

Chapter 8

Farm Service Agency (FSA) Disaster Set-Aside

I.	Introduction.....	1
II.	Application Due Eight Months From Disaster Designation.....	2
III.	Special Set-Aside Rules for Low Commodity Prices No Longer in Effect	2
IV.	Loan Eligibility for Set-Aside	2
	A. All FSA Farm Program Loans Generally Eligible for Set-Aside	3
	B. Limitations on Loans Eligible for Set-Aside	3
	1. No Set-Aside If Fewer Than Two Years Remaining on Loan	3
	2. No Set-Aside If Loan Was Already Accelerated	3
	3. No Set-Aside If Loan Restructured Since Disaster.....	3
	4. No Set-Aside of Debt Settlement Adjustment Payments.....	3
	C. If Loan Installment Has Previously Been Set Aside	4
	1. Generally, Only One Installment Per Loan May Be Set Aside.....	4
	2. Second Set-Aside No Longer Available.....	4
V.	Farmer Eligibility for Set-Aside	5
	A. Be a Direct FSA Borrower.....	5
	B. Operate in a Disaster Area	5
	C. Be Current or Less Than 90 Days Past Due on All FSA Loans When Applying for Set-Aside	5
	D. Act in Good Faith With FSA	5
	1. Defining Good Faith.....	6
	2. Accusations of Fraud, Waste, and Conversion Require Written Legal Opinion	6

FARMERS' GUIDE TO DISASTER ASSISTANCE

- 3. Special Rule for Actions Before October 14, 1988.....6
- E. Resolve Nonmonetary Defaults.....6
- F. Set-Aside Not Available for Costs Paid By the Government7
- G. Be Unable to Pay Expenses Due to Disaster7
 - 1. Expenses That May Be Taken Into Account.....7
 - 2. Calculations Based on Records7
 - 3. Disaster Compensation Taken Into Account7
 - 4. Disaster Expenses Taken Into Account.....7
 - 5. Looks to Next Production and Marketing Period8
- H. Show Positive Cash Flow for Next Accounting Period.....8
 - 1. Expenses to Be Included8
 - 2. Prepared According to FSA Regulations.....8
- I. Be Current on FSA Loan Payments After Set-Aside8
- J. Remain Eligible After FSA Approval9
- K. Sign Set-Aside Addendum Within 45 Days of Approval and
Less Than 165 Days After Payment Due Date.....9
- VI. Amount of the Set-Aside.....10**
 - A. Set-Aside Amount Is Generally What the Farmer Cannot Pay.....10
 - B. Set-Aside Amount When First Installment After Disaster Has
Been Paid10
 - C. No Balance May Remain Due on FSA Installment10
- VII. Set-Aside Terms, Interest Accrual, and Security Requirements11**
 - A. Set-Aside Installment Goes to the End of the Loan11
 - B. Interest Accrues on Principal That Is Set Aside11
 - C. Payments Go to Interest First.....11
 - D. Payments Go First to First Set-Aside, Then Subsequent Set-
Aside.....11
 - E. No Additional Security Requirements for Farmers Who Are
Current on FSA Debts.....11
 - F. Additional Security Requirements May Apply for Farmers
Who Are Not Current on All FSA Debts.....12

FARM SERVICE AGENCY (FSA) DISASTER SET-ASIDE

1.	Exception: Lien Would Prevent Borrower from Obtaining Credit	12
2.	Exception: Property May Have Significant Environmental Problems	12
3.	Exception: FSA Cannot Obtain a Valid Lien.....	12
4.	Exception: Property Is the Farmer’s Personal, Separate Residence	12
5.	Exception: Property Is Needed to Meet Essential Family Living and Farm Operating Expenses	13
VIII.	Interaction Between Primary Loan Servicing and Set-Aside.....	13
A.	Farmers Not Eligible for Set-Aside If Loans Have Been Restructured Since the Disaster Occurred	13
B.	Set-Aside Application Does Not Stop Clock on Applying for Loan Servicing	13
C.	Farmer May Have to Accept Set-Aside Before Receiving Decision on Loan Servicing Application.....	14
D.	Farmer May Seek Loan Servicing After Set-Aside If Facing Later Delinquency or Financial Distress	14
IX.	Cancellation and Reversal of Set-Aside	15
A.	When Loan Is Later Restructured	15
B.	When Farmer Would Qualify for Write-Down or Buyout	15
C.	When Farmer Was Not Authorized to Receive Set-Aside	15
X.	Exception Authority	15
XI.	Appeals of Set-Aside Decisions	16
XII.	Discrimination Is Illegal	16
	Chapter 8 Notes.....	17

