

³⁰ 7 C.F.R. § 761.2, "Good faith" (2019); Direct Loan Servicing Handbook, Exhibit 2, page 14, "Good Faith" (June 4, 2019).

also requires that the farmer adhere to all written agreements with FSA, including, for example, carrying out agreements that control the farmer's use of security property and the proceeds from the sale of security property. If the farmer is unable to carry out the agreements for reasons beyond the farmer's control, FSA will not consider this a failure to act in good faith.

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

If FSA denies a loan servicing request, including a set-aside application, because it claims that the farmer acted in bad faith by committing fraud, waste, or conversion of security property, FSA must support those allegations with a written legal opinion from USDA's Office of General Counsel (OGC).³¹ For example, if FSA believes that the farmer sold security property in violation of the security agreement, this may mean that FSA is actually accusing the farmer of an act of conversion. If FSA believes that the farmer converted security and wants to use that as a basis for claiming that the farmer has failed to act in good faith—and is therefore ineligible for a set-aside—FSA must back up the allegation of conversion with a written legal opinion from OGC.

F. Be Unable to Pay Installment Due to Circumstances Beyond Farmer's Control

FSA rules say that the inability of the farm to make payments must be due to circumstances beyond the farmer's control.³²

G. Resolve Nonmonetary Defaults

In order to be eligible for a set-aside, the farmer must resolve any outstanding nonmonetary defaults with FSA.³³ In general, actions that will be considered loan defaults are set out in the FSA loan documents that the farmer signs. A number of events can trigger a nonmonetary default. According to FSA rules, these events could include not acting in good faith, engaging in an act of fraud or waste, or otherwise failing to meet loan terms that do not involve payments on the loan.³⁴ Other things that might trigger a nonmonetary default could be no longer farming, failing to properly maintain chattel and real estate security, or not properly accounting for the sale of security property.

³¹ 7 C.F.R. § 761.2, "Good faith" (2019); Direct Loan Servicing Handbook, Exhibit 2, page 14, "Good Faith" (June 4, 2019).

³² 7 C.F.R. § 766.52(a)(2) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(2) (June 4, 2019).

³³ 7 C.F.R. § 766.52(a)(6) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(6) (June 4, 2019).

³⁴ 7 C.F.R. § 761.2, "Default" (2019); Direct Loan Servicing Handbook, Exhibit 2, page 20, "Nonmonetary Default" (June 4, 2019).

H. No Disqualifying Federal Crop Insurance Violation

A farmer will not be eligible for a set-aside if he or she is disqualified due to a violation of federal crop insurance program requirements.³⁵

I. Be Unable to Pay Expenses Due to Disaster

A farmer will only be eligible for a set-aside if, as a direct result of the disaster, the farmer does not have enough income to pay his or her expenses.³⁶ These expenses include: (1) family living and operating expenses; (2) debts to other creditors; and (3) debts to FSA.³⁷

When determining whether a farmer has enough income to pay expenses, FSA will consider the following three factors.

1. Production, Income, and Expense Records

The determination that the farmer does not have sufficient income to pay his or her expenses is based on the farmer's actual production, income, and expense records from the disaster year, as well as any other records FSA may require.³⁸

2. Disaster Compensation

Any compensation the farmer receives for disaster losses is included when calculating whether the farmer has enough income to pay expenses.³⁹ This may include insurance proceeds, condemnation awards, gifts, and any other compensation for the loss.

3. Increased Expenses Due to Disaster

When determining whether the farmer has enough income to pay his or her expenses, FSA considers any increased expenses incurred because of the disaster.⁴⁰ For example, due to a disaster a farmer may face the expense of restocking a foundation herd, rebuilding a farm structure, or reestablishing a crop. Or a farmer may face decreased production in the following year due to damage to land, water resources, or livestock herds. These disaster-related expenses and production losses should be considered by FSA when determining the farmer's need for a set-aside.

³⁵ 7 C.F.R. § 766.52(a)(7) (2019). Direct Loan Servicing Handbook, page 2-5, para. 45.A(7) (June 4, 2019). The disqualification standards for a federal crop insurance violation are set out at 7 C.F.R. § 718.11 (2019).

