

APPEALING FOR RELIEF

An Analysis of Appealed
Direct Farm Loan
Decisions 2009-2022 and
Opportunities for Reform



Center for Agriculture
& Food Systems
VERMONT LAW & GRADUATE SCHOOL



EXECUTIVE SUMMARY

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For U.S. farmers who cannot access credit from commercial lenders, the U.S. Department of Agriculture (USDA)'s Farm Service Agency (FSA) serves an invaluable function in supporting farm operations. In addition to guaranteeing loans from other lenders, FSA provides direct loans to farmers, enabling real estate purchases through farm ownership loans and ongoing farm business support through operating loans. These direct loans are the focus of this report. Because applicants often cannot get credit from other sources, those who are denied FSA direct loans have little recourse to access capital. However, any applicant who has been denied can appeal that decision to the National Appeals Division (NAD), an independent division of the Department of Agriculture that conducts administrative appeals hearings to review agency program decisions.

From January 2009 to June 2022, NAD heard 367 cases from farmers appealing FSA direct loan denials. This report analyzes those determinations to identify the regulatory lending requirements that were most at issue in appealed loan decisions. The top three issues include requirements that loan applicants have an acceptable credit history, demonstrated managerial ability, and a feasible plan for their operation, each of which is discussed further below.

This report also includes case examples addressing each of these issues and raising a set of recurring themes:

- broad FSA discretion when evaluating loan applications
- FSA employees engaging in heavier scrutiny of applications than either their regulations or agency loan making handbook demand
- NAD deference to FSA decision-making that can result in questionable or even incorrect denials being upheld on appeal

In addition to the challenges presented above, the NAD process itself creates a set of hurdles for loan applicants, including a formalized appeals process that is difficult for farmers to navigate without an attorney. Farmers' ability to obtain recourse through the appeals process is also limited by procedural idiosyncrasies that make it difficult for farmers to successfully access loans even when they receive a favorable decision on appeal. Finally, the process contains notable gaps, particularly its lack of recourse for applicants who have been subject to discrimination in their loan review.

When considered together, these challenges lead to negative outcomes for farmers trying to appeal unfavorable decisions. Specifically, the data demonstrate that farmers are successful in less than 18% of appeals. Unfortunately, these success rates only decrease when farmers appeal an initial NAD decision a second time.

Key Issues Identified in the Case Analysis

Findings from this report's case analysis are summarized below. They highlight recurring themes in NAD cases focused on the loan application requirements of credit history, managerial ability, and feasible plan, as well as process issues related to loan review and the appeals process.

Credit History

The credit history requirement was the most prevalent factor at issue in the NAD determinations analyzed, occurring in 148 cases. Based on the common credit history issues that arose in NAD case analysis, it is clear that:

- FSA does not consistently issue exceptions to applicants whose credit history issues may have been due to circumstances beyond their control;
- FSA does not consistently discuss credit history issues with appellants;
- FSA's flexibility under the credit history requirement can lead to excessive discretion and unfair treatment of loan applicants;
- lack of good faith determinations can result in a lifetime ban on accessing FSA loan assistance;
- receiving debt forgiveness can also bar applicants from loan eligibility; and
- credit history, in general, is a difficult requirement for loan applicants to meet.

Managerial Ability

A loan applicant can meet the managerial ability requirement by demonstrating adequate education, on-the-job training, or farming experience, or a combination of these factors. Managerial ability was at issue in 56 cases. Common issues in the case analysis relate mainly to FSA's broad discretion in assessing managerial ability. This broad discretion means that:

- under the farming experience option, farmers experience unpredictable loan review outcomes, which can allow for agency bias and discrimination;
- applicants struggle to meet the managerial ability requirement using a combination of qualifying experience, education, and on-the-job training;
- some farmers receive adverse decisions from FSA, even when other similarly situated farmers would not; and
- NAD often upholds FSA's decisions regarding managerial ability even when they are inconsistent.

