

APPEALING FOR RELIEF

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



Center for Agriculture
& Food Systems
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Photo by Scott Strebble care of Farm Aid

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For researchers or advocates who would like access to our coded case dataset, please reach out to CAFS at cafs@vermontlaw.edu.

ABOUT THE CENTER FOR AGRICULTURE AND FOOD SYSTEMS

Vermont Law and Graduate School's Center for Agriculture and Food Systems (CAFS) uses law and policy to build a more sustainable and just food system. With local, regional, national, and international partners, CAFS addresses food system challenges related to food justice, food security, farmland access, animal welfare, worker protections, the environment, and public health, among others. CAFS works closely with its partners to provide legal services that respond to their needs and develop resources that empower the communities they serve. Through CAFS' Food and Agriculture Clinic and Research Assistant program, students work directly on projects alongside partners nationwide, engaging in innovative work that spans the food system. Visit vermontlaw.edu/cafs to learn more.



ABOUT FARM AID

Best known for its annual music festival celebrating family farmers, Farm Aid works year-round to build a system of agriculture that values family farmers, good food, soil and water, and strong communities. Since 1985, Farm Aid has answered 1-800-FARM-AID to provide immediate and effective support services to farm families in crisis. In addition to its hotline, Farm Aid's online [Farmer Resource Network](#) connects farmers to an extensive network of organizations across the country that help farmers find the resources they need to access new markets, transition to more sustainable and profitable farming practices, and survive natural disasters.

Farm Aid works with local, regional and national organizations to promote fair farm policies and grassroots organizing campaigns designed to defend and bolster family farm-centered agriculture. They have worked side-by-side with farmers to protest factory farms and inform farmers and eaters about issues like genetically modified food and growth hormones. [Farm Aid's Action Center](#) allows concerned citizens to become advocates for farm policy change. By strengthening the voices of family farmers, Farm Aid stands up for the people upon whom we all depend.



ABOUT RAFI

RAFI (Rural Advancement Foundation International) challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. RAFI envisions a thriving and equitable food system where farming communities have dignity and agency; where they are supported by just policies; and where corporations and institutions are accountable to the communities they impact. Working across agricultural sectors and collaboratively through coalitions, RAFI combines on-the-ground practical services and policy advocacy to ensure farmers have access to the tools they need to make the right choices for their farms and families as well as for their communities and the environment. RAFI takes a whole system approach to change through integrated program areas: Farm Advocacy, the Farmers of Color of Network, Resources for Resilient Farms, Just Foods, Challenging Corporate Power, Come to the Table, and policy advocacy.

LIST OF ABBREVIATIONS

BIPOC	Black, Indigenous, and People of Color
CAFS	Center for Agriculture and Food Systems, Vermont Law and Graduate School
FOIA	Freedom of Information Act
FSA	Farm Service Agency, USDA
FSA handbook	Farm Service Agency Handbook on Direct Loan Making
GAO	Government Accountability Office
NAD	National Appeals Division, USDA
OASCR	USDA Office of the Assistant Secretary for Civil Rights
OGC	USDA Office of the General Counsel
USDA	United States Department of Agriculture

EXECUTIVE SUMMARY

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

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I. INTRODUCTION

One farmer's application was denied the same day the loan official received her credit report, despite a requirement that the loan official meet with the applicant first.¹⁵ Another farmer was denied a loan due to a lack of farming experience, despite having independently managed 160 acres for the past six years.¹⁶ A third farmer's loan application was denied after the loan official increased the amount of the loan request without the farmer's consent, then determined that he could not repay the higher amount.¹⁷

Nearly 300 farmers with stories like these appealed their loan denials over the past 14 years. In the best-case scenarios, they received favorable decisions on appeal and were ultimately able to access crucial funding for their farm businesses, albeit often several months later than they had planned. For other farmers, the initial loan denial was just the first step in a long bureaucratic process involving multiple rounds of appeals and new adverse loan decisions.

The United States Department of Agriculture (USDA)'s Farm Service Agency (FSA) is often referred to as a "lender of last resort," providing direct farm ownership and operating loans to farmers unable to access adequate credit from commercial lenders.¹⁸ However, FSA's broad discretion in lending can result in adverse loan decisions made in error, which limits farmers' access to capital needed to keep the farm operating. While the USDA's National Appeals Division (NAD)'s appeals process is intended to review adverse decisions from FSA and correct agency errors, the NAD process presents its own obstacles. As a result, many farmers receive unfavorable outcomes on appeal and are ultimately unable to access FSA loans.

FSA's broad discretion in lending can result in adverse loan decisions made in error, which limits farmers' access to capital needed to keep the farm operating.

Many federal agencies have independent divisions within the agency (like the National Appeals Division in USDA) that perform adjudications, which are a means for resolving disputes about a decision the agency has made. In these proceedings, the adjudicator or decision maker often determines whether to uphold or affirm the agency’s decision. Because the agency is involved in the dispute, adjudicative divisions of the agency are independent from the direction and control of other parts of the agency to prevent bias.

Government reports¹⁹ and accounts from FSA borrowers and farmer service providers demonstrate that farmers are not receiving appropriate resources to access loans, including support advocating for themselves on farm loan issues. A 2021 Government Accountability Office (GAO) report shows disparities in access to funding for minority and female farmers.²⁰ Data on FSA loan applications from 2017 to 2021 also indicates that the percentage of FSA loan application rejections for farmers of color has been increasing since 2017, especially for Black farmers.²¹ Additionally, NAD lacks jurisdiction to consider claims of discrimination, which leaves issues of racial, gender, and socioeconomic disparities in access to FSA loans unaddressed in the NAD process.

The Center for Agriculture and Food Systems (CAFS) at Vermont Law and Graduate School, together with Farm Aid and RAFI (Rural Advancement Foundation International), conducted a review of NAD appeals cases to identify trends in the cases that would inform policy recommendations for improving FSA and NAD practices. This report addresses key issues identified in NAD cases concerning FSA direct farm operating and farm ownership loan application denials appealed to NAD between January 1, 2009 and July 31, 2022. Each of the 367 NAD determinations analyzed was coded for the specific FSA lending regulations²² at issue in the decision. The coding process allowed the authors to identify trends regarding which lending requirements raise issues that get appealed to NAD and how NAD evaluates those issues on appeal.

The following section provides background on the FSA lending process and the NAD appeals process. Section III gives an overview of the data from the case analysis of NAD determinations. Sections IV, V, and VI discuss key lending issues identified through case analysis: credit history, managerial ability, and plan feasibility. Section VII identifies aspects of the loan review and NAD appeals processes that contribute to negative outcomes for farmers. Section VIII provides a set of policy recommendations to address key issues highlighted in Sections IV-VII. Finally, Section IX concludes the report, reiterating solutions presented in previous sections and highlighting areas for continued research.



II. LOAN APPEALS PROCESS

Producers apply for direct farm ownership and farm operating loans through USDA's FSA. If FSA denies their loan application, a producer can appeal that decision to NAD, another body within USDA. The loan review and appeals processes are described below.

Farm Service Agency

Within USDA, the Farm Service Agency (FSA) operates multiple farm programs, including direct farm operating and farm ownership loan programs (described in Table 1).²³ Farmers can apply for FSA loans through their county FSA offices.²⁴

TABLE 1.
FSA DIRECT FARM OPERATING AND FARM OWNERSHIP LOANS

TYPE OF LOAN	MAXIMUM AMOUNT	PURPOSES
Direct Farm Ownership Loan ²⁵	\$600,000	Purchasing farmland, expanding an existing farm, repairing buildings, or conserving soil or water
Direct Farm Operating Loan ²⁶	\$400,000	Equipment or livestock purchase, repairs, farm inputs, costs of transitioning to another type of production, etc.
Microloan ²⁷	\$50,000	Can be made for farm ownership or farm operating purposes

FSA approves or denies loan applications pursuant to FSA loan eligibility and approval regulations.²⁸ Within 60 calendar days of receiving a complete loan application, FSA must notify an applicant of the agency's decision, including any reason for denial.²⁹ If a loan is approved, funding will be made available to the applicant within 15 days of loan approval, subject to availability.³⁰

If FSA denies the farmer's loan application, that is considered an "adverse decision."³¹ **Adverse decisions are administrative decisions that are unfavorable to a program participant.**³² An adverse decision can also include the agency's failure to act on an individual's request or application within a reasonable or required timeframe.³³ When FSA makes an adverse loan decision, the loan applicant can appeal to USDA's NAD.³⁴

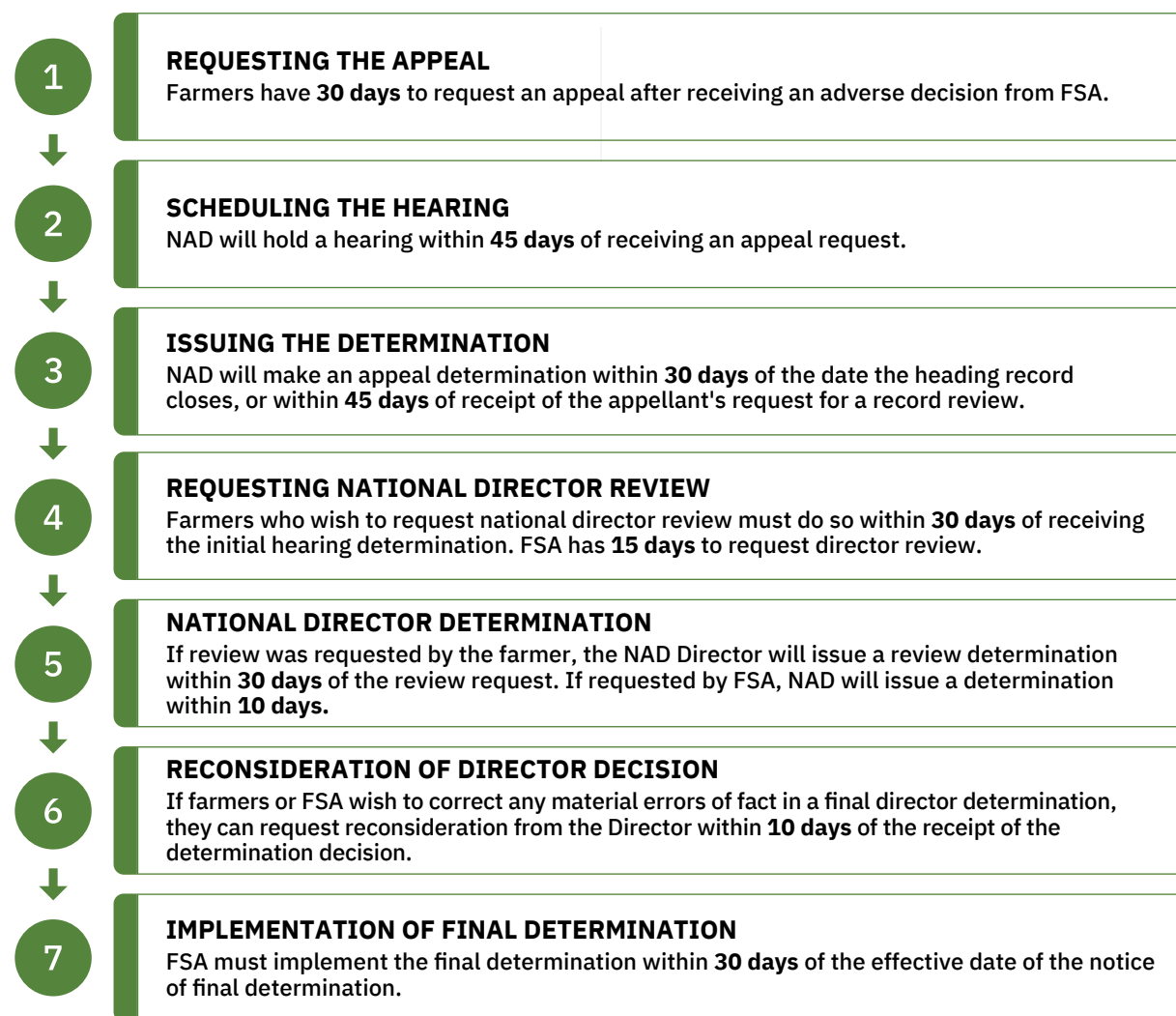


National Appeals Division

The National Appeals Division (NAD), which reports directly to the Secretary of Agriculture, hears appeals from adverse decisions made against farmers in certain USDA programs.³⁵ NAD is independent from other USDA agencies,³⁶ with a director appointed by the Secretary of Agriculture.³⁷ NAD's mission is to "conduct impartial administrative appeals hearings of adverse program decisions."³⁸

Farm Service Agency (FSA) direct loan applicants can file an appeal with NAD if FSA makes an adverse decision that affects them individually rather than as part of a general program requirement.³⁹ When a loan applicant receives an adverse decision, they have 30 days to file an appeal request.⁴⁰ The next step is an in-person evidentiary hearing between the appellant and the agency in front of a NAD administrative judge, which results in an administrative judge decision.⁴¹ After the decision is issued, either party may request review of the administrative judge's decision by the NAD Director (known as national director review).⁴² If neither the agency nor the appellant requests national director review, the administrative judge's decision becomes final.⁴³

FIGURE 1.
NAD APPEALS PROCESS TIMELINE



Note: Not all appellants follow each step in this timeline. Most only pursue the first stage of review.

For a detailed explanation of all stages of the NAD review process, see Karen Krub & Amanda Urbanek, **USDA's National Appeals Division Procedures and Practice**, National Agricultural Law Center (2019).

In addition to appeal hearings and director reviews, NAD also makes appealability decisions and reconsideration decisions. Appealability decisions are issued after a preliminary hearing to determine whether an adverse decision is appealable under NAD regulations. Reconsideration decisions provide an opportunity for the National Director to correct any errors in final NAD determinations.⁴⁴ Both types of decisions are rare (there was only one instance of each type in this report's dataset), so this report will focus on administrative judge decisions and national director reviews.

Federal district courts provide judicial review of final NAD determinations.⁴⁵ An appellant who receives an unfavorable final NAD determination can also request review of that decision from the U.S. Secretary of Agriculture before or instead of seeking judicial review.⁴⁶



Photo by Scott Streble care of Farm Aid

III. ISSUES AND OUTCOMES IN THE DATASET

This report highlights common issues that arose in the analysis of 367 NAD cases concerning adverse FSA farm operating and farm ownership loan decisions appealed to NAD between January 1, 2009, and July 31, 2022. This dataset spanned 14 years, three farm bills,⁴⁷ three presidents,⁴⁸ and six NAD directors.⁴⁹



NAD case determinations are available online at <https://usda-nad-local1.entellitrak.com/etk-usda-nad-prod-temp/page.request.do?page=page.searchDeterminations.styled>.

For researchers or advocates who would like to access the coded case dataset or additional case example summaries, please reach out to CAFS at cafs@vermontlaw.edu.

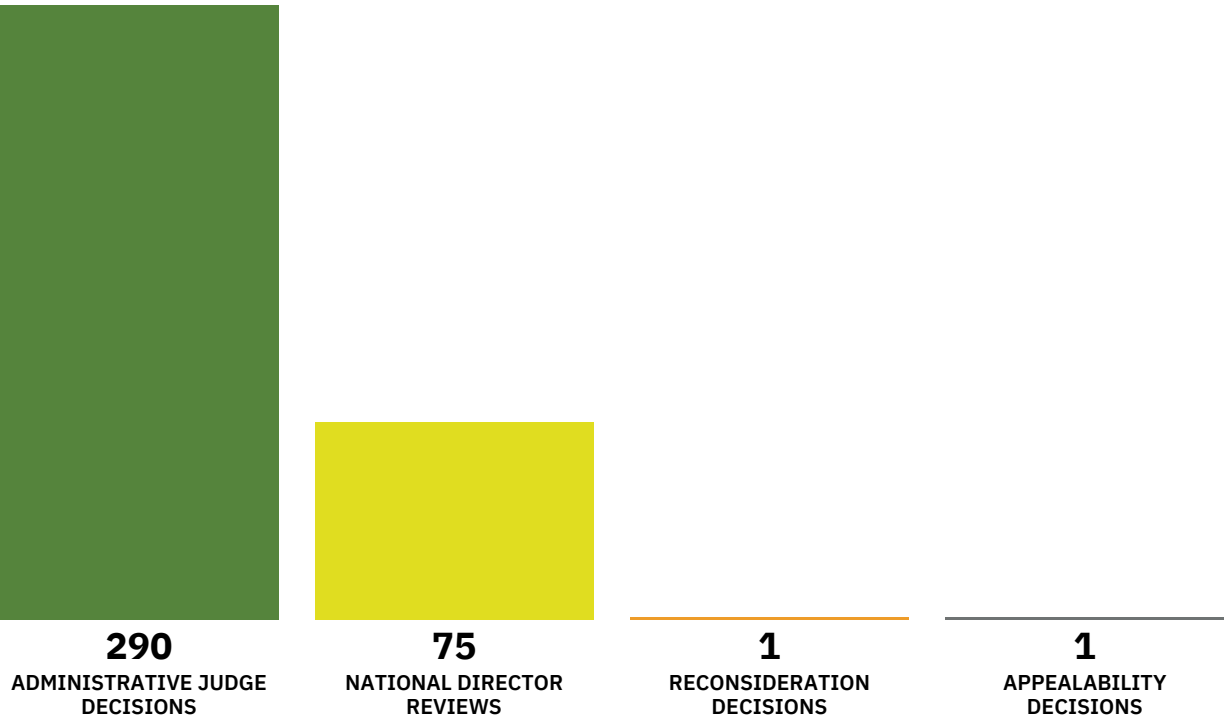
The cases examined in this analysis cover all levels of NAD review (described in Table 2). Some cases include multiple levels of review. For example, a case initially heard by an administrative judge could have gone to national director review and then later received a reconsideration decision by the National Director.

TABLE 2.
LEVELS OF NAD REVIEW

TYPE OF DECISION		DETERMINATIONS IN DATASET
Appealability Decision	Preliminary hearing to determine whether an adverse decision is appealable under NAD regulations	1
Administrative Judge Decision	Primary appeal hearing, overseen by an administrative judge	290
National Director Review	Administrative judge decision case reviewed by the National Director upon appellant or agency request	75
Reconsideration Decision	Opportunity for the National Director to correct errors in final NAD determination	1

Administrative judge decisions are the primary level of review within NAD and comprise the bulk of the cases analyzed in this dataset. Administrative judge decisions reviewed by the National Director (administrative judge decisions/national director review cases) make up the majority of the remaining cases. There are very few appealability decisions and reconsideration decisions.

FIGURE 2.
TOTAL DETERMINATIONS



Outcomes on Appeal

FIGURE 3.
TOTAL CASES BY OUTCOME

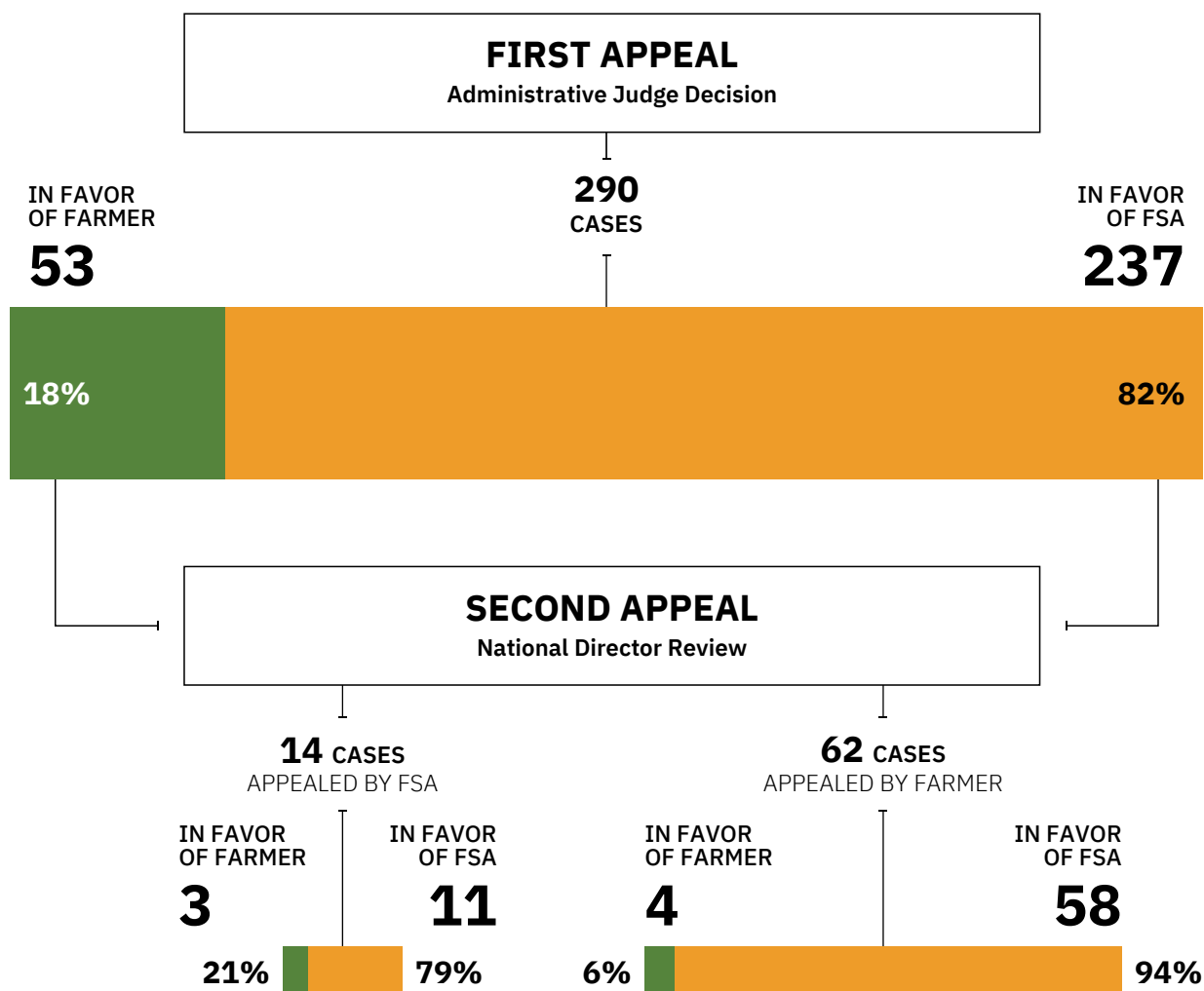


Appeals are overwhelmingly more likely to be decided in the agency’s favor than the farmer’s. Notably, FSA’s success rate is also high relative to other agencies.



FSA received a favorable outcome in 304 of the 367 cases analyzed (82.8%), and farmers received favorable outcomes on appeal in 63 cases analyzed (17.2%). Appeals are overwhelmingly more likely to be decided in the agency’s favor than the farmer’s. Notably, FSA’s success rate is also high relative to other agencies that conduct administrative appeals hearings, such as Veterans Affairs (~60%) or the Social Security Administration (22%).⁵⁰

FIGURE 4.
TOTAL CASES BY OUTCOME AT EACH LEVEL OF APPEAL

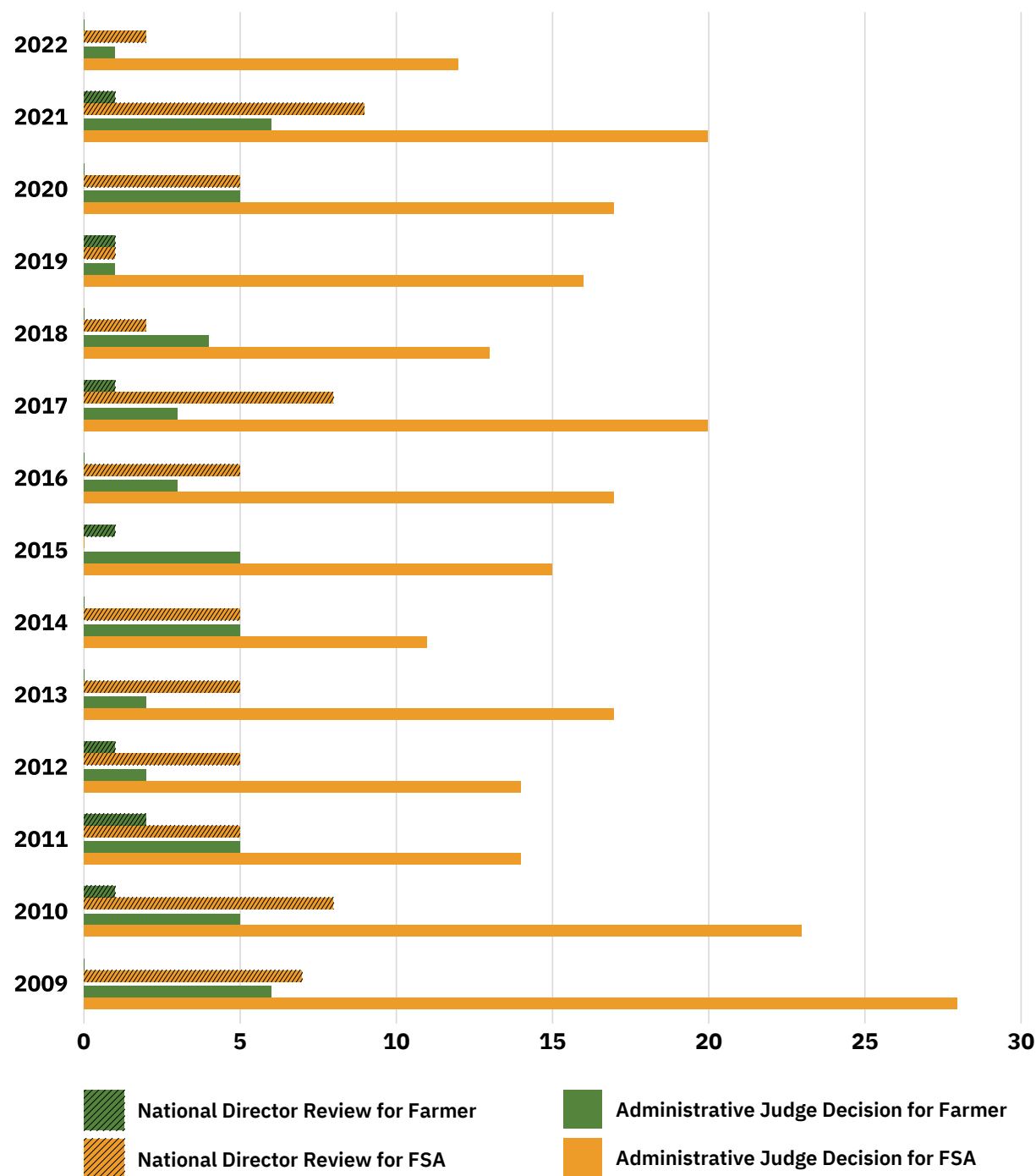


As shown in Figure 4, farmers receive significantly fewer favorable outcomes than FSA at both the administrative hearing level and on national director review. Additionally, farmers have less success at the director review level than they do at the hearing level, especially when the farmer is the party requesting review.

