

# Kansas Agricultural Mediation Services (KAMS) Info Sheet



By Forrest Buhler, KAMS Staff Attorney

## Farm Service Agency Farm Loan Program Direct Loan Restructuring Process

### Step No.

- #1 Packet of notices and forms sent to all borrowers who are<sup>1</sup>:
- Are "Financially distressed" but not delinquent<sup>2</sup>;
  - Are at least 90 days past due.<sup>3</sup>
  - Are in non-monetary default<sup>4</sup>;
  - Have filed bankruptcy<sup>5</sup>;
  - Request loan servicing information; or
  - Request voluntary conveyance of security.
- #2 Borrower receives notice of loan servicing and accompanying forms<sup>6</sup>. (**Note:** **Offset** against government payments owed to the borrower may occur once a borrower becomes delinquent. FSA must send notice of offset and give the borrower the option to contest the offset. Make sure to respond to the offset notice as well as the loan servicing paperwork.<sup>7</sup>)
- #3 Borrower prepares financial documents to submit to FSA, including the Farm Business Plan<sup>8</sup>, to work out a cash flow for the farm operation as well as several other forms required to apply for loan servicing.<sup>9</sup>
- #4 It is **mandatory** for a borrower to return the **fully completed**<sup>10</sup> forms requesting loan servicing within **60** days of the day borrower **received** the notice **if he is more than 90 days past due.**<sup>11</sup>

It is **optional** for the borrower to fill out and return the forms within 60 days **if the borrower has requested loan servicing before his loan(s) is past due.** If the borrower does not respond when it is optional to do so, then he will receive a second notice once he becomes 90 days past due,<sup>12</sup> at which time it will be mandatory to respond or lose valuable rights.<sup>13</sup>

If the forms are not timely returned when it is mandatory to do so, then FSA will accelerate the borrower's loan.<sup>14</sup> **It is important to understand that if FSA accelerates your loan, it speeds up the process that will eventually lead to foreclosure, offset, and denial of release of proceeds from the sale of your livestock or crops<sup>15</sup>. These and other rights will be lost if you do not respond.**

#5 FSA will decide whether borrower is eligible for loan servicing after a borrower has submitted a completed application.<sup>16</sup>

- 1) If FSA finds that the borrower is eligible for loan servicing, then FSA must notify the borrower of that fact within 60 days after receiving a complete application;<sup>17</sup>
- 2) If FSA finds that a "feasible plan" cannot be developed after considering all Primary Loan Servicing options, then within 15 days of the date such determination is made, FSA will send to the borrower "Notification of Adverse Decision for Primary Loan Servicing, Mediation or Meeting of Creditors and Other Options"<sup>18</sup>
- 3) If the "net recovery value"<sup>19</sup> of "nonessential assets"<sup>20</sup> is sufficient to pay the account current, the borrower has 90 days to pay the account current.<sup>21</sup>

#6 There are six general requirements that a borrower must meet in order to be eligible for primary loan servicing:<sup>22</sup>

- 1) Must be "**financially distressed**"<sup>23</sup> or **delinquent**<sup>24</sup> and the delinquency is for reasons beyond the borrower's control.<sup>25</sup>
- 2) Must **not** have sufficient "**nonessential assets**"<sup>26</sup> for which the net recovery value is sufficient to resolve the financial distress or pay the delinquent portion of the loan.<sup>27</sup> (Note: "Nonessential assets" are the borrower's assets which the borrower has an ownership interest that: a. do not contribute to income for essential family living expenses; and b. the farm operation; and c. are not exempt from judgment creditors in a bankruptcy<sup>28</sup>)
- 3) Must resolve a non-monetary default prior to closing the servicing action.<sup>29</sup>
- 4) Must have acted in "**good faith**"<sup>30</sup> in his or her dealings with FSA;<sup>31</sup>
- 5) Must pay a portion of the interest due on the loan if a financially distressed or current borrower applies for servicing.<sup>32</sup>
- 6) Must not be ineligible due to disqualification resulting from Federal crop insurance violation according to 7 CFR 718.<sup>33</sup>

#7 The **Debt And Loan Restructuring System (DALRS)** is the computer program FSA uses to determine if a borrower has a "feasible plan" for loan servicing purposes.<sup>34</sup> Please refer to the attached **DALRS** handout for a detailed explanation of how DALRS works.

#8 There are **seven restructuring options** available to service the various loans that borrowers have with FSA. The DALRS computer program considers each one of the options below in the order listed in determining if a "feasible plan" is possible with the required debt service margin<sup>35</sup>:

- 1) **Conservation Contract**—under this option the borrower agrees to set aside land for conservation, recreation, or wildlife purposes in exchange for reduction of a portion of an outstanding FLP debt.<sup>36</sup> Reduction of

debt under a conservation contract is not a "debt forgiveness" causing a loss to the Agency that would otherwise make a borrower ineligible for new loans with FSA.<sup>37</sup>

2) **Rescheduling**--this option is available for chattel loans and involves changing the loan payment schedule to better fit the borrower's ability to pay.<sup>38</sup>

- a. Payments can be made over a period of up to 15 years.<sup>39</sup>
- b. The interest rate will be the lower of either the current FSA interest rate or the loan's original interest rate.<sup>40</sup>

3) **Reamortization**--this is available only for real estate loans and involves changing the loan payment schedule to better fit the borrower's ability to pay.<sup>41</sup>

- a. Payments can be made over a period of up to 40 years from origination of the note or the useful life of the security, whichever is less, but in no event longer than the maximum number of years for the loan being reamortized.<sup>42</sup>
- b. The interest rate will be either the original interest rate or the current interest rate, whichever is lower.<sup>43</sup>

4) **Consolidation**--this option combines two or more OL loans to create one new loan which should result in a new payment schedule better fitting the borrower's repayment ability.<sup>44</sup>

- a. The interest rate will be the lower of either the current interest rate for that type loan or the original interest rate.<sup>45</sup>
- b. Payments can be made over a period of up to 15 years.<sup>46</sup>

5) **Limited Resource Program**--this program is designed to give special help to applicants who can't afford to borrow money at FSA's regular interest rates.<sup>47</sup>

- a. This is available only for operating and farm ownership loans.
- b. It must be determined that a feasible plan cannot be developed with the regular interest rate on the loan but can be developed with the limited resource rate.