II. Application Due Eight Months From Disaster Designation

FSA regulations set out strict deadlines for set-aside applications. In general, farmers must request a set-aside from FSA within eight months of the date the disaster was designated.⁶ The set-aside request must be made by all of the borrowers liable for the FSA debt.⁷

Borrowers who might be eligible for set-aside are supposed to be notified by FSA. FSA discussed its procedures for notifying borrowers of the availability of set-aside in the prefatory comments to the 2003 final rule, though it declined to include the procedures in the regulation. FSA stated that, "At present, the Agency provides notification, to any non-accelerated borrower who has not been restructured after a disaster and who may be eligible for [set aside], of all disaster designations in effect in that county or a contiguous county in any quarter in which a new designation is established."⁸

III. Special Set-Aside Rules for Low Commodity Prices No Longer in Effect

In January 1999, the set-aside program regulations were changed to include low 1998 commodity prices as a basis for allowing set-aside of an FSA loan installment.⁹ This provision was extended in May 2000 to allow set-asides based on low 1999 prices.¹⁰ On June 27, 2001, FSA issued an internal policy notice stating that commodity price-based set-asides were no longer available.¹¹

The final DSA rule issued in 2003 removed the regulatory mechanism allowing FSA to offer set-aside based on low prices.¹² The comments preceding the rule state that, "If FSA believes an additional regulatory program for economic disasters is required in future years, it will reactivate the 1951-T authority through the rulemaking process."¹³

IV. Loan Eligibility for Set-Aside

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

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

In general, annual installment payments on all types of FSA farm program loans may be set aside. These include FSA Farm Ownership (FO) loans, Operating (OL) loans, Soil and Water (SW) loans, Emergency (EM) loans, and others.¹⁴ Payments on FSA nonprogram loans may sometimes be set aside if the borrower also has farm program loans.¹⁵

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.¹⁶ This means that one- and two-year loans, and longer-term loans that are fewer than two years from the end of the repayment period, are not eligible for set-aside.

2. No Set-Aside If Loan Was Already Accelerated

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

3. No Set-Aside If Loan Restructured Since Disaster

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

4. 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.¹⁹

C. If Loan Installment Has Previously Been Set Aside

In general, the DSA regulations provide that only one unpaid installment for each FSA loan may be set aside. In recent years, however, FSA has issued special interim rules allowing for set-aside of a second loan installment.

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

Under DSA regulations, the general rule is that if a loan installment is still set aside from a previous disaster, the loan is not eligible for another set-aside.²⁰ Other FSA loans held by the farmer, however, may still be eligible for set-aside.

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

If an installment is set aside, and then that installment is paid in full by the farmer, another installment on the loan may be set aside.²¹ That is, once the set-aside installment has been paid in full, the set-aside no longer exists, and the loan may be considered for a set-aside in the future.

b. If Set-Aside Installment Canceled Through Loan Servicing, Restructured 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 is canceled. The farmer will then be able to request set-aside of an installment payment on the restructured loan.²²

2. Second Set-Aside No Longer Available

In 1997, 1999, and 2000, FSA allowed farmers who already had postponed a loan installment under the Disaster Set-Aside Program to receive a second set-aside based on natural disasters or low commodity prices in 1997, 1998, and 1999.²³ 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.²⁴ On June 27, 2001, FSA issued an internal policy notice stating that second set-asides were no longer available.²⁵

The final DSA rule issued in 2003 removed the regulatory mechanism allowing FSA to offer set-aside of a second loan installment.²⁶ The comments preceding the rule state that, "If FSA believes an additional regulatory program for economic disasters is required in future years, it will reactivate the 1951-T authority through the rulemaking process."²⁷

V. Farmer Eligibility for Set-Aside

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

A. Be a Direct FSA Borrower

To be eligible for a set-aside, the farmer must have been a direct FSA borrower at the time the disaster occurred.²⁸ The loan must have been made already and not yet paid off.²⁹

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.³⁰ This means that the operation must be located in a county officially designated as a disaster area or a county that borders on an officially designated disaster county.³¹ The farmer must have been operating the farm at the time of the disaster.

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

The final DSA rule published in 2003 narrowed the window of opportunity for farmers to apply for set-aside.³² At the time the application for set-aside is completed, the farmer must be current or less than 90 days past due on *all* FSA farm program loans.³³

D. Act in Good Faith With FSA

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

1. Defining Good Faith

FSA loan servicing regulations include a definition of good faith.³⁵ In general, according to FSA, a farmer has acted in good faith if he or she has demonstrated “honesty” and “sincerity” in carrying out written agreements with FSA. This includes, for example, carrying out agreements that control the farmer’s use of security property and the proceeds from the sale of security property. FSA must document these written agreements in the case file.