This data on director reversals is consistent with findings from a 1997 study conducted by two former NAD hearing officers. The study found that in national director reviews requested by FSA, the Director reversed the administrative judge decision in favor of FSA in 79% of cases.⁵¹ That figure is nearly identical to this report's findings. In national director reviews where the farmer requested review, the Director reversed the administrative judge decision in favor of the farmer in 20% of cases in the 1997 study.⁵² By contrast, the reversal rates in favor of the farmer are much lower in this report's dataset (6.5%). Director reversal rates in favor of the farmer have decreased significantly from the 1990s.

Figure 5 shows how often decisions favored the farmer or FSA at both the hearing level and the director review level over time in the current dataset.

FIGURE 5.
OUTCOMES AT ADMINISTRATIVE JUDGE DECISION AND NATIONAL DIRECTOR REVIEW LEVEL BY YEAR



Director Reversals and Judicial Independence

Farm advocates have raised concerns that the administrative judge decision reversal rate has historically been factored into administrative judges' performance reviews, which indirectly incentivizes administrative judges to find in favor of FSA rather than the farmer. The 1997 report quotes the NAD Director's five-year strategic plan at the time as follows:

Incorrect hearing officer determinations are overturned by the Director. Occasionally, a determination may be overturned on the basis of new information or other factors beyond the hearing officer's control, but in general, **reversals or remands of hearing officer determinations are indicators of hearing officer error.** Appropriate adjudication procedures and rational decision making will result in fewer reversals or remands. **This objective, which seeks to reduce the incidence of reversals or remands of hearing officer determinations, will be reflected directly in performance measures in all Annual Performance Plans.** Performance against stated targets will be reflected in the performance plans of individual hearing officers (emphasis added).⁵³

This policy incentivized administrative judges to make decisions that would be the least likely to get overturned by the NAD Director. Because FSA has broad discretion in lending decisions and because the farmer has the burden of proving the FSA's adverse decisions are erroneous, judges may have reasonably believed that ruling in favor of FSA was less likely to be overturned by the Director than ruling in favor of the farmer.

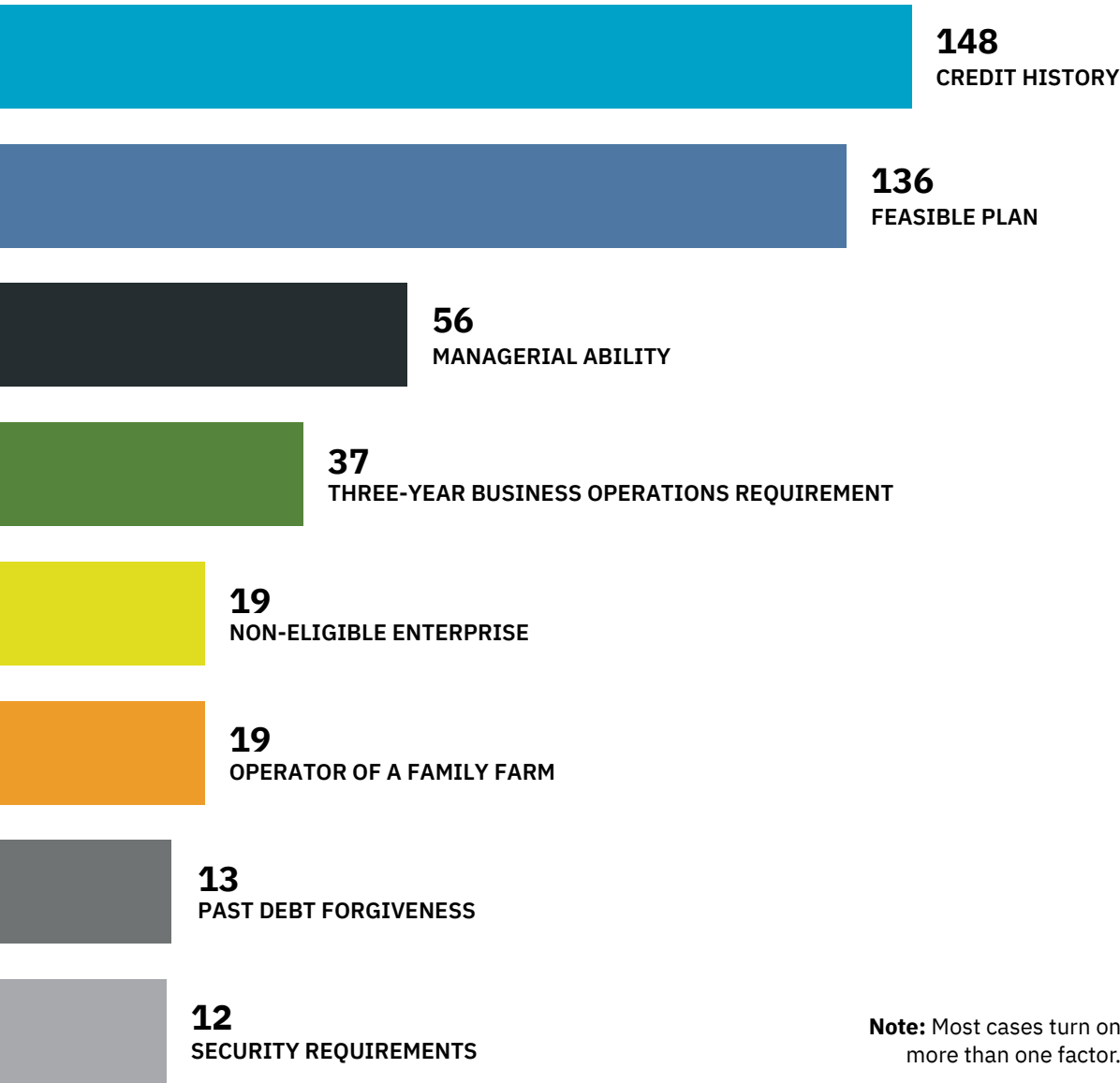
The research team requested current information on administrative judge performance review criteria in a Freedom of Information Act (FOIA) request submitted to NAD in July 2022 to determine whether reversal rates were still being factored into performance reviews but has not received this information at the time of publication.

To maintain judicial independence at NAD, administrative judges' decisions should not have the potential to be influenced by factors external to the case, including their personal job security.⁵⁴ If NAD's criteria for administrative judge performance still factor in the judge's rate of reversal by the Director, that provision should be removed.

Top Issues in the Case Analysis

The 367 NAD cases in the dataset were coded for the contested issues in each determination. These issues correspond to key FSA loan eligibility and approval requirements that prevented farmers from obtaining loan approval. Figure 6 shows the eight most common issues in the NAD case set.

FIGURE 6.
WHAT WERE THE MOST COMMON ISSUES IN NAD DETERMINATIONS?⁵⁵



Credit history, feasible plan, and managerial ability were the top three issues in the case analysis. Each of these key issues is discussed in detail in the following sections.

DISCRIMINATION

Allegations of agency discrimination were common in the case set (75 cases, or 20.4%, alleged discrimination). NAD does not consider discrimination allegations because discrimination claims are under the jurisdiction of the USDA Office of the Assistant Secretary for Civil Rights (OASCR).

Publicly available NAD data is redacted for personally identifiable information and therefore does not include demographic information on appellant farmers, so this report cannot track case outcomes by race or ethnicity. However, some demographic information on FSA loan decisions is available. The research team submitted a Freedom of Information Act (FOIA) request to FSA in July 2022 requesting FSA loan application decisions broken out demographically for the length of the NAD case dataset (2009–22). FSA responded with a more limited dataset covering 2017–21. That data, although it does not perfectly track the time period covered by this report, is still telling. It shows significant differences in loan approval rates by race and ethnicity (see figures 7 and 8), as well as discrepancies in the demographic breakdowns of the proportions of total loan dollar amounts approved and denied by FSA (see figures 9 and 10). Together, these suggest that discrimination may be a contributing factor in loan review. Consequently, achieving an outcome in the NAD appeals process that corrects this agency action is vital.

For further discussion of NAD’s role in discrimination claims, see Section VII below.

FIGURE 7.
PERCENTAGE OF FSA DIRECT LOAN DENIALS BY YEAR AND RACE⁵⁶

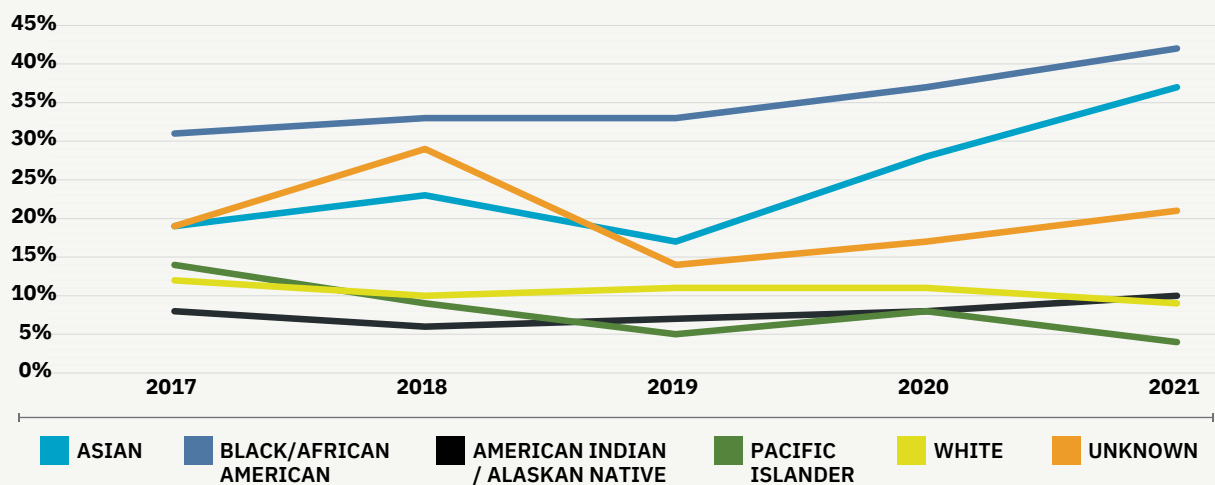


FIGURE 8.
PERCENTAGE OF FSA DIRECT LOAN DENIALS BY YEAR AND ETHNICITY⁵⁷

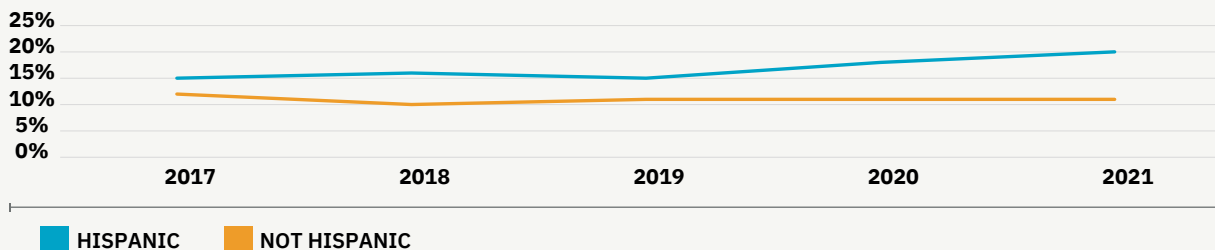


FIGURE 9.
TOTAL LOAN AMOUNTS APPROVED AND DENIED BY YEAR AND RACE⁵⁸

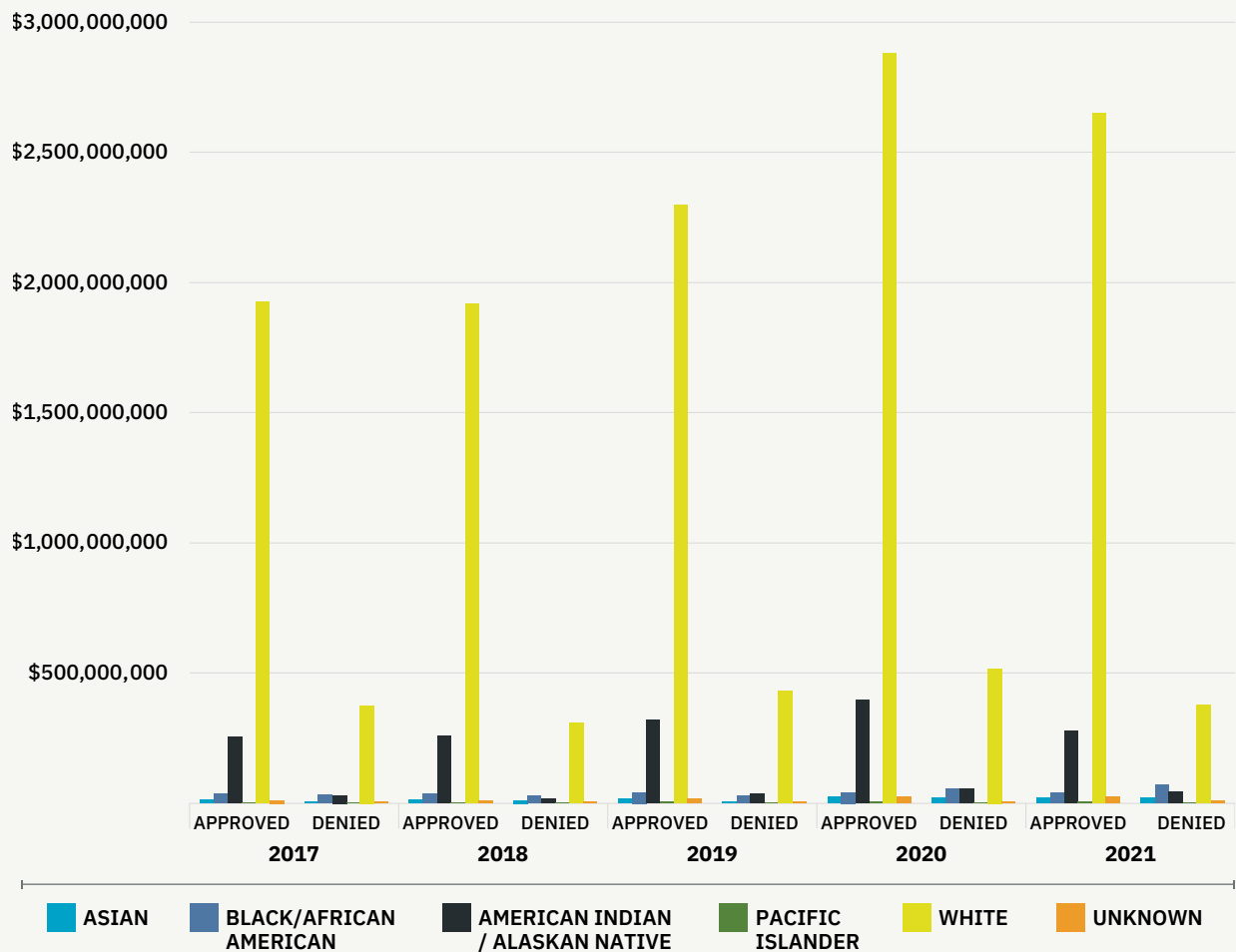
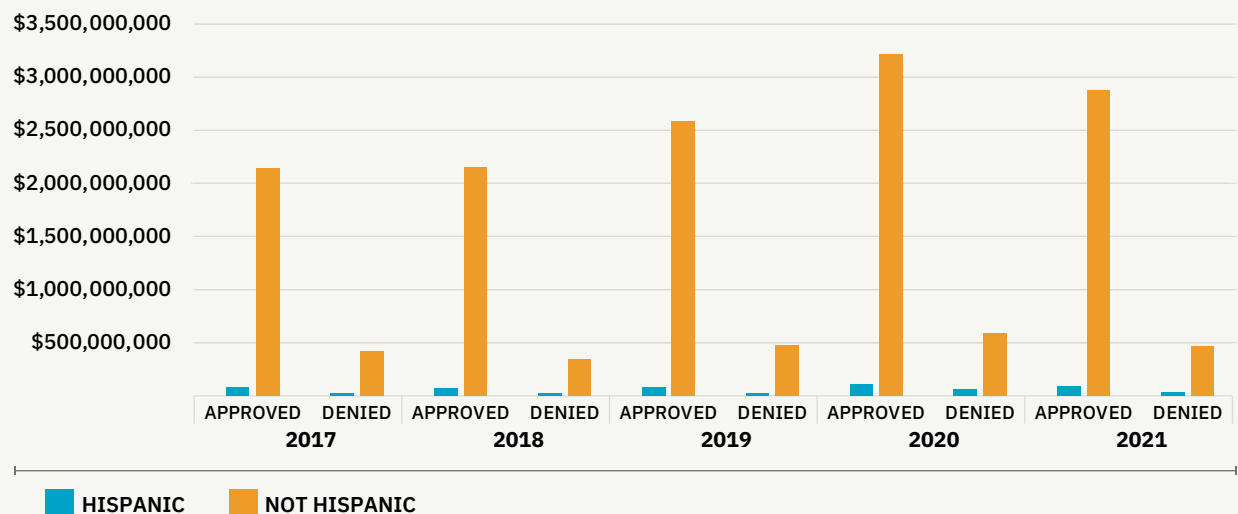


FIGURE 10.
TOTAL LOAN AMOUNTS APPROVED AND DENIED BY YEAR AND ETHNICITY⁵⁹





IV. KEY ISSUE: CREDIT HISTORY

The applicant must have acceptable credit history demonstrated by debt repayment.

USDA GENERAL ELIGIBILITY REQUIREMENTS FOR DIRECT LOAN MAKING, 7 C.F.R. § 764.101(D).

Three key lending issues emerged through this research. The first relates to credit history. The credit history requirement arose in 148 of the 367 NAD determinations analyzed (40.1%), making it the most common issue in the case analysis. The credit history requirement includes three considerations:

- whether the applicant has a history of **failures to repay past debts** as they came due
- whether or not the applicant will carry out the terms and conditions of the loan in **good faith**
- whether the applicant has caused the agency a loss by receiving **debt forgiveness**⁶⁰

Figure 11 shows the breakdown of credit history cases by key provision. Failure to repay past debts as they came due was the most common provision at issue (124 cases), followed by the good faith requirement (67 cases) and debt forgiveness (11 cases). The following sections discuss specific issues arising under each key provision.

FIGURE 11.

WHAT WERE THE MOST COMMONLY APPEALED CREDIT HISTORY ISSUES?

148 DETERMINATIONS

124

FAILURE TO REPAY DEBTS WHEN DUE



7 CFR 764.101(D)(3)

"A history of **failures to repay past debts as they came due** when the ability to repay was within the applicant's control will demonstrate unacceptable credit history."

67

GOOD FAITH



7 CFR 764.101(D)(1)

". . . whether the applicant will carry out the terms and conditions of the loan and deal with the Agency in **good faith**. In making this determination, the Agency may examine whether the applicant has properly fulfilled its obligations to other parties, including other agencies of the Federal Government."

11

DEBT FORGIVENESS

7 CFR 746.101(D)(2)

"When the applicant caused the Agency a loss by receiving **debt forgiveness**, the applicant may be ineligible for assistance in accordance with eligibility requirements for the specific loan type. If the debt forgiveness is cured by repayment of the Agency's loss, the Agency may still consider the debt forgiveness in considering the applicant's credit worthiness."

Note: Some cases involve more than one credit history provision. This is why the numbers of occurrences for each category in Figure 11 add up to more than the total number of credit history cases.

Failure to Repay Past Debts Is Most Common Credit History Hurdle

A history of failures to repay past debts as they came due when the ability to repay was within the applicant's control will demonstrate unacceptable credit history.

— USDA GENERAL ELIGIBILITY REQUIREMENTS FOR DIRECT LOAN MAKING, 7 C.F.R. § 764.101(D)(3). —

There are several circumstances that do "not automatically" cause FSA to conclude that the applicant has unacceptable credit history, including:

- foreclosures, judgments, and delinquent payments that occurred more than 36 months before the date of application (if no recent similar situations have occurred);
- agency delinquencies that have been resolved through loan servicing programs;
- isolated incidents of delinquent payments;
- the absence of credit history; or
- recent foreclosures, judgments, bankruptcies, or delinquent payments caused by circumstances that were temporary and beyond the applicant's control; or the result of a refusal to make full payment because of justifiable disputes.⁶¹

The FSA handbook provides further direction for FSA employees on how to assess failure to repay debts. It states that the “mere fact that an applicant filed bankruptcy will not be used as an indication of unacceptable credit history,” and that the “circumstances causing the nonpayment of debt must be considered.”⁶² The handbook notes that applicant credit scores will not be used to indicate poor credit history or as a basis for loan denial.⁶³ Additionally, the handbook requires FSA to meet with applicants to discuss any adverse or delinquent accounts in their credit history.⁶⁴ The purposes of this meeting are “to determine whether the adverse account status was caused by circumstances beyond the applicant’s control and to explain FSA creditworthiness requirements to the applicant.”⁶⁵

An applicant’s failure to repay debts when they came due was the most frequently occurring credit history issue in the case set. Several common themes arose in these cases, including FSA denying exceptions for credit issues beyond applicants’ control, FSA failing to meet with applicants to discuss adverse or delinquent accounts in their credit history, and NAD deferring to FSA decision making because of the agency’s broad discretion in reviewing credit history, even when NAD would have found applicants’ credit histories to be satisfactory.



Applicants Are Denied Exceptions for Credit Issues Beyond Their Control

FSA has the authority to make exceptions in the assessment of an applicant’s creditworthiness, enabling the agency to approve loans for applicants with some negative credit history.⁶⁶ The FSA handbook emphasizes that a “loan approving official’s authority to make exceptions is the most important tool for addressing creditworthiness.”⁶⁷ This tool is expected to benefit the applicant because it gives FSA flexibility to disregard certain credit issues if they align with any of the circumstances described above as “not automatically indicat[ing] an unacceptable credit history.”⁶⁸ As an example of a permitted exception, the handbook states that “isolated delinquent payments because of unforeseen medical expenses are considered beyond the applicant’s control.”⁶⁹ The handbook stresses that “extra diligence” is warranted to review the circumstances leading to negative credit reports⁷⁰ and that loan officials should consider whether credit issues “have been corrected or will be corrected if the requested loan is approved.”⁷¹ However, FSA does not always apply this level of diligence to its review of applicant credit history and makes credit history determinations without always properly considering an applicant’s extenuating circumstances.

The following case example demonstrates extenuating circumstances that FSA failed to recognize as meriting an exception. NAD reversed this decision on appeal.⁷²

CASE EXAMPLE 1

(CASE NO. 2018S000276)⁷³

FSA denied cattle farmer with contested credit history

In 2018, FSA denied a male cattle farmer a \$300,000 operating loan because of three federal tax liens levied between 2004 and 2006, as well as two judgments that disqualified the applicant from loan eligibility.

The administrative judge concluded that the debts FSA used to deny the application did not establish an unacceptable credit history. The administrative judge found that the appellant had no current accounts in delinquent or accelerated status and noted the farmer had repaid debts related to nearly \$20 million in losses after the attacks of September 11, 2001 and had paid over half of an additional \$2.5 million dollars in prior judgments against him. The administrative judge noted that “[c]ontrary to the Agency’s conclusion, the record clearly supports a finding that Appellant will repay his debts when they become due.”

The administrative judge admonished that the “Agency’s analysis ignores the flexibility its rules provide,” because the “negative credit incidents occurred 17 years ago, were of a temporary nature, were well beyond [the appellant’s] control, and have not occurred again.”



FSA FAILS TO DISCUSS CREDIT HISTORY ISSUES WITH APPLICANTS

FSA's handbook requires FSA to discuss questionable accounts with the loan applicant to determine whether an adverse account status was due to circumstances beyond the applicant's control.⁷⁴ In cases where FSA cannot justify an exception for extenuating circumstances, loan officials are required to explain FSA creditworthiness requirements, counsel applicants on the importance of paying accounts as agreed, and provide guidance on how the applicant can improve their credit history.⁷⁵

However, in several NAD cases, FSA did not follow its own requirement. Instead, loan officials made credit history determinations without consulting the applicants, resulting in both unwarranted application denials and missed opportunities for applicants to learn how to improve their credit moving forward if exceptions could not be made.

The following case example demonstrates FSA failing to meet with an applicant before denying their application due to credit history issues. NAD found that the agency erred.⁷⁶

CASE EXAMPLE 2

(CASE NO. 2009S000370)⁷⁷

FSA denied loans without discussing credit history with applicant

In 2009, a farmer appealed to NAD after she was denied a \$300,000 farm ownership loan and a \$50,000 operating loan due to an unacceptable credit history.

The appellant argued that certain collection amounts on her credit report were incorrect and that she had attempted to resolve discrepancies on her credit report. For example, when she discovered one outstanding debt upon receiving FSA's denial letter, the applicant paid the account in full. She also provided documentation to demonstrate efforts she had made to correct other inaccurate information on her credit report.

The administrative judge found that FSA denied the appellant's application the same day it was received and reviewed the appellant's credit report without first discussing the credit history issues with the farmer. The administrative judge therefore determined that FSA erred by denying the applications without meeting first to "determine whether the adverse account status was caused by circumstances beyond the applicant's control," as the FSA handbook requires.⁷⁸

FSA'S FLEXIBILITY IN ASSESSING CREDIT HISTORY LEADS TO EXCESSIVE DISCRETION

FSA's flexibility to issue exceptions gives the agency broad discretion in evaluating credit history. That flexibility can work in the applicant's favor if it allows them an exception or the opportunity to explain negative credit history through discussion with the agency. However, some applicants argue that FSA's credit history assessment is too subjective, which can lead to inconsistent processing of loan applications, unfair treatment, and opportunities for agency bias and discrimination.⁷⁹ This flexibility can also work against applicants at the appeals level, as NAD frequently defers to FSA's discretion under the credit history requirement—even when the agency denies an applicant whose credit history could have been considered acceptable.