6) **Deferral**--this option is an FSA-approved postponement of the borrower's payments of interest or principal or both.<sup>48</sup> This option is only considered if rescheduling, consolidation, and reamortization of all the borrower's loans will not result in a feasible plan with a 110% debt service margin,<sup>49</sup> the need for the deferral is temporary,<sup>50</sup> and the borrower develops feasible first-year and post-deferral farm operating plans.<sup>51</sup>

- a. The loan is rewritten and only partial payments or no payments are made for a deferral period of up to 5 years.<sup>52</sup>
- b. the borrower does not have to pay interest on the interest that accrues during the deferral period.<sup>53</sup>

7) **Write-down**--this option, which involves FSA reducing the amount that the borrower owes, is used only if the borrower cannot develop a feasible plan using the other loan servicing options with a debt service margin of 110%<sup>54</sup> **and must be delinquent.**<sup>55</sup> The rules provide that if DALRS shows a feasible plan without a writedown at a lower debt service margin than with a writedown, then the borrower will be given the choice of restructuring with or without a writedown.<sup>56</sup>

a. **Important Note:** A write-down received after April 4, 1996, makes the borrower ineligible for receiving certain new direct or guaranteed loans.<sup>57</sup> Exceptions: i) a new direct or guaranteed loan for annual operating expenses or family living expenses if the borrower was restructured with a writedown, or is current on payments under a confirmed reorganization bankruptcy plan;<sup>58</sup> ii) a new guaranteed loan if the borrower has only received debt forgiveness on or before April 6, 1996, on no more than three occasions;<sup>59</sup> iii) an emergency loan if the borrower has only received debt forgiveness on or before April 6, 1996, on no more than one occasion;<sup>60</sup> and iv) a new direct or guaranteed loan for annual farm or ranch operating expenses to borrowers who have received a debt forgiveness on not more than one occasion resulting directly and primarily from a major disaster or emergency designated by the President.<sup>61</sup>

b. There is a **lifetime limit of one debt forgiveness (i.e. write-down or buyout, either recovery or market value buyout)** on any direct loan.<sup>62</sup> A "debt forgiveness"<sup>63</sup> on a direct loan will be prohibited if the borrower has received debt forgiveness on another direct loan at any time.<sup>64</sup> "Debt forgiveness" does not include primary loan servicing options other than writedown.<sup>65</sup>

c. There is a total **lifetime limitation of \$300,000** on the amount of debt forgiveness by write-down and/or market value buyout that FSA may give to a borrower.<sup>66</sup>

d. If there is a **write-down on a loan secured by real estate**, the borrower is required to sign a **shared appreciation agreement**.<sup>67</sup>

e. A **shared appreciation agreement (SAA)** provides that if the land increases in value during a certain time period, the borrower must pay FSA a certain percentage of the increase in value.<sup>68</sup>

f. The **length of the shared appreciation agreement** can be for up to 5 years.<sup>69</sup> If the SAA was entered into on or after August 18, 2000, then the SAA may be for up to 10 years.<sup>70</sup> Shared appreciation is due on the earliest of the following dates:<sup>71</sup>

- i. At the end of the term of the shared appreciation agreement;
- ii. On the sale or conveyance of all or a portion of the Agency's real estate security, unless real estate is conveyed upon the death of a borrower to a spouse who will continue farming;<sup>72</sup>
- iii. On the date the borrower repays or satisfies all FLP loans;
- iv. The borrower ceases farming; or
- v. The Agency accelerates the borrower's loans.

g. **The amount the borrower will owe at the end of the shared appreciation agreement depends on how long it lasts:**<sup>73</sup>

- i. if the period is 4 years or less, the borrower will pay 75 percent of the appreciation in value of the security;
- ii. if the period is more than 4 years, the borrower will pay 50 percent of the appreciation in value;
- iii. the borrower can never owe more than was written off.<sup>74</sup>

h. **Calculation of the recapture amount owed** when a shared appreciation agreement comes due:<sup>75</sup>

- i. Positive difference between market value of the security property on the day the agreement was signed and the market value of the security property at the time of the calculation of the amount owed.<sup>76</sup>

ii. The value of the real estate security at the time of maturity of the shared appreciation agreement shall be the appraised value of the security at the highest and best use **less** the increase in the value of the security resulting from capital improvements added during the term of the SAA (contributory value).<sup>77</sup>

iii. The capital improvements must also meet one of the following criteria:

(A) It is the borrower's primary residence.<sup>78</sup>

Only the added value to the real property by the new or expanded portion of the original dwelling will be deducted from the current market value. If the added value is due to an expansion of the original dwelling then only the "living area square footage" value will be deducted--"living area" may not include patios, garages, porches, and similar additions.<sup>79</sup>

(B) The item is an improvement to the real estate with a useful life of over one year and is affixed to the property.<sup>80</sup> The item must also have been capitalized and not taken as an annual operating expense on the borrower's Federal income tax records.<sup>81</sup> If the new item is a replacement for an item that existed on the real estate at the time the SAA was originally executed then only the value added by the new item will be deducted.<sup>82</sup>

i. **Payment of recapture amount due.** The recapture amount under a shared appreciation agreement as a general rule must be paid in full on the date that the agreement matures.<sup>83</sup> If it is not then the borrower will be considered to be in "nonmonetary default",<sup>84</sup> unless one of the following options is allowed:

i. **Amortization.** Recapture may be amortized into a Shared Appreciation Payment Agreement for borrowers who meet certain eligibility requirements.<sup>85</sup>

