

UNITED STATES DEPARTMENT OF AGRICULTURE

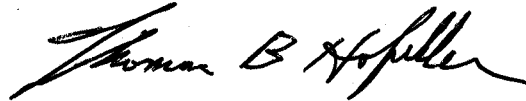
Farm Service Agency  
Washington, DC 20250

Notice AS-2157

**For:** FSA Offices and All Farm Loan Program and Farm Program Employees and Contractors

**Litigation Hold for Lawsuits Involving Farm Loan Programs and Non-Credit Farm Programs**

**Approved by:** Associate Administrator for Operations and Management



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**1 Overview**

**A Background**

The Farm Service Agency (FSA) is involved in a number of lawsuits alleging illegal discrimination in the Department of Agriculture (USDA) Farm Loan Programs (FLP) and non-credit Farm Programs (FP). In light of these lawsuits, *Keepseagle v. Schafer*, *Garcia v. Schafer*, *Love v. Schafer*, *Wise v. Schafer*, and *In re Black Farmers Discrimination Litigation*, discussed in more detail in paragraph 3, FSA has a legal obligation to preserve **all records** and **non-record** documentary materials pertaining to the Plaintiffs' claims wherever those materials may be located.

**B Purpose**

This notice:

- prescribes FSA-wide policies and responsibilities related to the retention of documentary materials, including electronically stored information (ESI), in response to FSA's duty to preserve related to the discrimination lawsuits described in paragraph 3
- rescinds in its entirety Notice AS-2152.

**Notes:** Holds or freezes applicable to the Tobacco Industry litigation and the hurricane litigation continue to apply and will be addressed separately by a forthcoming notice.

Notice AS-2152 is obsolete.

**C Contact**

For questions as to whether documentary materials fall within the scope of the preservation requirement, contact Chris Beyerhelm, Assistant Deputy Administrator for Farm Loan Programs, at either of the following:

- e-mail at **Chris.Beyerhelm@wdc.usda.gov**
- telephone at 202-720-7597.

Disposal Date	Distribution
April 1, 2009	FSA Offices and all FLP and FP employees and contractors; State Offices relay to County Offices

## 1 Overview (Continued)

### C Contact (Continued)

For questions related to the application of this notice to Federal records issues, contact John Underwood, Chief, Management Services Division, Kansas City Administrative Services Branch, Information Management Section (MSD/KCASB/IMS) at either of the following:

- e-mail at **John.Underwood@kcc.usda.gov**
- telephone at 816-926-6992.

For questions about the preservation of e-mails and other forms of ESI, contact Sue Bussells, Deputy CIO/Director, Information Technology Services Division, at either of the following:

- e-mail at **Sue.Bussells@wdc.usda.gov**
- telephone at 202-720-7796.

## 2 General Information About Litigation Holds

### A What Is a Litigation Hold

A litigation hold is the procedure for identifying, locating, and ensuring the retention and preservation of all documentary materials that may constitute potentially relevant evidence in pending or reasonably foreseeable litigation. “Documentary materials” means, collectively, records and non-records, in whatever form or format, including but not limited to, ESI, data, data compilations, spreadsheets, correspondence, notes, e-mails, writings, drawings, graphs, charts, photographs, sound recordings, images, and any other materials, whether original or duplicative, draft or final versions, partial or complete versions, informal or formal, internal or external, proprietary or nonproprietary.

FSA implements a litigation hold when it must suspend normal disposition actions (e.g., transfer, disposal, recycling, or destruction) related to documentary materials, and must segregate and preserve such materials because of legal, audit, or investigative needs. For further information about the Department-wide litigation hold policy, see DR 3090-001 (May 28, 2008) (<http://www.ocio.usda.gov/directives/doc/DR3090-001.pdf>).

### B What Does a Litigation Hold Require

The requirements of a litigation hold vary from case-to-case and depend on the nature of the claims asserted by the parties, any agreements reached by the parties, and any relevant court orders.