The following two case examples demonstrate both issues. The first illustrates FSA's subjectivity when a loan official denied an applicant based on the amount of his outstanding credit, rather than a failure to repay debts as they came due. The second case provides an example of excessive deference to FSA when NAD upheld a loan denial based on circumstances that were temporary and beyond the applicant's control.

Some applicants argue that FSA's credit history assessment is too subjective, which can lead to inconsistent processing of loan applications, unfair treatment, and opportunities for agency bias and discrimination.

CASE EXAMPLE 3

(CASE NO. 2018E000078)⁸⁰

NAD found FSA erred in credit history determination for farmer with several lines of credit

In 2018, NAD heard the case of a farmer who received an adverse decision on his \$300,000 operating loan application because FSA determined that the applicant's "expanded liabilities" prevented him from demonstrating an acceptable credit history, even though the farmer was not delinquent on those accounts.

The agency determined that the applicant's numerous lines of credit were "unsustainable" and therefore demonstrated unacceptable credit history and failure to repay debts when they came due. However, the administrative judge found that, despite having "significant accounts payable," the appellant's credit history contained "no persuasive evidence of a history of failure to repay" those debts. The administrative judge found that FSA erred in its credit history determination.

CASE EXAMPLE 4

(CASE NO. 2015S000287)⁸¹

NAD upheld FSA finding that farmer has unacceptable credit history due to her ex-husband's debts

In a 2015 case, a farmer received adverse decisions on her \$200,000 and \$100,000 operating loan applications due to unacceptable credit history. The farmer argued that the credit issues the agency had flagged were outside of her control because she was not aware of the accounts.

The administrative judge found that FSA's decision was erroneous because the agency relied upon incorrect information in the farmer's credit report. Multiple debts on the credit report belonged to the appellant's ex-husband and not the appellant, who had never had a bankruptcy or a civil judgment filed against her.

The administrative judge determined that even the delinquencies that were the appellant's responsibility were beyond her control because she was not aware of the accounts. During her marriage, her ex-husband had prevented her from having any knowledge of, or control over, her individual finances or the family's joint finances. In fact, her ex-husband "threatened her with physical abuse if she were even to receive mail from their mailbox." After her ex-husband left her, he had their mail forwarded to his new address and never contacted her to let her know about overdue accounts, so she was unaware of bills or notices from creditors indicating she owed money. After their divorce, the appellant's ex-husband was supposed to maintain payments on their former mobile home per a court order, but he did not. After receiving her credit report from FSA, the appellant immediately began paying off any debts she became aware of.

FSA requested a national director review of the administrative judge's decision. On review, the Director pointed to FSA regulations that say circumstances that are temporary and beyond the applicant's control "do not automatically indicate an unacceptable credit history . . ."

The Director stated that "[w]hile this language generally supports Appellant's position, the words 'do not automatically' suggest that FSA retains the discretion to weigh the totality of the circumstances and ultimately determine whether a history of delinquent payments is indicative of an unacceptable credit history." The Director did not find that FSA had abused its discretion in denying the applicant the loans and deferred to the agency.

Certain Credit Problems Can Lead to Lifetime Bans on Borrowing

In addition to applicants who are denied loans on a case-by-case basis for unacceptable credit history, some potential borrowers find they are permanently barred from accessing FSA loan assistance due to credit history issues. Farmers with lack of good faith determinations in their credit history can be treated by FSA as permanently ineligible for borrowing, even though the law does not require this treatment. Good faith was the second most common credit history issue in the case analysis. Farmers with debt forgiveness in their past can also face lifetime bans, in their case because of regulatory eligibility requirements for farm operating and farm ownership loans.

LACK OF GOOD FAITH DETERMINATIONS LEAD TO LIFETIME BANS ON BORROWING

As a part of the credit history assessment, FSA determines whether a loan applicant “will carry out the terms and conditions of the loan and deal with the Agency in good faith.”⁸² FSA’s general program administration regulations define “good faith” as “when an applicant or borrower provides current, complete, and truthful information” to the agency and “adheres to all written agreements,” while allowing for a borrower to maintain their good faith status if the “inability to adhere to all agreements is due to circumstances beyond the borrower’s control.”⁸³

In making a good faith determination, FSA may consider whether an applicant falsified or omitted information relevant to the loan decision, made reasonable efforts to meet the conditions and terms of previous FSA loans, failed to make reasonable efforts to resolve delinquencies with other lenders, or failed to file federal income tax returns.⁸⁴ If an applicant provides false information to the agency, the applicant may receive a formal “lack of good faith” determination from USDA’s Office of General Counsel (OGC).⁸⁵

These determinations from OGC can prevent farmers from being able to access future loans from FSA. The following case demonstrates FSA treating a lack of good faith determination as insurmountable and NAD’s deference to FSA’s interpretation as within the scope of the agency’s discretion despite a less severe interpretation by NAD. As a result, lack of good faith determinations can effectively become lifetime bans on accessing FSA loan assistance.

CASE EXAMPLE 5

(CASE NO. 2015S000267)⁸⁶

Director upheld lifetime ban for lack of good faith determination

In 2015, two Native American farmers, a husband and wife, applied for a microloan. The two were members of the class in *Keepseagle v. Vilsack*, a class action lawsuit alleging that the USDA discriminated against Native American borrowers.⁸⁷ Their loan was denied because a 2002 letter from the Office of General Counsel (OGC) stated that the appellants had failed to act in good faith when they “used crop proceeds on which Agency had a first lien to purchase a used pickup truck” without FSA approval.

During the case, FSA characterized the lack of good faith determination as an “indefinite determination” against appellants “that will never expire for any loans and/or servicing with FSA.”

The administrative judge upheld FSA’s decision. Part of the appellants’ argument was that the agency’s adverse decision violated the letter and spirit of the settlement agreement in *Keepseagle v. Vilsack*. The loans that were the subject of OGC’s lack of good faith determination were discharged under the *Keepseagle* settlement agreement. FSA does not consider debt written off under the *Keepseagle* settlement as debt forgiveness for loan-making purposes.⁸⁸ However, the administrative judge “found nothing in the settlement agreement” that would prevent the FSA from relying on an OGC opinion related to debts discharged under *Keepseagle* under the separate *good faith* requirement.

The Director upheld the administrative judge’s decision, finding that FSA did not abuse its discretion when assessing the appellants’ credit history. The decision includes this footnote:

“FSA’s position that a good faith determination is ‘indefinite’ in nature and ‘will never expire’ may be technically accurate; however . . . the regulations afford FSA discretion to decide how it considers an applicant’s repayment history. As a result, the agency could conceivably decide to overlook a past finding of failure to act in good faith under certain, extenuating circumstances. Thus, while I find that FSA acted properly in this case when it decided to act definitively based on a previous lack of good faith determination, **I disagree with FSA to the extent it suggests that it had no choice in this matter and that a past finding of failure to act in good faith automatically and permanently bars an applicant’s eligibility under any circumstances for any direct loan**” (emphasis added).

Subsequent appellants hoped that the Director’s footnote remark in Case Example 5 would lead to a change in FSA’s treatment of loan applicants with prior lack of good faith determinations. However, FSA has continued to interpret these determinations as justifications for lifetime bans on lending. An appellant from Case Example 5 applied for another microloan and was again denied due to the same 2002 lack of good faith determination, a decision NAD upheld, noting that “the Agency has used its discretion to effectively implement a ‘zero-tolerance policy’ or ‘one-strike rule’ with regard to a lack of good faith determination.”⁸⁹ In another farmer’s case, the administrative judge acknowledged that FSA’s stance on lack of good faith determinations “may seem harsh and unforgiving for a farmer with a three-year history of repaying several hundred thousand dollar loans with the Agency, including the loan that gave rise to the lack of good faith determination,” but still concluded that FSA acted within its discretion to enforce a lifetime ban against the farmer.⁹⁰

DEBT FORGIVENESS LEADS TO LIFETIME BANS ON BORROWING

When the applicant caused the Agency a loss by receiving debt forgiveness, the applicant may be ineligible for assistance in accordance with eligibility requirements for the specific loan type. If the debt forgiveness is cured by repayment of the Agency’s loss, the Agency may still consider the debt forgiveness in determining the applicant’s credit worthiness.

— USDA GENERAL ELIGIBILITY REQUIREMENTS FOR DIRECT LOAN MAKING, 7 C.F.R. § 764.101(D)(2). —

The issue of debt forgiveness arose less frequently in the case analysis than failure to repay debts or good faith. But for borrowers who receive debt forgiveness, there can be life-long consequences, including preventing a farmer from ever being eligible for FSA loan assistance again.⁹¹

In addition to the credit history eligibility requirements for all direct loans,⁹² the issue of debt forgiveness is raised in the specific eligibility requirements for both farm operating⁹³ and ownership loans⁹⁴ (described in Table 3). Although the general credit history requirement does not necessarily bar applicants with debt forgiveness from loan eligibility, the specific requirements for both farm operating and farm ownership loans do.

FSA’s credit history regulations allow FSA to consider an applicant’s debt forgiveness even if the loss has been cured by repayment,⁹⁵ while FSA handbook provisions on credit history list repayment of agency losses as a circumstance that the agency does *not* consider to be debt forgiveness.⁹⁶

TABLE 3.
LOAN-SPECIFIC DEBT FORGIVENESS PROVISIONS

	FARM OPERATING LOANS	FARM OWNERSHIP LOANS
Debt Forgiveness Clause	“The applicant and anyone who will sign the promissory note, [other than the exceptions below], must not have received debt forgiveness from the Agency on any direct or guaranteed loan.” ⁹⁷	“The applicant . . . and anyone who will sign the promissory note, must not have received debt forgiveness from the Agency on any direct or guaranteed loan.” ⁹⁸
Exceptions	An applicant may be eligible for an operating loan to pay annual farm operating and family living expenses if they: 1. received a write-down under section 353 of the Consolidated Farm and Rural Development Act;⁹⁹ 2. are current on payments under a Chapter 11, 12, or 13 bankruptcy reorganization plan; or 3. received debt forgiveness no more than once after April 4, 1996, resulting from a Presidentially designated emergency for their county.¹⁰⁰	None

Borrowers who have received debt forgiveness from FSA are ineligible for farm ownership loans but *may* be eligible for operating loans (only for annual farm operating and family living expenses) if they meet any of the exceptions listed in Table 3. The corresponding FSA handbook provision states that an applicant “may become eligible” for an operating loan for uses outside of annual operating and living expenses if the total amount of debt forgiveness is repaid.¹⁰¹

A key difference from the lack of good faith bans is that the debt forgiveness bans are written into the regulations themselves rather than resulting from FSA discretion. As the case example below shows, this regulatory hard line on eligibility can lead to harsh outcomes for loan applicants.

CASE EXAMPLE 6

(CASE NO. 2021S000286)¹⁰²

Cattle farmer found ineligible for FSA loans 20 years after receiving debt forgiveness

In 2021, a cattle farmer was denied farm ownership and operating loans because she received debt forgiveness on prior loans she cosigned with her husband. The appellant also claimed that FSA discriminated against her because of her gender.

On appeal, the farmer argued that the debt forgiveness occurred more than 20 years ago, when she was not actively involved in the farming operation. She was now applying for a loan on her own, after gaining substantial experience with cattle operations and financial and business management. The appellant further argued that “the Agency’s literature indicates that it targets and reserves loan funds for historically underserved and socially disadvantaged persons, such as herself, and . . . references that exceptions exist for past instances of debt forgiveness.”

The administrative judge found that FSA properly determined the appellant’s prior debt forgiveness made her ineligible for the requested loans, as the appellant did not qualify for any of the regulatory exceptions concerning debt forgiveness. While applicants who have filed for bankruptcy under Chapters 11, 12, and 13 and are current on their reorganization plans would be eligible for loans for annual farm operating and living expenses, the appellant and her husband filed for bankruptcy under Chapter 7, which does not involve a reorganization plan. The appellant was also requesting loans for land, equipment, and livestock purchases, not annual operating and living expenses.

The administrative judge stated that the “regulations do not make the mere passage of time, without actual repayment of the loss, an exception to the eligibility requirements,” and that “by co-signing the prior loans, Appellant became obligated on the loans the same as her husband.” The administrative judge also provided the appellant instructions on filing a discrimination claim, as NAD cannot consider discrimination claims.

Upon review, the National Director upheld the administrative judge’s decision.

The administrative judge in this case sympathized with the appellant, stating that “her education and experience with cattle operations, financial matters, and business management” would “make her a good candidate to begin her new proposed cattle operation,” but that the “regulations clearly make her ineligible for the requested loans from the Agency based on her prior debt forgiveness, and the National Appeals Division does not have the authority to compel the Agency to further consider her for the requested loans.”

Conclusion

The credit history requirement was the most prevalent factor at issue in the NAD determinations analyzed. 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 have the effect of “lifetime bans” 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.

While FSA's flexibility under the credit history requirement is intended to provide a more favorable review of an applicant's credit history,¹⁰³ it also gives the agency broad discretion in evaluating credit issues. This can lead to unfair scrutiny of applications, excessive subjectivity, bias, and discrimination.

In addition to each of the specific issues discussed above, credit history is generally a difficult requirement for applicants to meet. While some applicants' credit issues may be insurmountable, FSA is considered the “lender of last resort,” and if these applicants are able to obtain credit anywhere, it should be from FSA.¹⁰⁴ Whether a farmer has no established credit history¹⁰⁵ or is struggling with student debt because they obtained an agricultural education,¹⁰⁶ farmers should be able to take steps with the agency to make themselves creditworthy.



V. KEY ISSUE: MANAGERIAL ABILITY

Photo by Scott Strebler care of Farm Aid

The applicant must have sufficient managerial ability to assure reasonable prospects of loan repayment, as determined by the Agency.

— USDA GENERAL ELIGIBILITY REQUIREMENTS FOR DIRECT LOAN MAKING, 7 C.F.R. § 764.101(I). —

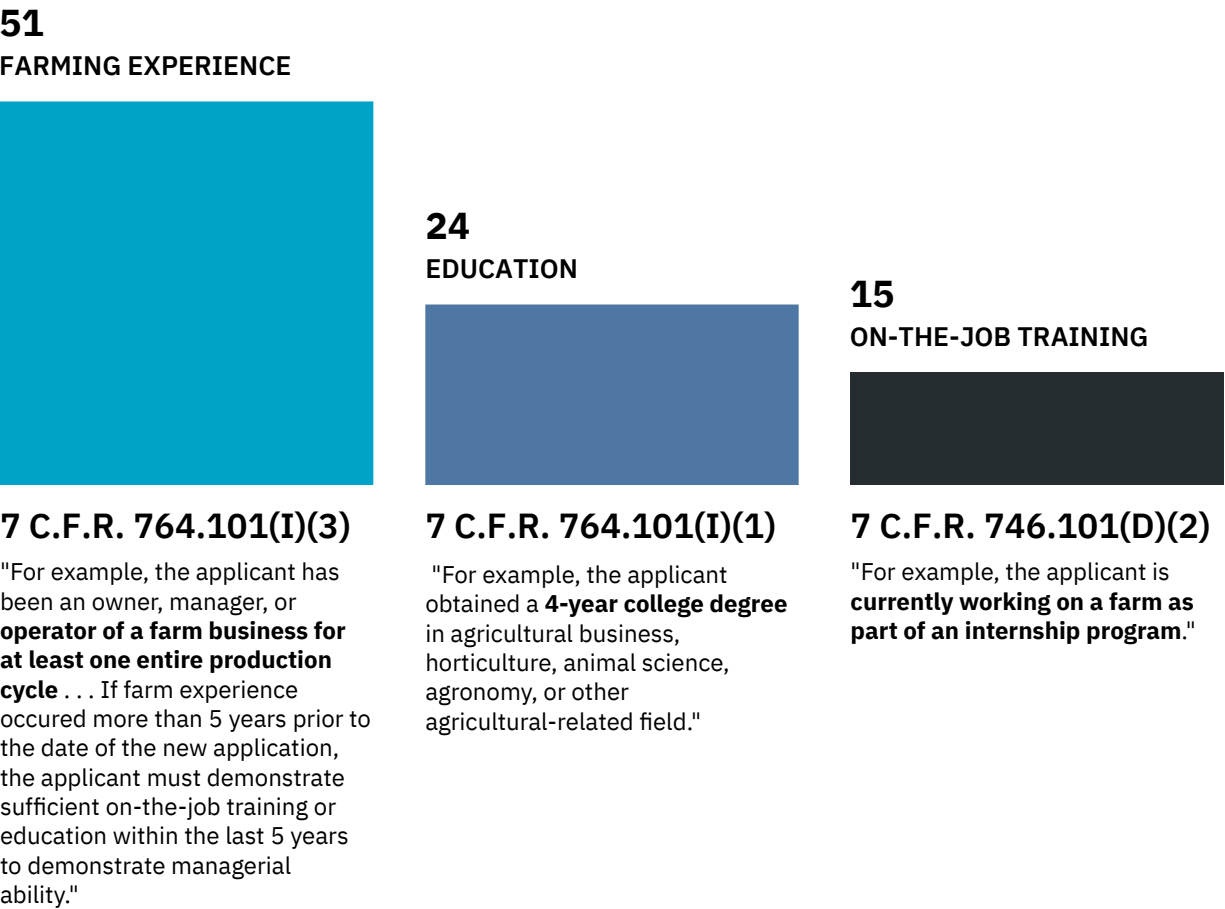
A loan applicant can meet the managerial ability requirement by demonstrating adequate education, on-the-job training, or farming experience.¹⁰⁷ The FSA handbook description of the managerial ability requirement states:

*The applicant may satisfy the managerial ability requirement with **any** combination of education, on-the-job training and farm experience, or by meeting **just 1** of these criteria. The level of management ability required will depend on the complexity of the operation and the amount of the loan request. The authorized agency official will consider each application on a case-by-case basis (emphasis in original).¹⁰⁸*

The first sentence and bolded language in the paragraph above demonstrate the flexibility within the managerial ability requirement to fulfill it by meeting one or a combination of the three criteria. (This much-needed flexibility was added through FSA handbook changes in 2012.)¹⁰⁹ The subsequent sentences demonstrate FSA's discretion in determining whether an applicant meets the requirement.

The managerial ability requirement was at issue in 56 out of the 367 NAD cases analyzed (15.2%). Of the cases questioning an appellant’s managerial ability, **farming experience** was at issue in the most cases (51), followed by **education** with 24 cases, then **on-the-job training** with 15 cases. These totals are reflected in Figure 12.

FIGURE 12.
WHAT WERE THE MOST COMMONLY APPEALED MANAGERIAL ABILITY ISSUES?



Note: Many cases involving managerial ability cite multiple or even all three categories because applicants can use a combination of the categories to meet the managerial ability requirement.

Common issues in the case analysis mainly relate to FSA’s broad discretion in assessing managerial ability.¹¹⁰ Under the farming experience option, excessive discretion leads to unpredictable loan review outcomes and can allow for agency bias and discrimination. Agency discretion similarly affects applicants trying to meet the managerial ability requirement using a combination of qualifying experience, education, and on-the-job training.

Excessive Discretion Leads to Unpredictable Outcomes Under the Farming Experience Option

The FSA handbook includes detail on each of the three ways to meet the managerial ability requirement. To meet the farming experience requirement alone, the applicant may have:

- *been an owner of a farm business with management and operator responsibilities for at least [one] entire production and marketing cycle;*
- *been employed as a migrant farm worker and elevated to a leadership or foreperson position for at least [one] entire production and marketing cycle and whose responsibilities include crop and field management, livestock health, breeding supervision, labor management or hiring, or general farm management;*
- *been employed as a farm manager or farm management consultant for at least [one] entire production and marketing cycle;*
- *raised on a farm and held significant responsibility for day-to-day management decisions for at least [one] entire production and marketing cycle; or*
- *obtained and successfully repaid one FSA Youth-[operating loan].*¹¹¹

The applicant must demonstrate their farming experience through FSA farm records or “similar documentation.”¹¹² If an applicant’s experience occurred more than five years prior to the date of the loan application, the applicant must “demonstrate sufficient on-the-job training or education within the last five years to demonstrate managerial ability.”¹¹³

The farming experience requirement is the most frequently occurring managerial ability issue in the analyzed cases. Common issues that arose in the cases involved determinations about what practices constitute “standard farming practices,” FSA’s use of information beyond what the regulations prescribe to make farming experience determinations, and applicants’ ability to demonstrate farming experience within the past five years.

'STANDARD FARMING PRACTICES' ARE SUBJECTIVE

Applicants attempting to meet the farming experience criterion must “be able to demonstrate that they have carried out their operation according to **standard farming practices** including keeping accurate records of income and expenses, income tax records, and breeding statistics, as applicable” (emphasis added).¹¹⁴ The phrase “standard farming practices” is not defined by the agency, nor is there a definitive list of records FSA may consider in its decision making (the recordkeeping requirement is discussed in more detail in the following section). This lack of definition or guidance gives FSA broad discretion to scrutinize applications. Farmers are denied for wide-ranging reasons that do not directly undermine their farming experience as described in the FSA handbook, such as failing to turn a profit (see Case Example 7), using inadequate irrigation,¹¹⁵ or having organic farm fields that fail to match the appearance of neighboring conventional fields.¹¹⁶

CASE EXAMPLE 7, PART I

(CASE NO. 2009W000376)¹¹⁷

Sod farmer lacked managerial ability despite extensive experience

In 2009, NAD heard the case of a farmer attempting to start a sod operation who was denied a direct operating loan (unknown amount) because FSA determined he lacked managerial ability. FSA scrutinized the farmer's managerial ability under all three criteria (discussed in part II of this case example on page 51) and denied his loan application.

In its analysis of the appellant's farming experience, the administrative judge discounted the farmer's nine years of experience operating his own farm. Even though the appellant met "the initial threshold" for farming experience, he did not carry out his operation according to "standard farming practices."

The administrative judge stated that record keeping and "generating enough income to pay for all expenses" constitute standard farming practices. This explanation of "standard farming practices" does not exist in FSA's regulations or handbook. The decision cited FSA's own hearing testimony as a source for this definition.¹¹⁸

The administrative judge noted that the farmer's three-year financial history did not match the farm income and expense information reported on his income tax returns for two years and that the farmer did not generate sufficient income in the last three years to pay for all expenses. Therefore, the administrative judge concluded that the farmer did not meet the farming experience criterion.



FSA USES INFORMATION OUTSIDE THE RECORDKEEPING REQUIREMENT TO DISQUALIFY FARMERS

In some cases, applicants could not meet the managerial ability requirement through farming experience because FSA evaluated factors not included in the farming experience regulatory or handbook requirements, including unnecessary recordkeeping.

The FSA handbook states that the “standard practices” requirement includes “keeping accurate records of income and expenses, income tax records, and breeding statistics, as applicable.”¹¹⁹ This provision only requires that the farmer provide documentation “as applicable” and that the documentation is “accurate.”¹²⁰ Table 4 shows several examples of information outside of the recordkeeping requirement that FSA demanded of applicants or relied upon to deny their loan applications.



Photo by Scott Strehle care of Farm Aid

TABLE 4.

CASE EXAMPLES OF FSA USING EXTRANEOUS INFORMATION UNDER THE FARMING EXPERIENCE REQUIREMENT

CASE EXAMPLE	FSA DECISION	NAD DETERMINATION(S)	NOTES
Case Example 8: Experienced BIPOC farmers denied loans due to crop loss Case No. 2009W000459¹²¹ 2009	A degree in Agricultural Science and 20 years of farming experience were insufficient. FSA contended that appellants had an unrealistic business plan and only one year of organic crop experience, which resulted in total crop loss. Appellants alleged that FSA racially discriminated against them.	The administrative judge confirmed that the appellants' 2008 crop failure was the result of documented weather events rather than their inexperience with organic farming. The administrative judge determined that FSA erred in its decision and that the husband appellant could meet the managerial ability requirement under either the education or farming experience provisions. NAD could not hear the discrimination allegations.	None
Case Example 9: Cattle farmer's managerial ability denied due to losses on tax returns Case No. 2009S000552¹²² 2009	The appellant was denied based in part on lack of managerial ability despite having independently operated his cattle farm for over 30 years. The African American appellant (self-identified in the case) alleged that FSA racially discriminated against him.	The administrative judge upheld the loan denial because the appellant's tax returns showed losses in each of the past three years and therefore were "not indicative of managerial ability." The National Director upheld the administrative judge's determination.	Neither regulations nor the FSA handbook require that an applicant's tax returns show a profit. Their purpose is to help demonstrate that an applicant's operation is conducted "according to standard farming practices," ¹²³ not to demonstrate a profit record.
Case Example 10: Cattle and hay farmer denied due to income from program payments Case No. 2010S000791¹²⁴ 2010	FSA denied loans despite the appellant submitting records that demonstrated her management responsibilities in a partnership entity, a successfully repaid FSA youth loan, and participation in a cattle operation.	NAD upheld FSA's decision. The administrative judge highlighted the appellant's tax returns, taking issue with the fact that a majority of the operation's total income that year was attributable to program payments. The administrative judge also noted that the appellant's 2007 tax return contained no information pertaining to production and expenses directly attributable to the appellant's cattle operation. Additionally, the administrative judge noted that the appellant had no taxable income for 2005, which fell within the life of the appellant's youth loan. Together, the administrative judge found that the tax returns failed to establish managerial ability.	The appellant's tax returns were met with a level of scrutiny that is not required by the regulations or handbook (for example, there is nothing in the managerial ability regulations that says that a majority of the income in a given year cannot come from program payments or that a farmer must demonstrate an income in every year they have had a loan).¹²⁵ Additionally, the farmer had repaid her Youth Loan in full. Her repayment of the Youth Loan <i>on its own</i> is sufficient to qualify her under the farming experience requirement.¹²⁶

CASE EXAMPLE	FSA DECISION	NAD DETERMINATION(S)	NOTES
Case Example 11: FSA erroneously required tax forms to demonstrate managerial ability Case No. 2011W000004¹²⁷ 2011	The appellant had worked on his father's farm his entire life with significant management responsibilities and was the sole manager of 160 acres of his father's land for the past six years. FSA argued that if the farmer had submitted a Schedule F tax form (showing profit or loss from farming) or had documentation showing he had worked for another farm as a farm manager, he would have been approved.	NAD found FSA's decision erroneous. The administrative judge noted the appellant's management experience deciding what variety and where to plant, how to rotate crops, what pesticides to use, when to harvest, and when and how to sell farm products. The administrative judge determined that the appellant provided "uncontroverted evidence that he has been involved in every aspect of the farm's operation, and has performed nearly every function related to its operation."	None
Case Example 12: Alfalfa growers denied by FSA for not owning farm equipment Case No. 2017W000230¹²⁸ 2017	FSA denied a farm ownership loan because the farmers did not own a swather or a baler, two items required for a haying operation. Therefore, they could not demonstrate managerial ability.	NAD determined FSA's adverse decision was erroneous. The administrative judge noted that the appellants made all of the management decisions regarding the timing of the hay cutting and baling, concluding that "ownership of all the necessary equipment is not an eligibility requirement and not reason to find a lack of managerial ability." The National Director upheld the administrative judge decision.	None

FARMERS DISQUALIFIED BY PAST-FIVE-YEARS REQUIREMENT

Applicants fulfilling the managerial ability requirement though farming experience alone must show that their farming experience accrued within the past five years.¹²⁹ Otherwise, “the applicant must demonstrate sufficient on-the-job training or education within the last [five] years to demonstrate managerial ability.”¹³⁰ Importantly, the FSA handbook does not define “sufficient,” leaving FSA substantial discretion in interpreting that term.

