

UNITED STATES DEPARTMENT OF AGRICULTURE

Farm Service Agency
100 USDA, Suite 102
Stillwater, Oklahoma 74074-2653

OK Notice FLP-348

For: County Offices

1951-S

**Information Needed in Determining Lack of Good Faith of Farm Loan Programs
Borrowers Due to Waste, Fraud, or Conversion**

Approved by: State Executive Director



1 OVERVIEW

A

Background

This FLP notice replaces OK Notice FLP-95, June 16, 1999.

B

Purpose

This FLP notice is being issued to assist Farm Service Agency with the Office of General Counsel's (OGCs) concurrence in making determinations of waste, fraud, or conversion. The purpose of this notice is to clarify the information that is necessary to determine whether a borrower is ineligible for Primary Loan Service Programs or Market Value Buyout, based on a lack of good faith due to fraud, waste, or conversion.

The attached GUIDE, should be used when requesting a written opinion to substantiate allegations of fraud, waste, or conversion.

2 Action

A

Responsibilities

In cases where FSA notifies a borrower of nonmonetary default, or denies a request for servicing due to fraud, waste, or conversion, the attached Guide will be completed to determine if there is sufficient documentation to justify the allegations of fraud, waste, or conversion.

The attached GENERAL GUIDELINES set out the elements of fraud, waste, and conversion, which OGC will use to render its opinion. This documentation will be obtained PRIOR to mailing Attachments 1, 3, and 4 to Exhibit A of FmHA Instruction 1951-S.

Continued on next page

Disposal

December 31, 2003

04-17-02

Distribution

Farm Loan Teams, County Offices,
DDs, CORs

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A

Responsibilities
(Continued)

For those borrowers in nonmonetary default based on a lack of good faith in meeting agreements made on Form FmHA 1962-1, "Agreement for the Use of Proceeds/Release of Chattel Security," or any other agreements made with FSA, the Ag Credit Manager should thoroughly document the facts in the running case record PRIOR to mailing Attachments 1, 3, and 4 to Exhibit A of FmHA Instruction 1951-S. An OGC opinion is not required in those cases in which a borrower fails to meet agreements with FSA. However, a lack of good faith based on a combination of reasons, (for example, conversion and breach of an agreement), will be supported by an OGC opinion regarding the conversion. If problems are encountered, OGC may be contacted for advice.

B

Contact

County Offices shall direct questions about this notice to Phil Estes, Farm Loan Chief at 405-742-1050.

C

Filing Instructions

Where FmHA Instructions are available, a copy of this notice shall be filed following FmHA Instruction 1951-S.

GENERAL GUIDELINES

**DETERMINATION OF THE
LACK OF GOOD FAITH BECAUSE OF FRAUD, WASTE, AND CONVERSION**

The following are the general elements of fraud, waste, and conversion which will be used by the Office of the General Counsel (OGC) in rendering its opinion in the possible denial of a borrower's request for Primary Loan Service Programs or Market Value Buyout. Please bear in mind that these are general elements only, and are furnished for Farm Service Agency's preliminary analysis only. The particular situation relative to the law will dictate the contents of OGC's opinion in each individual case. Each OGC office should refer to applicable State law in determining whether the necessary elements have been met in each case.

ELEMENTS

FRAUD:

- (1) A false representation or omission of fact,
- (2) Material fact,
- (3) Borrower's knowledge of its falsity,
- (4) Borrower's intent that the representation or omission should be acted on by FSA,
- (5) FSA's ignorance of its falsity,
- (6) FSA's reliance on the representation or omission,
and
- (7) FSA's consequent and proximate injury or damage.

WASTE:

- (1) Unlawful act or omission on part of borrower,
- (2) Affects FSA's security
- (3) Results in permanent injury to FSA security, and
- (4) Borrower is in lawful possession of FSA security.

May be:

- (a) Active waste - intentional destruction of FSA security,
- (b) Permissive waste - allowing death, decay, deterioration, disrepair, or destruction of FSA security through inexcusable neglect or negligence,
or,
- (c) Equitable waste - allowing death, decay, deterioration, disrepair, or destruction of FSA security by not following management practices that a prudent person would have followed under similar circumstances.

GENERAL GUIDELINES

**DETERMINATION OF THE
LACK OF GOOD FAITH BECAUSE OF FRAUD, WASTE, AND CONVERSION
(Continued)**

CONVERSION:

- (1) Valid lien by FSA in security,
- (2) Willful and/or malicious disposal of security by debtor(s),
- (3) Failure to obtain consent of disposal from FSA, and
- (4) Injury to FSA.