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

If FSA denies a loan servicing request, including a set-aside request, 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).³⁶ 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 uses this as a basis for claiming that the farmer has failed to act in good faith, FSA must back up this allegation of conversion with a written legal opinion from OGC.

3. Special Rule for Actions Before October 14, 1988

In some cases, FSA may not make a determination that a farmer failed to act in good faith based on actions the farmer took before October 14, 1988.³⁷

E. Resolve Nonmonetary Defaults

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

F. Set-Aside Not Available for Costs Paid By the Government

The final DSA rule published in 2003 eliminated set-aside 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 collateral.³⁹ FSA has taken the position that the failure to pay such "recoverable costs" must be addressed through primary loan servicing, rather than through set-aside.⁴⁰

G. Be Unable to Pay Expenses Due to Disaster

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

1. Expenses That May Be Taken Into Account

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

2. Calculations Based on Records

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

3. Disaster Compensation Taken Into Account

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

4. Disaster Expenses Taken Into Account

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

5. Looks to Next Production and Marketing Period

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

H. Show Positive Cash Flow for Next Accounting Period

A new requirement effective as of May 17, 2000, provides that a farmer will only be eligible for set-aside if, when taking the set-aside into account, he or she can develop a positive cash flow plan for the next accounting period.⁴⁷

1. Expenses to Be Included

The positive cash flow projection must show that the farmer will at least be able to pay all essential family living expenses, all operating expenses and taxes due during the year, and scheduled payments on all debts.⁴⁸

2. Prepared According to FSA Regulations

The farmer's cash flow projection must be prepared in accordance with FSA farm business planning regulations.⁴⁹ The farmer must provide any documentation needed to support the plan.

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

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

If the farmer becomes more than one installment behind on an FSA farm program loan while his or her set-aside request is being processed, or while an appeal of a set-aside denial is being considered, and the second installment cannot be paid current before the farmer signs the official set-aside forms, FSA will deny the set-aside.⁵¹

J. Remain Eligible After FSA Approval

If FSA approves the set-aside, that approval is contingent on the farmer remaining eligible for the set-aside until the FSA set-aside document is signed.⁵² (This document is an addendum to the farmer's loan note that describes the set-aside agreement.)⁵³ This means that the farmer's eligibility for set-aside could be jeopardized by any further delinquencies, nonmonetary defaults, bad faith actions, or the like during the period before the addendum is signed.

K. Sign Set-Aside Addendum Within 45 Days of Approval and Less Than 165 Days After Payment Due Date

The final DSA rule published in 2003 changed the timeline for applying for and receiving set-aside. As noted above, the set-aside application now must be completed within 90 days after the due date of the payment to be set aside.⁵⁴ Within 30 days after a complete set-aside application is submitted, FSA will determine if the borrower meets the requirements of the program.⁵⁵

Once the farmer's loan is declared eligible for set-aside, the farmer usually has up to 45 days to sign the set-aside addendum.⁵⁶ FSA may provide for a longer period of time for a farmer to sign the addendum under extenuating circumstances.⁵⁷ These circumstances could include, but are not limited to, situations where FSA's approval for the set-aside depends upon the farmer taking some action to become eligible, such as curing a nonmonetary default or making a partial payment. However, the possibility of an extension is limited by the requirement that the borrower must be less than 165 days past due when set-aside addendum is signed.

For example, if the farmer will not receive payment for his or her crop for more than 45 days after the set-aside is approved, and the farmer intends to use the proceeds from the crop to make an FSA payment in order to become eligible for a set-aside, this could count as an extenuating circumstance. In that case, the farmer might be given additional time to make the payment and sign the set-aside addendum, but only if the farmer would still be less than 165 days past due.⁵⁸ FSA has explained that the 165-day timeframe is based upon the time allowed for filing a completed application for loan servicing.⁵⁹

VI. Amount of the Set-Aside

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

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

In general, the amount set aside is limited to the amount of the loan installment that the farmer is unable to pay FSA from the production and marketing period in which the disaster occurred.⁶⁰ For example, if a farmer owes FSA a loan installment of \$20,000 and, because of the disaster, the farmer could only pay \$5,000 on the installment, the farmer could be eligible for a set-aside of \$15,000.

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

The set-aside program is generally intended to relieve the farmer from paying the first annual installment due after the disaster occurred.⁶¹ In many cases, however, a disaster declaration is not issued, or farmers do not learn of the program, until after the next FSA installment has been paid, at the expense of paying other creditors or covering essential family living and operating expenses.⁶²

Recognizing that payment of an FSA loan installment does not necessarily mean that the farmer was not adversely affected by the disaster, the set-aside rules provide that, if the first installment due on an FSA loan following the disaster has already been paid, the next scheduled installment may be set aside.⁶³ The amount set aside in such a case may not exceed the amount the farmer was unable to pay FSA because of the disaster.⁶⁴ Farmers must pay any portion of the installment that they are able to pay.

