

SOURCE: 64 FR 7378, Feb. 12, 1999, unless otherwise noted.

**§§ 762.1–762.100 [Reserved]**

**§ 762.101 Introduction.**

(a) *Scope.* This subpart contains regulations governing Operating Loans and Farm Ownership loans guaranteed by the Farm Service Agency. This subpart applies to lenders, holders, borrowers, Agency personnel, and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans.

(b) *Policy.* The Agency issues guarantees on loans made to qualified loan applicants without regard to race, color, religion, sex, national origin, marital status, or age, provided the loan applicant can enter into a legal and binding contract, or whether all or part of the applicant's income derives from any public assistance program or whether the applicant, in good faith, exercises any rights under the Consumer Protection Act.

(c) *Lender list and classification.* (1) The Agency maintains a current list of lenders who express a desire to participate in the guaranteed loan program. This list is made available to farmers upon request.

(2) Lenders who participate in the Agency guaranteed loan program will be classified into one of the following categories:

(i) Standard Eligible Lender under § 762.105,

(ii) Certified Lender, or

(iii) Preferred Lender under § 762.106.

(3) Lenders may continue to make loans under Approved Lender Program (ALP) agreements until they expire; however, these agreements will not be renewed when they expire. All ALP agreements with farm credit institutions will expire on February 12, 2001.

(d) *Type of guarantee.* Guarantees are available for both a loan note or a line of credit. A loan note is used for a loan of fixed amount and term. A line of credit has a fixed term, but no fixed amount. The principal amount outstanding at any time, however, may not exceed the line of credit ceiling contained in the contract. Both guarantees are evidenced by the same loan guarantee form.

(e) *Termination of loan guarantee.* The loan guarantee will automatically terminate as follows:

(1) Upon full payment of the guaranteed loan. A zero balance within the period authorized for advances on a line of credit will not terminate the guarantee;

(2) Upon payment of a final loss claim; or

(3) Upon written notice from the lender to the Agency that a guarantee is no longer desired provided the lender holds all of the guaranteed portion of the loan. The loan guarantee will be returned to the Agency office for cancellation within 30 days of the date of the notice by the lender.

**§ 762.102 Abbreviations and definitions.**

(a) *Abbreviations.*

ALP—Approved lender program

CLP—Certified lender program

CONACT—Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.)

EPA—Environmental Protection Agency

EIS—Environmental impact statement

EM—Emergency loans

FO—Farm ownership loans

FSA—Farm Service Agency

OL—Operating loans

PLP—Preferred lender program

SW—Soil and water

USDA—United States Department of Agriculture

(b) *Definitions.*

*Additional security.* Collateral in excess of that needed to fully secure the loan.

*Agency.* The Farm Service Agency, including its employees and state and area committee members, and any successor agency.

*Allonge.* An attachment or an addendum to a note.

*Applicant.* For guaranteed loans, the lender requesting a guarantee is the applicant. The party applying to the lender for a loan will be considered the loan applicant.

*Aquaculture.* The husbandry of aquatic organisms in a controlled or selected environment. An aquatic organism is any fish, amphibian, reptile, or aquatic

plant. An aquaculture operation is considered to be a farm only if it is conducted on the grounds which the loan applicant owns, leases, or has an exclusive right to use. An exclusive right to use must be evidenced by a permit issued to the loan applicant and the permit must specifically identify the waters available to be used by the loan applicant only.

*Assignment of guaranteed portion.* A process by which the lender transfers the right to receive payments or income on the guaranteed loan to another party, usually in return for payment in the amount of the loan's guaranteed principal. The lender retains the unguaranteed portion in its portfolio and receives a fee from the purchaser or assignee to service the loan, and receive and remit payments according to a written assignment agreement. This assignment can be reassigned or sold multiple times.

*Average farm customers.* Those conventional farm borrowers who are required to pledge their crops, livestock, and other chattel and real estate security for the loan. This does not include those high-risk farmers with limited security and management ability who are generally charged a higher interest rate by conventional agricultural lenders. Also, this does not include those low-risk farm customers who obtain financing on a secured or unsecured basis, who have as collateral such items as savings accounts, time deposits, certificates of deposit, stocks and bonds, and life insurance, which they are able to pledge for the loan.

*Basic Security.* All farm machinery, equipment, vehicles, foundation and breeding livestock herds and flocks, including replacements, and real estate which serves as security for a loan guaranteed by the Agency.