Feasible Plan

Plan feasibility was at issue in 136 NAD determinations. Of particular concern were issues arising from developing the farm operating plan. Based on the common issues that arose in NAD cases concerning plan feasibility, it is clear that:

- FSA does not consistently utilize accurate and verifiable information in the development and assessment of farmers' operating plans;
- when FSA has concerns regarding the accuracy and verifiability of an applicant's operating plan, it often fails to discuss and attempt to resolve them with the applicant;
- applicants with premium products struggle to have their premium prices recognized by the agency, which commonly defaults to commodity unit pricing;
- the microloan exception for documentation is inconsistently applied; and
- FSA often fails to encourage applicants to seek technical assistance in developing their operating plans.

Process Issues

Issues with FSA's loan application review process and NAD's subsequent appeals process make it harder for farmers to successfully access loans. Specifically:

- the NAD appeals process can be difficult to navigate due to its formality and increasingly legalistic character;
- barriers to obtaining the resolution of a case exist at the point of loan review, appeal, and implementation of a NAD determination; and
- gaps in the NAD process preclude appellants from obtaining relief for discrimination claims or equitable relief.

Recommendations

After analyzing 367 cases, speaking with farmer advocates and agency officials, and reviewing data collected from FSA and NAD, this report provides a set of recommendations, summarized below, to improve both the process and outcomes for farmers. Specifically, the report recommendations aim to:

- clarify certain FSA lending requirements;
- curtail agency discretion in other requirements, to achieve more consistent outcomes for farmers and reduce opportunities for bias and discrimination;
- develop policies that require FSA to follow its own rules in lending decisions; and
- make the NAD process less lopsided in favor of the agency.

With these changes, farmers can receive better and fairer initial decisions on their loan applications, and any remaining FSA errors can be reliably corrected by NAD when necessary.

Credit History Recommendations

The credit history issues identified in the case analysis can be addressed by amending FSA's regulations and handbook, particularly by reducing agency discretion. These issues can be further addressed through training and guidance for FSA field office employees to ensure consistent application of credit history rules and procedures. Credit history reform should also provide pathways for farmers to overcome negative credit history and improve their access to credit.

1. Provide additional training and guidance to FSA personnel on meeting with applicants.

Although FSA's handbook requires the agency to discuss questionable accounts with applicants whose credit histories include adverse or delinquent account statuses,¹ FSA does not always do this. This failure deprives applicants of the chance to explain any extenuating circumstances and benefit from exceptions for issues that were temporary or beyond their control.

2. Ensure FSA loan officials issue exceptions to applicants whose credit history issues are due to circumstances beyond their control.

The FSA handbook stresses that "extra diligence should be taken" to review credit reports to determine whether "circumstances were beyond the control of the applicant."² However, FSA makes credit history determinations without always properly considering an applicant's circumstances.

3. Reduce FSA discretion under the credit history requirement.

Regulatory changes should clearly limit FSA's flexibility to make different creditworthiness determinations for loan applicants in similar circumstances. This would create consistency and predictability and might reduce the number of appeals that come before NAD.

4. End lifetime bans on borrowing due to lack of good faith findings.

FSA handbook amendments made between 2019 and 2022 envision applicants with lack of good faith determinations being eligible for loans in certain circumstances.³ However, actual borrowers have not been able to recover from lack of good faith determinations, regardless of the age of the determinations or resolution of the issues prompting the determinations.

5. Make debt forgiveness requirements more flexible.

FSA's regulations and internal *Handbook on Direct Loan Making* (FSA handbook) differ in their treatment of debt forgiveness. They should be reconciled by adopting the FSA handbook's more permissive position. Additionally, applicants who received debt forgiveness from the agency due to extenuating circumstances that were temporary or beyond their control should have pathways to eligibility that do not necessarily require full debt repayment.

6. Provide pathways to creditworthiness.

FSA should provide clear guidelines that farmers can follow to make themselves creditworthy with the agency, such as taking an agency-approved course on financial management, working with existing creditors to resolve delinquencies, and demonstrating a pattern of timely debt repayment over a given period.

Managerial Ability Recommendations

The managerial ability requirement grants FSA broad discretion, which leads to inconsistent and unpredictable loan-making decisions. Additionally, due to this discretion, NAD often defers to FSA's decision-making pursuant to the managerial ability requirement. As a result, it can be difficult for farmers who have received adverse decisions from FSA to receive favorable outcomes on appeal, particularly under the farming experience criterion.