C. No Balance May Remain Due on FSA Installment

Any part of the FSA installment not set aside must be paid by the farmer by the time the set-aside addendum is signed by the farmer.⁶⁵ 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 addendum.⁶⁶ 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.⁶⁷

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

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

The amount set aside and interest accrued on any principal set aside will be due on or before the final due date of the loan.⁶⁸

B. Interest Accrues on Principal That Is Set Aside

Interest accrues on the principal portion of the loan installment that is set aside.⁶⁹ Interest does not accrue on the interest portion of the set-aside. Interest accrues on the set-aside loan principal at the same rate that is charged on the loan principal that is not set aside.⁷⁰

C. Payments Go to Interest First

Payments applied to the amount set aside are applied first to interest and then to principal.⁷¹

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 that is paid in full before they will be applied to the second set-aside installment.⁷²

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 addendum is signed are not required to put up any additional security to participate in the Disaster Set-Aside Program.⁷³ 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

Under the final DSA rule issued in 2003, farmers who are not current on all FSA debts at the time the set-aside addendum is signed may be required to provide additional security to FSA.⁷⁴ This applies even to farmers who were current on their debts at the time they applied for set-aside, if they missed a payment before the set-aside addendum was signed.

In general, a borrower who is not current on all FSA debts must provide the best lien obtainable on all assets.⁷⁵ Several exceptions, which also apply in FSA's other loan making and loan servicing programs, were also adopted.⁷⁶

1. Exception: Lien Would Prevent Borrower from Obtaining Credit

When doing so would prevent the farmer from obtaining credit from other sources, the farmer will not be required provide the best lien obtainable on all assets as a condition of receiving set-aside.⁷⁷

2. Exception: Property May Have Significant Environmental Problems

When the property could have significant environmental problems or costs, the farmer will not be required to provide a lien on the property as a condition of receiving set-aside.⁷⁸

3. Exception: FSA Cannot Obtain a Valid Lien

When FSA cannot obtain a valid lien, the farmer will not be required to provide the lien as a condition of receiving set-aside.⁷⁹

4. Exception: Property Is the Farmer's Personal, Separate Residence

In certain cases, the farmer will not be required to provide a best lien on the farmer's personal residence and appurtenances as a condition of receiving set-aside.⁸⁰ This exception only applies if the residence is located on a separate parcel and the available collateral is valued at 150 percent or more of the unpaid balance due on the loan.

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

The farmer will not be required to provide the best lien available on certain types of property as a condition of receiving set-aside. This property includes subsistence livestock, cash, retirement accounts, household goods, small tools and equipment, and similar items.⁸¹ Also excluded from the lien requirement are vehicles and collateral accounts used for the farming operation or for family living.⁸²

VIII. Interaction Between Primary Loan Servicing and Set-Aside

The Disaster Set-Aside Program is not intended to replace or get around the regular FSA loan servicing programs.⁸³ Set-aside is designed to provide rapid relief for farmers facing a temporary inability to make their FSA loan payments. Loan servicing is intended to help farmers who are having longer-term problems meeting their FSA loan payment obligations and who need more extensive assistance. The two programs interact in the following ways.

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

As mentioned earlier, farmers are not eligible to for set-aside if they have received loan servicing since the natural disaster occurred.⁸⁴

B. Set-Aside Application Does Not Stop Clock on Applying for Loan Servicing

It is important for farmers to keep in mind that an application for set-aside will not stop the running of the time period to apply for loan servicing assistance from FSA. If the time to apply for loan servicing runs out while the farmer is waiting to hear about his or her set-aside request and the set-aside does not make the farmer current, FSA will consider that the farmer has waived his or her loan servicing rights.⁸⁵ This would likely only occur for a delinquency that existed before the disaster. Under the final DSA rule published in 2003, every farmer who applies for set-aside after a disaster-related delinquency should receive a decision on that application before the deadline to apply for loan servicing arrives.⁸⁶

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

FSA's comments accompanying the first set-aside rule issued in 1994 indicated that farmers would have their choice between the programs.⁸⁷ The rule provided that once the farmer received the benefits of one of the programs—either set-aside or primary loan servicing—the application for the assistance not received would be automatically withdrawn.⁸⁸