CASE EXAMPLE 13

(CASE NO. 2013E000841)¹³¹

Black farmer caught in farming experience catch-22

In 2014, FSA denied a farmer (a member of the class in *Pigford v. Glickman*, a class action suit alleging that the USDA racially discriminated against Black farmers)¹³² a direct farm operating loan of an unspecified amount due in part to a lack of managerial ability because the farmer’s experience did not take place within the past five years.

The same farmer, in another simultaneous case,¹³³ was denied a farm ownership loan because he had too much experience to qualify as a beginning farmer. (Beginning farmers cannot have operated a farm for more than ten years.)¹³⁴

The appellant argued that he was being discriminated against due to these seemingly contradictory decisions. He had too much experience for a beginning farmer loan and too little recent experience for a regular loan. The administrative judge did not find that the agency erred in its decision because the eligibility criteria differ between the two types of loans.

Ironically, farmers with substantial farming experience such as this appellant may be unable to farm continuously due to issues caused by an inability to access previous FSA loans, including due to the types of discrimination that led to the *Pigford* lawsuit. Those gaps in farming experience can then bar them from receiving new loans.

Broad FSA Discretion in Combining Managerial Ability Criteria Leads to Denials

FSA's level of discretion and lack of specificity when evaluating managerial ability is a common issue that results in unfavorable outcomes from FSA and NAD. While applicants can use "any combination of education, on-the-job training and farm experience" to prove managerial ability, the regulations and FSA handbook do not specify what is necessary under each category for a farmer to satisfy the requirement. This leads to loan denials despite farmer applicants meeting "any combination" of the three criteria. The requirements for meeting farming experience alone are described above on page 43. The other two criteria are described below.

To meet the **education** requirement alone, the applicant must have completed "an educational program in agriculture," such as:

- *a [four]-year college degree or graduate degree in agriculture business, horticulture, animal science, agronomy, or other agricultural related fields;*
- *a [two]-year degree from a technical college in agriculture business, horticulture, animal science, agronomy, or other agricultural related fields;*
- *successful completion of farm management curriculum offered by the Cooperative Extension Service, a community college, adult vocational agriculture program, or land grant university;*
- *successful completion of a community-based, nationally based, non-profit, or similar farm workshop programs [sic]; or*
- *other comprehensive agricultural programs that include [a range of topics such as financial records, business plans, risk management, and marketing]¹³⁵*

To meet the **on-the-job training** requirement alone, an applicant must be:

- *working, or has recently worked, as hired farm labor with management responsibilities;*
- *completing, or recently completed, a farm mentorship or internship program with an emphasis on management requirements and day-to-day farm decisions . . . ; or*
- *participating, or recently participated, in urban or community-supported agriculture programs which incorporate basic agricultural training . . . ¹³⁶*

While applicants can use "any combination of education, on-the-job training and farm experience" to prove managerial ability, the regulations and FSA handbook do not specify what is necessary under each category for a farmer to satisfy the requirement.



Photo by Scott Strebler care of Farm Aid

Extra Scrutiny for Farming Experience

The farming experience criterion poses unique risks to the applicant because FSA scrutinizes not only the duration of the farmer's experience, but also their judgment. Under the education or on-the-job training criteria, a farmer can fully satisfy the managerial ability requirement without ever being in the risk-taking position of running a farm business (e.g., by completing a two-year degree for education or completing a farm mentorship program for on-the-job training).

By contrast, under the farming experience criterion, the quality of a farmer's decisions and business acumen are heavily scrutinized, with FSA exercising more latitude to determine that a farmer's experience is not "good" experience if it is not financially successful. As a result, for some farmers it may actually be more difficult to meet the managerial ability requirement if they do have substantial farm operating experience and are subject to FSA's scrutiny regarding the quality of their managerial decisions than if they do not have any farm business ownership and operating experience at all.

FSA exercises enormous discretion in determining how to combine criteria as well as whether to recognize certain types of experience, education, and training.¹³⁷ The following case demonstrates FSA's inconsistent approach to assessing applicants' ability to meet "any combination" of the managerial ability criteria.

CASE EXAMPLE 7, PART II

(CASE NO. 2009W000376)¹³⁸

Sod farmer lacked managerial ability despite extensive experience

In 2009, NAD heard the case of a farmer attempting to start a sod operation who was denied a direct operating loan (unknown amount) because FSA determined he lacked managerial ability.

The applicant's education included:

- four years of vocational agriculture classes (Future Farmers of America (FFA)) in high school, where he participated on the family farm, managed a hog operation, and successfully completed hog production projects; and
- training leading to receipt of a pesticide application license.

Administrative judge finding: The farmer did not meet the education criterion because the educational programs were not relevant to the appellant's proposed sod operation.

The applicant's on-the-job training included:

- six years as a hired farm laborer on his uncle's farm before purchasing his own farm in 2000; and
- two years of work on his uncle's sod farm hauling sod.

Administrative judge finding: The farmer did not meet the on-the-job training criterion because he had no management responsibilities while working on his uncle's farm or in hauling sod.

The applicant's farming experience included:

- nine years of operating his own farm.

Administrative judge finding: Despite the farmer's extensive experience, he did not carry out his operation according to "standard farming practices" (discussed further in part I of this case example on page 44). Therefore, the administrative judge concluded that the farmer did not meet the farming experience criterion either.

The administrative judge's conclusions regarding the education, on-the-job training, and farming experience categories were based on the farmer's ability to meet each of the individual categories alone. The farmer's experience in each category was heavily scrutinized. However, the administrative judge should have considered whether the farmer could meet the requirement by using "any combination" of the criteria to prove managerial ability.¹³⁹

Conclusion

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, leaving space 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 concludes that FSA's decisions regarding managerial ability are not erroneous, even when they are inconsistent.

Consequently, it can be difficult for farmers to receive loans due to challenges in meeting the managerial ability requirement, particularly under the farming experience criterion. By amending the handbook provisions concerning “combination” experience, record keeping, “standard farming practices,” and experience in the past five years, it is possible to remove some of the excessive discretion under the managerial ability requirement so that more farmers can access the funding they need.



VI. KEY ISSUE: PLAN FEASIBILITY

FSA regulations controlling loan approval require applicants to have a farm operating plan that “reflects a feasible plan, which includes repayment of the proposed loan and demonstrates that all other credit needs can be met.”

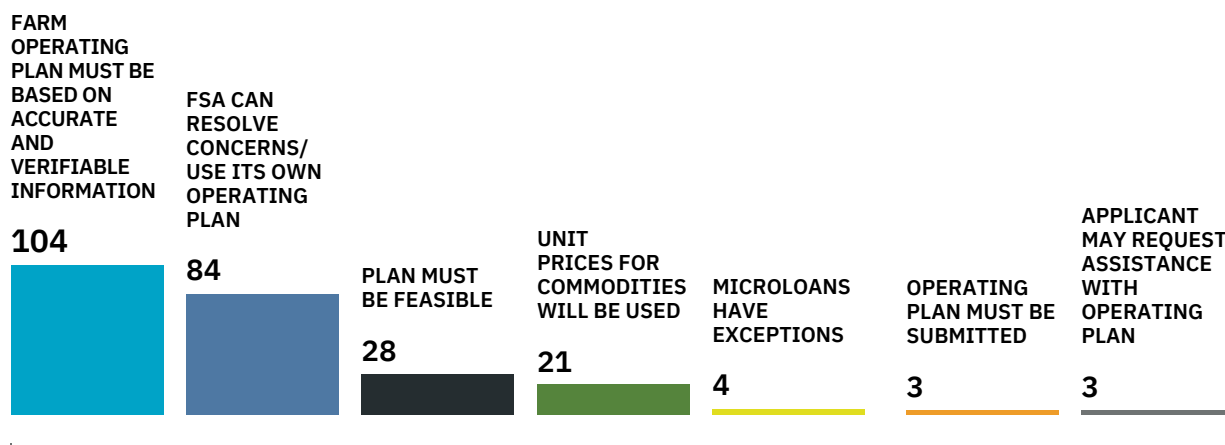
USDA LOAN DECISION REGULATIONS FOR DIRECT LOAN MAKING, 7 C.F.R. § 764.401(A)(1)(I).

A feasible plan is demonstrated when “an applicant or borrower’s cash flow budget or farm operating plan indicates that there is sufficient cash inflow to pay all cash outflow.”¹⁴⁰ The feasibility of a loan applicant’s farm operating plan was at issue in 136 of the 367 NAD determinations analyzed (36.9%). In the case analysis, common plan feasibility issues concerned the accuracy of information used to make the plan and failure to follow the appropriate process in developing the plan.

The FSA regulations pertaining to plan feasibility in the case analysis are depicted in Figure 13 below.

FIGURE 13.

WHAT WERE THE MOST COMMONLY APPEALED FEASIBLE PLAN ISSUES? 136 DETERMINATIONS



7 C.F.R. 761.104(C)

"The farm operating plan will be based on accurate and verifiable information." Historical information, positive and negative trends, mutually agreed upon changes and improvements, and current input prices will be taken into consideration when arriving at reasonable projections, projected yields, and natural disasters affecting production history.

7 C.F.R. 761.104(G)

"If that Agency believes the applicant or borrower's farm operating plan is inaccurate, or the information upon which it is based cannot be verified, the Agency will discuss and try to resolve the concerns with the applicant or borrower. If an agreement cannot be reached, the Agency will make loan approval and servicing determinations based on the Agency's revised farm operating plan."

7 C.F.R. 764.401(A)(1)(I)

The regulations require that "[t]he applicant's farm operating plan reflects a feasible plan, which includes repayment of the proposed loan and demonstrates that all other credit needs can be met." 7 C.F.R. 761.2(b) defines feasible plan as when "an applicant or borrower's cash flow budget or farm operating plan indicates that there is sufficient cash inflow to pay all cash outflow."

7 C.F.R. 761.104(D)

Unit prices for agricultural commodities established by the Agency will generally be used. Applicants and borrowers that provide evidence that they will receive a premium price for a commodity may use a price above the price established by the Agency.

7 C.F.R. 761.104(E)

"For [microloans], when projected yields and unit prices cannot be determined as specified in paragraphs (c) and (d) of this section because the data is not available or practicable, other documentation from other reliable sources may be used to assist in developing the applicant's farm operating plan."

7 C.F.R. 761.104(A)

"An applicant or borrower must submit a farm operating plan to the Agency, upon request, for loan making or servicing purposes."

7 C.F.R. 761.104(B)

"An applicant or borrower may request Agency assistance in developing the farm operating plan."

Note: Determinations regarding 7 C.F.R. § 764.401(a)(1)(I) are not discussed in the report, as they do not raise any concerns about plan content or development. These plans simply do not meet the regulatory requirement of feasibility. Determinations regarding 7 C.F.R. § 761.104(a) are not discussed in the report, as they merely reflect an applicant submitting an incomplete application. Some cases involve more than one provision. This is why the numbers of occurrences for each category add up to more than the total number of feasible plan cases.

The feasible plan regulations outline several requirements that FSA must follow when developing and assessing an applicant's farm operating plan. Unfortunately, in many cases, FSA does not follow these regulations, which leads to incorrect loan denials.

Several specific issues involving plan feasibility arose in the NAD case analysis. In the development and assessment of applicants' farm operating plans, FSA erred in numerous ways, including:

- relying on inaccurate and unverifiable information;
- failing to discuss and resolve plan feasibility concerns with the applicant;
- failing to consider and accept applicants' premium prices;
- failing to encourage applicants to seek technical assistance in developing their operating plans;
and
- making incorrect determinations regarding the microloan exception.



Photo by Scott Streble care of Farm Aid

FSA Uses Inaccurate and Unverifiable Information to Determine Feasibility

The farm operating plan will be based on accurate and verifiable information.

USDA GENERAL PROGRAM ADMINISTRATION REGULATIONS FOR FARM LOAN PROGRAMS, 7 C.F.R. § 761.104(C).

Farmer applicants submit farm operating plans as part of their loan application. If FSA is not satisfied the applicant's plan is feasible, the agency can revise the farm operating plan. A total of 104 cases in the dataset questioned the accuracy and verifiability of the information included in the operating plan, whether it was the applicant-submitted plan or the agency's revised plan for the applicant.

Determining a plan's feasibility requires the agency to consider historical information, positive and negative trends, changes and improvements to the farm operation, current input prices, and other factors that affect net farm income.¹⁴¹ The regulation also requires the agency to calculate projected yields based on the following hierarchy of sources:

1. the applicant's three-year production history
2. production information from crop insurance programs (if available)
3. FSA yield records
4. county averages
5. state averages¹⁴²

If the applicant's production history was affected by a designated disaster, the applicant may use county or state yield averages for affected years when those yields are comparable to the applicant's actual non-disaster years, or the production year with the lowest yield may be excluded if yields were affected by disasters during at least two of the three years.¹⁴³

FIGURE 14.
DISASTER YEAR YIELD CALCULATIONS

TYPICAL		DISASTER CALCULATION		2 OR MORE DISASTER YEARS	
year 1	farmer's yield	year 1	farmer's yield	year 1	farmer's yield
year 2	farmer's yield	disaster year	county or state average	disaster year	county or state average
year 3	farmer's yield	year 3	farmer's yield	disaster year	county or state average
				OR	
				year 1	farmer's yield
				disaster year	farmer's yield
				disaster year	lowest yield year

CASE EXAMPLE 14

(CASE NO. 2010S000659)¹⁴⁴

FSA incorrectly used disaster year yields to project future farm income

In 2010, NAD heard a case involving a fruit and vegetable farmer who was denied \$225,000, \$50,000, and \$30,000 operating loans. The agency asserted that the farmer's application was not reasonable or based on accurate and verifiable information. The appellant argued that FSA incorrectly used yields from the years crops were affected by disasters as a basis to project future yields, instead of using state average yields.

The regulations allow farmers whose productions have been substantially affected by a disaster to either:

- use county average yields (or state average yields if county average yields are not available) in place of the disaster year yields; or
- exclude the production year with the lowest actual or county average yield if their yields were affected by disaster during at least two of the three years.¹⁴⁵

The farmer's crop yields and income from 2006 through 2009 were low because their crops were affected by natural disasters. The farmer opted to use state average yields to project crop sales for 2010 through 2011. This projection resulted in positive cash flow of over \$500,000. However, FSA used the other exception when making its determination. FSA incorrectly interpreted its own regulation to require that the farmer use the second option because yields were affected by a disaster in at least two out of the last three years. FSA failed to acknowledge the word "or" which gives the applicant a choice of which disaster exception to use.

The administrative judge determined that the agency's decision was erroneous because FSA "failed to allow the appellant to elect to incorporate county or state average yields" in his farm operating plan.

Several cases demonstrate that FSA often relies on information that is not accurate or verifiable when they develop and assess farmers' operating plans, and then deny their applications based on that information.¹⁴⁶ Farmers with nontraditional operations may be at particular risk of having FSA use inaccurate information to determine their operating plan's feasibility.

TABLE 5.

CASE EXAMPLES OF FSA USING INACCURATE OR UNVERIFIABLE INFORMATION

	INSTANCES OF FSA USING INACCURATE OR UNVERIFIABLE INFORMATION	OUTCOME
Case Example 15,¹⁴⁷ 2015	- improperly projecting the yield for the appellant's soybean crop by using historical averages from up to 15 years prior, despite the farmer having actual production history available and using different farming practices than those used by another farmer to achieve the lower historical yields - miscalculating the farmer's income because it miscalculated his yields - failing to include additional income sources totaling over \$28,000	The administrative judge determined that FSA erred in its decision because the agency failed to follow the appropriate hierarchy of priorities to determine production yields. ¹⁴⁸
Case Example 16,¹⁴⁹ 2021	- using general production estimates for appellant's lamb production that did not account for him using Polypay sheep with higher lambing averages - incorrectly calculating the appellant's income by using averages that were not specific to his Polypay sheep - incorrectly assigning feed expenses per lamb when the farmer planned to wean the lambs on grass, incurring no feed expenses - failing to acknowledge the farmer's off-farm income as a trained pipefitter	The administrative judge determined that FSA erred in its decision.
Case Example 17,¹⁵⁰ 2016	- assigning a projected yield and income of zero for fertilized duck eggs, which are a specialty food item with origins in Southeast Asia - failing to notify appellant that his application was incomplete and to inform him of the documentation needed to complete his application¹⁵¹	The administrative judge determined that FSA erred in its decision.
Case Example 18,¹⁵² 2009	- not considering evidence that the appellants' production was twice what FSA predicted because they were double-planting crops - not acknowledging that organic produce could be sold at a premium - not considering evidence of appellants' contracts with buyers, even though appellants provided that information - not including appellants' winter crops in the operating plan - incorrectly valuing appellants' home - incorrectly representing appellants' debts - wrongfully deciding that a lack of managerial ability was evidence of an infeasible plan, rather than applying the regulatory requirements for a feasible plan	The administrative judge determined that FSA erred in its decision.
Case Example 19,¹⁵³ 2011	incorrectly projecting that the appellant would produce fewer blueberries in the next production cycle, contrary to her own production records of increasing yields and industry standards that indicate mature plants produce more than younger plants	The administrative judge determined that FSA erred in its decision.

FSA Fails to Discuss or Resolve Operating Plan Concerns

If the Agency believes the applicant or borrower's farm operating plan is inaccurate, or the information upon which it is based cannot be verified, the Agency will discuss and try to resolve the concerns with the applicant or borrower. If an agreement cannot be reached, the Agency will make loan approval and servicing determinations based on the Agency's revised farm operating plan.

— USDA GENERAL PROGRAM ADMINISTRATION REGULATIONS FOR FARM LOAN PROGRAMS, 7 C.F.R. § 761.104(G). —

The agency's authority to change farm operating plans and its corresponding obligation to discuss and try to resolve concerns with applicants before doing so arose in 84 of the 136 determinations where the issue of plan feasibility was in question. In the case analysis, disputes over this regulation arise because of the substance of the agency decision—the information the agency substituted for the applicant's—or the procedural requirement, where the agency failed to discuss and resolve its concerns with the applicant before making loan approval decisions based on its own revised plan. The substantive concerns overlap with the requirement for accurate and verifiable information discussed in the preceding section. Cases in this section raise concerns regarding FSA's failure to follow the procedures mandated by this regulation.¹⁵⁴

The FSA General Program Administration handbook provides the procedure for FSA to substitute its own plan for an applicant's:

*If a loan making/servicing decision is based on a revised farm operating plan the applicant does not agree with, the authorized agency official will enter the plan on which the applicant does not agree in [a farm business plan software program] along with the plan submitted by the applicant. The authorized agency official will document in [the program] the differences in the plans and the fact that the loan making/servicing decision was based on a revised farm operating plan on which the applicant does not agree.*¹⁵⁵

Where there is a disagreement between the agency and the applicant over the content of the operating plan, both plans should be recorded and available for review. As the following case demonstrates, the agency does not always follow that procedure.¹⁵⁶

CASE EXAMPLE 20

(CASE NO. 2014W000451)¹⁵⁷

FSA's lack of communication resulted in agency assumptions and incorrect information in farmer's operating plan

In 2014, a cattle farmer was denied \$300,000 Operating and \$135,000 Farm Ownership loans because FSA determined she did not have a feasible plan.

After the appellant submitted her farm plan, the agency representative met with her to discuss it but did not ask the appellant about her feed costs or when the appellant planned to purchase and sell her cows. Instead, the agency representative assumed that the appellant would purchase her cows in the spring and need to feed them for a year (appellant's plan actually envisioned only six months). Based on her own assumptions, the FSA representative more than doubled the appellant's feed cost projections. She then determined that, based on these costs, appellant's operating plan would result in a net annual loss. The FSA state farm loan director later denied the appellant's application based on the lack of a feasible plan.

The appellant submitted a revised plan showing an annual profit. The agency representative repeated her previous assumptions and again overestimated feed costs by assuming a 12-month plan instead of a six-month plan, resulting in a plan that again showed a net loss.

The appellant contacted the agency representative to discuss her revised farm operating plan. Upon learning that the appellant planned to feed her cows for only six months, the agency representative told the state director that the appellant's revised farm operating plan actually did project an annual net profit. However, the state director did not revisit his denial of the appellant's loan application and stated that the appellant was just "grasping at straws" by changing her feeding plan from 12 months to six.

The administrative judge concluded that the "agency erred by not fully discussing its concerns with Appellant and trying to resolve those concerns."

Much of the back-and-forth between the appellant, the agency representative, and the state director could have been avoided if the parties had discussed the appellant's plan with her. Instead, the lack of communication resulted in incorrect assumptions regarding the farmer's operation and tremendous delays in processing her application. The state director did not even attempt to correct the agency's error, which would have resulted in a feasible plan for the appellant.

FSA Fails to Consider Premium Prices

Unit prices for agricultural commodities established by the Agency will generally be used. Applicants and borrowers that provide evidence that they will receive a premium price for a commodity may use a price above the price established by the Agency.

— USDA GENERAL PROGRAM ADMINISTRATION REGULATIONS FOR FARM LOAN PROGRAMS, 7 C.F.R. § 761.104(D).

The premium price regulation requires the use of agency-developed agricultural commodity unit prices to project the income a farmer may make from their production, which helps determine whether their operating plan will be feasible. This regulation also allows applicants who receive premium prices for their products (such as organic farmers) to reflect higher prices in their farm operating plans if they can provide evidence to support those prices. The FSA General Program Administration handbook provision for this regulation states that evidence “may include, but is not limited to, contracts or other written agreements that guarantee the price for the commodity being produced,” and “if the applicant has historically received a premium price because of above average quality or grade of the product produced, the premium will be taken into account when determining the expected price to be received for that product.”¹⁵⁸

Every FSA state executive director is required to “issue a supplement listing the unit prices for all commodities commercially produced in their State, including resources for pricing and marketing strategies for commodities that have not traditionally been commercially produced or marketed in the past,” such as “organic production, locally or regionally produced agricultural food products, direct marketing to restaurants and grocery stores, CSA, and farmers markets.”¹⁵⁹

The FSA General Program Administration handbook lists several sources to obtain pricing data for alternative production and marketing methods, including USDA’s National Agricultural Statistics Service (NASS), USDA’s Agricultural Marketing Service (AMS), USDA’s Risk Management Agency (RMA), the National Agricultural Library, nonprofit organizations such as Rodale Institute’s New Farm Organic Price Report, and local sources such as state departments of agriculture, farmers market organizations, organic farmers and gardeners associations, roadside stand organizations, local retail outlets, and state universities.¹⁶⁰

The premium price regulation arose in 22 of the 136 determinations where the issue of plan feasibility was in question. In the case analysis, issues that arise under this regulation include disagreements between farmers and FSA about the agency’s unit prices, FSA’s failure to consider a farmer’s premium prices,¹⁶¹ or the farmer’s ability to provide sufficient evidence of premium prices.¹⁶²



CASE EXAMPLE 21

(CASE NO. 2017E000773)¹⁶³

Organic dairy farmer's premium prices not considered

In 2017, NAD heard a case involving multiple appellants who sought a \$225,000 farm ownership loan and a \$53,500 operating loan to purchase an organic dairy farm and operate it as a grass-fed, organic dairy. FSA denied the appellants' application for lack of a feasible plan. The appellants argued that the agency failed to consider their additional income and reduced expenses that their planned farm would generate as an organic dairy.

The administrative judge determined the agency erred when it calculated the appellants' milk prices because the agency used a conventional milk price (\$16.50/cwt) instead of a grass-fed, organic premium price (\$33/cwt), which was supported by evidence the appellants provided.

The administrative judge concluded that the agency's "assignment of a conventional milk price to a planned organic operation does not accurately or verifiably predict the cash flow of the organic operation." The administrative judge determined that this price exchange would make the appellants' plan feasible, and therefore, found the agency erred in denying the loans for lacking feasibility.

Less Common Feasible Plan Issues Also Affect Applicants

Often, NAD cases that questioned an appellant's plan feasibility considered multiple issues related to the development of the plan. These cases involve combinations of issues already discussed in this section as well as additional ones, including the agency's failure to encourage an applicant to seek technical assistance when developing their plan or determining what documentation to include for microloan applicants.

NAD DOES NOT CONSISTENTLY APPLY EXCEPTIONS FOR MICROLOANS

For Microloans, when projected yields and unit prices cannot be determined [using the procedures and sources used for larger loans] because the data is not available or practicable, other documentation from other reliable sources may be used to assist in developing the applicant's farm operating plan.