A. The term of the Shared Appreciation Payment Agreement will be based on the borrower's repayment ability and the useful life of the security, but shall not exceed 25 years.<sup>86</sup>

B. The borrower must give a lien on all assets except those listed in 766.112(b). However, The Shared Appreciation Payment Agreement does not need to be fully secured if all eligibility requirements have been met and the borrower provides the best lien obtainable on all assets.<sup>87</sup>

iii. **Debt settlement.** Partial settlement may be considered.<sup>88</sup>

j. **Restructure of amortized shared appreciation recapture payment plan.** If a Shared Appreciation Payment Agreement becomes delinquent or the borrower becomes "financially distressed", and the borrower has other program loans, then Agreement will be considered as part of the overall restructure process but can only be reamortized.<sup>89</sup> If the borrower does not have other program loans then the Agency will follow the procedures in Handbook 5-FLP Par. 67A.<sup>90</sup>

#9 If FSA decides that the borrower can develop a feasible plan and is eligible for primary loan servicing, then the borrower's debt will be restructured and the Agency will send an offer to the borrower to do so.<sup>91</sup> The borrower will have **45 days**<sup>92</sup> from the date of receiving the offer of restructure to accept the offer.

1) If the borrower does not timely accept the offer, or fails to respond then the Agency will send the borrower a notice of intent to accelerate and the borrower may request reconsideration, mediation and appeal in accordance with 7 CFR parts 11 and 780.<sup>93</sup>

2) FSA has **60 days** from the date the borrower submits a complete application for loan servicing to offer to restructure the debt.<sup>94</sup>

**(Important Note: Requirement to Pledge all Assets.** If the borrower is delinquent prior to restructuring the borrower **must pledge all assets**, both essential and nonessential, whether encumbered or unencumbered, to FSA as security at the time the loan is restructured.<sup>95</sup> The Agency will take the best lien obtainable on all assets the borrower owns except: 1) if taking a lien on such property will prevent the borrower from obtaining credit from other sources; 2) the property could have significant environmental problems; 3) if the Agency cannot obtain a valid lien; 4) when the property is subsistence livestock, cash, special collateral accounts the borrower uses for the farming operation, retirement accounts, personal vehicles necessary for family living, household contents, or small equipment such as hand tools and lawn mowers; or 5) when a contractor holds title to a livestock or crop enterprise, or the borrower manages the enterprise under a share lease or share agreement.<sup>96</sup>

**(Important Note: Check Tax Implications.** It is also important that you get tax advice before you decide to accept the offer, especially if the restructure involves sale of assets or debt write-off.)

#10 If FSA decides that the borrower is not eligible for loan restructuring and the problem is lack of a "feasible plan," or is not eligible for loan servicing, then FSA will notify the borrower within 15 days of its intent to accelerate the account.<sup>97</sup> The borrower may request reconsideration, mediation or appeal of this decision.<sup>98</sup>

**Mediation.** The USDA Certified State Agricultural Mediation Program for Kansas is the Kansas Agricultural Mediation Service (KAMS). Upon request by the borrower KAMS will set up the mediation with other creditors and FSA. Mediation is a process in which a trained, impartial person, called the mediator, helps the farmer and his

or her creditors look at their mutual problem, identify and consider options, and determine if they can agree on a solution.

- 1) The mediator has no decision-making authority. The mediator helps facilitate communication and cooperation between the parties and assists the parties in working out their own agreement.
- 2) Mediation is a voluntary process and the borrower chooses whether to participate.
- 3) Mediation can be requested by a farmer-borrower at any time, but mediation usually occurs after FSA advises the borrower of lack of a feasible plan--especially where the annual amount owed to **non-FSA** creditors exceeds the net income that is available to pay debts.
- 4) Mediation is most successful when the borrower properly prepares for a mediation by consulting with a competent financial advisor and attorney to review your cash flow and DALR\$ program.

#10A If you disagree with FSA's appraisal, you have a right to challenge it by one of the three following methods:<sup>99</sup> 1) Obtain a **technical appraisal review** of the Agency's appraisal for the reconsideration or appeal hearing;<sup>100</sup> 2) Obtain a **negotiated appraisal**<sup>101</sup> or 3) Obtain an **independent appraisal**<sup>102</sup> on the value of your assets.

1) **"Negotiation Appraisal"**. If an agreement cannot be reached on value, then the borrower may notify FSA and obtain a second appraisal. If the difference between the two appraisals is 5% or less, the borrower will choose the appraisal. If the difference is more than 5% the borrower may request a third appraisal, the cost of which will be shared by the Agency and the borrower. The borrower will select the third appraiser from a list provided by the Agency. The average of the two appraisals closest in value will be the final value from which there is no appeal.<sup>103</sup> Any negotiation of the Agency's appraisal must be completed before mediation.<sup>104</sup>

2) **"Independent Appraisal"**. A borrower may choose to appeal the FSA appraisal. The borrower will pay for an independent appraisal to be done. If the difference between the two appraisals is 5% or less then the borrower will choose which appraisal to use. If the difference is greater than 5% then the borrower will have the right to have the appraisal reviewed on appeal.<sup>105</sup>

3) **"Technical Appraisal Review"**. Without getting a separate appraisal, have FSA's appraisal reviewed by another appraiser.

#11 If mediation is not successful in working out an agreement between FSA, the creditors, and the borrower, then FSA will send notices informing the borrower of its intent to accelerate or continue accelerating the loans.<sup>106</sup> FSA will offer the borrower either **current market value buyout** or an opportunity to **appeal** the denial of loan servicing.<sup>107</sup>

1) **Current Market Value Buyout**<sup>108</sup> (CMVB)-- With this option, the borrower pays to FSA an amount equal to the "market value"<sup>109</sup> of the

borrower's loan security property and his nonessential assets less any prior liens.<sup>110</sup> In exchange, FSA writes off that part of its debt not paid out of the proceeds and eventually releases all liens and mortgages it has on the property.<sup>111</sup> (Check tax consequences!!!)

a. The "current market value" is the least amount FSA is willing to accept from the borrower as payment for the security property and the "nonessential" assets not previously secured to FSA.

b. The "current market value" is calculated by subtracting from the appraised market value of the collateral and non-essential assets, the amount of any prior liens.<sup>112</sup>

c. **CMVB is only offered when the borrower is denied primary loan servicing due to lack of a "feasible plan".<sup>113</sup> The number of buyouts and the amount of debt that can be forgiven to an FSA borrower is limited.<sup>114</sup> If the borrower has received a forgiveness of debt from FSA in the past, then the borrower may not be eligible to do a CMVB if it involves further forgiveness of debt.<sup>115</sup>**

d. **Other eligibility requirements include: the borrower has acted in good faith;<sup>116</sup> the borrower does not have non-essential assets for which the net recovery value is sufficient to pay the account current;<sup>117</sup> the present value of the restructured loans is less than the net recovery value;<sup>118</sup> and the borrower pays the amount required without FSA guaranteed or direct credit.<sup>119</sup>**

d. If FSA decides the borrower is not eligible for primary loan servicing, it sends a letter explaining whether or not the borrower is eligible for CMVB.<sup>120</sup>

f. The borrower has 90 days from the date the Agency notification to pay the CMVB amount.<sup>121</sup>

2) **Appeal Rights.** A borrower who is denied loan servicing may appeal that decision to the National Appeals Division for an independent hearing.<sup>122</sup>

a. There are **4 steps** to the process:

i. Request **reconsideration** between the borrower and the ag credit official who made the adverse decision; this step is optional and must be requested within 30 days;<sup>123</sup>

ii. Request a Hearing before NAD. The **formal appeal hearing** where a hearing officer from the National Appeals Division (NAD) staff conducts a hearing between the borrower and the FSA representative who made the adverse decision;<sup>124</sup> (Note: At this point, if you did not previously "negotiate an appraisal"--see step #10A above--

then you may request an "independent appraisal" of collateral if that is relevant to your appeal.<sup>125)</sup>

iii. the **National Director of Appeals review** which is a review of the decision made by the NAD hearing officer.<sup>126</sup>

iv. a **judicial review** of the final determination of NAD.<sup>127</sup>

d. If the borrower wins at any level of the appeal process, then the borrower is either eligible for primary loan servicing or FSA will reconsider eligibility for restructuring based on the outcome of the appeal.

e. If the borrower does not succeed in the appeal process, then FSA will offer CMVB again and the borrower will have 90 days to accept the offer.<sup>128</sup>

#12 If the loan is not restructured and the borrower does not accept the current market value buyout offer, then FSA will consider the borrower for preservation loan servicing if the borrower turned in the primary loan servicing forms within the time deadline. There is only one form of preservation loan servicing and that is the **Homestead Protection Program**.<sup>129</sup>

**Homestead Protection program**--the borrower can buy the homestead property or lease the property with an option to buy.<sup>130</sup> This only applies to certain real property which includes a dwelling used as the principal residence of the borrower, outbuildings useful to the borrower, and up to 10 acres of adjoining land.<sup>131</sup>

a. **Homestead property**- the principal residence and the adjoining land of up to 10 acres must have served as real estate security for the FLP loan and may include existing farm service buildings.<sup>132</sup> The borrower may propose the homestead protection site subject to FSA approval.<sup>133</sup>

b. **Lease terms**--lease with an option to purchase<sup>134</sup>:

i. lease period can't be less than 3 years nor longer than 5 years;<sup>135</sup>

ii. the rent will be based on equivalent rents charged for similar residential properties in the area.<sup>136</sup>

c. **Sale terms**--the sale price will be the appraised market value of the property when the option to buy is exercised.<sup>137</sup> (Note: The appraisal FSA uses will be set by an independent appraiser selected by the borrower from a list provided by FSA.<sup>138</sup>)

i. the borrower can pay by cash;<sup>139</sup> or

ii. the borrower can get FSA financing, through a "credit sale" procedure, if he or she qualifies.<sup>140</sup> (see paragraph 1.f.1 below on "credit sales")

d. **Times to apply** for homestead protection.

i. **Before** FSA gets title to property.<sup>141</sup>

A. If the borrower received and responded to the "Loan Servicing Application Package" on time (within the 60 days), the borrower will have applied for **all** primary and preservation loan servicing options.