³⁶ 7 C.F.R. § 766.52(a)(4) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(4) (June 4, 2019).

³⁷ 7 C.F.R. § 766.52(a)(4) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(4) (June 4, 2019).

³⁸ 7 C.F.R. § 766.52(a)(4)(i), (ii) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(4) (June 4, 2019).

³⁹ 7 C.F.R. § 766.52(a)(4)(iii) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(4) (June 4, 2019).

⁴⁰ 7 C.F.R. § 766.52(a)(4)(iv) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(4) (June 4, 2019).

J. Show Feasible Plan for Next Production Cycle

A farmer will only be eligible for a set-aside if, when taking the set-aside into account, he or she can develop a feasible farm operating plan for the next production cycle.⁴¹

1. Expenses to be Included

The feasible plan for the next production cycle must show that the farmer will at least be able to pay all essential family living expenses, all operating expenses and taxes due during the year, and meet scheduled payments on all debts.⁴²

2. Provide Documentation to Support Plan

The farmer must provide any documentation needed to support the farm operating plan.⁴³

K. Remain Eligible After FSA Approval

If FSA approves the set-aside, that approval is contingent on the farmer remaining eligible for the set-aside until the FSA set-aside document is signed.⁴⁴ This means that the farmer's eligibility for a set-aside could be jeopardized by any further delinquencies, nonmonetary defaults, bad faith actions, or the like, during the period before the set-aside agreement is signed.

L. Be Current on FSA Loan Payments After Set-Aside

After the scheduled installment is set aside, all of the farmer's FSA farm program and nonprogram loans must be current.⁴⁵

IV. Set-Aside Application Process and Timelines

The Disaster Set-Aside Program regulations set out strict deadlines for the application process, including deadlines for notification of the availability of set-aside, notification that a set-aside application has been approved, and deadlines for when the farmer must sign the set-aside agreement.

A. Notice of Set-Aside Availability

When a disaster is declared, FSA must notify borrowers of the availability of set-aside if the farmer was an FSA borrower at the time of the disaster.⁴⁶ FSA is required to notify borrowers of the availability of a set-aside within fifteen calendar days of the first disaster declaration for the county for that year.⁴⁷

⁴¹ 7 C.F.R. § 766.52(a)(5) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(5) (June 4, 2019).

⁴² 7 C.F.R. § 766.52(a)(5) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(5) (June 4, 2019).

⁴³ 7 C.F.R. § 766.52(a)(5) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(5) (June 4, 2019).

⁴⁴ Direct Loan Servicing Handbook, page 2-5, para. 45.A (June 4, 2019).

⁴⁵ 7 C.F.R. § 766.52(b)(2) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B(2) (June 4, 2019).

⁴⁶ Direct Loan Servicing Handbook, page 2-2, para. 42.A-B (June 4, 2019).

⁴⁷ Direct Loan Servicing Handbook, page 2-2, para. 42.B (June 4, 2019).

In order to receive a notice, the farmer must have been actively operating a farm in a county that was declared a disaster, or in a county that borders a declared disaster county.

FSA is not required to notify borrowers whose loans have been accelerated, whose loans have been restructured since the time of the disaster, who have only FSA youth loans (YL) or only what FSA calls nonprogram (NP) loans,⁴⁸ or who are paying FSA under a debt settlement agreement.⁴⁹

B. Application Requirements

In order to apply for a set-aside, farmers must submit a written request for set-aside to FSA.⁵⁰ In addition, farmers must provide actual production records, income records, and expense records for the production cycle that included the disaster.⁵¹ FSA may request other information that FSA thinks it needs to decide if the farmer is eligible. This can include documentation to support the farm operating plan, and could mean, for example, three years of production, income, and expense records.⁵²

C. Application Window—Within Eight Months of Disaster Designation

In general, farmers must make a written request for a set-aside from FSA within eight months of the date the disaster was designated.⁵³ The set-aside request must be signed by all of the borrowers liable for the FSA debt.⁵⁴

D. Application Deadline—Ninety Days After Installment Due Date

The set-aside application requirements must be completed within ninety days after the due date of the installment payment to be set aside.⁵⁵

E. Set-Aside Eligibility Notification Deadline

Within thirty days after a complete set-aside application is submitted, FSA will determine if the farmer meets the requirements of the program.⁵⁶ Farmers will be notified by letter “as soon as possible” after FSA makes this eligibility determination.⁵⁷

⁴⁸ FSA farm program loans are different from nonprogram loans. Nonprogram loans have less generous terms than farm loan program loans. See 7 C.F.R. § 761.2, “Non-program loan” (2019).