— USDA GENERAL PROGRAM ADMINISTRATION REGULATIONS FOR FARM LOAN PROGRAMS, 7 C.F.R. § 761.104(E). —

This regulation permits microloan applicants to use “other documentation” from reliable sources to demonstrate their projected yields and prices if projected yields and prices cannot be determined by considering the hierarchy of sources used to make these estimates for regular loans. Sometimes the agency does not properly recognize this exception for microloan applicants, either holding applicants to the same standards as regular loans, or using erroneous, unverifiable information in lieu of reliable sources. This regulation arose in four of the 136 determinations that considered plan feasibility.

CASE EXAMPLE 22

(CASE NO. 2020E000134)¹⁶⁴

FSA erroneously used traditional farming projections for vertical grower

In a 2020 case, a vertical hydroponic farmer was denied a \$50,000 microloan because FSA found he did not have a feasible plan. The appellant argued that the agency incorrectly reduced his acreage projection and erroneously applied horizontal farming computations that assume three harvesting cycles, when his vertical farm allows for twelve harvesting cycles.

FSA reduced the appellant’s 3.6-acre vertical projection to one traditional horizontal crop acre. The agency argued that the acreage reduction was justified because the applicant was a new farmer and therefore historical information could not be used as a guide. While “other documentation from other reliable sources” may be used for microloan projections when projected yield and price data is “not available or practicable,”¹⁶⁵ the information the agency substituted was erroneous and unreliable. The administrative judge determined that the agency erred when it reduced the appellant’s projected production acres and yield.

FARMERS MAY NOT BE ENCOURAGED TO SEEK TECHNICAL ASSISTANCE

An applicant or borrower may request Agency assistance in developing the farm operating plan.

— USDA GENERAL PROGRAM ADMINISTRATION REGULATIONS FOR FARM LOAN PROGRAMS, 7 C.F.R. § 761.104(B).

The technical assistance regulation is straightforward: farmers are allowed to request assistance in developing their farm operating plans. The FSA General Program Administration handbook provision for this regulation states that “applicants *will be encouraged* to obtain technical assistance” (emphasis added) and that those sources of assistance include “Extension Service, Land Grant Universities, State Programs, USDA 2501 grant recipient organizations and institutions, and private consultants.”¹⁶⁶ Because publicly available NAD determinations do not contain full agency records, it is unclear how often applicants are informed by the agency that they have the option to obtain assistance or how often they are encouraged by the agency to obtain assistance if they need it. This regulation arose in two of the 136 determinations where the issue of plan feasibility was in question.

CASE EXAMPLE 23

(CASE NO. 2013W000589)¹⁶⁷

FSA failed to inform farmer about technical assistance option

In 2013, NAD heard a case involving a row crop grower was denied a \$138,000 operating loan because FSA found his farm operating plan was not feasible. The applicant argued that FSA improperly calculated his expenses, double counted repayment of the loan in his expenses, and failed to tell him about the option of obtaining technical assistance in developing his farm operating plan.

The appellant had made significant changes to his operation over the past few years. FSA calculated his operating expenses based on averaging expenses from past years, before the changes were made, which resulted in a negative cash flow projection. The administrative judge determined that the agency incorrectly determined the appellant's farm operating plan was not feasible.

The administrative judge also concluded that FSA "failed to inform, to request or to encourage Appellant to seek technical assistance in developing his farm-operating plan to reflect Appellant's new enterprises." The administrative judge stated that upon discovering that the appellant added new enterprises, FSA "should have considered budget plans for each new crop enterprise, and analyzed current and realistic expenses moving forward."

Therefore, the administrative judge ultimately concluded FSA erred in not considering the appellant's new enterprises and not encouraging the appellant to seek technical assistance in developing his farm operating plan.

Conclusion

Plan feasibility was at issue in a significant number of 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 fails to encourage applicants to seek technical assistance in developing their operating plans.



VII. PROCESS ISSUES

In addition to key issues that arise under loan application requirements, farmers are also affected by process issues at both the initial loan decision and appeals levels that can make them less likely to receive ultimate approval for their loans. The NAD appeals process itself can be difficult to navigate due to its formality and increasingly legalistic character. It can be difficult to obtain resolution because of factors that lengthen the process at each step—loan review, appeals, and implementation of a NAD determination. For some appellants, the NAD process is ineffective because gaps in the process mean it does not address their primary problem or cannot provide the type of relief they seek.

The NAD Process Is Difficult for Farmers to Navigate

One factor contributing to negative outcomes for farmers is the challenge of navigating the appeals process itself. Appellants representing themselves may be unfamiliar with proceedings that farm advocates note have become increasingly legalistic since NAD's creation in 1994.¹⁶⁸

The law establishing NAD designates its hearings as “informal,”¹⁶⁹ but a 1997 court case held that NAD hearings are subject to the legal requirements of formal adjudication.¹⁷⁰

In administrative law, formal adjudications are those subject to the formal hearing provisions of the Administrative Procedure Act.¹⁷¹ Formal hearings are adversarial procedures similar to court trials.¹⁷² NAD hearings follow this model and include the questioning of witnesses placed under oath (which may also involve subpoenas), oral presentation of evidence and arguments, and the opportunity to challenge evidence presented by the opposing party.¹⁷³ Formal adjudications are typically presided over by administrative law judges, who are agency employees with some independence from agency oversight, including protection from at-will removal.¹⁷⁴ NAD hearings are presided over by administrative judges, who, while still relatively autonomous, are distinct from administrative law judges and typically enjoy less independence from the agency.¹⁷⁵

The formality and adversarial nature of NAD hearings can pose challenges for self-represented appellants. Additionally, farmers are at a disadvantage because they, rather than FSA, bear the burden of proof on appeal.

SELF-REPRESENTATION IS A CHALLENGE

FSA has both an appeals and litigation team¹⁷⁶ and a guide instructing agency representatives on how to navigate NAD appeals.¹⁷⁷ Appellants, by contrast, are intended to navigate the appeal *pro se*, advocating for themselves without an attorney.¹⁷⁸ Administrative judges do take measures to mitigate the imbalance between a represented agency and a *pro se* appellant, including providing instructions to appellants about NAD procedures and offering some leeway to self-represented appellants on procedural matters.¹⁷⁹ Administrative judges can also question self-represented parties to elicit relevant evidence and take a broader approach to admitting evidence than would be typical in a court setting.¹⁸⁰ Nevertheless, the NAD process can be difficult for farmers to navigate without representation¹⁸¹ and may contribute to farmers receiving fewer favorable outcomes on appeal.

A nationwide shortage of lawyers in rural areas also contributes to the challenges of self-representation for farmers. In 2020, the American Bar Association found that 40% of U.S. counties, mainly rural, are located in “legal deserts” served by less than one lawyer per 1,000 residents.¹⁸²

An estimated 75% of NAD appellants are self-represented or have the assistance of a family member or friend, 15% use non-lawyer representatives, and 10% are represented by lawyers.¹⁸³ The research team requested exact numbers of represented and unrepresented appellants in its FOIA request but was told that NAD does not track that information.

Notably, not all administrative adjudications follow the adversarial model that NAD employs. Some agencies hold non-adversarial proceedings for parties (typically applicants for benefits) to appear before an adjudicator without opposing counsel from the government agency.¹⁸⁴ In those cases, the adjudicator's role is to proactively investigate the facts rather than to evaluate opposing claims.¹⁸⁵ Considering FSA's vital role as lender of last resort, a less adversarial adjudication model, at least for farm lending cases, is worth exploring.

Past Determinations as Precedent

An important practice used in formal legal proceedings is treating past determinations as precedent to decide future cases.¹⁸⁶ In several cases, NAD has claimed that “NAD cases do not set precedent for later cases,” yet NAD judges continue to factor previous determinations into their decisions.¹⁸⁷ The benefit to adhering to precedent is that it creates consistency in determinations, which promotes fairness and predictability. However, it may be difficult for farmers representing themselves to understand and navigate past determinations without an attorney who can research prior cases. Interestingly, FSA's *Handbook on Program Appeals, Mediation, and Litigation* provides instructions to FSA on how to object to an appellant's reference to previous NAD determinations.¹⁸⁸ Whether referencing prior NAD cases should be permitted or not, it is a practice NAD employs, FSA objects to farmers using, and which potentially contributes to the challenges of self-representation.

BURDEN OF PROOF FAVORS THE AGENCY

The burden of proof is the requirement to produce evidence in support of a party's claim. In adjudications under the Administrative Procedure Act, generally, the burden of proof is on the proponent of the rule or order.¹⁸⁹ In this instance, that would mean FSA would bear the burden to prove their initial decision to deny the loan was correct. However, the burden of proof has been shifted to the opponent (the farmer) in NAD cases. Under NAD rules, “the appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.”¹⁹⁰ Preponderance of the evidence is an evidentiary standard that requires the claimant to show that there is a greater than 50% chance that the claim is true.¹⁹¹ Therefore, farmers appealing adverse FSA loan application decisions to NAD must prove that there is a greater than 50% chance that FSA erred in its adverse decision.

The challenge is that the burden is on the farmer to show that the agency's decision was incorrect, but they are operating at a disadvantage in comparison to the agency, which has much greater expertise in its own loan programs and more information at its disposal. The disparity is particularly acute for self-represented farmers. Given the high number of NAD cases resolved in favor of FSA, it is likely that farmers having the burden of proving FSA erred affects farmers' ability to receive favorable outcomes on appeal.¹⁹² Farm advocates have argued that the agency should instead have the burden of proving that the appellant's claim is untrue.¹⁹³

Resolution Can Be Difficult to Obtain

Several aspects of the FSA loan application and NAD appeals processes contribute to lengthy delays in farmers obtaining resolution to their cases. FSA's practice of noncomprehensive application review, withdrawn adverse decisions that lead to new adverse decisions, and slow or ineffective implementation of favorable NAD decisions all impede resolution of farmers' cases.

NONCOMPREHENSIVE REVIEW LEADS TO REPEATED APPEALS

FSA often denies loans based on one justification (such as unacceptable credit history) without reviewing the loan application for other defects ("noncomprehensive review"). If the farmer succeeds in appealing the first adverse decision, FSA reconsiders the loan application and often denies it for another reason (such as an infeasible plan), leading to an indefinite cycle of adverse decisions and appeals.¹⁹⁴

Noncomprehensive loan application review leads to unnecessarily lengthy appeals processes that waste time and resources for farmers and FSA, significantly delay farmers receiving vital financial assistance, and contribute to farmers losing trust in the agency. Slowing the full review process can also be a vehicle for discrimination and delay tactics known to have been used by FSA to prevent marginalized farmer groups such as Black, Native American, Hispanic,¹⁹⁵ and women farmers from accessing loans.¹⁹⁶

FSA regulations and handbook provisions do not specify whether loan review should be comprehensive before the agency issues a denial; they merely require that FSA provide "clear, specific reasons for the denial" and "a description of any loan review aspect that was not evaluated" in its denial letters.¹⁹⁷ However, NAD has incorrectly interpreted FSA's handbook provisions as requiring noncomprehensive review based on an outdated handbook provision that required FSA to notify ineligible applicants of the adverse decision "in writing, within [five] calendar days, of the determination."¹⁹⁸

CASE EXAMPLE 24

(CASE NOS. 2018S000276 AND 2019S000012)¹⁹⁹

Farmer's application denied twice for different reasons, NAD misinterpreted FSA handbook requirement

In 2018, NAD heard the case of an appellant denied a \$300,000 operating loan due to unacceptable credit history. On appeal, NAD found FSA's decision erroneous. The farmer then re-applied for the loan and was denied again, this time due to lack of a feasible plan. In 2019, the farmer appealed again, objecting to FSA's failure to include the feasibility issue in its first loan decision. The administrative judge concluded that FSA's first step in evaluating the appellant's application was to determine if he met the general eligibility requirements (which do not include feasibility), and therefore FSA properly denied the loan without making a feasibility determination. The administrative judge relied in part on a handbook provision saying that the agency must notify an applicant within five days after finding them ineligible for a loan.²⁰⁰ (This provision was later removed from the handbook when it was amended in November 2020.)²⁰¹

Upon national director review in February 2020, the Director agreed with the administrative judge and concluded FSA's decision regarding plan feasibility was not erroneous.

The handbook provision the administrative judge cited did not necessarily require FSA to deny an application immediately, without considering other factors of eligibility and loan approval. It merely provided a time limit (five days) in which the remaining loan application considerations must take place. After that provision was removed from the FSA handbook in 2020, at least one other NAD case continued to apply the outdated provision to find that FSA had not erred in providing noncomprehensive review of the farmer's application.²⁰²

If FSA assessed applicants' loan applications comprehensively upon initial review, it would eliminate time and resources wasted appealing multiple adverse decisions, prevent significant delays in farmers' access to funding, and address the potential for discrimination by limiting possibilities for unnecessary repeated denials and delays.

WITHDRAWN ADVERSE DECISIONS CAUSE PROBLEMS FOR FARMERS

According to FSA's handbook on appeals, "FSA may withdraw an adverse decision at any time during the NAD appeals process before a NAD hearing officer or NAD Director issues an appeal determination."²⁰³ The handbook states that FSA should withdraw adverse decisions only "when some error is detected or when it is determined to be in FSA's best interest, and possibly the participant's best interest, to withdraw the incorrect or misleading determination."²⁰⁴

When FSA withdraws an adverse decision, it removes the decision from the appeals process.²⁰⁵ FSA is required to notify the appellant and NAD that the adverse decision has been withdrawn but is not required to explain why it withdrew the decision.²⁰⁶ The appellant has 10 days to object to the withdrawn adverse decision.²⁰⁷ However, these objections have no effect.²⁰⁸ If the appellant objects, NAD finds that it no longer has jurisdiction over the case because the decision has been withdrawn.²⁰⁹

Withdrawn adverse decisions sound beneficial to farmers but are actually problematic for a few reasons. First, they prevent farmers from having their cases heard by NAD and potentially receiving favorable determinations. Second, they can lead to new adverse decisions being issued²¹⁰ for new or additional reasons. If the applicant chooses to appeal the new adverse decision, the NAD process begins again. Similar to the issue of noncomprehensive application review (discussed above), withdrawn adverse decisions can cause delays by requiring farmers to restart the NAD process multiple times for multiple denials of the same loan application.

The full scope of the problem of withdrawn adverse decisions is difficult to assess because data on these actions is not tracked. Withdrawn adverse decisions do not result in appeals determinations before NAD, and therefore, NAD keeps no record of these cases. However, one case in the dataset documented a withdrawn adverse decision because it was followed by a second adverse decision, which the farmer also appealed to NAD.²¹¹ After submitting a FOIA request to FSA for information regarding withdrawn adverse decisions, the authors were informed that FSA does not track their withdrawn adverse decisions. This lack of recordkeeping creates a gap in information that enables FSA to act arbitrarily, without recourse for the farmer.

LENGTHY IMPLEMENTATION CREATES NEW CHALLENGES

When a farmer receives a favorable determination from NAD regarding a loan application, FSA has 30 days to “implement” that decision.²¹² However, “implementing” does not mean automatically approving the farmer’s original loan application.²¹³ Crop loan applicants may be approved if FSA determines they can still produce a crop in the production cycle for which they originally requested their loan or during the next cycle if FSA determines the loan can be repaid.²¹⁴ Otherwise, a loan applicant whose adverse decision was reversed by NAD may be asked for updated financial information or have their farm operating plan reevaluated to re-confirm feasibility.²¹⁵ Because FSA can “implement” NAD decisions by requesting updated financial information from the applicant, FSA’s implementation can result in a new adverse decision,²¹⁶ leading the applicant to restart the lengthy appeals process.

Because FSA can “implement” NAD decisions by requesting updated financial information from the applicant, FSA’s implementation can result in a new adverse decision, leading the applicant to restart the lengthy appeals process.

This scenario is particularly problematic because a farmer’s financial situation may have worsened *because of* their inability to receive the needed financial assistance from FSA at the time of the first application. Farmers should not be further penalized as a result of FSA’s erroneous initial decision. Additionally, the potential to delay distribution of program funding to eligible applicants means this practice can also be a vehicle for discrimination.

One example of how delays stemming from the NAD process can harm farmers is when the delay undermines their eligibility for crop insurance. FSA requires borrowers to carry crop insurance (where applicable).²¹⁷ Crop insurance policies include final planting dates among their conditions.²¹⁸ Farmers who have had their loans denied once and have gone through the appeals process risk passing their final planting dates by the time they receive a favorable outcome from NAD. At that point, FSA can review their application, find that because they passed their final planting date they no longer have a valid crop insurance policy, and deny the loan a second time.

If FSA fails to implement a decision within 30 days, appellants also have the option to seek judicial review,²¹⁹ though “courts have reached drastically different conclusions about participants’ rights to compel implementation of a favorable NAD determination.”²²⁰

Gaps in the NAD Process Limit Available Relief

Two key criticisms concern recourse that NAD does not provide—review of discrimination claims and equitable relief for loan applicants. For affected farmers, these gaps mean that even favorable NAD determinations fall short of addressing their needs.

NAD DOES NOT CONSIDER DISCRIMINATION CLAIMS

NAD does not consider discrimination claims in its determinations because discrimination is under the jurisdiction of the USDA Office of the Assistant Secretary for Civil Rights.²²¹ Nevertheless, some applicants allege in their appeals that their adverse decisions are due to discrimination by the agency. Because demographic information is not available in NAD cases, the rate of discrimination claims within any particular protected class is not known. The figure below demonstrates case outcomes for cases with alleged discrimination.

FIGURE 15.
DISCRIMINATION

DETERMINATIONS WITH ALLEGED DISCRIMINATION



8
IN FAVOR OF FARMER

67
IN FAVOR OF FSA

Discrimination was alleged in 75 of the 367 cases analyzed (20.4%). If NAD considered discrimination claims in appeals, discrimination would be the third most common issue raised in the case set (more common than managerial ability). Because NAD did not consider discrimination claims in these decisions, the cases turned on other loan eligibility factors. However, FSA's high success rate in NAD determinations suggests that if FSA discriminated against these farmers, many of those discriminatory decisions were likely upheld.

If NAD considered discrimination claims in appeals, discrimination would be the third most common issue raised in the case set.

The research team submitted a FOIA request to FSA in July 2022 requesting FSA loan application decisions from 2009-22 (the length of the case dataset) broken out demographically, but received a more limited dataset covering 2017-21 instead (see discussion of discrimination on page 26). That data showed significant differences in loan approval rates by race, which suggests that discrimination may be a contributing factor in loan decisions.

NAD's regulations exclude from the definition of "participant" anyone whose claims arise under certain enumerated nondiscrimination provisions.²²² Despite the fact that most nondiscrimination provisions governing USDA programs are technically not excluded from NAD jurisdiction,²²³ NAD maintains that discrimination claims fall outside its jurisdiction because a process already exists for filing discrimination claims through USDA's OASCR.²²⁴

USDA's Discrimination Financial Assistance Program

The Inflation Reduction Act created the USDA Discrimination Financial Assistance Program, a one-time measure making \$2.2 billion available for farmers who experienced discrimination in USDA farm lending programs before January 1, 2021.²²⁵ Most cases in this report's dataset fall within the eligibility period for the USDA Discrimination Financial Assistance Program, which gives affected farmers another avenue to pursue discrimination relief. However, it is important to note that this program is not the same as a lawsuit or administrative hearing—there are no appeals, and the payments are not damages awarded for past discrimination.²²⁶

CASE EXAMPLE 25

(CASE NO. 2010W000653)²²⁷

FSA determined experienced farmer did not meet managerial ability requirement due to specific type of records submitted

In 2010, NAD heard a case involving a farmer (self-identified minority farmer) who applied for a \$20,000 operating loan and a \$190,000 operating loan and was denied due to unacceptable credit history, ability to obtain credit elsewhere, lack of a feasible plan, inability to meet the definition of a family farm, and a lack of managerial ability. NAD determined FSA erred in most of these determinations, including the issue of managerial ability.

The appellant's tax records indicated that he owned and operated a farm within the past five years and did so profitably. FSA argued the farmer failed to provide the detailed records it requested to verify that the appellant had sufficient managerial ability. The administrative judge stated that "while additional records may be helpful for FSA to decide whether Appellant's operation will cash flow, the published rule simply requires a full year's experience," which the farmer was able to prove with the records provided. The administrative judge also found that FSA cited no reason the appellant lacked managerial ability.

This appellant alleged discrimination against FSA in at least three previous NAD cases.²²⁸ FSA continued to deny this farmer loans for reasons that NAD had previously found erroneous in other cases of his from 2009 to 2010.²²⁹



Photo by Sabine Carey care of Farm Aid

EQUITABLE RELIEF IS NOT AVAILABLE TO ALL APPLICANTS

USDA program participants who: (1) in good faith relied on the action or advice of the agency to their own detriment; or (2) failed to fully comply with the requirements of the program but made a good faith effort to comply can seek “equitable relief” from the agency²³⁰ or through the NAD process from the Director.²³¹ Forms of equitable relief can include the ability to retain or continue to receive program benefits or other equitable relief as determined appropriate.²³²

If NAD had authority to compel equitable relief in loan application cases, that might alleviate some of the implementation concerns raised above, particularly by preventing FSA from “implementing” a NAD determination by essentially beginning the loan review process anew.

However, the availability of equitable relief is limited to USDA conservation and commodity support programs and specifically excludes crop insurance and agricultural credit programs.²³³ While the 2018 Farm Bill gave the Secretary the expanded authority to consider borrowers of direct FSA loans,²³⁴ this only includes *existing* borrowers in very specific circumstances and does not provide an option for equitable relief to *applicants* for direct farm loans from FSA.²³⁵ For example, an applicant for a direct farm operating loan who was denied a loan after relying in good faith on FSA action or advice that led to their application being denied or their loan decision being delayed would not qualify for equitable relief. The cases analyzed in this dataset only included adverse direct farm loan application decisions. Therefore, the applicants were not eligible for equitable relief.²³⁶

Conclusion

Issues with FSA’s loan review process and NAD’s appeals process make it harder for farmers to successfully receive their loans. It is clear that:

- the NAD appeals process can be difficult to navigate due to its formality and increasingly legalistic character;
- barriers to obtaining 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.



VIII. RECOMMENDATIONS

This report has identified several factors that contribute to farmers losing out on access to FSA loans at both the application and appeals levels. Addressing these barriers requires action within FSA to reduce unnecessary appeals, which would save time and resources for both farmers and USDA, and could contribute to building farmers' trust in the agency. Changes within NAD should ensure that when adverse decisions are appealed, the appeals process is navigable for the farmer, results in a meaningful resolution, and addresses all issues related to the adverse decision. The following recommendations aim to clarify some requirements and amend others to ensure that the regulations, FSA handbook, and agency employee practices all align to improve farmers' access to vital financial resources from the "lender of last resort."

Recommendations for Credit History

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 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,²³⁷ FSA does not always do so. 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. Failure to meet with applicants also deprives applicants of the opportunity to learn about credit history requirements from FSA and determine steps to improve their credit history moving forward when exceptions cannot be made.²³⁸

- ▶ Personnel at FSA county and state offices should receive additional training and guidance on the requirement to meet with applicants and how to conduct those meetings, ensuring that FSA personnel correctly follow agency procedure when assessing an applicant's credit history.

2. Ensure farm loan managers 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."²³⁹ However, FSA makes credit history determinations without always properly considering an applicant's circumstances.

- ▶ Provide field office training on implementing 2020 and 2022 handbook updates under 7 C.F.R. § 764.101(d)(3) about exceptions and "extra diligence," which delineate improper uses of credit scores in reviewing loans and emphasize the importance of identifying circumstances beyond the applicant's control.²⁴⁰
- ▶ Provide more specific guardrails in the FSA handbook for farm loan managers assessing an applicant's credit history. For example, a step-by-step process for analyzing credit history would help ensure that each application is evaluated with a consistent degree of diligence and consideration of an applicant's extenuating circumstances.

3. Reduce FSA discretion under the credit history requirement.

As is typical in administrative law, NAD generally defers to FSA when interpreting its own rules. Therefore, unfair treatment that falls within the scope of agency discretion is not corrected by NAD. Instead, 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.

For example, the regulations provide a list of circumstances that “*do not automatically* indicate an unacceptable credit history” (emphasis added).²⁴¹ The agency retains the discretion to consider the listed types of extenuating circumstances as indicators of unacceptable credit history. This practice can prevent applicants whose credit issues may have been far in the past, isolated, temporary, or beyond their control from receiving the benefit of the doubt.

- Amend 7 C.F.R. § 764.101(d)(3) to remove the word *automatically* and instead say “The following circumstances *do not, on their own*, indicate an unacceptable credit history.”

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

FSA handbook amendments made between 2019 and 2022²⁴² describe an example scenario where an applicant with a 10-year-old lack of good faith determination paid off the loan in question, making them “likely eligible” for a new loan from a creditworthiness standpoint.²⁴³ 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.

- Amend FSA handbook provisions under 7 C.F.R. 764.101(d)(1) to include the following paragraph:

A lack of good faith determination from the Office of General Counsel (OGC) will not render an applicant ineligible for future FSA loans if:

1. *the issues that caused the determination have been resolved;*
2. *the issues that caused the determination were isolated events that are unlikely to reoccur in the future, including circumstances that were of a temporary nature and beyond the applicant's control;*
3. *the determination was not received within 36 months of the loan application; and*
4. *the appellant has otherwise demonstrated good faith and acceptable credit history.*

- Remove language in 7 C.F.R. 764.101(d)(1) stating that in making determinations of good faith, “the Agency *may* examine whether the applicant has properly fulfilled its obligations to other parties, including other agencies of the Federal Government” (emphasis added).²⁴⁴ Because applicants' fulfillment of obligations to other parties is already considered under 7 C.F.R. 764.101(d)(3) (failure to repay debts when they came due), it is redundant to consider this again under the assessment of applicants' good faith. Additionally, the regulatory definition of “good faith” does not reference fulfillment of obligations.²⁴⁵ Because “good faith” is defined elsewhere, the requirement under 7 C.F.R. 764.101(d)(1) does not need further elaboration.