The changes in the final DSA rule published in 2003 make it less likely that a farmer will have a choice between programs. This is because farmers must apply for set-aside before they are 90 days past due, but FSA is not required to send notice of primary loan servicing programs until 15 days after a farmer is 90 days past due, and then farmers have 60 days to submit the application after they receive it. Even if a farmer requested loan servicing materials before FSA was required to send them, and submitted the two applications (one for set-aside and one for loan servicing) to FSA at the same time, it is likely that FSA would decide the set-aside application before issuing a decision on the loan servicing application, because of the lesser paperwork and shorter deadline involved.⁸⁹ By the 45th day after the farmer received a decision approving set-aside, the farmer would have to accept or decline the set-aside assistance, whether or not the farmer had received a decision on loan servicing.⁹⁰

This result seems somewhat inconsistent with the agency's warning that set-aside will not be used to "circumvent" primary loan servicing.⁹¹ By setting such a narrow window for set-aside eligibility, FSA is likely pushing farmers to accept set-aside offers as a precaution before they know whether their pending loan servicing applications will be approved.

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

Participation in the Disaster Set-Aside Program does not affect a farmer's right to receive FSA loan servicing later on. If, after receiving a set-aside, a farmer again becomes delinquent or experiences financial distress, his or her rights to loan servicing will be governed by the normal FSA loan servicing regulations.⁹² 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 addendum is signed.⁹³

IX. Cancellation and Reversal of Set-Aside

A set-aside may be canceled and reversed by FSA in some situations.⁹⁴ Sometimes this could be beneficial for the farmer, by making him or her eligible for another set-aside. Sometimes, however, the cancellation and reversal could be detrimental to the farmer.

A. When Loan Is Later Restructured

If the total balance of the loan is later restructured with primary loan servicing, the set-aside may be canceled.⁹⁵ The amount previously set aside would then be wrapped into the new obligation. This new debt could be considered for set-aside in case of a future disaster.

B. When Farmer Would Qualify for Write-Down or Buyout

If, prior to the due date of the first scheduled installment after the set-aside, FSA determines that the farmer, if delinquent, would qualify for a write-down or buyout under the loan servicing program, FSA may cancel the set-aside and consider the farmer for those programs.⁹⁶

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

If FSA concludes that the farmer was not authorized to receive a set-aside but received it anyway, the set-aside will be canceled.⁹⁷ FSA must wait until the farmer's appeal rights are exhausted before actually canceling the set-aside.⁹⁸ After the set-aside is canceled, the payment terms of the original promissory note will be retained as if the set-aside had never been granted.

Farmers who are financially distressed or delinquent after cancellation of the set-aside will be able to apply for regular FSA loan servicing.⁹⁹

X. Exception Authority

The FSA Administrator may, in individual cases, make an exception to the regulations governing the set-aside program if the exception is consistent with the statute authorizing the program or other applicable law. To justify an exception, FSA must conclude that the strict application of the regulations would adversely affect the government's interest.¹⁰⁰

XI. Appeals of Set-Aside Decisions

An adverse decision in the Disaster Set-Aside Program may be appealed.¹⁰¹ An adverse decision may include, among other things, a determination that a farmer is not eligible for set-aside or set-aside of a smaller amount than the farmer requested.¹⁰² A farmer may also appeal if FSA fails to make a decision on a set-aside application within 30 days after the complete application is submitted.¹⁰³

USDA's National Appeals Division (NAD) handles set-aside appeals.¹⁰⁴ NAD regulations set out a structured appeals process with important deadlines and other requirements. For example, appeals must be filed with NAD within 30 days after the farmer receives notice of the adverse decision.¹⁰⁵

XII. 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.¹⁰⁶ FSA is further prohibited by its own regulations from subjecting any person to discrimination in any program on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or the receipt of income from any public assistance program.¹⁰⁷