B. The borrower will be considered eligible if the Primary Loan Service programs cannot help. Forms FSA 2537 and 2538 will be sent to the borrower.<sup>142</sup>

ii. **After** FSA gets title to property.<sup>143</sup>

A. FSA will notify the borrower of the right to apply for homestead protection within 30 days of the date of FSA's acquisition of the land.<sup>144</sup>

B. The borrower must respond and ask for homestead protection in writing within **30** days after FSA acquires title to the land.<sup>145</sup>

e. **Eligibility**--the borrower's FSA Farm Loan Manager determines if the borrower is eligible.<sup>146</sup>

i. the borrower must be personally liable for the FSA loan that was secured in part by the homestead protection property;<sup>147</sup>

ii. the borrower must be the owner of the homestead property or the former owner;<sup>148</sup>

iv. the borrower must have lived in the home 6 years prior to applying for homestead protection (there is one exception);<sup>149</sup>

v. the borrower's received annual gross income from farming similar to the income of farms of the same size in the borrower's area, for 2 of the last 6 years;<sup>150</sup>

vi. the applicant must have received 60% of their gross annual income from farming in at least 2 of the last 6 calendar years immediately preceding the year of application.<sup>151</sup>

f. There are **two methods to buyback** the homestead and 10 acres from FSA under Homestead Protection:

i. **Credit sale** as a "Nonprogram Loan"<sup>152</sup> if certain eligibility requirements are met; and

ii. **Cash**

g. **Before** you give FSA title to your property, FSA will tell you whether you can get homestead protection, what the rents will be, whether it can write off the remaining debt before you convey the property, and the other terms of the homestead protection agreement.

h. **Before you agree to any homestead protection arrangements you should get tax advice.** There may be serious tax consequences resulting from the transfer of the land and improvements, and from the forgiveness of any of the remaining debt.

#13 If FSA decides that the borrower is not eligible for preservation loan servicing, then the borrower will have the right to appeal that decision.

#14 **Acceleration.**<sup>153</sup> The borrower's loan(s) will not be accelerated until the borrower has the opportunity to appeal any denial of the Preservation Loan Servicing and any Debt Settlement request. If all primary and preservation loan servicing options do not result in a restructuring, and all appeals fail to resolve the issue, FSA will accelerate the borrower's loan(s) with a **Notice of Acceleration** (if the borrower is not already accelerated). **At that time, FSA will stop releasing farm income to pay essential family living and operating expenses.**<sup>154</sup> FSA will also have the right to attempt to repossess collateral or start legal foreclosure or liquidation proceedings to take and sell the collateral.<sup>155</sup>

#14 FSA will take legal action to foreclose once all loan servicing options (both primary and preservation) have been completed, all appeals have been exhausted, and the loan has been accelerated. At that point FSA will have given the borrower the option to voluntarily liquidate. The borrower may want to see a lawyer to determine whether bankruptcy is a good option.

\*\*\*\*\*NOTE TO READER\*\*\*\*\*

This outline is designed for general informational use only. It is in no way intended to be used as a substitute for the regulations governing FSA, and it is not intended to be used as a substitute for the competent advice of an attorney or advocate. It is absolutely essential that the reader obtain the services of an experienced attorney or advocate for specific advice concerning a particular situation.

This outline includes references to the final rules promulgated by FSA on November 8, 2007, and effective December 31, 2007.

---

<sup>1</sup> 7 C.F.R. 766.101(a)

<sup>2</sup> 7 C.F.R. 766.101(a)(1). "Financially distressed" is defined as a borrower who is unable to develop a feasible plan for the current or next production cycle (see 7 CFR 761.2). Financially distressed or current borrowers must pay a portion of the interest due on the loans to be eligible for primary loan servicing (see 7 CFR 766.104(a)(5)).

<sup>3</sup> 7 C.F.R. 766.101(a)(2). "Past due" is defined as when a payment is not made by the due date (see 7 CFR 761.2).

<sup>4</sup> Examples of non-monetary default would include such things as: conversion of collateral; acting in bad faith; and failing to follow loan purposes or conditions.

<sup>5</sup> See 7 CFR 766.301 *et seq* for more detailed procedures for borrowers who are in bankruptcy.

<sup>6</sup> FSA sends written notice of primary loan servicing programs to the borrower by

certified mail to the last known address of the borrower (7 CFR 766.101(c)). The notification forms to be sent in each circumstance are stated in 7 CFR 766.101(b) with the actual forms set out in the Appendix to the regulations.)

<sup>7</sup>7 C.F.R. 1951.101 *et seq.* and 7 C.F.R. 3.40, 3.60 *et seq.* for specific procedures on how the offset is to be administered by FSA, notice requirements, response requirements, defenses, and other rules implementing the offset. The regulations detailing the offset procedure say that an offset may be processed once a loan is 90 days past due--see specifically 7 C.F.R. 1951.111. So it is very likely that the offset notice will be sent out with the Primary Loan Servicing packet.

<sup>8</sup>FSA Forms FSA-2037 and FSA-2038. Forms are available on the USDA e-Forms website: <http://forms.sc.egov.usda.gov/eForms/welcomeAction.do?Home>.

<sup>9</sup>The notification forms to be sent in each circumstance are stated in 7 CFR 766.101(b) with the actual forms set out in the Appendix to the regulations. The forms that need to be filled out and returned to FSA are set out in the notification form sent to the borrower.

<sup>10</sup>7 C.F.R. 766.102(a) sets out the criteria for having a "completed application".

<sup>11</sup>7 C.F.R. 766.101(d)(2)

<sup>12</sup>7 C.F.R. 766.103(a), .101(a)(2)

<sup>13</sup>FSA will send notice of intent to accelerate the loan. 7 C.F.R. 766.103(b)

<sup>14</sup>7 C.F.R. 766.103(b)

<sup>15</sup>7 C.F.R. 765.303(b) requires that FSA terminate releases of proceeds from the sale of normal income security for essential family living and farm operating expenses when an account is accelerated.

<sup>16</sup>7 C.F.R. 766.106

<sup>17</sup>7 C.F.R. 766.106(a) and (b)

<sup>18</sup>7 C.F.R. 766.106(b)(2)

<sup>19</sup>7 C.F.R. 761.2 Definitions—*Net recovery value of non-essential assets* is the appraised market value less any prior liens and selling costs.

