

UNITED STATES DEPARTMENT OF AGRICULTURE

Farm Service Agency
Washington, DC 20250

Program Appeals, Mediation, and Litigation
1-APP (Revision 2)

Amendment 6

Approved by: Administrator



Amendment Transmittal

A Reasons for Amendment

Subparagraph 2 C has been amended to update ALS contact information.

Subparagraphs 16 D, 16 F, and 25 A have been amended to clarify the distinction between late-filed FSA appeals or requests for mediation from reopening cases that may be administratively final.

Subparagraph 24 B has been amended to provide authority for CED's and SED's to withdraw certain adverse decisions.

Subparagraph 43 C has been amended to provide clarification that participants appealing NRCS determinations also have the right to mediation, unless they have already mediated the issue.

Subparagraph 136 C has been amended to reference the NAD Final Appeal Implementation Status Report.

Subparagraphs 153 B and C have been added and subparagraphs 163 C and 172 C have been amended to add the retention period for preserving individual FOIA and Privacy Act request files that are established in response to requests for records and requests to amend records.

Subparagraph 156 C has been added to reflect the change in how attorney fees and litigation costs assessed by a court in FOIA litigation are paid.

Exhibit 2 has been amended to add the definition of Federal rules of evidence.

Exhibit 8.5 has been added to provide an example of a determination letter for an FLM reconsideration.

Amendment Transmittal (Continued)

Page Control Chart		
TC	Text	Exhibit
5	1-3, 1-4 2-9, 2-10 2-21 through 2-24 2-37, 2-38 2-45, 2-46 4-9, 4-10 6-177 7-5 through 7-30 7-33, 7-34 7-73, 7-74	1, page 1 2, pages 3, 4 8.5, pages 1, 2 (add) page 3 (add)

Table of Contents (Continued)

Part 7 FOIA and Privacy Act (Continued)

Section 4 Privacy Act - Penalties

176	Statute of Limitations	7-91
177	Civil Remedies.....	7-92
178	Criminal Penalties.....	7-94
179-190	(Reserved)	

Part 8 Litigation

191	Settlements.....	8-1
192	Employees Appearing as Witnesses in Judicial or Administrative Proceedings.	8-4
193	Administrative Tort Claims	8-9
194	Awards Under EAJA	8-10

Exhibits

1	Reports, Forms, Abbreviations, and Redelegations of Authority	
2	Definitions of Terms Used in This Handbook	
3	(Reserved)	
4	ALS Generated NAD Case Activity Summary Report	
5-7	(Reserved)	
8	Example Initial Determination Letters	
8.5	Example Determination Letter for an FLM Reconsideration	
9	Summary Outline for Informal Hearing or Meeting	
10	Example Letter Denying a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal	
11	Example Letter Allowing a Participant Time to Provide Written Explanation for a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal	
12	Example Letter Denying a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal That is Accompanied by Explanation of Late-Filing	
13	Example Letter of Acknowledgement of Request for Review	
14	(Reserved)	
15	Example Determination Letter for a COC Appeal Hearing	
16-25	(Reserved)	
26	Example Letter of Acknowledgement of Request for Reconsideration or Appeal	
27	NRCS State Appeal Contacts	
28-40	(Reserved)	
41	Language for Objection to Parties Referencing NAD Cases in Other Decisions	
42-50	(Reserved)	
51	Example Summary Outline for Responses to Appellant-Filed Requests for NAD Director Review	
52-57	(Reserved)	
58	Mandatory Language to Insert in Adverse FOIA Decision Letters	
59, 60	(Reserved)	
61	Example Letter to Participants or Payees for EFT's	

2 FSA, Office of the Administrator, OBPI, ALS Organization

A ALS Organizational Structure and Duties

ALS is part of the Office of the Administrator. ALS:

- monitors and coordinates administrative appeal activities
- develops administrative appeal policy
- prepares National directives
- assists OGC and the Department of Justice with administrative appeals and litigation involving FSA and CCC

Note: ALS is FSA's point of contact for obtaining concurrence on behalf of the Executive Vice President, CCC, or Administrator, on any compromise or offer of settlement stemming from or potentially about administrative appeal or litigation.

- conducts hearings, as necessary, about suspension and debarment appeals
- assembles and prepares for signature by the Administrator, requests for NAD Director review or reconsideration
- provides guidance to FSA offices and officials on mediation cases and on appeals and litigation matters
- reviews and processes FOIA and Privacy Act appeals
- reviews and processes AFIDA appeals.

2 FSA, Office of the Administrator, OBPI, ALS Organization (Continued)

B ALS Addresses

The addresses for ALS are as follows.

For FedEx, UPS, or other Approved Overnight Mail Delivery	For USPS Delivery
USDA, FSA, ALS SOUTH BUILDING ROOM 6722-S 1400 INDEPENDENCE AVE SW WASHINGTON DC 20250-6722 Telephone: 202-690-3297.	USDA, FSA, ALS STOP 0570 APPEALS AND LITIGATION STAFF 1400 INDEPENDENCE AVE SW WASHINGTON DC 20250-0570

Notes: Use FedEx, UPS, or other approved overnight service when time is of the essence or when sending any electronic disks, photographs, or other sensitive or damageable material.

USPS regular or priority mail shall **not** be used to send case files or packages to ALS, or when time is a factor. USPS regular mail should be used **only** for routine letter correspondence.

C ALS Contact Information

ALS contacts are as follows.

Appeals and Litigation Staff		
Main Telephone Number: 202-690-3297		
FAX Number: 202-690-3003.		
Name	Title	Phone Number
John W. Welch	Director	202-690-3297
Gwen Sellman	Staff Assistant	202-690-3297
Charles Berge	Management Analyst	*--202-690-3297--*
Shelley Davis	Management Analyst	202-690-8034
H. Talmage Day	Legal Analyst	202-720-0358
G. Sean O'Neill	Management Analyst	202-720-9003
Carol Wagner	Legal Analyst	202-720-4966
Robin Wieland	Paralegal Specialist	202-690-2814

12 Required Elements of an Adverse Decision Letter (Continued)

B Letter Content

Use plain and simple language and terminology, with a minimum of acronyms and abbreviations that participants and others can easily understand.

Decision letters should contain as much information as possible summarizing all pertinent information and program provisions that could be relevant to the determination. A good decision letter:

- is a letter that adequately summarizes and explains everything that matters about a case
- should require little additional information to explain what is really at issue in a case.

The decision letter is the starting point for the next administrative review authority.

See Exhibits 8 and 15 for examples of adverse decision letters.

13 Appeal and Review Options in FSA’s Informal Appeals Process

A Options to Give Participants in Appealable Adverse Decisions

When notifying a participant of an adverse decision, use the applicable language in paragraph 14 to provide the right to request reconsideration, appeal, or mediation according to the following table.

Note: This does **not** apply to:

- matters that do **not** fall within the scope or jurisdiction of 7 CFR Parts 11 and 780 (paragraph 10)
- decisions that are **not** appealable (paragraph 15).

IF the adverse decision is made by...	THEN provide the right to...
COC employee	appeal to COC.
COC	reconsideration, appeal to STC, mediation, and appeal to NAD.
STO employee (not FLO, FLM, or SED)	
FLO	reconsideration, mediation, and appeal to NAD.
FLM	
SED	
Exception: SED relief determinations have no review or appeal rights.	
STC	appeal to NAD.
National Office official	

Exhibit 8 provides examples of some decisions made by various FSA officials or committees.

--Exhibit 8.5 provides an example of an FLM reconsideration decision.--

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)**D Requests Not Timely Filed**

[7 CFR 780.15(d)] Notwithstanding the time limits in paragraphs (b) and (c) of this section, a request for an appealability review, reconsideration, mediation, or appeal may be accepted if, in the judgment of the reviewing authority with whom such request is filed, exceptional circumstances warrant such action. A participant does not have the right to seek an exception under this paragraph. FSA's refusal to accept an untimely request is not appealable.

SED, FLM, FLO, COC, or STC as reviewing authority, may consider a request for appealability, appeal, mediation, or reconsideration that is **not** filed timely if the circumstances warrant such action. The reviewing authority **must** document, in writing, the reasons for accepting a late-filed request.

Note: Even though requests for mediation may be made by participants directly to the State mediation program according to paragraph 13, it remains FSA's responsibility to determine if the request for mediation was timely filed. FSA's authority to render a decision about the timeliness of any request for mediation is **not** delegated to any State mediation program. FSA reserves the right to refuse to accept any untimely request for mediation.

*--See subparagraph F for instructions on processing late-filed requests for appealability, reconsideration, mediation, or appeal.

See paragraph 25 for cases **not** meeting the late-file policy of subparagraph F.--*

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

E Misdirected Requests

If a request for appealability, reconsideration, mediation, or appeal is filed with an improper reviewing authority:

- acknowledge the request
- advise the appellant that the request is being referred to the proper authority for consideration.

Unless there is documentary evidence to show that the misdirected request for appealability, reconsideration, mediation, or appeal was itself **not** timely, do **not** deny appealability requests or requests for reconsideration, mediation, or appeal because of misdirection. Appealability decisions, reconsideration, mediation, or appeal should **not** be denied merely because the misdirection delayed receipt by the proper reviewing authority.

F Processing Late-Filed Requests for Appealability, Reconsideration, or Mediation or Appeal

Subparagraph D specifies that a participant does **not** have a right to an exception to the time limit set for filing requests for appealability, reconsideration, mediation, or appeal within FSA. FSA's authority and discretion, under subparagraph D and 7 CFR 780.15(d), to accept late filed requests, is **not** and should **not** be considered to be a relief determination giving rise to further appeals. An FSA decision **not** to accept a late-filed FSA appeal is final and **not** subject to further review or appealability review.

--If written requests for appealability, reconsideration, mediation, or appeal are received 1 to 14 calendar days beyond the time period specified in subparagraph B and 7 CFR 780.15,-- the FSA reviewing authority shall notify the participant that the request (for appealability, reconsideration, mediation, or appeal) was 1 of the following:

- **not** filed timely with FSA and; therefore, will **not** be further processed (Exhibit 10)
- considered **not** timely filed, but that the participant has 7 workdays to provide FSA a written explanation of why the late-filed request (for appealability, reconsideration, mediation, or appeal) should be accepted for further processing (Exhibit 11)
- accompanied by a satisfactory written explanation for such late-filing will be processed (paragraph 17).