Chapter 8 Notes

- ¹ 7 C.F.R. § 1951.952 (2004).
- ² Individuals who are delinquent on a federal debt are generally not eligible for new non-disaster loans, loan guarantees, or loan insurance from any federal agency. See 31 U.S.C. § 3720B; 7 C.F.R. §§ 1941.12(a)(11), 1943.12(a)(8) (2004). However farmers who are delinquent on FSA loans are eligible for Emergency (EM) loans. See Chapter 7 for more information about EM loans.
- ³ 68 Fed. Reg. 55,299 (2003) (codified at 7 C.F.R. §§ 1951.951 *et. seq.* (2004)).
- ⁴ Compare 7 C.F.R. § 1951.954(a)(4) (2003) with 7 C.F.R. § 1951.954(a)(5) (2004).
- ⁵ 69 Fed. Reg. 6,056, 6,096-97 (2004) (proposed to be codified at 7 C.F.R. pt. 766-C).
- ⁶ 7 C.F.R. § 1951.953(b) (2004).
- ⁷ 7 C.F.R. § 1951.953(b) (2004).
- ⁸ 68 Fed. Reg. 55,299, 55,302 (2003) (prefatory comments). This notification policy is included in FmHA Instruction 1951.953(a) (Dec. 12, 2003). The FmHA Instructions (now sometimes referred to as “FSA Transferred Instructions”) are the regulations with internal policies and procedures added in order to guide FSA employees.
- ⁹ 64 Fed. Reg. 392, 394 (1999) (codified at 7 C.F.R. § 1951.954(a)(1)(ii) (2000)).
- ¹⁰ 65 Fed. Reg. 31,248, 31,249 (2000) (codified at 7 C.F.R. § 1951.951 (2001)).
- ¹¹ Notice FLP-211, “Reminder of Elimination of Second Disaster Set-Aside (DSA) Authority,” 1.B (June 27, 2001).
- ¹² 68 Fed. Reg. 55,299, 55,301 (2003) (prefatory comments).
- ¹³ 68 Fed. Reg. 55,299, 55,301 (2003) (prefatory comments).
- ¹⁴ 7 C.F.R. § 1951.951 (2004). Other FSA loans eligible for set-aside include Economic Emergency (EE) loans, Special Livestock (SL) loans, Economic Opportunity (EO) loans, Softwood Timber (ST) loans, Recreation (RL) loans, and Rural Housing loans for farm service buildings (RHF).

FARMERS' GUIDE TO DISASTER ASSISTANCE

- ¹⁵ 7 C.F.R. § 1951.951 (2004).
- ¹⁶ 7 C.F.R. § 1951.954(b)(2) (2004).
- ¹⁷ 7 C.F.R. § 1951.954(a)(10) (2004). The new final rule states that the farmer's "loans" must not have been accelerated. The change from "loan," as the previous rule read, to "loans" was not included in the proposed rule, nor is it addressed in the prefatory comments to the final rule, so it seems likely that the change was a typographical error. Compare 67 Fed. Reg. 41,869, 41,872 (2002) (proposed to be codified at 7 C.F.R. § 1951.954(a)(10)) with 7 C.F.R. § 1951.954(a)(10) (2004). The issue could be important for a borrower who has one loan that has been accelerated, and one loan that has not been accelerated.
- ¹⁸ 7 C.F.R. § 1951.954(a)(11) (2004). This restriction applies to loan servicing received under 7 C.F.R. pt. 1951, subpt. S (2004).
- ¹⁹ 7 C.F.R. § 1951.954(a)(5) (2004). Debt settlement regulations for FSA farm program loans are found at 7 C.F.R. pt. 1956, subpt. B (2004).
- ²⁰ 7 C.F.R. § 1951.954(a)(2) (2004).
- ²¹ 7 C.F.R. § 1951.954(a)(2) (2004).
- ²² 7 C.F.R. § 1951.954(a)(2) (2004). For the applicable FSA loan restructuring regulations, see 7 C.F.R. pt. 1951, subpt. S (2004).
- ²³ See 7 C.F.R. § 1951.954(b)(2) (1998); 7 C.F.R. § 1951.954(b)(2) (1999); 7 C.F.R. § 1951.954(b)(2)(ii) (2000); and 7 C.F.R. § 1951.954(a)(1)(ii), (iii) (2001).
- ²⁴ 62 Fed. Reg. 41,251 (1997); 64 Fed. Reg. 392, 394 (1999); 65 Fed. Reg. 31,248 (2000).
- ²⁵ Notice FLP-211, "Reminder of Elimination of Second Disaster Set-Aside (DSA) Authority," 1.B (June 27, 2001).
- ²⁶ 68 Fed. Reg. 55,299, 55,301 (2003) (prefatory comments).
- ²⁷ 68 Fed. Reg. 55,299, 55,301 (2003) (prefatory comments).
- ²⁸ 7 C.F.R. § 1951.954(a)(1)(ii) (2004).