*Beginning farmer or rancher.* A beginning farmer or rancher is an individual or entity who:

(1) Meets the loan eligibility requirements for OL or FO assistance, as applicable, in accordance with this subpart;

(2) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 years. This requirement applies to all members of an entity;

(3) Will materially and substantially participate in the operation of the farm or ranch:

(i) In the case of a loan made to an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(ii) In the case of a loan made to an entity, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that the individual provide some amount of the management, or labor and management necessary for day-to-day activities, such that if the individual did not provide these inputs, operation of the farm or ranch would be seriously impaired;

(4) Agrees to participate in any loan assessment and financial management programs required by Agency regulations;

(5) Does not own real farm or ranch property or who, directly or through interests in family farm entities, owns real farm or ranch property, the aggregate acreage of which does not exceed 30 percent of the average farm or ranch acreage of the farms or ranches in the county where the property is located. If the farm is located in more than one county, the average farm acreage of the county where the loan applicant's residence is located will be used in the calculation. If the applicant's residence is not located on the farm or if the loan applicant is an entity, the average farm acreage of the county where the major portion of the farm is located will be used. The average county farm or ranch acreage will be determined from the most recent Census of Agriculture developed by the U.S. Department of Commerce, Bureau of the Census or USDA;

(6) Demonstrates that the available resources of the loan applicant and spouse (if any) are not sufficient to enable the loan applicant to enter or continue farming or ranching on a viable scale; and

(7) In the case of an entity:

(i) All the members are related by blood or marriage; and

(ii) All the stockholders in a corporation are beginning farmers or ranchers.

*Borrower.* An individual or entity which has outstanding obligations to the lender under any Agency loan or loan guarantee program. A borrower includes all parties liable for Agency debt, including collection-only borrowers, except those whose total loan and accounts have been voluntarily or involuntarily foreclosed or liquidated, or who have been discharged of all Agency debt.

*Capital leases.* Agreements under which the lessee effectively acquires ownership of the asset being leased. A lease is a capital lease if it meets any one of the following criteria:

(1) The lease transfers ownership of the property to the lessee at the end of the lease term.

(2) The lessee has the right to purchase the property for significantly less than its market value at the end of the lease.

(3) The term of the lease is at least 75 percent of the estimated economic life of the leased property.

(4) The present value of the minimum lease payments equals or exceeds 90 percent of the fair market value of the leased property.

*Cash flow budget.* A projection listing all anticipated cash inflows (including all farm income, nonfarm income and all loan advances) and all cash outflows (including all farm and nonfarm debt service and other expenses) to be incurred by the borrower during the period of the budget. Cash flow budgets for loans under \$50,000 do not require income and expenses itemized by categories. Cash flow budgets for loans under \$125,000 do not require income and expenses itemized by categories. It may also be prepared with a breakdown of cash inflows and outflows for each month of the review period and includes the expected outstanding operating credit balance for the end of each month. The latter type is referred to as a "monthly cash flow budget".

*Collateral.* Property pledged as security for a loan to ensure repayment of an obligation.

*Conditional commitment.* The Agency's commitment to the lender that the ma-

terial it has submitted is approved subject to the completion of all conditions and requirements contained therein.

*Consolidation.* The combination of outstanding principal and interest balance of two or more OL loans.

*Controlled.* When a director or employee has more than a 50 percent ownership in the entity or, the director or employee, together with relatives of the director or employee, have more than a 50 percent ownership.

*Cooperative.* An entity which has farming as its purpose and whose members have agreed to share the profits of the farming enterprise. The entity must be recognized as a farm cooperative by the laws of the State in which the entity will operate a farm.

*Cosigner.* A party who joins in the execution of a promissory note to assure its repayment. The cosigner becomes jointly and severally liable to comply with the terms of the note. In the case of an entity applicant, the cosigner cannot be a member, partner, joint operator, or stockholder of the entity.

*County average yield.* The historical average yield for a commodity in a particular political subdivision, as determined or published by a government entity or other recognized source.

*Debt writedown.* To reduce the amount of the borrower's debt to that amount that is determined to be collectible based on an analysis of the security value and the borrower's ability to pay.

*Deferral.* A postponement of the payment of interest or principal or both. Principal may be deferred in whole or in part, interest may only be partially deferred.