5. Make debt forgiveness requirements more flexible.

Debt forgiveness is a particularly thorny loan eligibility issue because it is considered not only in the general loan eligibility requirements for credit history,²⁴⁶ but also under the specific eligibility requirements for both farm ownership²⁴⁷ and operating loans.²⁴⁸ The general credit history loan eligibility regulation states that “if the debt forgiveness is cured by repayment of the Agency’s loss, the Agency may still consider the debt forgiveness in determining the applicant’s credit worthiness.”²⁴⁹ FSA’s handbook provisions, by contrast, outline several instances that FSA will not consider to be debt forgiveness, including “prior debt forgiveness that has been repaid in its entirety.”²⁵⁰ These two provisions are inconsistent.

- ▶ Amend 7 C.F.R. 764.101(d)(2) to reflect the FSA handbook’s more permissive position on repaid debt forgiveness and reduce the potential for FSA inconsistency in applying its regulations.
- ▶ Alternatively, strike debt forgiveness from credit history review entirely because it is already considered elsewhere under eligibility requirements.

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.

- ▶ Amend the statute and regulations controlling debt forgiveness—7 U.S.C. § 2008h,²⁵¹ C.F.R. § 764.101(d)(2), 7 C.F.R. § 764.252(b), and 7 C.F.R. § 764.152(b)—and corresponding handbook provisions to include the following exception:

The receipt of past debt forgiveness will not render an applicant ineligible for any type of FSA loan if:

1. *the issues causing the need for the debt forgiveness have been resolved;*
2. *the issues causing the need for the debt forgiveness were isolated events that are unlikely to reoccur in the future, including circumstances that were of a temporary nature and beyond the applicant’s control;*
3. *the debt forgiveness was received more than 36 months before the date of application;*
and
4. *the appellant has otherwise demonstrated acceptable credit history.*

6. Provide pathways to creditworthiness.

In addition to the changes recommended above, FSA’s regulations and handbook provisions should be amended to provide pathways to loan eligibility for applicants who have credit issues or lack an established credit history. 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.

Along with the recommendations above, creating specific pathways to creditworthiness can reduce barriers to FSA loan access, particularly for underserved and marginalized farming groups such as beginning farmers and farmers of color.²⁵²

Recommendations for Managerial Ability

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 handbook states that farmers can meet the managerial ability requirement with “**any** combination” (emphasis in original)²⁵³ 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.

- Amend Paragraph 69(A) of the FSA handbook to say “with any combination of education, on-the-job training and farm experience (*i.e. partially meeting at least one of the listed examples under two or more of the Managerial Ability categories*)” (added language in italics). This addition would give FSA more specific guidance for determining whether an applicant meets the managerial ability requirement by fulfilling a combination of the criteria. In appeals, appellants would better be able to meet their burden of proof if the standards were less ambiguous.

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.²⁵⁴ 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.

The purpose of requiring records under the farming experience category is to prove through documentation that the farmer has been in the business of farming for at least one production and marketing cycle. This purpose is confirmed by the FSA handbook, which notes that an applicant “may document this experience through FSA farm records or similar documentation.”²⁵⁵ However, the case examples demonstrate that FSA does not consider the amount of a farmer's experience alone as sufficient to satisfy the farming experience requirement but also considers the farmer's business acumen and productivity.

- Remove the recordkeeping handbook provision for managerial ability. Given that farmers' records are already evaluated under 7 CFR § 761.102 (Borrower Recordkeeping and Reporting), 7 CFR § 764.51 (Loan Application), and 764.401(a)(1)(i) (Feasible Plan), striking the requirement under managerial ability would prevent loan applications from being evaluated multiple times based on records.
- Alternatively, amend the handbook provision to state that FSA will examine financial statements and Schedule Fs for the sole purpose of proving that a farmer is in the business of farming and to ensure the income on their financial statements matches their tax returns (*i.e.* is “accurate”), rather than to assess the farm business's success or scrutinize a farmer's decision-making.

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

The handbook provision regarding “standard farming practices”²⁵⁶ needs to be clarified. Farm loan applicants need to understand how the agency is evaluating them under this criterion so they can provide the documentation needed to demonstrate compliance. Farmers also need to understand how they are being evaluated so they can challenge FSA’s conclusions in the event that FSA uses information for their area that the farmer believes is incorrect.

- ▶ Define “standard farming practices” and provide transparency for how FSA will determine whether a farmer is in compliance. Promulgating a definition through regulations would enable farmers to provide comments on the appropriate standards to apply. The resulting regulation would provide guardrails for FSA to know which factors they can consider and which they cannot.
- ▶ Add language to this provision to prevent farmers from being denied loans for having a bad season. In addition to weather and other geographically isolated events that can explain a farmer’s lower yields or crop losses, grant additional exceptions for extenuating circumstances beyond the farmer’s control that can adversely affect a farmer’s production (similar to the exemption under the credit history requirement).²⁵⁷
- ▶ Make specific exceptions under this requirement for farmers who have different production practices from other farmers in their area. The current requirement may be applied unfairly to farmers who do not use “traditional” farming practices, such as regenerative or organic farmers. While FSA should already compare yields of organic farms to farms with similar production practices, if there are no other similar farms in their area, FSA may not evaluate them fairly.

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

If an applicant’s farming experience did not take place in the past five years, they can still meet the managerial ability requirement if the farmer can show that they received education or on-the-job training within that time frame.²⁵⁸ However, additional exceptions should be made for farmers who have experienced extenuating circumstances that prevented them from farming.

- ▶ Amend the five-year requirement to include exceptions for extenuating circumstances that may have prevented an applicant from farming—especially those caused by the agency, such as discriminatory lending practices.²⁵⁹

Recommendations for Feasible Plan

In developing and assessing applicants' farm operating plans for feasibility, the cases analyzed demonstrate that FSA erred in numerous ways. First, the agency used inaccurate and unverifiable information, including failing to use premium prices when appropriate and incorrectly applying the microloan exception for documentation requirements. Second, the agency failed to discuss and resolve plan feasibility concerns with applicants and to encourage them to seek technical assistance in developing their operating plans. 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.

While the agency's errors highlight areas for improvement in FSA's lending regulations, they are also indicative of the agency's failure to follow its existing rules and procedures. Solutions to these issues require agency procedural reform more than policy change. State and county FSA offices should participate in trainings on the regulations that address plan feasibility and should improve their processing of loan applications for "nontraditional" farms, undergo 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 the issues.

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

FSA frequently erred in interpreting and applying regulations concerning plan feasibility. For example, FSA frequently relied on inaccurate and unverifiable information in the development and assessment of an applicant's plan. This includes FSA's failure to properly interpret disaster-year exceptions for determining yields and its failure to properly interpret and apply the hierarchy of priorities for determining yields. Additionally, FSA erred in interpreting and applying its own regulations by neglecting to discuss and resolve plan feasibility issues with applicants, by failing to consider applicants' premium prices, by improperly applying or not acknowledging the microloan documentation exception for yields and unit prices, and by not encouraging applicants to seek technical assistance.

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 conserve agency resources. Additionally, because not all farmers whose loans are denied appeal to NAD,²⁶⁰ they miss the opportunity for NAD to correct FSA's errors. For the farmers who receive favorable outcomes on appeal, the process is lengthy, adding significant delay to receiving vital financial assistance.

- ▶ Train personnel at FSA county and state offices on the regulations and FSA handbook provisions controlling plan feasibility and the development of the farm operating plan. This training should emphasize the particular problem areas where FSA frequently errs in determining plan feasibility.
- ▶ Factor failure to adhere to FSA lending regulations into FSA loan official performance reviews, including removing officials who continue to make significant errors after additional training.

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. This could include farms that are smaller or more diversified, raise specialty breeds of livestock, or produce specialty crops. This could also include organic, sustainable, or regenerative farm operations, as well as direct-to-market farms, urban farms, and farms that rely on new technology, such as vertical or indoor farms.

Based on the case examples, FSA is not equipped to adequately process applications for all types of farming operations. FSA should be better prepared to assist farmers who farm differently than “traditional” commodity farms.

- ▶ Train FSA county and state offices on how to better assist diversified and “nontraditional” farming operations, particularly on developing feasible plans for them.
- ▶ Update FSA’s pricing and yield projection information to be more inclusive of operations with different scales, farming practices, and diverse specialty products. Pursuant to the FSA handbook provision concerning premium prices, each FSA state executive director is required to “issue a supplement listing the unit prices for all commodities commercially produced in their State, *including resources for pricing and marketing strategies for commodities that have not traditionally been commercially produced or marketed in the past,*” such as “*organic production, locally or regionally produced agricultural food products, direct marketing to restaurants and grocery stores, CSA, and farmers markets*”(emphasis added).²⁶¹

According to this requirement, the FSA state executive director should already be issuing supplemental information for “nontraditional” farming operations. Updating this handbook provision to include information for additional types of farming practices and farm products would allow FSA to provide more accurate and verifiable information when developing and assessing farm operating plans for “nontraditional” operations.

- ▶ Amend 7 C.F.R. § 761.104(d) to say that “unit prices for agricultural commodities established by the Agency *can* be used *if* the Agency’s data is reflective of the applicant’s farming operation.” The current language, “[u]nit prices for agricultural commodities established by the Agency will generally be used,”²⁶² can lead NAD judges to defer to FSA’s figures on appeal, regardless of whether the agency’s or the appellant’s figures are more accurate and verifiable for the appellant’s specific farming operation.²⁶³
- ▶ Amend the hierarchy of priorities for calculating projected yields under 7 C.F.R. § 761.104(c) (3)(i-v) to include additional options for providing supporting information if a farmer does not have a three-year production history and accurate production information is not available for a certain area. An example of supporting information might include a letter from the state extension on yields for specific breeds.

FSA’s assessment of farmers’ operating plans should also account for certain circumstances that were beyond the farmer’s control (in addition to natural disasters) that may have affected their three-year production history and financial projections.

Production History and COVID-19

Many farmers had abnormal financial and production years due to the COVID-19 pandemic, and those abnormal years should not necessarily be used to project future income and expenses for their operating plans.²⁶⁴ Therefore, 7 C.F.R. § 761.104(c) should be amended to give farmers who face extenuating circumstances such as the COVID-19 pandemic the flexibility to exclude abnormalities when FSA uses their historical information to calculate projected farm expenses and income. While FSA is already supposed to make projections based on a “typical year,”²⁶⁵ amending this regulation would ensure farmers are evaluated fairly.

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. Without having demographic information for all appellants who received adverse decisions due to plan feasibility concerns, it is clear FSA made blatant errors in developing and assessing several farmers’ operating plans. Additionally, of the 136 NAD determinations that questioned plan feasibility, discrimination was alleged in 34 of them (discrimination may have occurred in other determinations but not have been alleged in the NAD hearing).

- ▶ Restrict agency discretion through the methods outlined in the previous recommendations to help prevent instances of discrimination and bias.
- ▶ Require state and county FSA offices to participate in ongoing implicit bias training and anti-discrimination training if they are not currently doing so.
- ▶ Fire FSA personnel who make discriminatory or biased lending decisions.²⁶⁶ Given the systemic nature of this issue and the fact that lending discrimination within FSA is ongoing,²⁶⁷ the problem needs to be addressed at the local level where loan decisions are being made.

Recommendations for Process Improvements

In addition to the specific recommendations for managerial ability, plan feasibility, and credit history highlighted in the three previous sections, 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,²⁶⁸ it is complex and time-consuming.²⁶⁹ Unless the NAD process is simplified, farmers should be assisted in navigating it.

- ▶ Provide grants to farmer advocate organizations to aid farmers navigating NAD appeals. This would allow farmers to receive guidance and representation without having to pay for an attorney, which many farmers likely cannot afford.²⁷⁰ Advocacy services could also be provided by farmer advocates in a program similar to USDA's Certified Mediation Program, in which state-designated entities independent of the agency provide alternative dispute resolution to program participants.²⁷¹
- ▶ Explore moving to a non-adversarial model of adjudication, in which the adjudicator investigates claims rather than opposing sides arguing them.

2. Consider shifting the burden of proof.

In NAD appeals, farmers have the burden of proving by a preponderance of the evidence that FSA erred in its adverse decision.²⁷² 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.²⁷³ Given the low rate of successful farmer appeals²⁷⁴ and the fact that the NAD assigns the burden of proof differently than other administrative adjudication processes do, USDA should consider changing its approach.

- ▶ Examine the issue of how the burden of proof affects appellants in direct farm loan programs and consider amending the NAD statute²⁷⁵ and regulations²⁷⁶ to transfer the burden of proof from the appellant to the agency for direct loan appeals.

3. Require comprehensive review of loan applications.

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.

- ▶ Amend FSA's regulations for processing a complete loan application under 7 C.F.R. § 764.53 to require FSA to comprehensively evaluate a loan application for all eligibility and loan approval requirements before issuing a denial.
- ▶ Amend FSA's handbook provisions under "Notification of Loan Denial"²⁷⁷ to require that all reasons for the loan denial must be stated in the denial letter to the applicant.²⁷⁸ In the event that the farmer appeals the decision to NAD and receives a favorable outcome, the agency should be unable to deny the loan again for a reason that was not stated in the original denial letter, absent changed circumstances that would make the applicant newly ineligible for the loan.

4. Improve implementation of NAD determinations.

When an appellant receives a favorable outcome in a NAD determination, FSA has 30 days to "implement" that decision.²⁷⁹ Rather than immediately delivering program benefits to the appellant, FSA can meet its implementation requirement by simply requesting updated financial information from the appellant because the appellant's financial situation may have changed during the appeals process, particularly if the applicant's financial information on file with FSA is more than 90 days old by the time an appeal determination is made.²⁸⁰

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.

- ▶ Amend 7 C.F.R. § 764.401(c) to say: "If an FLP loan denial is overturned on administrative appeal, the Agency *will not* automatically approve the loan. *If an FLP loan denial is upheld in part, FSA shall follow the specific implementation instructions from NAD*" (amendments in italics). This adjustment will also require additions to NAD regulations under 7 C.F.R. § 11.12 or statutory requirements under 7 U.S.C. § 7000 to require NAD to provide specific implementation instructions to FSA with final appeal determinations.²⁸¹
- ▶ Amend loan closing regulations at 7 C.F.R. § 764.402(e) to remove the provision allowing FSA to reconfirm loan approval requirements and request updated financial information from the applicant if the loan is not closed within 90 days of loan approval.²⁸²

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

During the course of the NAD appeals process, FSA can withdraw the adverse decision being appealed at any point before the administrative judge or NAD Director issues an appeal determination.²⁸³ This prevents the appeal from moving forward as there is no longer an adverse decision for NAD to consider,²⁸⁴ 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 believes 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.

- Amend 7 C.F.R. § 11.8 to add “If FSA withdraws an adverse decision, the appellant will have the opportunity to object within 10 days of the requested withdrawal. If an appellant objects to the withdrawn adverse decision, NAD will proceed with the appeal.”

Because NAD's internal guidance documents and directives are not publicly available, it is unclear whether other means are available to change NAD's processing of objections to withdrawn adverse decisions. The research team requested information on NAD's internal policies in its FOIA request but did not receive that information.

6. Coordinate between NAD and USDA's Civil Rights Office for NAD cases with discrimination claims.

The definition of a NAD “participant” under 7 C.F.R. § 11.1 is interpreted by the agency to exclude claims alleging discrimination in USDA programs,²⁸⁵ which appellants must file with USDA's Office of the Assistant Secretary for Civil Rights (OASCR) instead.²⁸⁶ Preventing NAD from considering discrimination claims in cases that otherwise fall within NAD's jurisdiction 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.²⁸⁷

A 2021 audit conducted by the USDA Inspector General found discrimination complaints had processing times well in excess of the Department's stated 180-day standard, with some cases taking up to 799 days.²⁸⁸ USDA's annual report on civil rights complaints for fiscal year 2021 shows that its average processing time that year for program (i.e., non-employment) civil rights complaints was 369 days, with an agency-specific average of 644 days for FSA complaints.²⁸⁹ Despite being more than three times longer than the 180-day standard, these numbers are significantly lower than those from fiscal year 2019, when the averages were 989 days for USDA overall and 2,293 days for FSA specifically.²⁹⁰

USDA should identify and implement a process to avoid burdening appellants with two unrelated cases based on one set of facts—one before OASCR with their discrimination claim and another before NAD to review their adverse loan decision. One possible approach is for NAD to issue interlocutory orders referring the discrimination question to OASCR for resolution before reaching a determination on the adverse loan decision, with the caveat that this approach risks significantly delaying resolution in the NAD case. Other scholars have suggested requiring NAD to report data on allegations of discrimination in its cases to Congress or another oversight body, or coordinating complaints between NAD and OASCR.²⁹¹

NAD and OASCR differ significantly in terms of their jurisdiction, information gathering functions, and remedies, with NAD generally having a much narrower scope. For example, NAD can reverse an adverse decision but cannot award money damages to a farmer who was discriminated against. Coordinating between NAD and OASCR is no substitute for significant reform in OASCR itself and would not change which cases are within NAD's jurisdiction. (Appeals would still come to NAD based on adverse decisions from the agency.) However, allowing OASCR and NAD to coordinate on addressing discrimination complaints that arise in NAD cases would provide farmers a more complete hearing of the circumstances that led to their adverse decision, with the opportunity to have that decision reversed if it was discriminatory. This would allow farmers who choose to appeal adverse loan decisions to have their complaints heard by NAD, and those who do not wish to appeal could still file a claim with OASCR. USDA's Equity Commission could provide guidance on which means of coordination might be most effective.

7. Make loan applicants eligible for equitable relief.

The provisions governing equitable relief specifically exclude agricultural credit and crop insurance programs.²⁹² While the 2018 Farm Bill gave the Secretary of Agriculture the expanded authority to consider borrowers of direct FSA loans,²⁹³ 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.²⁹⁴

- Amend the statutory and regulatory provisions governing equitable relief for farm loan programs under 7 U.S.C. § 2008a and 7 C.F.R. § 768.1 to cover applicants to farm loan programs in addition to existing borrowers.

Farm loan applicants may then seek equitable relief through the NAD process or from the Secretary of Agriculture, FSA state director (depending on the dollar amount), or other designee.²⁹⁵



Photo by Scott Streble care of Farm Aid.

IX. CONCLUSION

The analysis of 367 NAD cases concerning adverse FSA direct farm operating and farm ownership loan decisions appealed to NAD between January 1, 2009, and July 31, 2022, revealed several key issues in the FSA and NAD processes.

Credit history, managerial ability, and plan feasibility were the top issues that arose in the case set. These issues can be addressed by amending statutory, regulatory, and FSA handbook provisions that control FSA's direct lending programs. Specifically, the agency should update its provisions to remove excessive FSA discretion (which can enable discrimination and bias) and allow for more flexibility in meeting lending requirements in order to make loans more accessible, particularly to beginning farmers, farmers of color, and farmers whose operations are considered "nontraditional." Additionally, FSA personnel should be trained to ensure that they understand FSA lending regulations and apply them correctly and equitably.

FSA personnel should also regularly receive anti-discrimination and implicit bias training if these efforts are not already underway, and FSA employees who have made discriminatory or biased lending decisions should no longer be permitted to work for the agency. State and national offices should conduct frequent reviews of county employees and hold local offices accountable.

Several additional issues with the NAD and FSA processes also became apparent in the case analysis, such as lack of access to equitable relief, inability to have NAD hear discrimination claims, farmers bearing the burden of proof on appeal, unfavorable implementation of NAD decisions, withdrawn adverse decisions, noncomprehensive application review, and navigating the complex NAD process. These issues can also be addressed through statutory or regulatory changes, FSA handbook amendments, and changes to NAD internal guidance that will help farmers receive more favorable outcomes at both the FSA application level and the NAD appeals level.

The full extent of some of the problems raised in the dataset is uncertain due to incomplete data. The research team did not receive information in response to the entirety of its July 2022 FOIA request. In particular, it would be useful to have:

- information on loan approvals and denials organized by applicant demographics for the entirety of the case dataset (in order to identify the potential for discrimination in lending programs since demographic information is not available through NAD cases);
- information on withdrawn adverse decisions (to better understand how often FSA withdraws adverse decisions and what the outcomes are); and
- information on NAD internal policies and directives (in order to understand how director reversals may affect administrative judge performance reviews and how NAD operates).

Ultimately, farmers typically receive unfavorable outcomes at every level of the NAD appeals process, and farmer outcomes have gotten significantly worse since 1997. Discrimination is also alleged frequently, but NAD does not consider those claims. Many of the policy and process issues highlighted above are vehicles for discrimination that need to be addressed. The amendments to FSA and NAD policies above need to be made in order for farmers to be treated fairly, receive favorable outcomes at both the FSA and NAD level, and access the vital financial assistance that they deserve.

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/USDA-FSA-Public/usdafiles/Outreach/pdfs/usda_fsa_equitable_relief_faq_final_8-2022.pdf.
- 15 Case No. 2009S000370 (U.S.D.A. Nat'l Appeals Div. May 22, 2009) (final admin. review), [09S0370H.htm](https://www.fsa.usda.gov/Internet/FSA_File/2009S000370H.htm).
- 16 Case No. 2011W000004 (U.S.D.A. Nat'l Appeals Div. Jan. 7, 2011) (final admin. review), [11W004H.htm](https://www.fsa.usda.gov/Internet/FSA_File/2011W000004H.htm).
- 17 Case No. 2016W000422 (U.S.D.A. Nat'l Appeals Div. July 27, 2016) (final admin. review), [16W422H.htm](https://www.fsa.usda.gov/Internet/FSA_File/2016W000422H.htm).
- 18 7 C.F.R. § 101(e); JIM MONKE, CONG. RSCH. SERV., R46768, AGRICULTURAL CREDIT: INSTITUTIONS AND ISSUES 1 (2021), <https://crsreports.congress.gov/product/pdf/R/R46768/2>.
- 19 U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-399T, FAIR LENDING, ACCESS, AND RETIREMENT SECURITY (2021).
- 20 *Id.* at 2.
- 21 Chandelis Duster & Janie Boschma, MANY BLACK FARMERS NATIONWIDE STRUGGLING TO KEEP THEIR FARMS AFLOAT AS THEY FACE DISPARITIES ACROSS THE BOARD, CNN (Dec. 15, 2021), <https://www.cnn.com/2021/12/15/politics/black-farmers-debt-relief-disparities/index.html>.
- 22 Other information that was tracked for each of the cases included: who requested the appeal (whether it was an individual farmer or an entity), the appellant's argument, the issues in question, the determination decision, which party obtained a favorable outcome (FSA or the farmer), the reasoning for the decision, how many prior appeals the appellant had with NAD, the appellant's gender (if known), the appellant's race and ethnicity (if known), the amount of the loan(s) requested, the type of loan(s) requested (Farm Ownership or Operating), and the name of the administrative judge or Director presiding over the hearing.
- 23 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., FARM PROGRAMS, <https://www.fsa.usda.gov/about-fsa/structure-and-organization/farm-programs/index>; Farm Loans, <https://www.fsa.usda.gov/about-fsa/structure-and-organization/farm-loans/index> (last visited Jan. 4, 2024). Emergency loans are another type of direct loan FSA provides in situations of natural disasters or other emergencies. 7 USC § 1961 et seq. This report does not consider emergency loans, whose requirements differ from other types of direct loans.
- 24 *Id.*
- 25 7 U.S.C. §§ 1922, 1925(a); 7 C.F.R. § 764.151.