GUIDE

QUESTIONNAIRE TO BE COMPLETED AND FURNISHED TO THE OFFICE OF GENERAL COUNSEL (OGC) WHEN SEEKING OPTIONS ON DENIAL OF REQUESTS FOR PRIMARY LOAN SERVICING PROGRAMS, OR MARKET VALUE BUYOUT, ON THE BASIS OF FRAUD, WASTE, OR CONVERSION.

I. FRAUD: Are you making an allegation that the borrower is not in good faith because of fraud against FSA? Yes _____ No _____ (If yes, completely answer the following question and furnish applicable documentation. Attach additional sheets if necessary.)

A. Did the borrower make a false representation to FSA? Yes _____ No _____ (If yes, specifically set out the false representation or attach a copy if written.)

B. Was the false representation material to FSA's decision to provide the borrower with a loan, or to restructure, refinance, or compromise an existing loan? Yes _____ No _____ (If yes, specifically set out the importance of the false representation.)

C. Did the borrower know that the information was false or did the borrower intentionally omit material information? Yes _____ No _____ (If yes, specifically set out why you think the borrower had knowledge of the false information or intended to omit material information.)

Continued on next page

GUIDE
(Continued)

D. Did FSA know at the time that the representation or omission made was false and intentional? Yes _____ No _____ (If no, when did FSA learn of the false representation or omission of fact.)

E. Did FSA rely on the false representation or omission of material fact when FSA loaned the borrower money, or to restructure, refinance, or compromise an existing loan? Yes _____ No _____ (Specifically set out the basis for your opinion.)

F. What was the date of the alleged fraud?

G. Set out specifically the injury FSA suffered because of the false representation or omission of material fact.

H. What actions did FSA take once the alleged fraud was discovered?

GUIDE
(Continued)

I. Other facts for OGC to consider in its analysis:

II. WASTE: Are you making an allegation that the borrower did not act in good faith because of waste against FSA's security? Yes _____ No _____ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)

A. If real estate security was involved, was the borrower in lawful possession of FSA security?

B. Did the borrower actively destroy all or part of FSA's security? Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.)

C. Did the borrower allow the death, decay deterioration, disrepair, or destruction of FSA security through inexcusable neglect or negligence? Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.)

GUIDE

(Continued)

D. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FSA security by not following management practices that a prudent person would have followed under similar circumstances?

Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.)

E. When did the alleged waste take place?

F. What actions did FSA take once the alleged waste was discovered?

G. What permanent injury was caused to FSA's security by the alleged act of waste? (Set out in detail the monetary loss suffered by FSA.)

H. Other facts for OGC to consider in its analysis:

GUIDE
(Continued)

III. **CONVERSION:** Are you making an allegation that the borrower did not act in good faith because of conversion of FSA security? Yes _____ No _____ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)

A. What was the type and dollar value of the collateral converted? List the approximate dates of conversion and the buyer's identity as near as FSA knows or can guess.

B. Was the collateral sold by the borrower without authorization, or was it sold with authorization, but the borrower failed to account for the proceeds?

C. Did the borrower dispose of FSA's security in conscious and knowing violation of the provisions of all previous agreements, instructions and regulations of FSA? Yes _____ No _____ (If yes, specifically set out the basis for your opinion.)

D. What use did the borrower make of the proceeds of the converted items? (If you are not sure, give your best guess and the basis for the opinion.)

GUIDE
(Continued)

E. Are there any aggravating or mitigating circumstances known?
Yes _____ No _____ (If yes, specifically set out the basis for your opinion.)

F. What was the date of the last previous security/collateral check by FSA prior to the alleged act of conversion? (Please summarize the findings of that chattel check.)

G. Had the borrower ever converted collateral before the incident(s) in question? If so, when did it happen, what was involved, and what action did FSA take? Also, have any new loans been granted to the borrower after the time FSA became aware of any conversion?

H. What was the actual County Office procedure in granting approval for this borrower to sell collateral - not just what the regulations say?

I. What excuses, statement or confessions did the borrower make regarding the missing collateral? When and to whom were these statements made?

GUIDE
(Continued)

J. Has there been a contact investigation, referral to OGC or OIG on the matter? Yes _____ No _____ (If yes, please state the details of the referral. If no, specifically state why a referral of the conversion was not made.)

K. State specifically the injury FSA suffered because of alleged conversion of its security.

L. Other facts for OGC to consider in its analysis:
