

For: FSA Employees

Providing Review Rights in Adverse Decisions and Right of Appealability Review

Approved by: Administrator



1 Overview

A Background

On July 27, 2005, FSA published an interim final rule, 7 CFR Part 780, with request for comments in the FR (70 FR 43262). Notice APP-42 was issued to clarify and reiterate FSA current policy about review rights, provide guidelines for adverse decisions, and provide example letters. Since this notice was issued FSA has become aware of the need to further clarify mandatory language for alternative dispute resolution (ADR) (also referred to as mediation) regarding adverse FSA program decisions.

B Purpose

This notice:

- clarifies and reiterates FSA policy about review rights in adverse decisions
- provides guidelines for adverse decisions that are not appealable
- provides example letters acknowledging a request for reconsideration or appeal
- does **not** apply in cases where 7 CFR Part 1951, subpart S, requires other appropriate notices
- obsoletes Notice APP-42.

C Contact

Direct questions about the procedures in this notice or issues about the appeal system to Appeals and Litigation Staff (ALS) at 202-690-3297.

| | |
|----------------------|--|
| Disposal Date | Distribution |
| April 1, 2007 | All FSA employees; State Offices relay to County Offices |

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2 Right to Request Reconsideration, Appeals, or ADR

A Options for Participants in Initial Adverse Decisions

When notifying a participant of an adverse initial decision, use the applicable language in paragraph 3 to provide the right to request reconsideration, appeal, or ADR according to the following table.

Note: This does **not** apply to initial adverse decisions that do not fall within the scope of 7 CFR 780 and 7 CFR Part 11, such as nonprogram loans. Refer to the applicable regulations and operating procedures for specific instructions about handling these types of decisions.

As part of ADR, FSA offers participants the opportunity for mediation according to this notice. If a participant requests a form of ADR other than mediation, contact ALS for guidance.

| IF the initial adverse decision is made by... | THEN provide the right to... |
|---|---|
| COC employee | appeal to COC. |
| COC | reconsideration, appeal to STC, ADR, and appeal to NAD. |
| Farm Loan Officer (FLO) | reconsideration, ADR, and appeal to NAD. |
| Farm Loan Manager (FLM) | |
| SED | |
| Exception: SED relief determinations have no review or appeal rights. | |
| STC | |
| National Office official | appeal to NAD. |

B Options for Participants in Reconsideration Decisions

When notifying a participant of an adverse reconsideration, use the applicable language in paragraph 3 to provide the right to appeal and request ADR according to the following table.

| IF the reconsideration decision is made by... | THEN provide the right to... |
|---|--|
| COC | appeal to STC, ADR, and appeal to NAD. |
| FLO | ADR and appeal to NAD. |
| FLM | |
| SED | |
| Exception: SED relief determinations have no review or appeal rights. | |
| STC | |

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2 Right to Request Reconsideration, Appeals, or ADR (Continued)

C Options for Participants in Appeal Decisions

When notifying a participant of an adverse appeal decision, use the applicable language in paragraph 3 to provide the right to appeal and request ADR according to the following table.

| IF the adverse appeal decision is made by... | THEN provide the right to... |
|---|--|
| COC | appeal to STC, ADR, and appeal to NAD. |
| STC | ADR and appeal to NAD. |

Exception: Do **not** provide the right to ADR if FSA and the participant have previously mediated the issue or otherwise completed ADR.

3 Mandatory Language to Insert in Adverse Decision Letters

A Requirements to Use Language

The language in subparagraphs B through F shall be used, as applicable, according to paragraph 2, in all adverse decision letters.

Exception: For farm loan servicing actions, the exhibits and attachments provided in 7 CFR Part 1951, subpart S, must be used when notifying participants of adverse decisions.

B Appeal to COC

The following is the **mandatory** language for insertion in an adverse decision letter:

“You may appeal this determination to the County Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the County Committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you appeal this determination to the County Committee, you may later appeal an adverse determination of the County Committee to the FSA State Committee or NAD. To appeal, write to the County Committee at the following address and explain why you believe this determination is erroneous. (Insert COC address.)”

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3 Mandatory Language to Insert in Adverse Decision Letters (Continued)

C Reconsideration

The following is the **mandatory** language for insertion in an adverse decision letter for reconsideration of a determination:

“You may request that the (insert COC, Farm Loan Officer, Farm Loan Manager, or STC, as applicable) reconsider this determination by filing a written request no later than 30 calendar days after you receive this notice in accordance with FSA’s appeal procedures found at 7 CFR Part 780. If you request reconsideration, you have the right to an informal hearing with (insert COC, Farm Loan Officer, Farm Loan Manager, or STC, as applicable) which you or your representative may attend personally or by telephone. If you choose to seek reconsideration, you may later appeal the determination to (insert STC or NAD, as applicable). To request reconsideration, write to (insert COC, Farm Loan Officer, Farm Loan Manager, or STC, as applicable) at the following address and explain why you believe this determination is erroneous. (Insert applicable address.)”

D Appeal to STC

The following is the **mandatory** language for insertion in an adverse decision letter:

“You may appeal the County Committee’s determination to the State Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the State Committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to appeal to the State Committee, you may later appeal the determination of the State Committee to NAD. If you appeal an initial decision of a County Committee to the State Committee, you waive your right to reconsideration by the County Committee of that decision. To appeal, write to the State Committee at the following address and explain why you believe this determination is wrong. (Insert STC address.)”

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3 Mandatory Language to Insert in Adverse Decision Letters (Continued)

E ADR

States **without** a certified mediation program shall use the following:

“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.)

In the alternative, you may seek another form of ADR.”

States **with** a certified mediation program shall use the following:

“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 (insert State name) State mediation program at the following address and provide a copy of your request for mediation to FSA. (Insert mediation program address or other address as agreed upon by State certified mediation program and State FSA office.)

In the alternative, you may seek another form of ADR.”

F Appeal to NAD

The following is the **mandatory** language for insertion in an adverse decision letter:

“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 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.”

4 Issues That Are Not Appealable

A Non-Appealable Adverse Determination Notification of Right of Appealability Review

1-APP, subparagraph 1 D, describes some issues that are not appealable. Decisions involving cases that do not have any disputes of fact are not appealable. Participants have the right to appeal when there is a question of fact or when there is some dispute as to the correct application of a rule, regulation, or generally applicable provision. However, participants cannot appeal the rules, regulations, or generally applicable provisions themselves. Letters notifying participants that a decision is not appealable must clearly explain to the participant the reasons that the decision is not appealable. Avoid using general and vague statements that do not sufficiently demonstrate the reasons that the decision is not appealable.

Participants now have a choice and may request that SED or NAD Director review the FSA determination that an adverse decision is not appealable. After fully explaining the adverse decision, according to paragraph 5, and the reasons why the facts in the case are not in dispute, include the following in the adverse decision:

“(Insert, as applicable, “I have”, “The COC has” or “The STC has”) determined that the issue is not appealable. You may seek a review of this determination by filing with either the FSA State Executive Director or the NAD Director a written request no later than 30 calendar days after the date you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780 or the NAD appeal procedures found at 7 CFR Part 11. If you believe that this issue is appealable, you must write to either the FSA State Executive Director or the NAD Director at the applicable address shown and explain why you believe this determination is appealable. If you choose to seek an appealability review of this determination with the FSA State Executive Director, you need not send the NAD Director any information. If you seek an appealability review with the NAD Director, provide FSA a copy of your request. In the event you request an appealability review by the State Executive Director and the State Executive Director determines that the issue is not appealable, you will be afforded the right to request an appealability review by the NAD Director. (Insert SED and NAD address.)”

Exception: If a COC employee determines that a decision is not appealable, replace the mandatory language above with the following:

“I have determined that the issue is not appealable. You may seek a review of this determination by filing with the FSA State Executive Director a written request no later than 30 calendar days after the date you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you believe that this issue is appealable, you must write to the FSA State Executive Director at the address shown and explain why you believe this determination is appealable. In the event that the FSA State Executive Director determines that the issue is not appealable, you will be afforded the right to request an appealability review by the NAD Director. (Insert SED address.)”

4 Issues That Are Not Appealable (Continued)

B Actions Required Following SED Appealability Determination

The following table describes the action required for the various possibilities stemming from an SED review of appealability.

| IF the SED appealability determination is that the adverse decision... | THEN (with respect to the adverse decision) provide the right to... |
|---|--|
| is appealable | reconsideration, appeal, ADR, or appeal to NAD, as applicable, according to paragraph 2. |
| is not appealable | seek an appealability review from NAD according to subparagraph C. |

C Notification of SED Non-Appealability Determination

If, after performing a review of appealability, SED finds or determines that the matter or issue being contested is **not** one that is appealable, the participant may request that the NAD Director review the FSA adverse determination and SED appealability determination. After fully explaining the adverse determination and basis upon which SED determined it was not appealable, include the following in the SED non-appealability determination:

“(Insert, as applicable, “I have”, The SED has,”) determined that the issue is not appealable. You may seek a review of this determination by filing with the NAD Director a written request no later than 30 calendar days after the date you receive this notice in accordance with the NAD appeal procedures found at 7 CFR Part 11. If you believe that this issue is appealable, you must write to the NAD Director at the address shown and explain why you believe this determination is appealable. If you choose to seek an appealability review with the NAD Director, provide FSA a copy of your request. (Insert NAD address.)”