--If written requests for appealability, reconsideration, or appeal are received more than 14 calendar days beyond the time period specified in subparagraph B and 7 CFR 780.15, follow paragraph 25.--

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

F Processing Late-Filed Requests for Appealability, Reconsideration, or Mediation or Appeal (Continued)

<p>IF...</p>	<p>THEN the FSA reviewing authority with whom the late-filed request was submitted shall do either of the following:</p>
<p>FSA receives both of *--the following within 1 to 14 calendar days after the deadline in subparagraph B and 7 CFR 780.15:--*</p> <ul style="list-style-type: none"> • a written request for appealability, reconsideration, mediation, or appeal, as applicable • a timely filed written explanation for such late-filing 	<p>accept the late-filed request for appealability, reconsideration, mediation, or appeal, as applicable.</p> <p>Note: Proceed according to paragraph 17 the same as if the late-filed request had been timely filed.</p> <hr/> <p>decline to accept the late-filed request for appealability, reconsideration, mediation, or appeal, as applicable.</p> <p>The participant shall be notified that FSA’s decision not to further process the late-filed request for appealability, reconsideration, mediation, or appeal is administratively final and not subject to further review or appeal.</p> <p>Note: The participant cannot challenge or seek appealability from NAD on this FSA determination.</p> <p>See Exhibit 12 for an example letter.</p>

*--**Reminder:** Handle requests received more than 14 calendar days late according to paragraph 25.--*

17 Acknowledging Requests and Preparing for Informal Hearings, Meetings, and Appeals

A Acknowledgement Letter

Handle requests for appealability, reconsideration, or mediation according to the following table.

IF the participant is seeking...	THEN...
an appealability review by the SED	a separate acknowledgement is not required. The SED shall issue an appealability decision according to subparagraph 15 C.
reconsideration or appeal	<p>issue an acknowledgement letter (Exhibit 13) informing the appellant:</p> <ul style="list-style-type: none"> • of the right to an informal hearing or meeting with the reviewing authority • that a copy of FSA’s administrative record will be sent to the appellant’s address of record in advance of the hearing • of the scheduled date, time, and location of the hearing or meeting <p>Note: Allow at least 10 calendar days notice, unless waived by the appellant.</p> <ul style="list-style-type: none"> • that the hearing may be a personal hearing or may be by telephone, if sufficient telephone equipment is available • that if the appellant or representative cannot, or chooses not to, attend the hearing or meeting, the appellant may submit written comments before the scheduled review • that the Government does not reimburse appellants for expenses incurred with an informal hearing or meeting • that the appellant has the right to request a verbatim transcript of the hearing at appellant’s expense through FSA’s contract service, if such request is received by FSA at least 7 calendar days before the hearing.

21 Appeal or Reconsideration Determinations (Continued)

D Decision Letter Guidelines

The appellant and other affected participants **must** be advised of the determination by way of a letter and may also include a revised notice, where applicable. See Exhibit 15 for notification letter requirements. The determination letter **must** include **all** of the following:

- statement of issues being addressed, including program, program year, appellant's name, farm number, etc.
- background or history of the matter being considered, including a brief history of appellant's participation in the program and dispute that has generated request for review or appeal
- appellant's argument organized by issue, to the extent the issue is addressed
- findings of fact
- analysis (conclusions drawn by the reviewing authority based on findings of fact) organized by issue with citation of applicable regulations and program procedure
- determination
- further review rights, as applicable (subparagraphs 13 B and C).

Notes: If the appeal involves an issue about an NRCS Title XII determination, ensure that a copy of the determination is provided to NRCS **and** the appellant.

If a decision is adverse to the participant, to the extent possible, include all pertinent issues in the decision notification. Include **all** reasons for an adverse decision, **not** just a determination on a threshold question or the primary reason for the adverse determination, in the notice to the appellant.

--Exhibit 8.5 provides an example of an FLM reconsideration decision.--

21 Appeal or Reconsideration Determinations (Continued)**E Referring a Matter for Relief**

During FSA's informal appeal process, if the reviewing authority determines that a case merits the consideration of relief by a higher reviewing authority, advise the appellant:

- that a determination will be delayed

Note: Be aware of time constraints and default determination provisions that may apply.

- of the reason for the delay; do **not** discuss with or give the appellant details of the recommendation or misleading hope that relief may be granted
- that notification will be mailed after the higher reviewing authority has acted on the case.

Note: Follow 4-CP for issues involving farm programs.

If the adverse decision is affirmed on appeal or reconsideration and relief is either **not** considered or full relief is **not** granted, notify the appellant, in writing, of both the program and relief determination according to subparagraph 13 A.

Note: As explanation, by acting on a relief request, the higher reviewing authority adopts and ratifies the underlying program decision leading to the relief requests. Therefore, appeal rights on the program decision are identical to the relief decision.

24 **Withdrawing FSA Adverse Decisions (Continued)**

B Examples of Withdrawing Decisions

The following table describes some instances when FSA adverse decisions may be withdrawn. The table is **not** intended to include all situations.

IF an adverse decision was rendered by...	THEN the decision may be withdrawn by...	IF...
COC employee	COC employee (same person who issued *--adverse decision), CED, COC, SED, STC, or National Office official	<ul style="list-style-type: none"> • information becomes available to show that the adverse decision is seriously flawed or was based on incorrect information • the decision clearly does not conform with program procedure or regulations • it would be in FSA’s best interest to withdraw the decision and reissue a decision that is factually correct and that is according to prescribed procedure or regulations.
COC	COC, authorized FSA appeal representative, SED, STC, or National Office official	
DD	DD, Farm Loan Chief, SED, STC, FSA appeal representative, or National Office official	
Farm Loan Chief	Farm Loan Chief, authorized FSA appeal representative, or National Office official	
FLP Specialist	FLP Specialist, authorized FSA appeal representative, or National Office official--*	
FLO	FLO, FLM, authorized FSA appeal representative, or National Office official	
FLM	FLM, authorized FSA appeal representative, or National Office official	
SED	SED or National Office official tion: SED equitable relief determinations may be withdrawn only by SED.	
STC	STC, authorized FSA appeal representative, or National Office official	
National Office official	National Office official or authorized FSA appeal representative	

25 Finality of Administrative Decisions and Reopening FSA Appeals Cases**A Finality of Administrative Decisions**

[7 CFR 780.15] To the extent practicable, no later than 10 business days after an agency decision maker renders an adverse decision that affects a participant, FSA will provide the participant written notice of the adverse decision and available appeal rights.

Notwithstanding the time limits of 780.15(b) and (c), a participant's request for appealability review, reconsideration, or appeal by FSA may be accepted if, in the judgment of the reviewing authority with whom such request is filed, exceptional circumstances warrant such action. A participant does not have the right to seek an exception under 780.15(d). FSA's refusal to accept an untimely request is not appealable or subject to appealability review.

[7 CFR 780.16] To the extent practicable, no later than 30 calendar days after an agency decision becomes a final administrative decision of USDA, FSA will implement the decision.

[7 CFR 11.13] A final determination of the National Appeals Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

An applicant may not seek judicial review of any agency adverse decision appealable under 7 CFR part 11 without receiving a final determination from the Division pursuant to the procedures of 7 CFR part 11.

FSA's appeal regulations provide for the finality of FSA decisions. NAD Rules of Procedure provide for finality of NAD determinations.

Various rules and regulations require FSA to act and issue decisions within prescribed timeframes. Generally, upon receiving a decision, a participant has 30 calendar days in which to exercise review, appeal, and mediation options that may be available. If a participant chooses, for whatever reason, to not exercise an available option of review or appeal, the FSA decision becomes administratively final.

If a participant elects **not** to appeal an FSA decision to either FSA or NAD, the participant **cannot** later seek judicial review of the matter.

--Follow subparagraph 16 F for processing late-filed requests for appealability, reconsideration, mediation, or appeal received 1 to 14 calendar days after the deadline mentioned in subparagraph 16 B and 7 CFR 780.15.--

43 FSA's Consideration of NRCS Determination Appeals (Continued)

C Appeal Rights Following State Conservationist Review

If State Conservationist upholds the final NRCS Title XII determination and the appeal raises no other issues reviewable within FSA, the participant shall be given notice of the right to appeal the decision only to NAD.

***--Note:** Participants appealing NRCS determinations also have the right to mediation unless they have already mediated the issue. If mediation is still applicable, follow subparagraph 14 E.--*

The following is **mandatory** language to be included in the adverse decision letter:

“You may appeal this determination to the National Appeals Division (NAD) by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter. (*Insert NAD address.*)”

If the participant subsequently requests a NAD appeal, FSA is responsible for submitting the FSA record to NAD. However, since this is an appeal of an NRCS final decision, an official from NRCS **must** continue to be involved in the appeal process to furnish information for FSA about the determination and/or decision under appeal to NAD. This may include information about the determination and/or decision, field visits, handbook guidance, and other documentation relevant in the matter to ensure that the record, as well as hearing exhibits and testimony submitted to NAD, is complete and contains all documentation and authorities relevant to the determination appealed to NAD.

Note: FSA **must** contact NRCS and provide the NRCS State Office appeals contact (Exhibit 27) a copy of the request for NAD appeal and all information provided by NAD about the appeal proceedings, including the request for FSA record, the pre-hearing teleconference, and all hearing and post-hearing notifications.

NRCS staff **must** attend, be available as witnesses, and assist FSA's representative in any appeal to NAD involving FSA's ratification of an NRCS final Title XII determination. FSA and NRCS may agree to have an NRCS employee function as FSA's representative on a case by case basis. In that case, FSA's representative **must** maintain a presence in the appeal proceedings and both agencies **must** attend the NAD hearing and participate in any further requests resulting from NAD's appeal decision.

43 FSA's Consideration of NRCS Determination Appeals (Continued)

D NRCS Appeal Contacts

Exhibit 27 provides a list of current NRCS appeal contacts. FSA offices shall consult with NRCS State Offices, if a contact is unavailable.

44-50 (Reserved)

136 Reporting Implementation Status (Continued)

C State Office Actions

To facilitate FSA reporting, ALS will contact SAC’s monthly in States with final appeal *--determinations that are pending implementation, to obtain a NAD Final Appeal Implementation Status Report on implementation status, as follows.--*

- For reporting purposes, implementation occurs when the next step required to correct the error identified by NAD in its final determination has been initiated. The following table has examples of implementation.

Error Identified	Implementation
Payment Error	Determine sum to be paid.
Error in Claim	Reverse claim.
Error in Servicing Notice	Issue corrected notice.
Error in Appraisal	Initiate procurement of a new or corrected appraisal.

- Final determinations where the decision was **not** based on merits will **not** be included in *--the NAD Final Appeal Implementation Status Report. Examples include the following:--*
 - dismissal by NAD for failure to appear
 - dismissal following withdrawal of decision by FSA
 - dismissal on a determination of no jurisdiction by NAD.
- For reporting on implementation status:
 - if no further steps are required for implementation after the final NAD determination, SAC will report, “no steps required” and “implemented”
 - if all steps required to process a payment to a prevailing appellant or to process a recovered overpayment have occurred as of the reporting date, SAC will report that implementation of the determination is “pending”

Note: If steps necessary to begin processing payment have been taken or if demand for an overpayment has been sent, SAC will report, “implemented”, but will furnish additional information about status and timing for payment or steps in process to recover any overpayment.

- in cases where implementation **cannot be initiated** with 30 calendar days after the appeal becomes final, SAC will briefly state the reason for any delay and the expected time for implementation
- in all other cases, SAC will report the final determination “implemented”, if the first steps to implement the final determination have been taken.

137-150 (Reserved)

152 State FOIA Coordinators (Continued)

B Responsibilities Relating to Appeals

When ALS receives an appeal of a decision made by a State or County Office to deny the release of FSA records, ALS will notify the State FOIA coordinator. FOIA coordinators will provide assistance in:

- forwarding the FOIA request file compiled by the record holding office to ALS

Notes: If the volume of the requested records is so large as to make sending all records impractical, ALS may request a representative sample.

Copies shall be 1-sided and the best copies available. The record holding office shall notate on the FOIA request file that all copies are the best available. Copies of records that were withheld in full shall **not** have information blacked out or added. Copies of records that were partially released, according to 2-INFO, shall include the brackets showing the information that was withheld but the information shall **not** be blacked out.

- obtaining background information pertinent to the FOIA request, as determined by ALS or OGC
- obtaining declarations, if applicable, from the FSA employee who performed, supervised, or coordinated the record search efforts, as determined by ALS or OGC.

State and County Offices **must** use FedEx, United Parcel Service, or other shipping companies with overnight delivery, to ship the FOIA request file and any other information required by ALS.

Note: Mail sent to the National Office using standard USPS creates delays because of package inspections and irradiation technology usage to decontaminate bacteria. Because irradiation “over exposes” images on paper, reviewing the records and providing the requester the best copy available, as required by FOIA, will be difficult, if not impossible.

153 FOIA Request File

A Material To Be Included

A complete copy of the FOIA request file, maintained by the record holding office according to 25-AS, may be required to be forwarded to ALS. The material in the file shall include:

- the original written request
- a copy of the record holding office's response.

Depending on the individual request, the FOIA request file may also include, but **not** be limited to:

- originals or best copies available of the requested records

Note: Requested records will include pages released to the requester **and** pages withheld.

- supporting documentation or correspondence compiled in the course of processing the request relating to:
 - fees, including fee waiver determinations
 - the search for records
 - expedited processing determinations
 - consultations and referrals
 - contact with the requester about the request
 - any unusual circumstances that may justify a delay in responding to a request.

Note: See 2-INFO for examples of unusual circumstances that could justify a delay.

*--B Retention Period

FSA records that are denied release in response to an initial FOIA request must be segregated and preserved while a FOIA appeal or FOIA litigation is pending. All relevant records about individual requests, as described in subparagraph A, must be preserved until further notice.

C Consequences for Failure to Preserve Records

Failure to preserve records through the conclusion of FOIA litigation could result in court-ordered sanctions against FSA. Sanctions would include attorney fees and litigation costs, and potentially, other penalties such as injunctive relief.--*

154 Processing Appeals**A Regulations**

[7 CFR 1.14(b)] Each agency shall provide for review of appeals by an official different from the official or officials designated to make initial denials.

B Separating Duties

If an appeal is received by the record holding office, the head of the office shall forward the appeal to the Administrator, according to paragraph 151, and notify the requester that the appeal is being referred to the Administrator for a determination.

C ALS Responsibility

ALS is responsible for processing administrative appeals under FOIA and preparing *--materials used by the Justice Department and OGC to defend FSA in FOIA litigation.--*

D ALS Initial Denial Review

The administrative appeals process is to be made available to a requester **after** FSA has given all consideration to the FOIA request according to FSA procedure. Processing the initial request may include performing a search for records and determining applicable fees. If responsive records exist, a review of the records shall be completed to determine what information is exempt from disclosure.

On a case-by-case basis, if the initial review by ALS reveals that the request was **not** processed according to 2-INFO, ALS may remand the FOIA request to the record holding office, through the State Office, for additional processing and a complete response. ALS will close its files on the appeal and notify the requester that the request is being referred to the record holding office for further processing and response. If the request is partially denied under FOIA, the requester will again be provided appeal rights to the Administrator.

State Offices shall contact PAS for guidance about the processing FOIA requests received.

155 Final Administrative Determination**A Regulation**

[7 CFR 1.14(c) (first sentence)] 5 U.S.C. 552(a)(6)(A)(ii) provides that each agency in the Department to which an appeal of a denial is submitted shall inform the requester of its determination concerning that appeal within 20 working days (excepting Saturdays, Sundays, and legal public holidays), plus any extension authorized by 1.16, of its date of receipt.

B Appeal Is Granted in Full

If FSA determines to grant the appeal in full, the written response to the requester shall include any conditions surrounding the decision to grant the request, such as the payment of fees. If the responsive records are released to the requester by ALS on appeal, the response shall also include the name, mailing address, and telephone number of the FSA employee to contact to make arrangements for inspection or record release.

C Appeal Is Denied

If FSA determines to deny the appeal, either in part or in whole, FSA **must** receive concurrence from OGC with respect to legal sufficiency.

ALS shall send a copy of the records requested and all correspondence relating to the request to OGC. When the volume of records is so large as to make sending a complete copy impractical, ALS shall include a representative sample of the requested records and an informative summary of the records to OGC.

OGC shall review, as promptly as practicable, the request and appeal and provide FSA all necessary assistance to respond to the appeal within the administrative deadline or any extension of the administrative deadline.

The requester shall be informed of the final determination, the reasons for denial, if denied, the name, title or position of each employee responsible for denial, and the right to judicial review of the denial by an appropriate U.S. District Court.

Note: The Administrator, or designee, is authorized to receive FOIA appeals and make determinations to deny FOIA appeals.

156 Judicial Review**A Appellant's Rights**

Any requester has the right to seek judicial review in an appropriate U.S. District Court, if the Administrator denies an appeal either in whole or in part.

If FSA fails to meet an administrative deadline in either the initial review or administrative appeal process, the requester has been deemed to have fully, or “constructively”, exhausted his or her administrative remedies and can seek immediate judicial review.

Note: On complaint, the U.S. District Courts with jurisdiction over FOIA cases can be the district in which the complainant resides or has his or her principal place of business, where the FSA records are located, or in the District of Columbia.

B Court Action

FOIA includes a provision permitting the U.S. District Court to award reasonable attorney fees and litigation costs if an appellant substantially prevails in litigation. FOIA does **not** authorize a requester to seek monetary damages against FSA or its employees. However, in certain circumstances, FOIA provides that FSA employees who arbitrarily withhold information may be subject to disciplinary action.

***--C Attorney Fees and Litigation Costs**

Attorney fees and litigation costs assessed by a court will be paid directly from FSA appropriations.--*

157-160 (Reserved)

163 Processing Appeals

A Proper Referral

If an appeal is received by the recording holding office, the head of the office shall immediately transmit the appeal to the Administrator and notify the requester that the appeal is being sent to the Administrator for a final determination. The record holding office shall include with the transmittal:

- a copy of the initial request for access to, or a copy of, the records
- specific identification of the records or information sought by the requester, including the name of the applicable system of records
- the reason for the denial and any relevant circumstances that support the decision.

B ALS Responsibility

ALS is responsible for processing appeals of FSA's refusal to grant access and preparing materials used by the Department of Justice and OGC to defend Privacy Act access lawsuits.

163 Processing Appeals (Continued)**C ALS Initial Denial Review and Processing**

When FSA receives an appeal of a decision by a State or County Office to deny access, FSA shall acknowledge receiving the appeal within 10 workdays, excluding Saturdays, Sundays, and legal public holidays and, whenever practicable, indicate whether or **not** to grant the appeal.

ALS shall immediately notify the designated State FOIA coordinator that a Privacy Act appeal has been received. State FOIA coordinators will provide assistance in forwarding to ALS:

- a copy of the initial request for access to, or copies of, records
- a copy of the record holding office's response that provides the reason for the denial
- supporting documentation that specifically identifies the requested records or information, including the name of the applicable system of records
- a record of any contact with the requester about the request
- any unusual circumstances that may justify a delay in responding to the request, if applicable.

On a case-by-case basis, ALS may determine that the requested records **must** be reviewed by ALS or OGC **before** FSA can make its final determination. The State FOIA coordinator will assist the record holding office in forwarding to ALS the best copies available of the requested records. See paragraph 152 for guidance on shipping records to the National Office.

Note: The record holding office shall maintain individual Privacy Act files, according to 25-AS, created in response to requests for access to, or copies of, records received from the subject of the records. See paragraph 153 for descriptions of the type of *--material included in individual Privacy Act request files. All relevant records maintained in individual Privacy Act request files must be preserved until further notice.--*

172 Processing Appeals**A Proper Referral**

If an appeal is received by the record holding office, the head of the office shall immediately transmit the appeal to the Administrator and notify the requester that the appeal is being sent to the Administrator for a final determination. The record holding office shall include the following with the transmittal:

- a copy of the initial request to amend records
- all information required to be submitted by the requester in support of the request.

Note: The request shall include the name of the system of records, as published in the system notice to which the request relates, a description of the nature (that is, modification, addition, or deletion) and substance of the correction or amendment requested, and any other information specified in the system notice. FSA's current System of Records is detailed in 3-INFO, Exhibit 4.

B ALS Responsibility

ALS is responsible for processing FSA's refusal to amend record appeals and preparing materials used by the Justice Department and OGC to defend Privacy Act amendment lawsuits.

172 Processing Appeals

C ALS Initial Denial Review and Processing

When ALS receives an appeal of a decision by a State or County Office to refuse to amend records, ALS will notify the designated State FOIA coordinator. State FOIA coordinators will provide assistance in forwarding to ALS:

- a copy of the initial request to amend records and required information in support of the request
- a copy of the record holding office's response that provides the reason for the denial
- a copy of the FSA record subject to the appeal, if required by ALS or OGC
- a record of any contact with the requester about the request
- any unusual circumstances that may justify a delay in responding to the request, if applicable.

On a case-by-case basis, ALS may determine that the records subject to the appeal **must** be reviewed by ALS or OGC **before** FSA can make its final determination. The State FOIA coordinator will assist the record holding office in forwarding to ALS the best copies available of the subject records. See paragraph 152 for guidance on shipping records to the National Office.

Note: The record holding office shall maintain individual Privacy Act files, according to 25-AS, created in response to requests to amend records. See paragraph 153 for descriptions of the type of material included in individual Privacy Act request files.

--All relevant records maintained in individual Privacy Act request files must be preserved until further notice.--

Reports, Forms, Abbreviations, and Redelegations of Authority

Reports

This table lists the required report in this handbook.

Reports Control Number	Title	Reporting Period	Submission Date	Negative Reports	Reference
	NAD Final Appeal Implementation Status	Monthly	15 th of each month	Required	136

Forms

None.

Abbreviations Not Listed in 1-CM

The following abbreviations are not listed in 1-CM.

Approved Abbreviation	Term	Reference
2008 Farm Bill	Food, Conservation, and Energy Act of 2008	136
ADR	alternative dispute resolution	51, 81
ALS	Appeals And Litigation Staff	Text, Ex. 4
EAJA	Equal Access to Justice Act	29, 73, 182
FTCA	Federal Tort Claims Act	193
SAC	State appeals coordinator	4, 5, 78, 84, 86, 89, 98, 136
Title XII	Food Security Act of 1985, Title XII	3, 9, 13, 19, 21, 41-43

Re delegations of Authority

None.

Definitions of Terms Used in This Handbook (Continued)***--Civil Judgment**

[7 CFR 3017.920] **Civil judgment** means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).--*

Confidential Mediation

[7 CFR 780.2] **Confidential mediation** means a mediation process in which neither the mediator nor parties participating in mediation will disclose to any person oral or written communications provided to the mediator in confidence, except as allowed by 5 U.S.C. 574 [Administrative Disputes Resolution Act] or 7 CFR part 785 [regulations governing the Certified Agricultural Mediation Program].

Constructive Knowledge

Constructive knowledge is knowledge that a person using reasonable care or diligence should have, and; therefore, is attributed by law to a given person.

***--Conviction**

[7 CFR 3017.925] **Conviction means** — (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.--*

De Novo Review

A de novo review means reviewing the issue as if there had been no earlier ruling.

***--Debarment**

[7 CFR 3017.930] **Debarment** means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR Chapter 1). A person so excluded is debarred.--*

Discovery

Discovery is the legal act or process of finding or learning something that was previously unknown. In general, discovery does **not** apply to NAD proceedings.

Definitions of Terms Used in This Handbook (Continued)

Disqualified

[7 CFR 3017.940] **Disqualified** means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under— (a) The Davis-Bacon Act (40 U.S.C. 276(a)); (b) The equal employment opportunity acts and Executive orders; or (c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

Excluded or Exclusion

Excluded or exclusion means that, either by court order, agreement, settlement, or administrative process, a participant is prohibited from participating in or receiving benefits under some or all agency programs or may participate or receive benefits only under certain conditions. The time period of an exclusion may be limited or lifetime.

*--Federal Rules of Evidence

Federal rules of evidence are rules governing proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges.--*

Handbooks, Notices, and Other Directives

Handbooks, notices, and other directives are internal operating guidelines issued to Field Offices and employees to facilitate the implementation of a program or delivery of services as prescribed in enabling legislation (statute), regulation, or Federal Register notice. Generally, FSA handbooks, notices, and directives should be considered FSA's official generally applicable interpretation of enabling legislation or statute, regulation, or Federal Register notice.

Hearing

[7 CFR 780.2] A **hearing** is an informal proceeding on an appeal to afford a participant opportunity to present testimony, documentary evidence, or both to show why an adverse decision should be reversed or modified.

Hearsay

Hearsay, generally, is:

- second-hand knowledge
- testimony given by a witness based not what she or he knows personally, but what others have said.

Example Determination Letter for an FLM Reconsideration

The following example is for illustration purposes only and is not intended to be an accurate description of program or eligibility provisions.

Mrs. Brenda Op
Op Farms Partnership
HCR 3 Box X
Anywhere, PA 44865

Date

Dear Mrs. Op:

This letter is in response to the request for reconsideration you filed on behalf of Op Farms Partnership with Ima Employee, Farm Loan Manager, regarding a denial of primary loan servicing and the Farm Service Agency's (FSA's) plan to accelerate farm loans.

BACKGROUND

In June 2008, Op Farms Partnership's direct loan payments to FSA became 90 days past due. FSA advised Op Farms Partnership of the availability of primary loan servicing options such as consolidation, rescheduling, reamortization, limited resource rates, deferral, and writedown. Op Farms Partnership timely filed an application for loan servicing. In October 2008, FSA determined Op Farms Partnership eligible for loan servicing. FSA planned to reschedule Op farms Partnership's direct FSA debt and obtain a lien on all assets (partnership and personal). Op Farms Partnership accepted FSA's terms in November 2008. Soon thereafter, Op Farms Partnership and Brenda Op objected to the condition that it offer all assets (partnership and personal) for lien. Op Farm Partnership argued that offering all assets to FSA would prevent it from obtaining future credit to operate its farm. In December 2008, FSA withdrew its offer of loan servicing because Op Farms Partnership would not agree to the terms of FSA's offer of loan servicing. On or about this same time, FSA became aware that Op Farms Partnership was delinquent in its FSA guaranteed loan payments. In January 2009, OP Farms Partnership requested that FSA reconsider its decision.

ISSUES

1. Considering Op Farms Partnership's delinquent guaranteed loan payments, is Op Farms Partnership's farm plan feasible?
2. Does Op Farms Partnership's assertion that it is unable to pay guaranteed loan payments due to the poor economy show error in FSA's decision?
3. Is Op Farms Partnership's unwillingness to offer a lien on all assets relevant to its eligibility for primary loan servicing?

GENERAL PROGRAM PROVISIONS

Regulations at 7 CFR Part 766, Subpart C, govern Loan Servicing Programs. A borrower must have at least a 100 percent debt servicing margin (income and expenses at least equal) for FSA to consider primary loan servicing.

Example Determination Letter for an FLM Reconsideration (Continued)

Mrs. Brenda Op and Op Farms Partnership
Page 2

OP FARMS PARTNERSHIP'S POSITION

Op Farms Partnership does not dispute that it is delinquent on its guaranteed loans. However, Op Farms Partnership asserts that it is the poor economy that prevents it from making timely payments. Op Farms Partnership recognizes that its inability to make timely payments adversely affects its ability to develop a feasible plan. Op Farms Partnership also argued that requiring it to offer a lien on all assets would prevent it from getting needed credit from private lenders to operate its farm.

FINDINGS OF FACT

1. Op Farms Partnership's two direct farm loans became at least 90 days past due effective June 2008. (Agency Record (AR) 6 – 16)
2. On June 25, 2008, FSA sent Op Farms Partnership Form FSA-2510, Notice of Availability of Loan Servicing to Borrowers Who Are 90 Days Past Due. (AR 17)
3. Following receipt of Op Farms Partnership's loan servicing application, FSA prepared a Debt and loan restructuring System (eDALR\$) Analysis Report. FSA completed eDALR\$ assuming that Op Farms Partnership's guaranteed loan payments were current. The eDALR\$ report showed Op Farms Partnership had a \$14,182 cash flow margin. (AR 59 – 86)
4. FSA sent Op Farms Partnership form FSA-2517, Offer of Primary Loan Servicing. The form indicated FSA planned to reschedule both direct loans and take a lien on all partnership and personal assets. FSA subsequently received Form FSA-2518, Acceptance of Primary Loan Servicing, showing Op Farms Partnership agreed to comply with the terms of FSA's offer within 45 days. (AR 37- 41)
5. Op Farms Partnership wrote FSA objecting to offering all assets for lien. The letter set off a series of correspondence culminating with FSA withdrawing its offer of primary loan servicing. (AR 47 – 59)
6. FSA sent Op Farms Partnership form FSA-2521, Denial of Primary Loan Servicing and Intent to Accelerate.
7. Op Farms Partnership is approximately \$30,000 past due on its guaranteed loan payments. (AR 25)

ANALYSIS

Considering Op Farms Partnership's guaranteed loan payments, Op Farms Partnership's farm plan is not feasible. When FSA first calculated Appellant's eDALR\$, Op Farms Partnership had a positive cash flow of \$14,182 based on the assumption that all debts were current. (Finding number 3) Factoring in the \$30,000 past due guaranteed loan payments (finding number 7), Op Farms Partnership has a -\$15,817 cash flow, which indicates a debt service margin less than 100 percent. Without a feasible plan of operation, Op Farms Partnership is not eligible for primary loan servicing.

Op Farms Partnership's assertion that it was unable to make timely loan payments on its guaranteed loan due to the poor economy does not show FSA error. The requirement to have at least 100 percent debt service margin is without exception (7 CFR §105(b)).

Op Farms Partnership's objection to offering a lien on all assets is not relevant to its eligibility for primary loan servicing. The requirement for additional security applies only to borrowers eligible for restructure. (7 CFR §760.112). FSA is not considering Op Farms Partnership for debt restructure at this time.

Example Determination Letter for an FLM Reconsideration (Continued)

Mrs. Brenda Op and Op Farms Partnership
Page 3

DETERMINATION

The denial primary loan servicing was factually correct and in accordance with regulations.

If you believe that my decision is erroneous, you have the following options:

Mediation

Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the time frame in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the FSA State Executive Director at the following address: *(Insert SED address or Mediation Program address, as applicable.)*

Appeal to the Department of Agriculture National Appeal Division (NAD)

You may appeal this determination to NAD by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD Appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter. *(Insert applicable NAD address.)*

If you do not timely exercise one of the preceding options, this shall be the final administrative determination with respect to this matter in accordance with the regulations at 7 CFR Part 780 and 7 CFR Part 11.

Sincerely,

(Insert name)
Farm Loan Manager