⁴⁹ Direct Loan Servicing Handbook, page 2-2, para. 42.A (June 4, 2019).

⁵⁰ 7 C.F.R. § 766.54(a)(1) (2019); Direct Loan Servicing Handbook, page 2-3, para. 43.A (June 4, 2019).

⁵¹ 7 C.F.R. § 766.54(b) (2019); Direct Loan Servicing Handbook, page 2-3, para. 43.B (June 4, 2019).

⁵² Direct Loan Servicing Handbook, page 2-3, para. 43.B (June 4, 2019).

⁵³ 7 C.F.R. § 766.54(a)(1) (2019); Direct Loan Servicing Handbook, page 2-3, para. 43.A(1) (June 4, 2019). The disaster designation may be a presidential disaster declaration or a designation by the Secretary of Agriculture or FSA Administrator. Direct Loan Servicing Handbook, page 2-2, para. 42.A (June 4, 2019).

⁵⁴ 7 C.F.R. § 766.54(a)(2) (2019); Direct Loan Servicing Handbook, page 2-3, para. 43.A(2) (June 4, 2019).

⁵⁵ 7 C.F.R. §§ 766.52(b)(3); Direct Loan Servicing Handbook, page 2-6, para. 45.B(3), page 2-3, para. 43.A(3) (June 4, 2019).

⁵⁶ 7 C.F.R. § 766.55 (2019); Direct Loan Servicing Handbook, page 2-8, para. 46.A (June 4, 2019).

⁵⁷ Direct Loan Servicing Handbook, page 2-8, para. 46.A (June 4, 2019).

F. Set-Aside Acceptance Deadline—Forty-Five Days After Approval

Once the farmer has received notice that the loan has been approved for set-aside, the farmer has up to forty-five calendar days to sign the set-aside agreement.⁵⁸

The rule describing the acceptance deadline is confusing. The regulations say the farmer has forty-five days to accept after receiving the set-aside approval notification.⁵⁹ The FSA Handbook is slightly different. The Handbook states that the farmer has forty-five calendar days—from the date of FSA's approval letter—to accept the set-aside. The Handbook also adds that if the letter is sent by mail the farmer has forty-eight calendar days to accept.⁶⁰ In theory, according to FSA, this allows three calendar days for delivery.

Just to make sure the acceptance is timely, the farmer should assume the deadline is forty-five calendar days from the date on the FSA approval letter, although a case could be made that the deadline is forty-eight days from the date on the letter.

An exception to this forty-five-day limit may be requested, but the decision of whether to grant or deny the request is at the discretion of FSA, and it is not appealable.⁶¹

In all cases, the farmer must be less than 165 days past due when the set-aside agreement is signed.⁶²

V. Amount of the Set-Aside

Up to the full amount of one year's annual FSA loan installment can be set aside.⁶³ The amount that will actually be set aside will depend on what the farmer is able to pay FSA and what amount the farmer needs in order to cover expenses and debt payments to other creditors.

A. General Rule: Set-Aside Amount is What the Farmer Cannot Pay

The general rule for set-asides is that they are limited to the lesser of: (1) the first annual loan installment due after the disaster occurred; or (2) the amount of the annual

⁵⁸ 7 C.F.R. § 766.57 (2019); Direct Loan Servicing Handbook, page 2-8, para. 46.B (June 4, 2019).

⁵⁹ 7 C.F.R. § 766.57 (2019).

⁶⁰ Direct Loan Servicing Handbook, page 2-8, para. 46.B (June 4, 2019).