5 Adverse Decisions and Acknowledging Request for Review

A Initial Adverse Decision Letters

Initial adverse decisions must sufficiently and completely explain to participants:

- the program benefits being sought, such as operating loan, CRP payment, etc.
- the program eligibility provisions at issue
- findings about the issue under appeal
- analysis and conclusions about the application of the program provisions to the findings of fact
- determination, according to the example in Exhibit 1.

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5 Adverse Decisions and Acknowledging Request for Review (Continued)

B Appeal and Reconsideration Adverse Decision Letters

Refer to 1-APP, Exhibit 12, for a sample determination letter that must be used when notifying participants of appeal and reconsideration of adverse decisions.

C Acknowledging Request for Review Notification to Participant

The reviewing authority, that is CED, FLM, STC, etc., must acknowledge a participant's request for appeal or reconsideration. See example letter in Exhibit 2 that must be provided to participants upon receipt of a request for appeal or reconsideration.

Reminder: In cases involving an appeal to NAD, NAD is the reviewing authority and is responsible for acknowledging NAD appeals.

6 Required Action

A SED Action

SED's shall ensure that the instructions in this notice are followed.

B DD Action

DD's shall ensure that FLO's, FLM's, COC's, and COC employees adhere to the instructions in this notice.

C FLO, FLM, and CED Action

FLO's, FLM's, and CED's shall follow the instructions in this notice when issuing adverse determination letters.

Reminders: Additional guidance:

- about adverse decisions contained in applicable program handbooks must be followed
- on adverse decisions about FLP's in 1-FLP must be followed.

Example of Initial Adverse Decision Letter

This is an example of the initial adverse decision letter to be sent by FLM.

Dear *(insert participant's name)*:

This responds to your request for *(insert applicable program benefit – e.g. “a direct operating loan in the amount of \$60,000”)*.

(Insert and fully explain adverse decision as described in paragraph 5 of this notice.)

If you believe that this decision is erroneous, you have the following options.

Reconsideration

You may request that I reconsider this determination by filing a written request no later than 30 calendar days after you receive this notice in accordance with FSA appeal procedures found at 7 CFR Part 780. If you request reconsideration, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to seek reconsideration, you may later appeal the determination to the National Appeals Division. To request reconsideration, write to me at the following address and explain why you believe this determination is erroneous.

(Insert applicable address.)

Alternative Dispute Resolution (ADR)

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.)

In the alternative, you may seek another form of ADR.

Example of Initial Adverse Decision Letter (Continued)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.

(Insert applicable nondiscrimination statement (see paragraph 6)).

Sincerely,

(Insert name)

Farm Loan Manager

Example Letter of Acknowledgement of Request for Reconsideration or Appeal

This is an example of the letter of acknowledgement of request for reconsideration to be sent by the County Office.

Dear *(insert participant's name)*:

This letter acknowledges your *(insert "request for reconsideration" or "appeal," as applicable)* of the *(specify date and decision maker)* determination regarding *(insert issue under review – e.g. request for noninsured crop disaster assistance program payments for pinto bean losses on unit number 5)*.

(Identify reviewing authority) will review your request for *(insert "reconsideration" or "appeal," as applicable)* on *(insert date and time)*. The hearing will be held in *(insert name and address of office)*. You, your authorized representative, or both, are invited to attend this hearing and submit any additional information in support of your request for *(insert "reconsideration" or "appeal," as applicable)*.

The hearing is informal and a verbatim transcript is not ordinarily made. However, if you want a transcript to be made at your expense, please notify me at least 7 days prior to the hearing and I will make the necessary arrangements. Regulations at 7 CFR §780.13 prohibit appellants and their representatives from making any electronic recording of hearings with FSA. FSA will not reimburse you for any costs you may incur in connection with your *(insert "reconsideration" or "appeal," as applicable)*.

If you chose not to attend the hearing, you may submit, before the scheduled hearing date, information and evidence you wish to be considered. *(Insert name of reviewing authority)* will consider your *(insert "request for reconsideration" or "appeal," as applicable)* and make a decision based upon the information submitted by you, in addition to the documents and evidence contained in the administrative record.

The *(insert name of reviewing authority)* will provide the determination in writing to your or your representative as soon as possible after the scheduled hearing. If you have any questions regarding this matter, you may contact *(insert name and telephone number of contact)*.

Sincerely,

(Insert name)

(Insert title)