1. Add specificity to the “combination” experiential provision.

While the FSA handbook states that farmers can meet the managerial ability requirement with “**any** combination” (emphasis in original)⁴ of education, on-the-job training, and farming experience, this phrasing does not provide enough direction for FSA to determine how to assess different types of experience together.

2. Refine or eliminate the financial recordkeeping requirement under the Farming Experience criterion.

The current recordkeeping requirement is ambiguous and therefore affords FSA broad discretion.⁵ Refining the recordkeeping requirement would prevent FSA from taking into account extraneous information that is not relevant to the amount and quality of a farmer's experience.

3. Refine the “standard farming practices” requirement under the farming experience criterion.

The handbook provision regarding “standard farming practices”⁶ should be clarified so that farm loan applicants understand how they are being evaluated under this criterion, both to provide the documentation needed to demonstrate compliance and to challenge FSA's conclusions in the event that FSA relies on information that the farmer believes is incorrect.

4. Amend the “five-year” requirement to allow farmers to more easily meet the criterion under farming experience.

Exceptions to the requirement that farming experience occur in the past five years⁷ should be made for farmers who have experienced extenuating circumstances that prevented them from farming for a period of time.

Feasible Plan Recommendations

In developing and assessing applicants' farm operating plans for feasibility, the cases analyzed demonstrate that FSA erred in numerous ways. These errors suggest broader issues: FSA failing to follow its own regulations and handbook provisions concerning plan feasibility and struggling to process applications from producers with unconventional operations, creating the potential for plan feasibility issues to be vehicles for discrimination.

State and county FSA offices should participate in trainings and receive guidance on the regulations that address plan feasibility. They should improve their processing of loan applications for “nontraditional” farms, undergo mandatory implicit bias and antiracism training, and face consequences for failing to follow regulations and for discriminatory practices. FSA needs better internal processes for tracking agency error to ensure solutions are targeted at addressing these issues.

1. Reduce rate of FSA error in interpreting and applying plan feasibility regulations.

Many farmers in the cases analyzed received favorable outcomes on appeal after NAD confirmed that FSA failed to follow its regulations when it issued adverse decisions to them. The agency should prioritize reducing its error rate to avoid the need for appealed decisions and to conserve agency resources.

2. Improve FSA processing of applications from producers with “nontraditional” operations

FSA appears to err more frequently when processing loan applications for farm operations that differ from the “traditional” commodity farms that FSA typically serves. Based on the case examples, it is clear that FSA is not equipped to adequately process applications for all types of farming operations. FSA should develop solutions that enable the agency to better assist farmers who farm differently than “traditional” commodity farms.

3. Reduce opportunity for plan feasibility issues to be a vehicle for agency bias and discrimination.

Given the numerous application processing errors associated with feasibility, there is significant potential for discrimination when it comes to the development and assessment of a farmer's operating plan. Restricting agency discretion through the methods outlined in the previous recommendations could help prevent instances of discrimination and bias.

Process Improvement Recommendations

There are several ways to improve the FSA and NAD processes. These changes would allow farmers to obtain more favorable outcomes at the FSA application level and in NAD appeals.

1. Help farmers navigate the NAD process.

While the NAD appeals process is intended to be navigable by farmers without the assistance of an attorney,⁸ it is complex and time-consuming.⁹ Unless the NAD process is simplified, farmers should receive assistance in navigating it.

2. Consider shifting the burden of proof.

In NAD appeals, farmers have the burden of proving that FSA erred in its adverse decision. This burden makes it difficult for farmers to receive favorable outcomes on appeal, particularly for smaller-scale farmers who are less likely to be able to hire legal counsel. The agency should consider shifting the burden to FSA.

3. Require comprehensive review of loan applications.

Some loan applications may have multiple defects that can lead to the loan being denied. A comprehensive review of the loan application would consider all eligibility criteria at once and inform the applicant of all defects in one denial letter, which the applicant could appeal if appropriate. Noncomprehensive review occurs when FSA denies a loan application for one reason without considering all potential defects. If the applicant then prevails on appeal, the agency sometimes issues a new denial letter based on a criterion that was not evaluated the first time. Noncomprehensive loan application review wastes agency and farmer time and resources, delays farmers receiving vital financial assistance, and undermines farmers' trust in USDA. Given the potential for delay tactics, noncomprehensive review can also be a vehicle for discrimination.