- 26 7 U.S.C. §§ 1942, 1943; 7 C.F.R. § 764.251.
- 27 7 C.F.R. § 764.51(c)-(d).
- 28 7 C.F.R. § 764.101 (General Eligibility Requirements, which are typically considered “threshold requirements”); 7 C.F.R. § 764.401 (Loan Decision, which contains additional requirements for loan approval, including meeting the General Eligibility Requirements). Credit History and Managerial Ability are eligibility requirements, whereas a Feasible Plan is an approval requirement.
- 29 7 C.F.R. § 764.53(c).
- 30 7 C.F.R. § 764.402(e)(1).
- 31 7 U.S.C. § 6991.
- 32 *Id.*
- 33 7 U.S.C. §§ 6991, 7996(b).
- 34 7 U.S.C. § 6996.
- 35 These programs fall under the following agencies: Farm Service Agency, Risk Management Agency, Natural Resource Conservation Service, Rural Housing Agency, Rural Business Cooperative Service, and Rural Utilities Service. NAT’L APPEALS DIV., U.S. DEPT. OF AGRIC., <https://www.usda.gov/oha/nad> (last visited Jan. 4, 2024).
- 36 NAT’L APPEALS DIV., U.S. DEPT. OF AGRIC., <https://www.usda.gov/oha/nad> (last visited Jan. 4, 2024).
- 37 7 U.S.C. § 6992(e)(1); KAREN KRUB & AMANDA URBANEK, USDA’S NATIONAL APPEALS DIVISION PROCEDURES AND PRACTICE (Nat’l Agric. Libr., 2019), <https://nalcprowpenginepowered.com/wp-content/uploads/assets/articles/krub-urbanek-nad.pdf>. NAD Directors serve six-year terms and are eligible for reappointment. 7 U.S.C. § 6992(b)(2).
- 38 NAT’L APPEALS DIV., *supra* note 36.
- 39 7 U.S.C. § 6992(e)(1); 7 U.S.C. § 6991 (definition of “adverse decision”); 7 U.S.C. § 6992(d), (“the Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal”).
- 40 7 U.S.C. § 6996(b).
- 41 KRUB & URBANEK, *supra* note 37, at 32-33.
- 42 7 U.S.C. § 6998; 7 C.F.R. § 11.9(a).
- 43 7 U.S.C. § 6997(d); 7 C.F.R. § 11.8(f)
- 44 KRUB & URBANEK, *supra* note 37, at 49.
- 45 7 U.S.C. § 6999.
- 46 KRUB & URBANEK, *supra* note 37, at 50.
- 47 Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018); The Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014); Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, 122 Stat. 923.
- 48 Barack Obama (2009-2017), Donald Trump (2017-2021), Joseph Biden (2021-present).
- 49 M. Terry Johnson (2009-2011), Roger Klurfeld (2009, 2010, 2013), James T. Murray (2011-2014), Steven C. Silverman (2014-2017), Jennifer K.M. Nicholson (2016-2019, 2021), Frank M. Wood (2019-present).
- 50 U.S. DEP’T OF VETERANS AFFS., *Appeals Modernization Act Comprehensive Plan and Reporting*, <https://benefits.va.gov/REPORTS/ama/index.asp> (last visited Jan. 4, 2024); Neil Woods, Woods and Woods LLC, What is the Success Rate for VA Disability Appeals?, (Oct. 11, 2022), <https://www.woodslawyers.com/va-disability-appeal-success-rate/> (noting that between 2019 and 2022, Veterans Affairs appellants had a success rate of more than 40% at the hearing level); Javier Meseguer, SOC. SEC. ADMIN., *Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, 73 SOC. SEC. BULL. 2 (2013), <https://www.ssa.gov/policy/docs/ssb/v73n2/v73n2p39.html#:~:text=However%2C%2085%20percent%20of%20the,a%20rate%20of%2078%20percent> (noting that between 1997 and 2004, Social Security appellants had a success rate of 78% the hearing level).
- 51 Wendell Fennell & Fred Young, *Judicial Independence Under Siege*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 211, 213 (1997).
- 52 *Id.*
- 53 *Id.* at 214-15 (quoting the NAD 5-year Strategic Plan (1997)).
- 54 See AM. BAR ASS’N., *Independent Judiciary*, https://www.americanbar.org/groups/public_education/resources/independent-judiciary-resources/ (last visited Jan. 4, 2024).
- 55 **Credit History**, 7 C.F.R. § 764.101(d): “The applicant must have acceptable credit history demonstrated by debt repayment”; **Feasible Plan**, 7 C.F.R. § 764.401(a)(1)(i): “The Agency will approve a loan only if it determines that: (i) The applicant’s farm operating plan reflects a feasible plan, which includes repayment of the proposed loan and demonstrates that all other credit needs can be met . . .”; **Managerial Ability**, 7 C.F.R. § 764.101(i): “The applicant must have sufficient managerial ability to assure reasonable prospects of loan repayment, as determined by the Agency”;

3-year business operations requirement for Farm Ownership Loans, 7 C.F.R. § 764.152(d): “The applicant: . . . must have participated in the business operations of a farm for at least 3 years out of the 10 years prior to the date the application is submitted” (the FSA handbook refers to this requirement as “Farm Experience” but the report authors changed the name here to avoid confusion with Farming Experience as a subcategory of Managerial Ability); **Non-Eligible Enterprise**, 7 C.F.R. § 764.102(f): “Loan funds will not be used to establish or support a non-eligible enterprise, even if the non-eligible enterprise contributes to the farm”; **Operator of a Family Farm**, 7 C.F.R. § 764.101(k): “The applicant must be the operator of a family farm after the loan is closed”; **Debt Forgiveness** for Operating Loan applicants, 7 C.F.R. § 764.252: “The applicant and anyone who will sign the promissory note . . . must not have received debt forgiveness from the Agency on any direct or guaranteed loan”; **General Security Requirements**, 7 C.F.R. § 764.103(b): “All loans must be secured by assets having a security value of at least 100 percent of the loan amount, except for EM loans . . .”.

56 Response to FOIA request.

57 Response to FOIA request.

58 Response to FOIA request.

59 Response to FOIA request.

60 7 C.F.R. § 764.101(d)(1)-(3).

61 7 C.F.R. § 764.101(d)(3).

62 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).

63 *Id.*

64 *Id.*

65 *Id.*

66 7 C.F.R. § 764.101(d)(1)-(3).

67 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).

68 *Id.*; Case No. 2018S000276 (U.S.D.A. Nat’l Appeals Div. June 26, 2018) (final admin. review), 18S276H.htm.

69 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).

70 *Id.* at 4-8.5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).

71 *Id.*

72 *See, e.g.*, Case No. 2015W000028 (U.S.D.A. Nat’l Appeals Div. Dec. 22, 2014) (final admin. review), 15W028H.htm (where a limited number of delinquent payments were temporary and beyond the appellant’s control when they occurred in the context of dividing assets during her divorce, including debts that were her ex-husband’s legal responsibility).

73 Case No. 2018S000276 (U.S.D.A. Nat’l Appeals Div. June 26, 2018) (final admin. review), 18S276H.htm.

74 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).

75 *Id.*

76 In another case where FSA similarly failed to meet with loan applicants, NAD upheld the agency’s decision, and the appellants were denied their loan despite FSA’s procedural error reviewing their application. Case No. 2009E000282 (U.S.D.A. Nat’l Appeals Div. Apr. 23, 2009) (final admin. review), 2009E000282H.htm.

77 Case No. 2009S000370 (U.S.D.A. Nat’l Appeals Div. May 22, 2009) (final admin. review), 2009S000370H.htm.

78 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).

79 Case No. 2012E000387 (U.S.D.A. Nat’l Appeals Div. June 18, 2012) (final admin. review), 12E387H.htm (appellant arguing that FSA’s evaluation of their credit history was subjective; NAD agreed but concluded that subjectivity did not indicate the agency erred in its decision); Case No. 2022E000029 (U.S.D.A. Nat’l Appeals Div. Jan. 24, 2022) (final admin. review), 22E029H.htm (appellant arguing that FSA’s evaluation of credit “gives the local farm loan manager discretion in making exceptions” and is “very subjective and subject to inconsistent application and abuse,” and NAD agreeing that the “Agency’s exercise of discretion in evaluating credit history of program applicants could be inconsistent,” but finding that that allegation was outside of NAD’s review); Case No. 2010E000169 (U.S.D.A. Nat’l Appeals Div. July 8, 2010) (final admin. review), 10E169R.htm (appellant arguing that the subjectivity of FSA’s credit history assessment “can be used at the whim of FSA in order to deny a loan request,” and that “FSA stated . . . it determines acceptable credit based solely on a subjective opinion by FSA,” allowing for a “biased stacked deck approach” when evaluating an applicant’s credit history, but NAD concluding that FSA did not abuse its discretionary

- authority (statements from the appellant’s attorney were obtained through a FOIA request (2022-OHA-04774-F) for this NAD case file)).
- 80 Case No. 2018E000078 (U.S.D.A. Nat’l Appeals Div. Oct. 3, 2018) (final admin. Review), 18E078H.htm.
- 81 Case No. 2015S000287 (U.S.D.A. Nat’l Appeals Div. May 18, 2015) (final admin. Review), 15S287H.htm; Case No. 2015S000287 (U.S.D.A. Nat’l Appeals Div. Apr. 7, 2016) (Dir. Rev.) 15S287R.htm.
- 82 7 C.F.R. § 764.101(d)(1).
- 83 7 C.F.R. § 761.2.
- 84 FARM SERV. AGENCY, *supra* note 1, at 4-5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).
- 85 *Id.*
- 86 Case No. 2015S000267 (U.S.D.A. Nat’l Appeals Div. July 21, 2015) (final admin. Review), 15S267H.htm; Case No. 2015S000267 (U.S.D.A. Nat’l Appeals Div. June 16, 2016) (Dir. Rev.), 15S267R.htm.
- 87 *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 29, 2011).
- 88 FARM SERV. AGENCY, *supra* note 1, at Par. 65(A).
- 89 Case No. 2017S000533 (U.S.D.A. Nat’l Appeals Div. Dec. 7, 2017) (final admin. review), 17S533H.htm.
- 90 Case No. 2017S000441 (U.S.D.A. Nat’l Appeals Div. Sep. 29, 2017) (final admin. review), 17S441H.htm.
- 91 7 U.S.C. § 2008h; 7 C.F.R. § 764.101(d)(2).
- 92 *See* 7 C.F.R. § 764.101(d)(2).
- 93 *See* 7 C.F.R. § 764.252(b).
- 94 *See* 7 C.F.R. § 764.152(b).
- 95 7 C.F.R. § 764.101(d)(2).
- 96 7 C.F.R. § 764.101(d)(2); FARM SERV. AGENCY, *supra* note 1, at 4-6, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Nov. 6, 2020). Other circumstances the handbook lists as **not** being considered debt forgiveness include: debt reduction through a conservation easement or contract; debt written off as part of a discrimination complaint against FSA, including in conjunction with the *Pigford* Consent Decree or *Keepseagle* settlement; and prior debt forgiveness on a youth loan, if circumstances were beyond the applicant’s control. *Id.*
- 97 7 C.F.R. § 764.252(b).
- 98 7 C.F.R. § 764.152(b).
- 99 Consolidated Farm and Rural Development Act, Sec. 353, 7 U.S.C. § 2001.
- 100 7 C.F.R. § 764.252(c).
- 101 FARM SERV. AGENCY, *supra* note 1, at Amend. 37, Par. 202(B), 9-7, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).
- 102 Case No. 2021S000286 (U.S.D.A. Nat’l Appeals Div. Oct. 13, 2021) (final admin. review), 21S286H.htm; (U.S.D.A. Nat’l Appeals Div. Jan. 18, 2022) (Dir. Rev.), 21S286R.htm.
- 103 FARM SERV. AGENCY, *supra* note 1, at 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated June 8, 2017).
- 104 *See* 7 C.F.R. § 761.1 (describing the objective of FSA’s Farm Loan programs “to provide progression lending and management assistance to eligible farmers to become owners or operators, or both, of family farms, to continue such operations when credit is not available elsewhere, or to return to normal farming operations after sustaining substantial losses as a result of a designated or declared disaster”) (emphasis added).
- 105 Case No. 2015E000838 (U.S.D.A. Nat’l Appeals Div. Dec. 2, 2015) (final admin. review), 15E838H.htm.
- 106 Case No. 2022S000086 (U.S.D.A. Nat’l Appeals Div. May 20, 2022) (final admin. review), 22S086H.htm.
- 107 7 C.F.R. § 764.101(i)(1)-(3).
- 108 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).
- 109 For a discussion of the greater flexibility afforded under the 2012 amendments, *see* NAT’L SUSTAINABLE AGRIC. COAL., *FSA Increases Flexibility for Loans to Beginning Farmers* (Mar. 9, 2012), <https://sustainableagriculture.net/blog/fsa-loan-handbook-revisions/>.
- 110 *See* Case No. 2014E000023 (U.S.D.A. Nat’l Appeals Div. Jan. 21, 2014) (final admin. review), 14E023H.htm (interpreting FSA’s discretion under this category as being so broad that NAD could not review FSA’s managerial ability determinations *at all*).
- 111 FARM SERV. AGENCY, *supra* note 1, at 4-13, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022). Applicants for Microloans for Operating Loan purposes have some alternatives to meeting the Farming Experience requirement,

including past participation with an agriculture-related organization, such as 4-H or FFA, or a self-directed apprenticeship with a qualified mentor. *Id.* Entity applicants for farm ownership loans have somewhat heightened farming experience requirements, including the requirement that members constituting a majority interest in the entity must have participated in a farm's business operations for at least three years out of the preceding ten, with some allowances for other experiences to substitute for part of that time. 7 C.F.R. § 764.152(d).

112 FARM SERV. AGENCY, *supra* note 1, at 4-13, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).

113 *Id.*

114 *Id.*

115 Case No. 2013S000231 (U.S.D.A. Nat'l Appeals Div. May 14, 2013) (final admin. review), 13S231H.htm.

116 Case No. 2011S000643 (U.S.D.A. Nat'l Appeals Div. Oct. 14, 2011) (final admin. review), 11S643H.htm.

117 Case No. 2009W000376 (U.S.D.A. Nat'l Appeals Div. July 2, 2009) (final admin. review), 2009W000376H.htm.

118 *Id.* (citing Agency Representative Testimony, HA, Tr. 1, 1:34:00-1:35:00).

119 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Jul. 25, 2022).

120 *Id.*

121 Case No. 2009W000459 (U.S.D.A. Nat'l Appeals Div. Sept. 29, 2009) (final admin. review), 2009W000459H.htm.

122 Case No. 2009S000552 (U.S.D.A. Nat'l Appeals Div. Aug. 7, 2009) (final admin. review), 2009S000552H.htm.

123 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Jul. 25, 2022).

124 Case No. 2010S000791 (U.S.D.A. Nat'l Appeals Div. Nov. 23, 2010) (final admin. review), 2010S000791H.htm.

125 7 C.F.R. § 764.101(i)(1-3).

126 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022) ("To meet the managerial ability

requirement through farming experience alone, the applicant may have: . . . obtained and successfully repaid one FSA Youth-OL").

127 Case No. 2011W000004 (U.S.D.A. Nat'l Appeals Div. Jan. 7, 2011) (final admin. review), 11W004H.htm.

128 Case No. 2017W000230 (U.S.D.A. Nat'l Appeals Div. May 5, 2017) (final admin. review), 17W230H.htm.

129 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).

130 *Id.*

131 Case No. 2013E000841 (U.S.D.A. Nat'l Appeals Div. Feb. 3, 2014) (final admin. review), 13E841H.htm.

132 Pigford v. Glickman, Nos. Civ.A. 97-1978 (PLF), Civ.A. 98-1693 (PLF) (D.D.C. Apr. 14, 1999).

133 Case No. 2014E000015 (U.S.D.A. Nat'l Appeals Div. Feb. 3, 2014) (final admin. review), 14E15H.htm.

134 7 C.F.R. § 761.2(b) (defining "beginning farmer").

135 FARM SERV. AGENCY, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022) ("[O]ther comprehensive agricultural programs that include the following or similar topics: financial records and budget analysis; developing farm business plans; asset management; cost of production and benchmarking; risk management; developing a risk management strategy; strengths, weaknesses, opportunities, and threats analysis; business and strategic planning; marketing plans and strategy; advertising; product and enterprise diversification").

136 FARM SERV. AGENCY, *supra* note 1, at 4-12.5, 4-12.6, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Jan. 27, 2016).

137 *See, e.g.*, Case No. 2013E000477 (U.S.D.A. Nat'l Appeals Div. July 5, 2013) (final admin. review), 13E477H.htm (discrediting a farmer's "home based education" and experience working on a family farm as a basis for demonstrating managerial ability).

138 Case No. 2009W000376 (U.S.D.A. Nat'l Appeals Div. July 2, 2009) (final admin. review), 2009W000376H.htm.

139 *Farm Serv. Agency*, *supra* note 1, at 4-12, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24,

- 2022).
- 140 7 C.F.R. § 761.2(b) (defining “Feasible Plan”).
 - 141 7 C.F.R. § 761.104(c); FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., HANDBOOK ON GENERAL PROGRAM ADMINISTRATION, 1-FLP (Rev. 1) Amend. 229, Par. 242(A) 8-87, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a237.pdf (last updated May 10, 2022).
 - 142 7 C.F.R. § 761.104(c)(3).
 - 143 7 C.F.R. § 761.104(c)(4).
 - 144 Case No. 2010S000659 (U.S.D.A. Nat’l Appeals Div. Aug. 26, 2010) (final admin. review), 2010S000659H.htm.
 - 145 7 C.F.R. § 761.104(c)(4).
 - 146 *See, e.g.*, Case No. 2010S000843 (U.S.D.A. Nat’l Appeals Div. Dec. 13, 2010) (final admin. review), 2010S000843H.htm (relying heavily on an Extension Specialist’s analysis of the appellant’s organic farm operating plan, despite contradictory information within the Specialist’s findings and an acknowledgment by the Specialist that the university at which they worked did not have reliable information about organic farming to provide FSA).
 - 147 Case No. 2015E000726 (U.S.D.A. Nat’l Appeals Div. Sep. 3, 2015) (final admin. review), 15E726H.htm.
 - 148 Use of the applicant’s own production records for the previous three years is the first item on the list of priorities, followed by per-acre information from federal crop insurance payments, FSA farm program actual yield records, county averages, and state averages. 7 C.F.R. § 761.104(c)(3).
 - 149 Case No. 2010E000058 (U.S.D.A. Nat’l Appeals Div. Jan. 15, 2010) (final admin. review), 2010E000058H.htm.
 - 150 Case No. 2015W000552 (U.S.D.A. Nat’l Appeals Div. Mar. 1, 2016) (final admin. review), 15W552H.htm.
 - 151 7 C.F.R. § 764.52.
 - 152 Case No. 2009W000459 (U.S.D.A. Nat’l Appeals Div. Sep. 29, 2009) (final admin. review), 2009W000459H.htm.
 - 153 Case No. 2012S000010 (U.S.D.A. Nat’l Appeals Div. Dec. 21, 2011) (final admin. review), 12S010H.htm.
 - 154 *See, e.g.*, Case No. 2018E000576 (U.S.D.A. Nat’l Appeals Div. Dec. 13, 2018) (final admin. review), 18E576H.htm (denying a farmer’s loan application without first raising issues that the farmer likely could have addressed, such as including his wife on the application so her income could be considered as part of the farm’s cash flow); Case No. 2018E000352 (U.S.D.A. Nat’l Appeals Div. July 6, 2018) (final admin. review), 18E352H.htm (failing to discuss concerns with appellants, one of whom testified he did not even see a copy of FSA’s revised plan until after the loan application was denied).
 - 155 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., HANDBOOK ON GENERAL PROGRAM ADMINISTRATION, 1-FLP (Rev. 1) Amend. 229, Par. 242(A) 8-90, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a237.pdf (last updated May 10, 2022). This handbook provision implements 7 C.F.R. § 761.104(g).
 - 156 *See, e.g.*, Case No. 2016W000422 (U.S.D.A. Nat’l Appeals Div. July 27, 2016) (final admin. review), 16W422H.htm (finding no evidence in the record that the agency complied with the requirement to document the differences between its own plan and the applicant’s).
 - 157 Case No. 2014W000451 (U.S.D.A. Nat’l Appeals Div. Nov. 21, 2014) (final admin. review), 14W451H.htm.
 - 158 FARM SERV. AGENCY, HANDBOOK ON GENERAL PROGRAM ADMINISTRATION, *supra* note 155, at 8-88.5, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a237.pdf (last updated May 10, 2022).
 - 159 *Id.*
 - 160 *Id.*
 - 161 *See, e.g.*, Case No. 2021S000112 (U.S.D.A. Nat’l Appeals Div. Apr. 6, 2021) (final admin. review), 21S112H.htm (refusing to use premium organic prices for a USDA-certified organic beef cattle ranch).
 - 162 *See, e.g.*, Case No. 2016W000422 (U.S.D.A. Nat’l Appeals Div. July 27, 2016) (final admin. review), 16W422H.htm (refusing to consider appellant’s premium beef prices because that income was not demonstrated on the appellant’s tax returns). Showing premium prices on tax returns is not an evidentiary requirement to demonstrate a feasible plan. *See* 7 C.F.R. § 761.104(d) (providing that applicants must show evidence for their premium prices, but not requiring that such evidence include tax returns).
 - 163 Case No. 2017E000773 (U.S.D.A. Nat’l Appeals Div. Dec. 15, 2017) (final admin. review), 17E773H.htm.
 - 164 Case No. 2020E000134 (U.S.D.A. Nat’l Appeals Div. Mar. 19, 2020) (final admin. review), 20E134H.htm.
 - 165 7 C.F.R. § 761.104(e).

- 166 FARM SERV. AGENCY, HANDBOOK ON GENERAL PROGRAM ADMINISTRATION, *supra* note 155, at 8-86, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a237.pdf (last updated May 10, 2022).
- 167 Case No. 2013W000589 (U.S.D.A. Nat'l Appeals Div. Feb. 12, 2014) (final admin. review), 13W589H.htm.
- 168 Subtitle H, Department of Agriculture Reorganization Act, Pub. L. No. 103-354 (1994) (establishing NAD). Farm advocates at RAFI have suggested that NAD's appeal process formalized significantly when lawyers took the place of IRS investigators as administrative judges. This formalization was also noticeable in the NAD case analysis, as NAD determinations began to be written in more formal, legal language starting in 2015. In December 2014, NAD began to use the term "administrative judge" rather than the previous term "hearing officer," although the role of the adjudicator did not change. KRUB & URBANEK, *supra* note 37, at 6 n.10; NAT'L APPEALS DIV., U.S. DEPT. OF AGRIC., *Frequently Asked Questions (FAQs)*, <https://www.usda.gov/oha/nad/appeals/faqs> (last visited Jan. 6, 2024).
- 169 7 U.S.C. § 6995.
- 170 Michael Asimow, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE APA 109-110 (2019), <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf> (citing *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997) and noting that USDA acquiesced to the court's findings in Applicability of Equal Access to Justice Act and Administrative Procedure Act, 74 Fed. Reg. 57,401 (Nov. 6, 2009)).
- 171 5 U.S.C. §§ 554, 556, 557.
- 172 BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 6 (2021).
- 173 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, 1-APP (Rev. 2) Amend. 2, Par. 89(A), 6-58, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Sep. 8, 2008); *Id.* at Par. 93, 6-66 (last updated Jun. 3, 2008).
- 174 HARRINGTON & SHEFFNER, *supra* note 172, at 6-7.
- 175 *See id.* at 12-13 (describing the role of adjudicators employed in informal adjudications).
- 176 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Par. 2, 1-4, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Sep. 13, 2016).
- 177 *Id.*
- 178 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"); *Pro se*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("One who represents oneself in a court proceeding without the assistance of a lawyer").
- 179 Connie Vogelmann, *Self-Represented Parties in Administrative Hearings*, ADMIN. CONF. OF THE U.S., 49 (Oct. 28, 2016) <https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Final-Report-10-28-16.pdf>.
- 180 *Id.* at 47.
- 181 FARMERS' LEGAL ACTION GROUP (FLAG), *Topic: Appeals*, <http://www.flaginc.org/topic/appeals> (last visited Jan. 2, 2024) ("the system can be difficult to understand, and farmers are held to very strict deadlines").
- 182 AMER. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2 (2020) <https://www.american-bar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> (identifying uneven distribution of lawyers across the country and the existence of "legal deserts"). The report includes "county-equivalents" along with counties in determining the prevalence of legal deserts.
- 183 Vogelmann, *supra* note 179, at 46 (citing an estimate by Deputy Director of NAD, Jim Murray). Note that these estimates were made for NAD hearings as a whole, not specific to FSA appeals or farm lending programs.
- 184 HARRINGTON & SHEFFNER, *supra* note 172, at 15 (noting that examples of adjudication processes following this model include those in the Department of Veterans' Affairs and disability benefits adjudication in the Social Security Administration).
- 185 *Id.*
- 186 *Precedent*, Wex, LEGAL INFO. INST., CORNELL L. SCH., <https://www.law.cornell.edu/wex/precedent> (last visited Jan. 5, 2024) ("Precedent refers to a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues. Precedent is incorporated into the doctrine of stare decisis and requires courts to apply the law in the same manner to cases with the same facts").
- 187 Case No. 2010W000117 (U.S.D.A. Nat'l Appeals Div. Feb. 24, 2011) (final admin. review), 10W117H.htm; *see also* Case No.

- 2014S000173 (U.S.D.A. Nat'l Appeals Div. May 23, 2014) (final admin. review), [14S173H.htm](#) (stating that “NAD Hearing Officers’ determinations are not precedent for other Hearing Officers” but nevertheless cited to a prior case and agreed with the reasoning and determination); *see also* Case No. 2010W000364 (U.S.D.A. Nat'l Appeals Div. July 28, 2010) (final admin. review), [10W364H.htm](#) (stating that a previous determination was “not precedent for the unique facts of [the] case,” but still referenced the determination and used it as “a solid framework with which to approach [the] issue); NAD judges also sometimes cite to court cases, despite NAD discouraging this practice. NAT'L APPEALS DIV., U.S. DEPT. OF AGRIC., THE NATIONAL APPEALS DIVISION GUIDE VII(A) (Oct. 2008), <https://www.usda.gov/sites/default/files/documents/nad-guide-oct-2008.pdf> (“Citations to court decisions generally are not appropriate in appeal determinations. If a legal citation is required because it is controlling in the matter, its inclusion should be discussed with the Hearing Officer’s supervisor”).
- 188 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Par. 96, 6-71 https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf, (last updated June 3, 2008) (“Example: An appellant references or cites other NAD determinations in other cases. In response, FSA’s representative should make a written or verbal objection to such attempt by the appellant. It is important that this objection be on the record”); *see also* Exhibit 41, p 1 (last updated June 3, 2008) (providing Language for Objection to Parties Referencing NAD Cases in Other Decisions: “Citing other appeal decisions that may have been decided by NAD in response to a different set of facts and an administrative record that will never be made part of the case record in this appeal confuses the NAD appeal process and complicates any further review”).
- 189 5 U.S.C. § 556(d).
- 190 7 C.F.R. § 11.8 (e).
- 191 *Preponderance of the Evidence*, Wex, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Jan. 5, 2024).
- 192 304 of 367 cases analyzed (82.83%) fell in favor of FSA.
- 193 This claim is informed by conversations with farm advocates at RAFI, who often represent farmers on NAD appeal and have expressed the difficulty farmers have in meeting the burden of proof.
- 194 *See, e.g.*, Case No. 2009W000484 (U.S.D.A. Nat'l Appeals Div. July 24, 2009) (final admin. review), [09W484H](#); Case No. 2009W000173 (U.S.D.A. Nat'l Appeals Div. Apr. 10, 2009) (final admin. review), [09W173H](#); Case No. 2010W000119 (U.S.D.A. Nat'l Appeals Div. Mar. 24, 2010) (final admin. review), [10W119H](#); Case No. 2010W000653 (U.S.D.A. Nat'l Appeals Div. Nov. 24, 2010) (final admin. review) [10W653H](#) (where the same farmer was denied for multiple loans on multiple occasions for multiple different reasons).
- 195 This report uses the term “Hispanic” because the case *Garcia v. Vilsack*, which alleged unlawful discrimination at the USDA, used the term, and it is used when filing discrimination claims at USDA.
- 196 Stephen Carpenter, *The USDA Discrimination Cases: Pigford*, In *Re Black Farmers, Keep-seagle, Garcia, and Love*, 17 *DRAKE J. AGRIC. L.* (2012) (describing that if a loan was made but provided late, a discrimination claimant could prevail: “Lateness of an agricultural loan can be quite damaging given the precise time and seasonal requirements in agriculture . . . a crop planted a month late could be effectively worthless”); Abril Castro & Caius Z. Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, *CTR. FOR AM. PROGRESS* (Apr. 3, 2019) (“Throughout the 1900s, multiple reports outlined equal opportunity violations at county-level offices where black farmers were denied loan applications or suffered discriminatory delays . . . Delays in loan processing—typically due to discrimination—led many farmers to lose the full benefits of the entire farming season and thus experience large losses in profits”).
- 197 FARM SERV. AGENCY, *supra* note 1, at Amend. 37, Par. 356(C), 15-16, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Nov. 6, 2020).
- 198 *Id.* at Amend. 23, Par. 73(B), 4-19, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a23.pdf (last updated Jan. 27, 2016).
- 199 Case No. 2018S000276 (U.S.D.A. Nat'l Appeals Div. June 26, 2018) (final admin. review), [18S276H.htm](#); Case No. 2019S000012 (U.S.D.A. Nat'l Appeals Div. Mar. 4, 2019) (final admin. review), [19S012H.htm](#); Case No. 2019S000012 (U.S.D.A. Nat'l Appeals Div. Feb. 13, 2020) (Dir. Rev.), [19S12R.htm](#).
- 200 FARM SERV. AGENCY, *supra* note 1, at Amend. 23, Par. 73(B), 4-19, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a23.pdf (last updated Jan. 27, 2016).
- 201 *Id.* at Amend. 37, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a37.pdf (last updated Nov. 6, 2020).
- 202 Case No. 2021W000183 (U.S.D.A. Nat'l Appeals Div. July 22, 2021) (final admin. review),

21W183H.htm.