FARM SERVICE AGENCY (FSA) DISASTER SET-ASIDE

- ²⁹ 7 C.F.R. § 1951.954(b)(1) (2004).
- ³⁰ 7 C.F.R. § 1951.954(a)(1)(i) (2004).
- ³¹ 7 C.F.R. § 1951.954(a)(1)(i) (2004).
- ³² 68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments). The agency had suggested in the proposed rule that set-aside be available only to farmers who were current on all of their debts, but in response to unanimous opposition during the public comment period, FSA instituted the requirement that farmers be less than 90 days past due when the application is completed. Under the prior rule, farmers who were one payment behind on their FSA loans were eligible for set-aside. 7 C.F.R. 1951.954(a)(4) (2003). FSA's Disaster Set Aside Fact Sheet, available at www.fsa.usda.gov/pas/publications/facts/html/debtset02.htm, has not been updated since September, 2002. As a result, the Fact Sheet does not advise farmers of the new requirement that complete applications must be submitted before the farmer is 90 days past due.
- ³³ 7 C.F.R. § 1951.954(a)(5) (2004).
- ³⁴ 7 C.F.R. § 1951.954(a)(3) (2004).
- ³⁵ 7 C.F.R. § 1951.906, "Good faith" (2004).
- ³⁶ 7 C.F.R. § 1951.906, "Good faith" (2004).
- ³⁷ 7 C.F.R. § 1951.906, "Good faith" (2004). This exception applies if the sole basis for FSA's determination that the farmer acted in bad faith was the farmer's disposition of normal income security before October 14, 1988, without FSA's consent, and the farmer can show that the proceeds were used to pay essential family living and farm operating expenses. Normal income security is defined at 7 C.F.R. § 1962.4, "Normal income security" (2004). The use of proceeds for essential living and operating expenses must meet the requirements of 7 C.F.R. § 1962.17 (2004).
- ³⁸ 7 C.F.R. § 1951.954(a)(4) (2004).
- ³⁹ 7 C.F.R. § 1951.954(b)(5) (2004).

- 40 68 Fed. Reg. 55,299, 55,302 (2003) (prefatory comments). Presumably, a farmer who repaid any cost recoverable amount paid by FSA would be eligible for set aside. This could be an attractive option if the cost recoverable amount paid was small.
- 41 7 C.F.R. § 1951.954(a)(7) (2004).
- 42 7 C.F.R. § 1951.954(a)(7) (2004).
- 43 7 C.F.R. § 1951.954(a)(7) (2004).
- 44 7 C.F.R. § 1951.954(a)(7) (2004).
- 45 7 C.F.R. § 1951.954(a)(7) (2004).
- 46 7 C.F.R. § 1951.954(a)(7) (2004).
- 47 7 C.F.R. § 1951.954(a)(8) (2004).
- 48 7 C.F.R. § 1951.954(a)(8) (2004).
- 49 7 C.F.R. § 1951.954(a)(8) (2004). These regulations are found at 7 C.F.R. § 1924.56 (2004).
- 50 7 C.F.R. § 1951.954(a)(9) (2004).
- 51 7 C.F.R. § 1951.957(c) (2004).
- 52 7 C.F.R. § 1951.957(a) (2004).
- 53 The document is FmHA Instruction 1951-T, Exhibit A, "Addendum to the Promissory Note/Assumption Agreement for the Disaster Set-Aside Addendum."
- 54 7 C.F.R. §§ 1951.952, 1951.954(a)(5) (2004).
- 55 7 C.F.R. § 1951.957(a)(1) (2004). The previous rule required a decision "upon receipt of a DSA request." 7 C.F.R. § 1951.957(a)(1) (2003).
- 56 7 C.F.R. § 1951.957(a)(2) (2004).
- 57 7 C.F.R. § 1951.957(a)(2) (2004).
- 58 7 C.F.R. §§ 1951.957(a)(2), 1951.954(a)(6) (2004).
- 59 68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments).

FARM SERVICE AGENCY (FSA) DISASTER SET-ASIDE

- 60 7 C.F.R. § 1951.954(b)(4) (2004).
- 61 7 C.F.R. § 1951.952 (2004).
- 62 68 Fed. Reg. 55,299, 55,301-02 (2003) (prefatory comments).
- 63 7 C.F.R. § 1951.954(b)(3) (2004).
- 64 7 C.F.R. § 1951.954(b)(4) (2004).
- 65 7 C.F.R. § 1951.954(b)(4) (2004). An earlier provision effective before January 5, 1999, stated this requirement more explicitly. See 7 C.F.R. § 1951.954(b)(4) (1999).
- 66 7 C.F.R. § 1951.954(b)(5) (2004).
- 67 7 C.F.R. § 1951.954(b)(5) (2004). This amount also takes into consideration any payments applied to principal and interest since the installment due date.
- 68 7 C.F.R. § 1951.957(b)(3) (2004).
- 69 7 C.F.R. § 1951.957(b)(2) (2004).
- 70 7 C.F.R. § 1951.957(b)(2) (2004). 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.
- 71 7 C.F.R. § 1951.957(b)(7) (2004).
- 72 7 C.F.R. § 1951.957(b)(7) (2004).
- 73 7 C.F.R. § 1951.957(b)(4) (2004).
- 74 7 C.F.R. § 1951.957(b)(4) (2004).
- 75 7 C.F.R. § 1951.957(b)(4) (2004). A best lien will be required from all obligors on the loan if the borrower is a farming entity.
- 76 68 Fed. Reg. 55,299, 55,300-01 (2003) (prefatory comments) (referring to 7 C.F.R. §§ 1951.910(b), 1941.19(c)).
- 77 7 C.F.R. § 1951.957(b)(4)(i) (2004).
- 78 7 C.F.R. § 1951.957(b)(4)(ii) (2004).
- 79 7 C.F.R. § 1951.957(b)(4)(iii) (2004).