⁶¹ Direct Loan Servicing Handbook, page 1-6, para. 4.A, and page 2-8, para. 46.B (June 4, 2019). FSA may only grant such a request if the exception is consistent with the statute authorizing the program or other applicable law, and if FSA concludes that the strict application of the regulations would adversely affect the government's financial interest. 7 C.F.R. § 766.401 (2019). For more detailed information on what information should be included in an exception request, see Direct Loan Servicing Handbook, pages 1-6 and 1-7, para. 4.A-B (June 4, 2019).

⁶² 7 C.F.R. § 766.52(a)(8) (2019); Direct Loan Servicing Handbook, page 2-5, para. 45.A(8) (June 4, 2019). FSA has explained in the past that the 165-day timeframe is based upon the time allowed for filing a completed application for loan servicing. 68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments). Currently, those timeframes require that farmers apply within 90 days of their loan installment payment deadline, and then FSA has 30 days to approve the application, and finally the farmer has 45 days within which to sign the set-aside agreement (90+30+45=165 days).

⁶³ 7 C.F.R. § 766.53(a)(1) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F(1) (June 4, 2019).

installment payment the farmer is unable to pay due to the disaster.⁶⁴ A set-aside therefore cannot be more than the amount of a farmer's annual loan installment payment.

Under this general rule, farmers must pay any portion of the installment that they are able to pay.⁶⁵ For example, if a farmer owes FSA a loan installment of \$20,000 and, because of the disaster, the farmer could only pay \$5,000 on the installment, the farmer would only be eligible for a set-aside of \$15,000.

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

The set-aside program is intended to relieve the farmer from paying the first annual installment due after the disaster occurred.⁶⁶ In many cases, however, a disaster declaration is not issued right away, or farmers do not learn of the program until after the farmer has paid an installment following the disaster. Paying this first installment after a disaster often occurs at the expense of paying other creditors or covering essential family living and operating expenses.⁶⁷ The set-aside rules recognize that payment of an FSA loan installment does not necessarily mean that the farmer was not adversely affected by the disaster. As a result, if the first installment due on an FSA loan following the disaster has already been paid, the next annual installment may be set aside.⁶⁸ The amount set aside in such a case may not exceed the amount the farmer was unable to pay FSA because of the disaster.⁶⁹

C. No Balance May Remain Due on FSA Installment

Any part of the FSA installment not set aside must be paid by the farmer by the time the farmer signs the set-aside agreement.⁷⁰ The amount of the set-aside is therefore the unpaid balance remaining on the FSA installment at the time the farmer signs the set-aside agreement. This amount will include unpaid interest and any principal that would have been credited to the farmer's account if the installment had been paid on the due date.⁷¹

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

Several important terms apply to the set-aside program.

⁶⁴ 7 C.F.R. § 766.53(a)(2) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F(2) (June 4, 2019).

⁶⁵ 7 C.F.R. § 766.53(a)(2) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F(2) (June 4, 2019).

⁶⁶ 7 C.F.R. § 766.58(a) (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.E(a) (June 4, 2019).

⁶⁷ See 68 Fed. Reg. 55,299, 55,301-02 (2003) (prefatory comments).

⁶⁸ 7 C.F.R. §§ 766.53(a)(1), 766.58(b) (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.E(b) (June 4, 2019).

⁶⁹ 7 C.F.R. § 766.53(a)(2) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F(2) (June 4, 2019).

⁷⁰ 7 C.F.R. § 766.53(b) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F(2) (June 4, 2019).

⁷¹ This amount also takes into consideration any payments applied to principal and interest since the installment due date. 7 C.F.R. § 766.53(b) (2019); Direct Loan Servicing Handbook, page 2-7, para. 45.F (June 4, 2019).

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

The amount set aside, and interest accrued on any principal set aside, is moved to the end of the loan repayment period and will be due on or before the final due date of the loan.⁷²

B. Interest Accrues on Principal that is Set Aside

Interest continues to accrue on the principal part of the loan installment that is set aside.⁷³ Interest accrues on the set-aside loan principal at the same rate that is charged on the loan principal that is not set aside.⁷⁴ Interest appears not to accrue on the interest portion of the set-aside.