- 203 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at 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). NAD uses the term “rescind” rather than “withdraw” for the same action. NAT’L APPEALS DIV., U.S. DEPT. OF AGRIC., THE NATIONAL APPEALS DIVISION GUIDE 44-45 (Oct. 2008) (“The agency may rescind its adverse decision at any time.”) While FSA generally cannot withdraw an adverse decision after NAD has issued an appeal determination, FSA can contact the Appeals and Litigation Staff (ALS) to obtain written concurrence. FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at 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).
- 204 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 24(A), 2-44, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf.
- 205 *Id.*
- 206 *Id.*
- 207 NAT’L APPEALS DIV., U.S. DEPT. OF AGRIC., THE NATIONAL APPEALS DIVISION GUIDE 44-45 (Oct. 2008) <https://www.usda.gov/sites/default/files/documents/nad-guide-oct-2008.pdf>; (“The appellant must always have the opportunity to comment on whether he/she agrees the entire adverse decision has been rescinded. . . . The Hearing Officer can accept the appellant’s verbal comment if the record is clear the appellant agrees there are no remaining issues for appeal and the appellant wants to withdraw the appeal or have the appeal dismissed . . . The Hearing Officer can also notify the appellant in writing of an agency rescission and provide 10 days for the appellant to comment. If the appellant does not voluntarily withdraw the appeal, the Hearing Officer will determine if the entire adverse decision that is the subject of the appeal was rescinded. If there is no adverse decision outstanding, the appeal will be dismissed by the Hearing Officer”). Farmer advocates at RAFI provided CAFS with accounts of farmers receiving these notifications from NAD and objecting to the withdrawn adverse decisions per NAD’s instructions only to be told that NAD no longer had jurisdiction over the case (such as in Case No. 2022S000183). Information for most cases involving adverse withdrawn decisions is not publicly available on the NAD website because the cases cannot be heard after the adverse decision is rescinded, and therefore no determination or publicly available record of the case exists.
- 208 *Id.*
- 209 *Id.*; Case No. 2010S000011 (U.S.D.A. Nat’l Appeals Div. Dec. 30, 2009) (final admin. review), 10S011H.htm (“Appellant objected to FSA’s rescission of its adverse decision. Because NAD no longer had jurisdiction to hear the appeal due to FSA’s rescission of its adverse decision, [the administrative judge] dismissed it.”).
- 210 While it is possible that FSA may recognize it made an adverse decision in error and withdraw the decision in order to deliver program benefits to the applicant, farm advocates at RAFI have rarely seen FSA withdraw adverse decisions without issuing new adverse decisions. *See also* FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 24(A), 2-44, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jan. 8, 2009) (stating “FSA should withdraw adverse decisions only when some error is detected or when it is determined to be in FSA’s best interest, and possibly the participant’s best interest, to withdraw the incorrect or misleading determination” (emphasis added); and FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 24(A), 2-45, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jan. 26, 2011) (stating FSA may withdraw an adverse decision if “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”).
- 211 Case No. 2010S000011 (U.S.D.A. Nat’l Appeals Div. Dec. 30, 2009) (final admin. review), 2010S000011H.htm.
- 212 7 U.S.C. § 7000; 7 C.F.R. § 11.12(a) (“On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination”).
- 213 7 C.F.R. § 764.401(c).
- 214 7 C.F.R. § 764.401(c)(2).
- 215 7 C.F.R. § 764.401(c).
- 216 For example, if NAD found that FSA erroneously concluded that a farmer was ineligible for a loan due to an unacceptable credit history, and FSA implemented that decision by requesting updated financial information from the applicant, FSA could deny the farmer a loan again based on the new financial information.

- 217 7 U.S.C. § 2008f; 7 C.F.R. § 764.108(c) (“Growing crops used to provide adequate security must be covered by crop insurance if such insurance is available. . . .”); 7 C.F.R. § 764.108(d) (“Prior to closing the loan, the applicant must have obtained at least the catastrophic risk protection level of crop insurance coverage for each crop which is a basic part of the applicant’s total operation, if such insurance is available, unless the applicant executes a written waiver of any emergency crop loss assistance with respect to such crop . . .”); FARM SERV. AGENCY, *supra* note 1, at Amend. 37 Par. 112 (c).
- 218 7 C.F.R. § 457.8; *See* Common Crop Insurance Policy, <https://www.ecfr.gov/current/title-7/subtitle-B/chapter-IV/part-457> (last updated Jan. 5, 2024) (“*Final planting date*. The date contained in the Special Provisions for the insured crop by which the crop must initially be planted in order to be insured for the full production guarantee or amount of insurance per acre”).
- 219 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 72(B), 6-3, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jun. 3, 2008) (“NAD final determinations are reviewable and enforceable in U.S. District Courts”).
- 220 KRUB & URBANEK, *supra* note 37, at 59.
- 221 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 72(B), 6-3, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Jun. 3, 2008) (“NAD does **not** process or issue determinations about discrimination complaints”) (emphasis in original); *See e.g.*, Case No. 2021W000183 (U.S.D.A. Nat’l Appeals Div. July 22, 2021) (final admin. review), 21W183H.htm (maintaining that NAD was “not the proper forum in which to pursue a civil rights program complaint,” and provided the appellant with instructions for filing a discrimination claim with Office of the Assistant Secretary for Civil Rights).
- 222 7 C.F.R. § 11.1 (defining “participant” to exclude “persons whose claim(s) arise under . . . [d]iscrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15 [discrimination in financial assistance programs], 15a [discrimination in education programs], 15b [discrimination on the basis of handicap in programs or activities receiving federal financial assistance], 15e [discrimination on the basis of handicap in programs or activities conducted by USDA], and 15f [discrimination complaints alleging discrimination by USDA in the years 1981 - 1996]”).
- Confusingly, the nondiscrimination provisions governing USDA programs (i.e., programs most likely to be involved in NAD cases) are not included in the list of exclusions for NAD participants. The provisions are located at 7 C.F.R. § 15d. KRUB & URBANEK, *supra* note 37, at 8. USDA’s nondiscrimination provisions were included under a listed section of the regulations (7 C.F.R. part 15) before being moved to an unlisted section (part 15d) in 1999. KRUB & URBANEK, *supra* note 37. Because part 15d did not exist when the NAD “participant” definition was promulgated, it was not included in the list of exclusions. *Id.*
- 223 KRUB & URBANEK, *supra* note 37, at 8-9 (“Of the five discrimination complaint processes that are specifically excluded under the NAD rule, only one—Part 15e (nondiscrimination on the basis of handicap in programs administered by USDA)—directly relates to complaints of discriminatory conduct by USDA”).
- 224 NAT’L APPEALS DIV., U.S. DEPT. OF AGRIC., THE NATIONAL APPEALS DIVISION GUIDE §3 IX(B) (Oct. 2008), <https://www.usda.gov/sites/default/files/documents/nad-guide-oct-2008.pdf>; KRUB & URBANEK, *supra* note 37, at 8-9; OFF. OF THE ASST. SEC’Y FOR CIV. RTS., U.S. DEPT. OF AGRIC., *How to File a Program Discrimination Complaint*, <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint>.
- 225 Inflation Reduction Act § 22007(e), Pub. L. 117-169 (Aug. 16, 2022).
- 226 Stephen Carpenter & Lindsay Kuehn, *Farmers’ Guide to USDA Discrimination Financial Assistance Program*, FARMERS’ LEGAL ACTION GROUP (FLAG) 1, 2-3 (Sept. 28, 2023), <http://www.flaginc.org/wp-content/uploads/2023/11/Farmers-Guide-to-USDAs-Discrimination-Financial-Assistance-Program-DFAP-Third-Edition-Sept-28th-2023.pdf>.
- 227 Case No. 2010W000653 (U.S.D.A. Nat’l Appeals Div. Nov. 24, 2010) (final admin. review), 10W653H.htm.
- 228 Case No. 2009W000484 (U.S.D.A. Nat’l Appeals Div. July 24, 2009) (final admin. review), 09W484H.htm; Case No. 2009W000484 (U.S.D.A. Nat’l Appeals Div. Apr. 7, 2016) (NAD Dir. Rev.), 09W484R.htm; Case No. 2009W000173 (U.S.D.A. Nat’l Appeals Div. Apr. 10, 2009) (final admin. review) (09W173H.htm); Case No. 2010W000119 (U.S.D.A. Nat’l Appeals Div. Apr. 10, 2009) (final admin. review), 10W119H.htm.
- 229 Case No. 2009W000484 (U.S.D.A. Nat’l Appeals Div. July 24, 2009) (final admin. review), 09W484H.htm; Case No. 2009W000484 (U.S.D.A. Nat’l Appeals Div. Nov. 10, 2009) (NAD Dir. Rev.), 09W484R.htm; Case No.

- 2009W000173 (U.S.D.A. Nat'l Appeals Div. Apr. 10, 2009) (final admin. review), 09W173H.htm; Case No. 2010W000119 (U.S.D.A. Nat'l Appeals Div. Mar. 24, 2010) (final admin. review), 10W119H.htm.
- 230 7 U.S.C. § 7996(b).
- 231 7 U.S.C. § 6998(d) (“Subject to regulations issued by the Secretary, the Director shall have the authority to grant equitable relief under this section in the same manner and to the same extent as such authority is provided to the Secretary under section 7996 of this title and other laws. Notwithstanding the administrative finality of a final determination of an appeal by the Division, the Secretary shall have the authority to grant equitable or other types of relief to the appellant after an administratively final determination is issued by the Division”); 7 C.F.R. § 11.9(e).
- 232 7 U.S.C. § 7996(c) (“The Secretary may authorize a participant in a covered program to—(1) retain loans, payments, or other benefits received under the covered program; (2) continue to receive loans, payments, and other benefits under the covered program; (3) continue to participate, in whole or in part, under any contract executed under the covered program; (4) in the case of a conservation program, reenroll all or part of the land covered by the program; and (5) receive such other equitable relief as the Secretary determines to be appropriate”).
- 233 7 U.S.C. § 7996(a)(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.)”).
- 234 Agriculture Improvement Act of 2018, Pub. L. 87-128, title III, § 366, 132 Stat. 4672 (2018) (codified at 7 U.S.C. § 2008a; 7 C.F.R. § 768.1).
- 235 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., *EQUITABLE RELIEF FAQ* (Aug. 2022), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Outreach/pdfs/usda_fsa_equitable_relief_faqs_final_8-2022.pdf (“The 2018 Farm Bill authorized USDA to provide flexibility to certain direct loan borrowers who acted in good faith but may not have received the correct guidance from FSA resulting in them receiving a loan that they were not eligible for. Previously, direct loan borrowers that may not have received correct guidance were required to immediately repay the loan or convert it to a non-program loan with higher interest rates, less favorable terms, and limited loan servicing. Now, FSA has additional flexibilities to assist those borrowers and they will not be penalized”).
- 236 Case No. 2021W000107 (U.S.D.A. Nat'l Appeals Div. Mar. 11, 2021) (final admin. review), 21W107H.htm (finding that the appellant’s case was “not among those eligible for equitable relief pursuant to 7 U.S.C. § 2008a” because the appellant had “neither been approved for nor received a direct farm ownership, operating, or emergency loan,” and had only applied for one); But see *id.* (where NAD cited “See, e.g., NAD Case No. 2019S000445 (Dir. Rev., Apr. 23, 2020) (Appellant who was approved for—but had not yet received—a direct Farm Operating Loan and appealed to NAD because the amount authorized was substantially less than that for which he had applied was eligible for NAD equitable relief consideration); and Case No. 2020E000099 (Dir. Rev., Jun. 18, 2020) (Appellant who received a direct Farm Operating Loan that was later subject to acceleration was eligible for NAD equitable relief consideration)”).
- 237 FARM SERV. AGENCY, *supra* note 1, at Amend. 31, Par. 65(D), 4-8, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a31.pdf (last updated Oct. 24, 2022).
- 238 *Id.*
- 239 *Id.*
- 240 COMPARE FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 65(D), 4-8.5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022) *with* FARM SERV. AGENCY, *supra* note 1, at Amend. 37, Par. 65(D), 4-8 https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a37.pdf (last updated Nov. 6, 2020) and Farm Serv. Agency, *supra* note 1, at (Rev. 1) Amend. 1, Par. 65(D), 4-8 https://www.fsa.usda.gov/Internet/FSA_File/3-flp-r1.pdf (last updated Dec. 31, 2007), implementing 7 C.F.R. § 764.101(d)(3). Added language in the 2022 version includes: “In some cases, credit reports for applicants may have been negatively impacted by delays in healthcare reimbursements, slow interaction with other agencies and organizations, or by other circumstances beyond the applicant’s control. Therefore, extra diligence should be taken to review the credit reports to determine if the circumstances were beyond the control of the applicant. Loan officials should consider if problems identified on the credit report have been corrected or will be corrected if the requested loan is approved. This is especially true of credit reports for microloan applicants who may have been operating using personal credit cards or high interest non-agricultural loans before applying with FSA.” FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 65(D), 4-8.5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct.

- 24, 2022)
- 241 7 C.F.R. § 764.101(d)(3).
- 242 *Compare* FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 65(A), 4-4, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022) with FARM SERV. AGENCY, *supra* note 1, at Amend. 35, Par. 65(A), 4-5, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated May 8, 2019).
- 243 FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 65(A), 4-4, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).
- 244 7 C.F.R. § 764.101(d)(1).
- 245 7 C.F.R. § 761.2 (“Good faith is when an applicant or borrower provides current, complete, and truthful information when applying for assistance and in all past dealings with the Agency, and adheres to all written agreements with the Agency including, but not limited to, loan agreement, security instruments, farm operating plans, and agreements for use of proceeds. The Agency considers a borrower to act in good faith, however, if the borrower’s inability to adhere to all agreements is due to circumstances beyond the borrower’s control. In addition, the Agency will consider fraud, waste, or conversion actions, when substantiated by a legal opinion from OGC, when determining if an applicant or borrower has acted in good faith”).
- 246 7 C.F.R. § 764.101(d)(2).
- 247 7 C.F.R. § 764.152(b).
- 248 7 C.F.R. § 764.252(b).
- 249 7 C.F.R. § 764.101(d)(2).
- 250 FARM SERV. AGENCY, *supra* note 1, at Amend. 37, Par. 65(A), 4-6, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Oct. 24, 2022).
- 251 Consolidated Farm and Rural Development Act, Pub. L. No. 87-128 § 343 (1972).
- 252 Ximena Bustillo, ‘Rampant issues’: Black farmers are still left out at USDA, POLITICO (Jul. 5, 2021), <https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876>; Ximena Bustillo, *There Aren’t Enough Young Farmers. Congress Is Looking To Change That*, NPR (Sep. 1, 2022), <https://www.npr.org/2022/09/01/1120100449/farm-bill-not-enough-young-farmers-congress>.
- 253 FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 69(A) 4-13, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).
- 254 *Id.*
- 255 *Id.*
- 256 *Id.*
- 257 7 C.F.R. § 764.101(d)(3)(iv) (failing to pay past debts when they came due resulted from “. . . circumstances that were of a temporary nature and beyond the applicant’s control . . .”).
- 258 FARM SERV. AGENCY, *supra* note 1, at Amend. 45, Par. 69(A) 4-13, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a44.pdf (last updated Oct. 24, 2022).
- 259 *Id.*
- 260 This could be for many reasons, such as not knowing they have the option or not having the time or resources to go through the appeals process.
- 261 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 215, Par. 242(A) 8-88.5, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a237.pdf (last updated May 10, 2022).
- 262 7 C.F.R. § 761.104(d).
- 263 *See, e.g.*, Case No. 2014W000423 (U.S.D.A. Nat’l Appeals Div. Oct. 22, 2014) (final admin. review), 14W423H.htm (deferring of NAD to the agency’s pricing estimate because information on this breed of livestock was not available for the appellant’s county).
- 264 *See, e.g.*, Case No. 2021E000107 (U.S.D.A. Nat’l Appeals Div. Mar. 15, 2021) (final admin. review), 21E107H.htm (arguing that “2020 was an unusual year for his farm expenses and sales and therefore the FSA should not use some of the 2020 figures for his farm projections”).
- 265 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 204, Par. 242(A) 8-86, https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a241.pdf (last updated Nov. 6, 2020).
- 266 Ellyn Ferguson, *House Panel Leader Vows End to ‘Racial Discrimination’ at USDA*, ROLL CALL (March 25, 2021), <https://rollcall.com/2021/03/25/house-panel-leader-vows-end-to-racial-discrimination-at-usda/> (“despite the findings of discrimination in the Pigford case, there’s no record of the Agriculture Department firing any officials involved in the incidents”).
- 267 Safiya Charles, *Federal Appeals Judge Allows Black Farm Group to Join Defense in Debt Cancellation Case*, THE COUNTER (Mar. 28, 2022), <https://thecounter.org/federation-of-south->

ern-cooperatives-joins-defense-black-farmer-debt-usda/; Chandelis Duster & Janie Boschma, *Many Black Farmers Nationwide Struggling To Keep Their Farms Afloat As They Face Disparities Across The Board*, CNN (Dec. 15, 2021), <https://www.cnn.com/2021/12/15/politics/black-farmers-debt-relief-disparities/index.html>.

- 268 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").
- 269 FARMERS' LEGAL ACTION GROUP (FLAG), *Topic: Appeals*, <http://www.flaginc.org/topic/appeals> (last visited Jan. 2, 2024) ("[T]he system can be difficult to understand, and farmers are held to very strict deadlines").
- 270 Lisa Held, *Farmers Can't Afford the Legal Help They Need. These Lawyers Are Mobilizing to Change That*, CIVIL EATS (May 17, 2018), <https://civileats.com/2018/05/17/farmers-cant-afford-the-legal-help-they-need-these-lawyers-are-mobilizing-to-change-that/>; Some appellants may be able to recover attorney fees from FSA under the Equal Access to Justice Act, but it requires that the appellant prevail in the determination, that the agency's position not be "substantially justified" in the view of the administrative judge, and that the appellant meet net worth means testing. 5 U.S.C. §§ 504(a)(1), 504(b)(1)(B); see KAREN KRUB & AMANDA URBANEK, *supra* note 37, at 60-62 <https://nalcprowpenginepowered.com/wp-content/uploads/assets/articles/krub-urbanek-nad.pdf>.
- 271 See FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., *Certified Mediation Program*, <https://www.fsa.usda.gov/programs-and-services/certified-mediation-program/index> (last visited Jan. 6, 2024).
- 272 7 C.F.R. § 11.8(e) ("The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence"); 7 U.S.C. § 6997(c)(4).
- 273 The proposed Fair Credit for Farmers Act would shift the burden of proof to FSA for farmers whose annual farm income is \$300,000 or lower. Fair Credit for Farmers Act of 2023, S. 2668, 117th Cong. § 4.
- 274 304 of 367 determinations in the dataset (82.83%) were in favor of FSA.
- 275 7 U.S.C. § 6997(c)(4).
- 276 7 C.F.R. § 11.8(e).
- 277 FARM SERV. AGENCY, *supra* note 1, at Amend. 37, Par. 356(C), 15-16, https://www.fsa.usda.gov/Internet/FSA_File/3-flp_r02_a45.pdf (last updated Nov. 6, 2020).
- 278 The third bullet under Notification of Loan Denial ("a description of any loan review aspect that was not evaluated") should be stricken and replaced with "an exhaustive list of all possible reasons for loan application denial and descriptions of each item."
- 279 7 U.S.C. § 7000; 7 C.F.R. § 11.12(a) ("On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination").
- 280 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at Amend. 2, Par. 135(D), 6-173, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf (last updated Sep. 8, 2008) (providing an example of how to implement a NAD decision concerning a farm loan: "Example 1: After a final NAD decision has determined agency error in a decision on farm loan repayment ability, FSA requests updated financial and production information to make a new determination on repayment ability. The request is proper because an appellant's circumstances may have changed during the pendency of the appeal." And "agencies, according to their regulations, may consider changes in the condition of the participant in implementing any NAD final determination."); 7 C.F.R. § 764.401(c) (a loan applicant whose adverse loan decision was reversed by NAD will either be asked for updated financial information, approved for a crop loan if they applied for one and if the agency determines it can be repaid within the given period, or will have their farm operating plans reevaluated to re-confirm feasibility); 7 C.F.R. § 764.402(e)(2) ("If the loan is not closed within 90 days of loan approval or if the applicant's financial condition changes significantly, the Agency must reconfirm the requirements for loan approval prior to loan closing," and "The applicant may be required to provide updated information for the Agency to reconfirm approval and proceed with loan closing").
- 281 7 C.F.R. § 11.12; 7 U.S.C. § 7000.
- 282 7 C.F.R. § 764.402(e).
- 283 FARM SERV. AGENCY, HANDBOOK ON PROGRAM APPEALS, MEDIATION, AND LITIGATION, *supra* note 173, at 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).
- 284 *Id.* at Par. 24(A), 2-44, https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf.

- 285 See discussion *supra* pg. 77.
- 286 See e.g., Case No. 2021W000183 (U.S.D.A. Nat'l Appeals Div. July 22, 2021) (final admin. review), 21W183H.htm (maintaining that NAD was “not the proper forum in which to pursue a civil rights program complaint,” and provided the appellant with instructions for filing a discrimination claim with Office of the Assistant Secretary for Civil Rights).
- 287 Nathan Rosenberg & Bryce Wilson Stucki, *How USDA Distorted Data To Conceal Decades of Discrimination Against Black Farmers*, THE COUNTER (Jun. 26, 2019), <https://the-counter.org/usda-black-farmers-discrimination-tom-vilsack-reparations-civil-rights/>; Ellyn Ferguson, *IG Finds A Familiar Pattern of Delay at USDA Civil Rights Office*, ROLL CALL (Feb. 15, 2022); Press Release, Sen. Ben Ray Lujan, *Luján, Grassley Express Concern over USDA Backlog of Civil Complaints* (May 5, 2022), <https://www.lujan.senate.gov/newsroom/press-releases/lujan-grassley-express-concern-over-usda-backlog-of-civil-complaints/>.
- 288 *Hearing on Office of the Inspector General Report on USDA Oversight of Civil Rights Complaints Before the H. Committee on Agric.*, 117 Cong. 30 (2022) <https://www.congress.gov/event/117th-congress/house-event/LC68202/text?s=1&r=15> (statement of Inspector Gen. Phyllis K. Fong) (“In FY 2019, OASCR processed program complaints within 799 days on average—significantly in excess of its 180-day goal stated within Departmental guidance”); U.S. DEPT. OF AGRIC., DEP’T MANUAL 4330-001, PROCEDURES FOR PROCESSING PROGRAM COMPLAINTS AND CONDUCTING CIVIL RIGHTS COMPLIANCE REVIEWS IN USDA CONDUCTED PROGRAMS AND ACTIVITIES (Oct. 18, 2000); U.S. DEPT. OF AGRIC., DEP’T REG. 4330-002, NONDISCRIMINATION IN PROGRAMS AND ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM USDA (Mar. 3, 1999).
- 289 U.S. DEP’T. OF AGRIC., REPORT OF CIVIL RIGHTS COMPLAINTS, RESOLUTIONS AND ACTIONS FOR FISCAL YEAR 2021, 5 (2022), <https://www.usda.gov/sites/default/files/documents/report-civil-rights-complaints-resolutions-actions-fy-2021.pdf>.
- 290 U.S. DEP’T. OF AGRIC., REPORT OF CIVIL RIGHTS COMPLAINTS, RESOLUTIONS AND ACTIONS FOR FISCAL YEAR 2019, 10 (2020), <https://www.usda.gov/sites/default/files/documents/fy2019-civil-rights-complaints-report.pdf>. Some scholars recommend fast-tracking certain discrimination complaints through the OASCR process, including several related to loan making, in recognition of the particularly devastating effects that a discriminatory adverse loan decision can have. FOOD LAW AND POL’Y CLINIC, HARV. L. SCH., SUPPORTING CIVIL RIGHTS AT USDA: OPPORTUNITIES TO REFORM THE USDA OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS 18-19 (Apr. 2021), https://chlp.org/wp-content/uploads/2013/12/FLPC_OAS-CR-Issue-Brief.pdf.
- 291 FOOD LAW AND POL’Y CLINIC, HARV. L. SCH., SUPPORTING CIVIL RIGHTS AT USDA: OPPORTUNITIES TO REFORM THE USDA OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS 20 (Apr. 2021), https://chlp.org/wp-content/uploads/2013/12/FLPC_OAS-CR-Issue-Brief.pdf.
- 292 7 U.S.C. § 7996(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.).”).
- 293 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.
- 294 FARM SERV. AGENCY, U.S. DEPT. OF AGRIC., EQUITABLE RELIEF FAQ (2018), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Outreach/pdfs/usda_fsa_equitable_relief_faq_final_8-2022.pdf.
- 295 7 U.S.C. §§ 7996(b), 7996(e), 7996(e)(4).



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