<sup>20</sup>7 C.F.R. 761.2 Definitions—Nonessential assets

<sup>21</sup>7 C.F.R. 766.106(b)(2)(iii)

<sup>22</sup>7 C.F.R. 766.104

<sup>23</sup>"Financially distressed" is defined as a borrower who is unable to develop a feasible plan for the current or next production cycle (see 7 CFR 761.2).

<sup>24</sup>7 C.F.R. 761.2 Definitions. "...for loan servicing purposes, is a borrower who has failed to make all scheduled payments by the due date."

<sup>25</sup>7 C.F.R. 766.104(a)(1)(i)-(v) defines "circumstances beyond the borrowers control."

<sup>26</sup>7 C.F.R. 761.2 Definitions—Nonessential assets

<sup>27</sup>7 C.F.R. 766.104(a)(2)

<sup>28</sup>7 C.F.R. 761.2 Definitions—Nonessential assets

<sup>29</sup>7 C.F.R. 766.104(a)(3)

<sup>30</sup>7 C.F.R. 761.2 Definitions—Good Faith.

<sup>31</sup>7 C.F.R. 766.104(a)(4)

<sup>32</sup>7 C.F.R. 766.104(a)(5)

<sup>33</sup>7 C.F.R. 766.104(a)(6)

---

<sup>34</sup>Handbook 5-FLP Par. 103A requires that DALR\$ be used for consideration of servicing options. For an extensive detailed explanation of how the DALR\$ program works see the Agency's "Instructions for Using DALR\$" Exhibit 17 of Handbook 5-FLP.

<sup>35</sup>See 7 C.F.R. 761.2 Definitions—Feasible plan and Debt Service Margin. See also 7 C.F.R. 766.105(b)(1)-(3) for specific debt service margin criteria.

<sup>36</sup>7 C.F.R. 761.2 Definitions—Conservation Contract; 7 C.F.R. 766.110 for detailed criteria.

<sup>37</sup>7 C.F.R. 761.2 Definitions—Debt forgiveness.

<sup>38</sup>7 C.F.R. 766.107(b)

<sup>39</sup>7 C.F.R. 766.107(c)(2)

<sup>40</sup>7 C.F.R. 766.107(d)(1)-(4). Current interest rate may be the interest rate in effect on the date of receiving a completed servicing application or the rate on the date of restructure.

<sup>41</sup>7 C.F.R. 766.108(a)

<sup>42</sup>7 C.F.R. 766.108(b)

<sup>43</sup>7 C.F.R. 766.108(c)(1)-(4). Current interest rate may be the interest rate in effect on the date of receiving a completed servicing application or the rate on the date of restructure.

<sup>44</sup>7 C.F.R. 766.107(a)

<sup>45</sup>7 C.F.R. 766.107(d)(1)-(4). Current interest rate may be the interest rate in effect on the date of receiving a completed servicing application or the rate on the date of restructure.

<sup>46</sup>7 C.F.R. 766.107(c)(2)

<sup>47</sup>7 C.F.R. 761.2 Definitions—Limited Resource interest rate. See also 7 CFR 765.51 for criteria used in reviewing the borrower's eligibility for this interest rate annually.

<sup>48</sup>7 C.F.R. 761.2 Definitions—Deferral.

<sup>49</sup>7 CFR 766.109(a)(2)

<sup>50</sup>7 CFR 766.109(a)(3)

<sup>51</sup>7 CFR 766.109(a)(4)

<sup>52</sup>7 CFR 766.109(b)(1)

<sup>53</sup>7 CFR 766.109(b)(2)

<sup>54</sup>7 CFR 766.111(b)(1)

<sup>55</sup>7 CFR 766.111(a)(2)

<sup>56</sup>7 C.F.R. 766.111(b)(1).

<sup>57</sup>7 C.F.R. 764.101(d)(2). The types of loans a borrower who received a writedown (debt forgiveness causing loss to the Agency) would not be eligible for would include: Farm Ownership loans (7 CFR 764.152(b)); Youth loans (7 CFR 764.302(b)); Beginning Farmer Downpayment loans (7 CFR 764.202(a)); Operating Loans not mentioned in the main paragraph (7 CFR 764.252(b)); Emergency loans (7 CFR 764.352(f)).

<sup>58</sup>7 C.F.R. 764.252(c)(1)-(2).

<sup>59</sup>7 C.F.R. 762.120(a)(1)(i) and 2-FLP paragraph 108C.

<sup>60</sup>7 CFR 764.352(f)

<sup>61</sup>7 C.F.R. 764.252(c)(3); 7 C.F.R. 762.120.

<sup>62</sup>7 C.F.R. 766.111(a)(3)

<sup>63</sup>7 C.F.R. 761.2 Definitions—Debt Forgiveness. The definition of "debt forgiveness" includes reducing or terminating a direct or guaranteed loan in a manner that results in loss to FSA through: a) any write-downs or write-offs under the debt restructuring provisions; b) any debt settlement; or c) payment of a loss on a guaranteed loan. A "forgiveness of debt" that

---

makes a borrower ineligible for certain types of loans does not include: a conservation contract debt reduction; writedown pursuant to settlement of a discrimination claim; a debt forgiveness that has been repaid in its entirety; consolidation, rescheduling, reamortization, or deferral of a loan.

<sup>64</sup>7 C.F.R. 766.111(a)(3)

<sup>65</sup>7 C.F.R. 761.2 Definitions—Debt Forgiveness. A “forgiveness of debt” that makes a borrower ineligible for certain types of loans does not include: a conservation contract debt reduction; writedown pursuant to settlement of a discrimination claim; a debt forgiveness that has been repaid in its entirety; consolidation, rescheduling, reamortization, or deferral of a loan.

<sup>66</sup>7 C.F.R. 766.111(b)(3). Debt reduction under a conservation contract is not included in this amount.