4. Improve implementation of NAD determinations.

Requiring updated financial information from the farmer should not be a permitted form of implementation for a NAD determination. Within 30 days of receiving a final NAD determination that is favorable to the farmer, FSA should implement the NAD determination by approving the farmer for the loan and delivering program benefits owed to the farmer. If a final NAD determination was in part favorable to the farmer and in part favorable to FSA, NAD should provide FSA with specific implementation instructions for how to properly implement the decision.

5. Prevent withdrawn adverse decisions from prolonging the appeals process.

During the course of the NAD appeals process, FSA can withdraw the adverse decision on appeal at any point before the administrative judge or NAD Director issues an appeal determination.¹⁰ This prevents the appeal from moving forward as there is no longer an adverse decision for NAD to consider,¹¹ even if the appellant objects to the withdrawal. Withdrawn adverse decisions can therefore lead to significant delays for farmers hoping to receive financial assistance from FSA and can even be a vehicle for discrimination.

FSA should continue to have the option to withdraw an adverse decision when it is favorable to the appellant, as it could save the farmer from having to go through the appeals process and may allow them to receive program benefits sooner. However, when the appellant feels that withdrawing the adverse decision would not be in their best interest, the appellant's objection to NAD should have a tangible effect, rather than resulting in NAD simply stating it no longer has jurisdiction.

6. Coordinate between NAD and USDA's civil rights office for NAD cases with discrimination claims.

The regulatory definition of a NAD "participant" is interpreted by the agency to exclude claims alleging discrimination in USDA programs, which appellants must file with USDA's Office of the Assistant Secretary for Civil Rights (OASCR) instead. Preventing NAD from considering discrimination claims delays much-needed recourse for loan applicants who have been discriminated against. Additionally, the OASCR discrimination claims process has a troubling history of unresolved discrimination complaints, failing to process discrimination claims in a timely manner, and failing to deliver adequate remedies to farmers who were discriminated against.

USDA should identify and implement a process to avoid burdening appellants with two cases—one before OASCR with their discrimination claim and another before NAD to review their adverse loan decision. USDA's Equity Commission could provide guidance on which types of coordination might be most effective and equitable.

7. Make loan applicants eligible for equitable relief.

The legal provisions governing equitable relief specifically exclude agricultural credit and crop insurance programs.¹² While the 2018 Farm Bill gave the Secretary of Agriculture expanded authority to consider borrowers of direct FSA loans,¹³ this only includes *existing borrowers* in very specific circumstances and does not provide an option for equitable relief to applicants of direct farm loans from FSA.¹⁴

Endnotes

- 1 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., HANDBOOK ON DIRECT LOAN MAKING, 3-FLP (Rev. 2) Amend. 31 Par. 65(D), 4-8.5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a31.pdf (last updated Oct. 24, 2022).
- 2 *Id.* at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).
- 3 *Id.* at 4-4 to 4-5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).
- 4 *Id.* at 4-13, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at 4-12.6, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Apr. 1, 2015).
- 8 FARMERS' LEGAL ACTION GROUP (FLAG), *Topic: Appeals*, <http://www.flaginc.org/topic/appeals> (last visited Jan. 2, 2024) (“This administrative appeal system is intended to allow farmers to advocate for themselves, without the need for an attorney”).
- 9 *Id.* (“[T]he system can be difficult to understand, and farmers are held to very strict deadlines”).
- 10 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, 1-APP (Rev. 2) Amend. 2, Par. 87(A), 6-55, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jan. 8, 2009).
- 11 *Id.* at Par. 24(A), 2-44, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jan. 8, 2009).
- 12 7 U.S.C. § 7996a(2)(A)-(B) (“The term ‘covered program’ does not include—(i) an agricultural credit program carried out under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.); or (ii) the crop insurance program carried out under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.)”).
- 13 Agriculture Improvement Act of 2018, Pub. L. 87-128, tit. III, § 366, 132 Stat. 4672 (2018) (codified at 7 U.S.C. § 2008a); 7 C.F.R. § 768.1.
- 14 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., EQUITABLE RELIEF FAQ (Aug. 2022), https://www.fsa.usda.gov/Assets/US-DA-FSA-Public/usdafiles/Outreach/pdfs/usda_fsa_equitable_relief_faq_final_8-2022.pdf.



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