*Depreciation and amortization expenses.* An annual allocation of the cost or other basic value of tangible capital assets, less salvage value, over the estimated life of the unit (which may be a group of assets), in a systematic and rational manner.

*Direct loan.* A loan serviced by the Agency as lender.

*Entity.* Cooperatives, corporations, partnerships, joint operations, trusts, or limited liability companies.

*Family farm.* A farm which:

(1) Produces agricultural commodities for sale in sufficient quantities so

that it is recognized in the community as a farm rather than a rural residence;

(2) Provides enough agricultural income by itself, including rented land, or together with any other dependable income to enable the borrower to:

(i) Pay necessary family living and operating expenses;

(ii) Maintain essential chattel and real property; and

(iii) Pay debts;

(3) Is managed by:

(i) The borrower when a loan is made to an individual; or,

(ii) The members, stockholders, partners, or joint operators responsible for operating the farm when a loan is made to an entity;

(4) Has a substantial amount of the labor requirement for the farm and nonfarm enterprise provided by:

(i) The borrower and the borrower's immediate family for a loan made to an individual; or

(ii) The members, stockholders, partners, or joint operators responsible for operating the farm, along with the families of these individuals, for a loan made to an entity; and

(5) May use a reasonable amount of full-time hired labor and seasonal labor during peak load periods.

*Family living expenses.* Any withdrawals from income to provide for needs of family members.

*Family members.* The immediate members of the family residing in the same household with the individual borrower, or, in the case of an entity, with the operator.

*Farm.* A tract or tracts of land, improvements, and other appurtenances which are used or will be used in the production of crops, livestock, or aquaculture products for sale in sufficient quantities so that the property is recognized as a farm rather than a rural residence. The term "farm" also includes any such land and improvements and facilities used in a nonfarm enterprise. It may also include the residence which, although physically separate from the farm acreage, is ordinarily treated as part of the farm in the local community.

*Feasible plan.* A plan is feasible when a borrower or applicant's cash flow budget indicates that there is sufficient cash inflow to pay all cash out-

flow each year during the term of the loan. If a loan approval or restructuring action exceeds one production cycle and the planned cash flow budget is atypical due to cash or inventory on hand, new enterprises, carryover debt, atypical planned purchases, important operating changes, or other reasons, a cash flow budget must be prepared that reflects a typical cycle. If the request is for only one cycle, a feasible plan for only one cycle is required for approval.

*Fish.* Any aquatic, gilled animal commonly known as "fish" as well as mollusks, or crustaceans (or other invertebrates) produced under controlled conditions (that is, feeding, tending, harvesting, and such other activities as are necessary to properly raise and market the products) in ponds, lakes, streams, artificial enclosures, or similar holding areas.

*Fixture.* An item of personal property attached to real estate in such a way that it cannot be removed without defacing or dismantling the structure, or substantially damaging the structure itself.

*Graduation.* The Agency's determination that a borrower of a direct loan, is financially stable enough to refinance that loan with a commercial lender with or without a guarantee.

*Guaranteed loan.* A loan made and serviced by a lender for which the Agency has entered into a lenders agreement and for which the Agency has issued a loan note guarantee. This term also includes lines of credit except where otherwise indicated.

*Hazard insurance.* Includes fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, builder's risk, public liability, property damage, flood or mudslide, workers compensation, or any similar insurance that is available and needed to protect the security, or that is required by law.

*Holder.* The person or organization other than the lender who holds all or a part of the guaranteed portion of an Agency guaranteed loan but who has no servicing responsibilities. When the lender assigns a part of the guaranteed loan to an assignee by way of execution of an assignment form, the assignee becomes a holder.

*In-house expenses.* Expenses associated with credit management and loan servicing by the lender and the lender's contractor. In-house expenses include, but are not limited to: employee salaries, staff lawyers, travel, supplies, and overhead.

*Interest assistance agreement.* The signed agreement between the Agency and the lender setting forth the terms and conditions of the interest assistance.

*Interest assistance anniversary date.* Date on which interest assistance reviews and claims will be effective. This date is established by the lender. Once established, it will not change unless the loan is restructured.

*Interest assistance review.* The yearly review process which includes an analysis of the borrower or applicant's farming operation and need for continued interest assistance, completion of the needs test and request for continuation of interest assistance.

*Joint operation.* Individuals that have agreed to operate a farm or farms together as a business unit. The real and personal property may be owned separately or jointly by the individuals.