<sup>67</sup>7 C.F.R. 766.111(b)(4) and 766.201(a)

<sup>68</sup>7 C.F.R. 766.203.

<sup>69</sup>7 C.F.R. 766.201(b)

<sup>70</sup> Handbook 5-FLP Par. 342A

<sup>71</sup>7 C.F.R. 766.201(b) and Handbook 5-FLP Par. 342A

<sup>72</sup> If the borrower sells a portion of the security, then the borrower must pay shared appreciation only on the portion sold (7 CFR 766.203(b)). Also, in the event of a partial sale, an appraisal of the property being sold may be required to determine the market value at the time the SAA was signed (7 CFR 766.202(b)). Handbook 5-FLP Par. 343B has several examples to show how this works.

<sup>73</sup>7 C.F.R. 766.203(a)

<sup>74</sup>7 C.F.R. 766.203(c)

<sup>75</sup>7 C.F.R. 766.202 and Handbook 5-FLP Par. 343. Helpful examples: Exhibit 26 in Handbook 5-FLP contains a worksheet to be used in calculating the shared appreciation amount, and includes several detailed examples showing how this regulation and rule would be applied.

<sup>76</sup>7 C.F.R. 766.202 requires that a current appraisal of the property be completed within the previous 12 months in accordance with 7 CFR 761.7 which governs appraisals.

<sup>77</sup>7 C.F.R. 766.202(a)(1)-(3). Capital improvements must be identified prior to completion of the appraisal, and the appraisal must specifically identify the contributory value of the improvements.

<sup>78</sup>7 C.F.R. 766.202(a)(3)(i).

<sup>79</sup> An example of this calculation is set out in the Handbook 5-FLP at Par. 343C.

<sup>80</sup>7 C.F.R. 766.202(a)(3)(ii).

<sup>81</sup>7 C.F.R. 766.202(a)(3)(ii)(A).

<sup>82</sup>7 C.F.R. 766.202(a)(3)(ii)(B).

<sup>83</sup>7 C.F.R. 766.201(b) and 766.203(a). Handbook 5-FLP Par. 341B requires that the Farm Service Agency notify a borrower with a shared appreciation agreement of the terms of that agreement annually as a reminder of the fact that the shared appreciation may be due at the end of the term of the agreement. See Exhibit 25 of Handbook 5-FLP for copy of the notice.

<sup>84</sup>Handbook 5-FLP Par. 344D.

<sup>85</sup>7 C.F.R. 766.204 Amortization of recapture. Shared appreciation recapture will be amortized into a Shared Appreciation Payment Agreement if: 1) the borrower has not ceased farming; 2) the borrower’s account has not been accelerated; 3) the borrower has provided a complete application under 764.51(b) by the recapture due date; 4) the borrower is unable to pay

---

the recapture and cannot obtain funds from any other source; 5) a feasible plan is developed that includes payment of the shared appreciation amount; 6) the borrower gives a lien on all assets except those provide for in 766.112(b); and 7) the borrower signs all loan agreements and security instruments required.

<sup>86</sup> 7 C.F.R. 766.205(b)

<sup>87</sup> Handbook 5-FLP Par. 346E

<sup>88</sup> Although borrowers are only entitled to one debt forgiveness under the CONACT direct loan program, a debt settlement (including further debt forgiveness) may be processed outside of CONACT authorities based on provisions in 31 U.S.C. Chapter 37, and as detailed in 7 C.F.R. 1956, Subpart B.

<sup>89</sup> 7 C.F.R. 766.204(b) and Handbook 5-FLP Par. 346I. Shared Appreciation Payment Agreements cannot be consolidated, deferred or written down.

<sup>90</sup> Handbook 5-FLP Par. 346I

<sup>91</sup> 7 C.F.R. 766.106(a)(1) and (b)(1)

<sup>92</sup> 7 C.F.R. 766.106(a)(1)(i) for financially distressed or current borrowers and (b)(1)(i) for borrowers 90 days past due or in monetary default.

<sup>93</sup> 7 C.F.R. 766.106(b)(2)(i)

<sup>94</sup> 7 C.F.R. 766.106

<sup>95</sup> 7 C.F.R. 766.112(a). Note that if the restructure occurs prior to the loan becoming delinquent, then the borrower can avoid having FSA take a lien against previously non-mortgaged assets. A list of "allowable security" is set out at Handbook 5-FLP Par. 211B.

<sup>96</sup> 7 C.F.R. 766.112(b)(1)-(5). Note again that this rule does not apply if the restructure occurs prior to the loan becoming delinquent.

<sup>97</sup> 7 C.F.R. 766.106(b)(2)

<sup>98</sup> 7 C.F.R. 766.106(b)(2)(i). The request for further review under these options must be made within thirty (30) days of receipt of the adverse decision letter from FSA (See 7 CFR 780.6(b) and 780.13(c)).

<sup>99</sup> For a review of the appeal of appraisal procedures see Handbook 1-FLP Par. 144 Appeals of Decisions Based on Appraisals.

<sup>100</sup> 7 C.F.R. 766.115(a)(1)

<sup>101</sup> 7 C.F.R. 766.115(a)(3)

<sup>102</sup> 7 C.F.R. 766.115(a)(2)

<sup>103</sup> 7 C.F.R. 766.115(a)(3)(i)-(iv). See also Handbook 5-FLP Par. 230B for more details.

<sup>104</sup> 7 C.F.R. 766.114(b)

<sup>105</sup> 7 C.F.R. 766.115(a)(2)

<sup>106</sup> 7 C.F.R. 766.106(b)(2)

<sup>107</sup> 7 C.F.R. 766.106(b)(2)(i) and (iv)

<sup>108</sup> 7 C.F.R. 766.113. Note: The FAIR Act (Sec. 645(1)(B)) changed this from a "net recovery" buyout to "market value" buyout.