Whatever the scope of a litigation hold, preservation must occur regardless of whether the documentary materials may ultimately be withheld as privileged or ultimately determined to be unreasonably burdensome to produce.

## 2 General Information About Litigation Holds (Continued)

### B What Does a Litigation Hold Require (Continued)

Many litigation holds impact FSA's established management plan for both **records and non-records**. A hold generally requires that documentary materials be retained for longer periods of time than identified in the normal disposition guidance. In addition, a litigation hold is often broader than a "records freeze", that is, it requires the preservation of materials beyond those that constitute "records" as defined by the Federal Records Act.

### C Failure to Comply With a Litigation Hold

Failure to comply with a litigation hold can result in sanctions against the government or disadvantage the government's position in litigation. It can also result in monetary or other contempt sanctions against individuals who failed to take appropriate steps to locate and segregate materials subject to a litigation hold. In extreme cases, agency performance-based action or disciplinary sanction may be warranted under 5 U.S.C. 4301, *et seq.*, or 5 U.S.C. 7501, *et seq.*

### D Destruction of Documentary Materials Subject to a Litigation Hold

An FSA Office shall not delete or destroy any documentary materials, whether records or non-records, that are potentially the subject of a litigation hold or record retention freeze without first obtaining clearance from the USDA Office of the General Counsel (OGC).

If an FSA Office is uncertain as to whether documentary materials fall within the scope of a litigation hold, the office should contact Chris Beyerhelm, Assistant Deputy Administrator for Farm Loan Programs. For questions about the application of a litigation hold to records, the office should contact John Underwood, MSD, KCASB, IMS. For questions about the preservation of e-mails and other forms of ESI, the office should contact Sue Bussells, Deputy CIO/Director, Information Technology Services Division.

When requesting guidance under this litigation hold, the FSA Office should provide a detailed description of the materials in question to the appropriate contact person. These designated contacts will consult with OGC and provide the FSA Office with guidance on the disposal or retention of the materials.

**Note:** See subparagraph 1 C for contact information.

## 3 Scope of the Lawsuits at Issue and Duty to Preserve

### A Lawsuits

*Keepseagle v. Schafer* is a nationwide class action lawsuit filed by Native American farmers and ranchers alleging discrimination in USDA Farm Loan Programs. The Plaintiffs allege discrimination in violation of the Equal Credit Opportunity Act in the access to and participation in Farm Loan Programs, such as the alleged denial or delay of farm loans and loan servicing by FSA and/or Farmers Home Administration (FmHA) officials.

### 3 Scope of the Lawsuits at Issue and Duty to Preserve (Continued)

#### A Lawsuits (Continued)

*Garcia v. Schafer* is a similar lawsuit filed by Hispanic farmers and ranchers. Likewise, female farmers and ranchers filed *Love v. Schafer* and certain female and African American farmers and ranchers filed *Wise v. Schafer*. The Plaintiffs in these three lawsuits allege discrimination in violation of the Equal Credit Opportunity Act and other provisions of law, in the access to and participation in USDA's Farm Loan Programs, such as the alleged denial or delay of farm loans and loan servicing by FSA and/or FmHA officials. The Plaintiffs also allege that USDA violated the Administrative Procedure Act in connection with certain non-credit Farm Programs by failing to act on administrative complaints of discrimination that the Plaintiffs filed with USDA.

*In re Black Farmers Discrimination Litigation* is a consolidated action incorporating over 20,000 individual plaintiffs suing under § 14012 of the 2008 Farm Bill. Approximately 53,000 additional individual plaintiffs are expected to file suit against USDA within the next two years. These individual plaintiffs attempted to participate in *Pigford v. Glickman* but were deemed to have filed their claims beyond the deadline for submission of a claim. They allege that USDA discriminated against them on the basis of their race in the access to and participation in USDA's Farm Loan and non-credit Farm Programs.

