

FmHA AN NO. 2343(1951)

August 8, 1991

SUBJECT: Information Needed in Determining Lack of Good Faith of Farmer Program Borrowers Due to Waste, Fraud, or Conversion

TO: State Directors, District Directors, and County Supervisors

PURPOSE/INTENDED OUTCOME:

This Administrative Notice (AN) is being issued to assist the Office of the General Counsel (OGC) in making legal determinations of waste, fraud, or conversion. The purpose of this AN is to clarify the information that is necessary to determine whether a borrower is ineligible for Primary Loan Service Programs, Net Recovery Buyout, or Leaseback/Buyback, based on a lack of good faith due to fraud, waste, or conversion.

The attached GUIDE, or a substitute approved by your Regional Attorney, OGC, should be used when requesting a written legal opinion from OGC to substantiate allegations of fraud, waste, or conversion.

COMPARISON WITH PREVIOUS AN:

This AN updates and replaces Farmers Home Administration (FmHA) AN No. 2077(1951), which expired on January 31, 1991.

The unnumbered letter of November 30, 1990, directed County Supervisors to withdraw pending offers of net recovery buyout in cases in which a determination of lack of good faith had been made. This AN also reflects the requirement that a borrower act in good faith in order to be eligible for leaseback/buyback, in accordance with Section 1951.911(a)(4) of FmHA Instruction 1951-S.

IMPLEMENTATION RESPONSIBILITIES:

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

EXPIRATION DATE: July 31, 1992

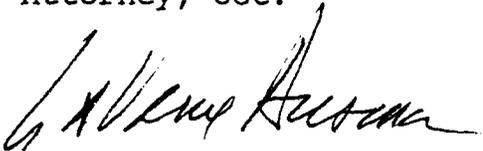
FILING INSTRUCTIONS:
Preceding FmHA
Instruction 1951-S



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.

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 FmHA, the County Supervisor 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 FmHA. 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.

THIS AN DOES NOT AUTHORIZE SENDING 1951-S NOTICES TO BORROWERS WHO ARE IN NONMONETARY DEFAULT. These notices cannot be sent to borrowers until FmHA's regulations are revised to comply with provisions of the 1990 Food, Agriculture, Conservation and Trade (FACT) Act (1990 Farm Bill). Questions on how to service borrowers who are now in nonmonetary default should be addressed to your Regional Attorney, OGC.



LA VERNE AUSMAN
Administrator

Attachments

Sent by Time Delay Option to States at 1:30 pm on 8/12/91
to Districts at 3:30 pm on 8/12/91 and Counties at 7:30 am
on 8/13/91 by GSS.

G E N E R A L G U I D E L I N E S
D E T E R M I N A T I O N O F T H E
L A C K O F G O O D F A I T H B E C A U S E O F F R A U D , W A S T E , A N D C O N V E R S I O N

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, Net Recovery Buyout, or Leaseback/Buyback, as required by 7 CFR Sections 1951.909(c)(2) and 1951.911(a)(4). Please bear in mind that these are general elements only, and are furnished for Farmers Home Administration's (FmHA) 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 FmHA,
- (5) FmHA's ignorance of its falsity,
- (6) FmHA's reliance on the representation or omission, and
- (7) FmHA's consequent and proximate injury or damage.

WASTE:

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

May be:

- (a) Active waste - intentional destruction of FmHA security,
- (b) Permissive waste - allowing death, decay deterioration, disrepair, or destruction of FmHA security through inexcusable neglect or negligence, or

(c) Equitable waste - allowing death, decay, deterioration, disrepair, or destruction of FmHA security by not following management practices that a prudent person would have followed under similar circumstances.

CONVERSION:

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

G E N E R A L G U I D E L I N E S
D E T E R M I N A T I O N O F T H E
L A C K O F G O O D F A I T H B E C A U S E O F F R A U D , W A S T E , A N D C O N V E R S I O N

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G U I D E

QUESTIONNAIRE TO BE COMPLETED AND FURNISHED TO THE OFFICE OF THE GENERAL COUNSEL (OGC) WHEN SEEKING OPTIONS ON DENIAL OF REQUESTS FOR PRIMARY LOAN SERVICING PROGRAMS, NET RECOVERY BUYOUT, OR LEASEBACK/BUYBACK 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 FmHA? 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 FmHA? Yes ___ No ___ (If yes, specifically set out the false representation or attach a copy if written.)

B. Was the false representation material to FmHA'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.)

D. Did FmHA know at the time that the representation or omission made was false and intentional?

Yes No (If no, when did FmHA learn of the false representation or omission of fact.)

E. Did FmHA rely on the false representation or omission of material fact when FmHA 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 FmHA suffered because of the false representation or omission of material fact.

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

G U I D E

QUESTIONNAIRE TO BE COMPLETED AND FURNISHED TO THE OFFICE OF
THE GENERAL COUNSEL (OGC) WHEN SEEKING OPTIONS ON DENIAL OF
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B. Was the false representation material to FmHA'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.)

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

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

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

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B. Was the false representation material to FmHA'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.)

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

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F. What was the date of the alleged fraud?

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

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

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 FmHA'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 FmHA security?

B. Did the borrower actively destroy all or part of FmHA'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 FmHA security through inexcusable neglect or negligence? Yes ___ No ___ (If yes, specifically set out the facts supporting your opinion.)

D. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FmHA 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 FmHA take once the alleged waste was discovered?

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

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

III. CONVERSION: Are you making an allegation that the borrower did not act in good faith because of conversion of FmHA 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 FmHA 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 FmHA's security in conscious and knowing violation of the provisions of all previous agreements, instructions and regulations of FmHA? 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.)

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 FmHA 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 FmHA take? Also, have any new loans been granted to the borrower after the time FmHA 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, statements or confessions did the borrower make regarding the missing collateral? When and to whom were these statements made?

J. Has there been a contract 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 FmHA suffered because of alleged conversion of its security.

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