C. Payments Go to Interest First

Payments applied to the amount set aside are applied first to interest and then to principal.⁷⁵

D. Payments Go First to First Set-Aside, then Subsequent Set-Aside

If more than one installment was set aside on the loan, payments will be applied to the oldest set-aside installment—until it is paid in full—before they will be applied to the second set-aside installment.⁷⁶

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

Farmers who are current on their FSA debts at the time the set-aside agreement is signed are not required to put up any additional security for the loan.⁷⁷ All existing security agreements between the farmer and FSA will remain in effect.

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

Farmers who are not current on all FSA debts at the time the set-aside agreement is signed may be required to provide additional security to FSA.⁷⁸ This applies even to farmers who were current on their debts at the time they applied for a set-aside, but who missed a payment before the set-aside agreement was signed.

⁷² 7 C.F.R. § 766.59(b) (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.F(2) (June 4, 2019).

⁷³ 7 C.F.R. § 766.59(a)(1) (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.F(1) (June 4, 2019).

⁷⁴ For farm program loans with limited resource interest rates, any changes in the limited resource interest rates will affect the interest rate charged on the principal that is set aside. 7 C.F.R. § 766.59(a)(2) (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.F(2) (June 4, 2019).

⁷⁵ 7 C.F.R. § 766.59(c) (2019); Direct Loan Servicing Handbook, page 2-11, para. 49.A (June 4, 2019).

⁷⁶ Direct Loan Servicing Handbook, page 2-11, para. 49.B (June 4, 2019).

⁷⁷ 7 C.F.R. § 766.56 (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.H (June 4, 2019).

⁷⁸ 7 C.F.R. § 766.56 (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.H (June 4, 2019).

In general, a farmer who is not current on all FSA debts must provide the best lien obtainable on all assets.⁷⁹ There are several exceptions to this requirement. The exceptions also apply to FSA's other loan making and loan servicing programs.

1. Exception: Lien Would Prevent Farmer from Obtaining Credit

When doing so would prevent the farmer from obtaining credit from other sources, the farmer will not be required to provide the best lien obtainable on all assets as a condition of receiving a set-aside.⁸⁰

2. Exception: Property May Have Significant Environmental Problems

When the property could have significant environmental problems or costs, the farmer will not be required to provide a lien on the property as a condition of receiving a set-aside.⁸¹

3. Exception: FSA Cannot Obtain a Valid Lien

When FSA cannot obtain a valid lien, the farmer will not be required to provide the lien as a condition of receiving a set-aside.⁸²

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

As a condition of receiving a set-aside, the farmer will not be required to provide the best lien available on certain types of property. This property includes subsistence livestock, cash, retirement accounts, household goods, small tools and equipment, and similar items.⁸³ Also excluded from the lien requirement are personal vehicles necessary for family living and collateral accounts used for the farming operation or for family living.

5. Exception: Some Contract Production and Some Leases

If a contractor holds title to the farm enterprise, be it livestock or crops, a lien is not required on that enterprise.⁸⁴ In addition, if the farmer manages a farm enterprise under a share lease or share agreement, a lien is not required.

⁷⁹ 7 C.F.R. § 766.56 (2019); Direct Loan Servicing Handbook, page 2-9, para. 46.H (June 4, 2019). A best lien will be required from all obligors on the loan if the borrower is an entity. See 7 C.F.R. § 766.112(a) (2019); Direct Loan Servicing Handbook, page 6-1, para. 211.A (June 4, 2019).

⁸⁰ 7 C.F.R. § 766.112(b)(1) (2019); Direct Loan Servicing Handbook, page 6-2, para. 211.C(1) (June 4, 2019).

⁸¹ 7 C.F.R. § 766.112(b)(2) (2019); Direct Loan Servicing Handbook, page 6-2, para. 211.C(2) (June 4, 2019). This exception refers to environmental problems as described in 7 C.F.R. pt. 799 (2019).

⁸² 7 C.F.R. § 766.112(b)(3) (2019); Direct Loan Servicing Handbook, page 6-2, para. 211.C(3) (June 4, 2019).

⁸³ 7 C.F.R. § 766.112(b)(4) (2019); Direct Loan Servicing Handbook, page 6-2, para. 211.C(4) (June 4, 2019).

⁸⁴ 7 C.F.R. § 766.112(b)(5) (2019); Direct Loan Servicing Handbook, page 6-2, para. 211.C(5) (June 4, 2019).

VII. Interaction Between Set-Aside and Primary Loan Servicing

The set-aside program is not intended to replace, or circumvent, the regular FSA loan servicing programs.⁸⁵ Set-aside is designed to provide rapid relief for farmers facing a temporary inability to make their FSA loan payments. Loan servicing, on the other hand, is intended to help farmers who are having longer-term problems meeting their FSA loan payment obligations and who need more extensive assistance.⁸⁶ The two programs interact in the following ways.

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

As mentioned earlier, farmers are not eligible for a set-aside if they have already received loan servicing on the loan after the natural disaster occurred.⁸⁷

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

A set-aside application will not stop the running of the time period allowed to apply for loan servicing assistance from FSA. If the time to apply for loan servicing runs out while the farmer is waiting to hear about his or her set-aside request, and the set-aside does not make the farmer current, FSA will consider the farmer to have waived his or her loan servicing rights.⁸⁸ Under the current application and decision timelines for set-asides and loan servicing, this would likely only occur for a delinquency that existed before the disaster. Every farmer, however, who applies for a set-aside after a disaster-related delinquency should receive a decision on that application before the deadline to apply for loan servicing arrives.⁸⁹

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

Farmers may have to accept or reject a set-aside before receiving a decision on a loan servicing application.⁹⁰ This is because of the timelines for submitting set-aside

⁸⁵ 7 C.F.R. § 766.51(b) (2019); Direct Loan Servicing Handbook, page 2-1, para. 41.A(b), page 2-6, para. 45.C (June 4, 2019).

⁸⁶ For the regulations governing FSA loan servicing, see 7 C.F.R. pt. 766, subpt. C (2019).

⁸⁷ 7 C.F.R. § 766.52(b)(4) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B(4) (June 4, 2019).

⁸⁸ See, for example, 59 Fed. Reg. 53,079, 53,081 (1994) (prefatory comments).

⁸⁹ This is true because the farmer must apply for a set-aside within eight months following a natural disaster, but before he or she is 90 days past due. 7 C.F.R. §§ 766.52(b)(3), 766.54(a) (2019). FSA must then determine whether the farmer is eligible within 30 days. 7 C.F.R. § 766.55 (2019). This means that farmers should receive a decision on set-aside eligibility when they are less than 120 days past due. By contrast, under the loan servicing timeframe, FSA notifies borrowers of loan servicing options 15 days after they are 90 days past due, and then the borrower has 60 days to submit a completed application. In other words, the window for applying for loan servicing is 165 days following when the farmer is past due (15 days + 90 days + 60 days = 165 days). For the 15-day deadline, see Direct Loan Servicing Handbook, page 3-1, para. 66.A (June 4, 2019); for the 90-day and 60-day deadlines, see 7 C.F.R. § 766.103(b) (2019), and see Fed. Reg. 55,299, 55,300 (2003) (prefatory comments). Thus, a farmer who is denied set-aside should still have time to apply for loan servicing, provided the delinquency occurred after the disaster.

⁹⁰ Up until 2003, FSA rules allowed farmers to choose between loan servicing and set-aside programs. For example, FSA's comments accompanying the first set-aside rule issued in 1994 indicated that farmers would have their choice between the loan servicing and set-aside

applications and signing the set-aside agreements. Farmers must apply for set-aside before loans are ninety days past due.⁹¹ FSA is not required to send notice of primary loan servicing programs until fifteen days after a farmer is ninety days past due, and then farmers have sixty days to submit the loan servicing application after they receive it. Because of the lesser paperwork and shorter deadlines involved with set-asides, even if a farmer requested loan servicing materials before FSA was required to send them, and submitted the two applications to FSA at the same time (one for a set-aside and one for loan servicing), it is likely that FSA would decide the set-aside application before issuing a decision on the loan servicing application.⁹² By the forty-fifth day after the farmer received a decision approving a set-aside, the farmer would have to accept or decline the set-aside assistance, whether or not the farmer had received a decision on loan servicing.⁹³

This result seems somewhat inconsistent with FSA's warning that a set-aside will not be used to "circumvent" primary loan servicing.⁹⁴ By setting such a narrow window for set-aside eligibility, FSA is likely pushing farmers to accept set-aside offers as a precaution before they know whether their pending loan servicing applications will be approved.

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

Participation in the set-aside program does not affect a farmer's right to receive FSA loan servicing later on. If, after receiving a set-aside, a farmer again becomes delinquent or experiences financial distress, his or her rights to loan servicing will be governed by the normal FSA loan servicing regulations.⁹⁵

VIII. Cancellation and Reversal of Set-Aside

A set-aside will be canceled and reversed by FSA in some situations.⁹⁶ Sometimes this could be beneficial for the farmer, by making him or her eligible for another set-aside. Sometimes, however, the cancellation and reversal could be detrimental to the farmer.

A. When Loan is Later Restructured

If the total balance of the loan is later restructured with primary loan servicing, the set-aside will be canceled.⁹⁷ The amount previously set aside would then be wrapped into the

programs. See 59 Fed. Reg. 53,079, 53,080 (1994) (prefatory comments). The rule provided that once the farmer received benefits under one of the programs, the application for the assistance not received would be automatically withdrawn. See 7 C.F.R. § 1951.957(a)(2) (2003). Changes adopted in 2003 make it less likely that a farmer will have a choice between programs.

⁹¹ 7 C.F.R. § 766.52(b)(3) (2019); Direct Loan Servicing Handbook, page 2-6, para. 45.B(3) (June 4, 2019).

⁹² Set-aside applications are to be decided within 30 days after FSA receives a completed application. 7 C.F.R. § 766.55 (2019). Loan servicing applications to be decided within 60 days after FSA receives a completed application. 7 C.F.R. § 764.53(c) (2019).

⁹³ 7 C.F.R. § 766.57 (2019); Direct Loan Servicing Handbook, page 2-8, para. 46.B (June 4, 2019).

⁹⁴ 7 C.F.R. § 766.51(b) (2019); Direct Loan Servicing Handbook, page 2-1, para. 41.A (June 4, 2019).

⁹⁵ 7 C.F.R. part 766, subpt. C (2019); 7 C.F.R. § 766.60(a) (2019). FSA's comments accompanying the first set-aside rule state that a farmer may apply for loan servicing "at any time" after the set-aside agreement is signed. 59 Fed. Reg. 53,079, 53,081 (1994) (prefatory comments).

⁹⁶ 7 C.F.R. § 766.60 (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

⁹⁷ 7 C.F.R. § 766.60(a) (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

new obligation. This new debt could be considered for a set-aside in case of a future disaster.

B. Acceleration of the Loan

If a loan for which a set-aside is in place is later accelerated by FSA, the set-aside is cancelled.⁹⁸ In an acceleration, a lender demands that the entire loan be repaid back right away.⁹⁹ FSA accelerates a loan when it determines that the borrower cannot or will not meet the loan obligations and all loan servicing options have been offered and concluded.¹⁰⁰

C. When Farmer Opts for Current Market Value Buyout

If the farmer becomes delinquent after the set-aside, he or she may be eligible to buy out the FSA loan for the current market value of FSA's security interests and any non-essential assets.¹⁰¹ If the farmer pursues a current market value buyout, the set-aside installment of any loan involved would be canceled under the buyout.¹⁰²

D. When Farmer Was Not Authorized to Receive Set-Aside

If FSA concludes that the farmer was not authorized to receive a set-aside but received it anyway, the set-aside will be reversed.¹⁰³ FSA must wait until the farmer's appeal rights are exhausted before actually reversing the set-aside. After the set-aside is reversed, the payment terms of the original promissory note will be restored as if the set-aside had never been granted.¹⁰⁴

E. When Farmer Pays the Set-Aside Installment

If the farmer pays the set-aside installment, the set-aside agreement will be cancelled.¹⁰⁵

IX. Exceptions to Set-Aside Rules

The FSA Administrator may, in individual cases, make an exception to the regulations or Handbook rules governing the set-aside program, so long as the exception is consistent with the statute authorizing the program or other applicable law.¹⁰⁶ To grant an exception, FSA must conclude that the strict application of the regulations would adversely affect the government's financial interest.¹⁰⁷

⁹⁸ Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

⁹⁹ For FSA rules on acceleration, see Direct Loan Servicing Handbook, Exhibit 2, page 1, "Acceleration," page 15-5, para. 534 (June 4, 2019).