- 80 7 C.F.R. § 1951.957(b)(4)(iv) (2004).
- 81 7 C.F.R. § 1951.957(b)(4)(v) (2004).
- 82 7 C.F.R. § 1951.957(b)(4)(v) (2004).
- 83 7 C.F.R. § 1951.952 (2004). For the regulations governing FSA loan servicing, see 7 C.F.R. pt. 1951, subpt. S (2004).
- 84 7 C.F.R. § 1951.954(a)(11) (2004).
- 85 59 Fed. Reg. 53,079, 53,081 (1994) (prefatory comments).
- 86 This is true because the farmer must apply for set-aside before he or she is 90 days past due, and FSA must determine whether the farmer is eligible within 30 days. 7 C.F.R. §§ 1951.954(a)(5), 1951.957(a)(1) (2004). This means that farmers should receive a decision on set-aside eligibility when they are less than 120 days past due. Under the loan servicing timeframe, FSA notifies borrowers of loan servicing options 15 days after they are 90 days past due, and then the borrower has 60 days to submit a complete application. $15 + 90 + 60 = 165$. 68 Fed. Reg. 55,299, 55,300 (2003) (prefatory comments). Thus, a farmer who is denied set-aside should still have time to apply for loan servicing, provided the delinquency occurred after the disaster.
- 87 59 Fed. Reg. 53,079, 53,080 (1994) (prefatory comments).
- 88 See 7 C.F.R. § 1951.957(a)(2) (2003).
- 89 7 C.F.R. § 1951.957(a)(1) (2004) (set-aside applications to be decided upon within 30 days after FSA receives a completed application); 7 C.F.R. § 1951.909(h)(1) (2004) (loan servicing applications to be decided within 60 days after FSA receives a completed application).
- 90 7 C.F.R. § 1951.957(a)(2) (2004).
- 91 7 C.F.R. § 1951.952 (2004).
- 92 7 C.F.R. § 1951.958 (2004).
- 93 59 Fed. Reg. 53079, 53,081 (1994) (prefatory comments).
- 94 7 C.F.R. § 1951.958(a) (2004).

FARM SERVICE AGENCY (FSA) DISASTER SET-ASIDE

- ⁹⁵ 7 C.F.R. § 1951.958(a)(1) (2004).
- ⁹⁶ 7 C.F.R. § 1951.958(a)(2) (2004).
- ⁹⁷ 7 C.F.R. § 1951.958(a)(3) (2004).
- ⁹⁸ 7 C.F.R. § 1951.958(a)(3) (2004).
- ⁹⁹ 7 C.F.R. § 1951.958(a)(3) (2004).
- ¹⁰⁰ 7 C.F.R. § 1951.959 (2004). Either the FSA State Executive Director or the Deputy Administrator for Farm Programs may request an exception. Requests for exception must be made in writing and supported with documentation to explain the adverse effect and proposed alternative courses of action, and to show how the adverse effect will be eliminated or minimized if the exception is granted. FmHA Instruction 1951.959 (Dec. 12, 2003). See note 8 for more information about the FmHA Instructions.
- ¹⁰¹ 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” (2004).
- ¹⁰² 7 C.F.R. § 11.3 (2004). The letter to the borrower must describe “in full detail” all the reasons for the adverse decision. FmHA Instruction 1951.957(c) (Dec. 12, 2003). See note 8 for more information about the FmHA Instructions.
- ¹⁰³ 7 C.F.R. § 1951.957(a)(1) (2004); 7 C.F.R. § 11.1 “Adverse decision” (2004) (stating that 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.).
- ¹⁰⁴ 7 C.F.R. pt. 11 (2004).

FARMERS' GUIDE TO DISASTER ASSISTANCE

- ¹⁰⁵ 7 C.F.R. § 11.6(b)(1) (2004). For a detailed discussion of NAD procedures, see *USDA's National Appeals Division Practice and Procedures* by FLAG attorney Karen Krub, available on the Internet at www.flaginc.org/pubs/arts/NADarticle_NatAgLawCtr2003.pdf, or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, Minnesota, 55101; or by electronic mail at lawyers@flaginc.org.
- ¹⁰⁶ 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).
- ¹⁰⁷ 7 C.F.R. pt. 15d (2004).