<sup>109</sup> 7 C.F.R. 761.2 Definitions—Market value.

<sup>110</sup> 7 C.F.R. 766.113(a) and Handbook 5-FLP Par. 321A.

<sup>111</sup> 7 C.F.R. 761.2 Definitions—Current market value buyout is the termination of a borrower's loan obligations to the Agency... See also Handbook 5-FLP Par. 321A.

<sup>112</sup> 7 C.F.R. 761.2 Definitions—Current market value buyout which is defined as the current market value of the collateral less prior liens.

<sup>113</sup>7 C.F.R. 766.113(a)(4)

<sup>114</sup>7 C.F.R. 766.113(a)(1)—borrower has not previously received debt forgiveness on any other loan (see definition of “debt forgiveness” at 761.2 for what is and is not included in that phrase); 766.113(7)—the amount of the debt forgiveness does not exceed \$300,000. If DALR\$ shows that FSA would write-off more than \$300,000 of the borrower’s debt then the borrower is not eligible for primary loan servicing or CMVB (see Handbook 5-FLP Par. 321B).

<sup>115</sup>7 C.F.R. 766.113(a)(1)

<sup>116</sup>7 C.F.R. 766.113(a)(2)

<sup>117</sup>7 C.F.R. 766.113(a)(3)

<sup>118</sup>7 C.F.R. 766.113(a)(5)

<sup>119</sup>7 C.F.R. 766.113(a)(6)

<sup>120</sup>7 C.F.R. 766.113(b). Handbook 5-FLP Par. 322 sets out the forms that will be sent notifying the borrower of the CMVB amount.

<sup>121</sup>7 C.F.R. 766.113(b). If the borrower exercises the right to an independent appraisal, negotiated appraisal, reconsideration, mediation, or appeal the 90 days will start on the day the borrower receives the Agency or NAD final decision (Handbook 5-FLP Par. 322B).

<sup>122</sup>7 C.F.R. 766.106(b)(2)(i) allows the borrower to request reconsideration, mediation or appeal in accordance with 7 C.F.R. part 780 and 7 C.F.R. part 11.

<sup>123</sup>7 C.F.R. 780.15(c). The reconsideration decision is a new decision that restarts applicable time periods--780.15(g).

<sup>124</sup>7 C.F.R. 11.8

<sup>125</sup>7 C.F.R. 766.115(a)(2)

<sup>126</sup>7 C.F.R. 11.9

<sup>127</sup>7 C.F.R. 11.13

<sup>128</sup>Handbook 5-FLP Par. 322B

<sup>129</sup>7 C.F.R. 766 Subpart D--Homestead Protection. The FAIR Act (Sec. 638(3)) eliminated the Farmland Leaseback/Buyback program which allowed a borrower to leaseback farmland turned over to FSA for a period of 5 years with the option to purchase that farmland back within that 5-year period. The Homestead Protection program is all that remains of Preservation Loan Servicing options.

<sup>130</sup>7 C.F.R. 761.2 Definitions—Homestead protection. Handbook 5-FLP Par. *et seq.* give specific details for processing the servicing option.

<sup>131</sup>7 C.F.R. 766.152(a)

<sup>132</sup>7 C.F.R. 766.152(1)

<sup>133</sup>7 C.F.R. 766.152(2)

<sup>134</sup>7 C.F.R. 766.154

<sup>135</sup>7 C.F.R. 766.154(b)(3)

<sup>136</sup>7 C.F.R. 766.154(b)(1)

<sup>137</sup>7 C.F.R. 766.154(c)(2)

<sup>138</sup>7 C.F.R. 766.154(e). FSA pays for the appraisal—Handbook 5-FLP Par. 284E.

<sup>139</sup>7 C.F.R. 766.154(c)(3)

<sup>140</sup>7 C.F.R. 766.154(c)(4). Note: "Credit sales" are considered an FSA "nonprogram loan" and may be used to finance the buyback if certain conditions are met: the lessee has not received a previous debt forgiveness; FSA has funds available; and the lessee demonstrates an ability to repay such a loan.

---

<sup>141</sup>7 C.F.R. 766.151(a)

<sup>142</sup>7 C.F.R. 766.151(a)(1) and Handbook 5-FLP Par. 281A

<sup>143</sup>7 C.F.R. 766.151(b)

<sup>144</sup>7 C.F.R. 766.151(b)(1) and Handbook 5-FLP Par. 281B.

<sup>145</sup>7 C.F.R. 766.151(b)(1)

<sup>146</sup>7 C.F.R. 766.152(b)

<sup>147</sup>7 C.F.R. 766.152(b)(1)(i)-(ii)

<sup>148</sup>7 C.F.R. 766.152(b)(1)

<sup>149</sup>7 C.F.R. 766.152(b)(3)

<sup>150</sup>7 C.F.R. 766.152(b)(2)(i)-(ii)

<sup>151</sup>7 C.F.R. 766.152(b)(3)

<sup>152</sup>7 C.F.R. 766.154(c)(4). The three conditions that must exist are that: the lessee has not received a previous debt forgiveness; the Agency has funds available to finance the purchase of Homestead Protection property; and the lessee demonstrates an ability to repay the loan (766.154(c)(4)(i)-(iii)).

<sup>153</sup>7 C.F.R. 766.355

<sup>154</sup>7 C.F.R. 765.303(b) requires that releases of sale proceeds from income collateral will be terminated once the borrower's loan(s) is accelerated. 7 C.F.R. 792.7 provides for administrative offset of government payments (i.e. income tax refund, farm program payments, etc.) that may be owed to the borrower to collect on the debt owed to FSA.

<sup>155</sup>7 C.F.R. 766.357