¹⁰⁰ Direct Loan Servicing Handbook, page 15-1, para. 531.A (June 4, 2019).

¹⁰¹ 7 C.F.R. § 766.113(a) (2019); Direct Loan Servicing Handbook, page 8-1, para. 321.A-B (June 4, 2019).

¹⁰² 7 C.F.R. § 766.60(b) (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

¹⁰³ 7 C.F.R. § 766.61 (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.B (June 4, 2019).

¹⁰⁴ Direct Loan Servicing Handbook, page 2-10, para. 48.B (June 4, 2019).

¹⁰⁵ 7 C.F.R. § 766.60 (2019); Direct Loan Servicing Handbook, page 2-10, para. 48.A (June 4, 2019).

¹⁰⁶ 7 C.F.R. § 766.401(a) (2019); Direct Loan Servicing Handbook, page 1-6, para. 4.A (June 4, 2019).

¹⁰⁷ 7 C.F.R. § 766.401(b) (2019); Direct Loan Servicing Handbook, page 1-6, para. 4.A (June 4, 2019). Only the Administrator or the Deputy Administrator for Farm Loan Programs may approve an exception. An FSA State Director's request for an exception and any supporting

X. Appeals of Set-Aside Decisions

An adverse decision on a set-aside may be appealed.¹⁰⁸ An adverse decision may include, among other things, a determination that a farmer is not eligible for a set-aside or is eligible for a set-aside of a smaller amount than the farmer requested.¹⁰⁹ A farmer may also appeal if FSA fails to make a decision on a set-aside application within thirty days after a complete application is submitted.¹¹⁰

USDA's National Appeals Division (NAD) handles set-aside appeals.¹¹¹ NAD regulations set out a structured appeals process with important deadlines and other requirements. For example, appeals must be filed with NAD within thirty days after the farmer first receives notice of the adverse decision.¹¹²

XI. Discrimination is Illegal

FSA is prohibited by the Equal Credit Opportunity Act (ECOA) from discriminating against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the applicant's receipt of income from any public assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes the ECOA.¹¹³ FSA is further prohibited by its own regulations from subjecting any person to discrimination in any program on the basis of race, color, religion, sex, age, national origin, marital status, sexual orientation, disability, the receipt of income from a public assistance program, parental status, political beliefs or gender identity.¹¹⁴

documentation must explain the adverse effect and proposed alternative courses of action and show how the adverse effect will be eliminated or minimized if the exception is granted. According to the Handbook, FSA only considers exceptions that are submitted under extraordinary circumstances. Direct Loan Servicing Handbook, pages 1-6 and 1-7, para. 4.A-B (June 4, 2019).

¹⁰⁸ An "adverse decision" is defined as an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations.

7 C.F.R. § 11.1, "Adverse decision" (2019).

¹⁰⁹ 7 C.F.R. § 11.3 (2019).

¹¹⁰ 7 C.F.R. § 766.55 (2019). An adverse decision includes the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations. 7 C.F.R. § 11.1 "Adverse decision" (2019).

¹¹¹ 7 C.F.R. pt. 11 (2019).

¹¹² 7 C.F.R. § 11.6(b)(1) (2019). For a discussion of NAD procedures, see FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016). A downloadable copy of the handbook can be found here:

<https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk>.

¹¹³ Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, Title V, 88 Stat. 1500 (current version at 15 U.S.C. §§ 1691-1691f).

¹¹⁴ General Program Administration, 1-FLP (Revision 1), page 3-1, par. 41A-B (Aug. 18, 2019).