#### B Documentary Material Subject to the Litigation Hold

For these lawsuits, FSA has a legal obligation to preserve **all record and non-record documentary materials** related to the claims in these lawsuits. The law requires FSA to preserve such materials in whatever form they are generated and maintained, as discussed further below. Therefore, employees must continue to preserve the following.

- All documentary materials relating to the Farm Loan Programs, including but not limited to borrower files and borrower data.
- All documentary materials relating to non-credit Farm Programs, including but not limited to all producer files.
- All documentary materials relating to all FSA Farm Loan Program and non-credit Farm Program customers (including unsuccessful applicants), including those who have formally or informally filed a discrimination complaint.
- All administrative files. Administrative files include, but are not limited to, the following:
  - directives and notices
  - time and attendance sheets
  - travel and training files
  - correspondence files
  - State Committee (STC) and County Office Committee (COC) meeting minutes.

### 3 Scope of the Lawsuits at Issue and Duty to Preserve (Continued)

#### B Documentary Material Subject to the Litigation Hold (Continued)

- All electronic data, even if it may be duplicative of data stored elsewhere, including:
  - data "work tables"
  - data extracted from other databases
  - data sent to a centralized or shared database
  - data underlying summary reports.
- Any other documentary materials that are potentially relevant to the lawsuits identified in this notice.

#### C Formats and Media Covered by the Hold

The duty to preserve documentary materials does not depend on the type of medium on which the information exists. The materials may exist in various forms, including but not limited to, paper records, handwritten notes, memorandums documenting telephone calls, e-mail, and other electronic communication, word processing documents (including drafts), spreadsheets, databases, calendars (including electronic calendars), electronic address books, personal data assistants (PDA's - Palm Pilot and Blackberry), internet usage files, system manuals, and network access information.

All ESI must be preserved in an **unaltered form** (original native format). For example, although printing an archival copy of an e-mail or Word document may comply with the established record schedule, a litigation hold requiring the preservation of ESI would require that the relevant e-mail or Word document be saved in its original electronic format.

#### D Time Period

Any documentary materials that are potentially relevant to the lawsuits identified in this notice must be preserved if they were created or received between 1980 and the present.

**Note:** This hold applies **prospectively**, so continue to preserve all relevant documentary materials created and received going forward until further notice.

### 3 Scope of the Lawsuits at Issue and Duty to Preserve (Continued)

#### E To Whom Does the Litigation Hold Apply

The litigation hold applies to all FSA employees and to FSA contractors where contracts specify which documentary deliverables or other ESI belong to the Government to the extent that the employees or contractors have documentary materials subject to the hold.

The litigation hold extends to documentary materials stored or maintained in FSA property, and to FSA materials created on or stored in computers owned by FSA employees, consultants, and contractors.

Finally, the litigation hold requires managers to preserve the relevant documentary materials and ESI of departing employees. The litigation hold also requires information technology staff to ensure that e-mails or other relevant ESI of departing employees that exists on agency servers is preserved.

#### F What Actions Must Be Taken

All FSA employees and contractors (at County, State, and National Office) are affected by this litigation and shall, until further notice:

- not destroy written documents of any sort
- retain electronically created and/or stored documents in their native format.

**Example:** All e-mails received must be either auto-archived or archived into personal folders.

**Supervisors and managers** must take steps to ensure that the hold is carried out by employees under their supervision, including issuing periodic reminders about the hold requirements.

The **agency records officer** must contact the National Archives and Records Administration (NARA) to request a temporary extension of the retention period. The records officer must further notify NARA of the need to freeze any relevant records located at a Federal Records Center. Finally, the records officer must notify the relevant archivists for Regional Records Services.

The **agency chief information officer** (CIO) must identify relevant agency information technology systems that may contain information responsive to the hold and suspend routine disposition, deletion, or destruction of such information. This may include suspension of any recycling of backup media. The agency CIO must also assist with the segregation and preservation of responsive information.