*Land development.* Items such as terracing, clearing, leveling, fencing, drainage and irrigation systems, ponds, forestation, permanent pastures, perennial hay crops, basic soil amendments, and other items of land improvements which conserve or permanently enhance productivity.

*Lender.* The organization making and servicing the loan or advancing and servicing the line of credit which is guaranteed under the provisions of Agency regulations. The lender is also the party requesting a guarantee.

*Lender's agreement.* The appropriate Agency form executed by the Agency and the lender setting forth the loan responsibilities of the lender and agency when the loan guarantee is issued.

*Lien.* A legally enforceable hold or claim on the property of another obtained as security for the repayment of indebtedness or an encumbrance on property to enforce payment of an obligation.

*Liquidation expenses.* The cost of an appraisal, due diligence evaluation, environmental assessment, outside attorney fees and other costs incurred as a

direct result of liquidating the security for the guaranteed loan. Liquidation fees do not include in-house expenses.

*Loan or line of credit agreement.* A document which contains certain lender and borrower agreements, conditions, limitations, and responsibilities for credit extension and acceptance in a loan format where loan principal balance may fluctuate throughout the term of the document.

*Loan applicant.* The party applying to a lender for a guaranteed loan or line of credit.

*Loan transaction.* Any loan approval or servicing action.

*Loss claim.* A request made to the Agency by a lender to receive a reimbursement based on a percentage of the lender's loss on a loan covered by an Agency guarantee.

*Loss rate.* The net amount of guaranteed OL, FO, and SW loss claims paid on loans made in the past 7 years divided by the total loan amount of OL, FO, and SW made in the past 7 years.

*Major deficiency.* A deficiency that directly affects the soundness of the loan.

*Majority interest.* Any individual or a combination of individuals owning more than a 50 percent interest in a cooperative, corporation, joint operation, or partnership.

*Market value.* The amount which an informed and willing buyer would pay an informed and willing, but not forced, seller in a completely voluntary sale.

*Minor deficiency.* A deficiency that violates Agency regulations, but does not affect the soundness of a loan.

*Mortgage.* A legal instrument giving the lender a security interest or lien on real or personal property of any kind.

*Negligent servicing.* The failure to perform those services which would be considered normal industry standards of loan management or failure to comply with any servicing requirement of this subpart or the lenders agreement or the guarantee. The term includes the concept of a failure to act or failure to act timely consistent with actions of a reasonable lender in loan making, servicing, and collection.

*Net farm operating income.* The gross income generated by a farming operation annually, minus all yearly operating expenses (including withdrawals from entities for living expenses), operating loan interest, interest on term debt and capital lease payments, and depreciation and amortization expenses. Net farm operating income does not include off-farm income and social security taxes, carryover debt and delinquent interest.

*Net recovery value.* The market value of the security property assuming that it will be acquired by the lender, and sold for its highest and best use, less the lender's costs of property acquisition, retention, maintenance, and liquidation.

*Nonessential asset.* Assets in which the borrower has an ownership interest that do not contribute an income to pay essential family living expenses or maintain a sound farming operation, and are not exempt from judgment creditors.

*Normal income security.* All security not considered basic security.

*Partnership.* Any entity consisting of two or more individuals who have agreed to operate a farm as one business unit. The entity must be recognized as a partnership by the laws of the State in which the entity will operate and must be authorized to own both real estate and personal property and to incur debts in its own name.

*Potential liquidation value.* The amount of the lender's protective bid at the foreclosure sale. Potential liquidation value is determined by an independent appraiser using comparables from other forced liquidation sales.

*Present value.* The present worth of a future stream of payments discounted to the current date.

*Presidentially-designated emergency.* A major disaster or emergency designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*)

*Primary security.* The minimum amount of collateral needed to fully secure a proposed loan.

*Principals of borrowers.* Includes owners, officers, directors, entities and

others directly involved in the operation and management of a business.

*Protective advances.* Advances made by a lender to protect or preserve the collateral itself from loss or deterioration. Protective advances include but are not limited to:

- (1) Payment of delinquent taxes,
- (2) Annual assessments,
- (3) Ground rents,
- (4) Hazard or flood insurance premiums against or affecting the collateral,
- (5) Harvesting costs,
- (6) Other expenses needed for emergency measures to protect the collateral.

*Recapture.* The amount that a guaranteed lender is entitled to recover from a guaranteed loan borrower in consideration for the lender writing down a portion of their guaranteed loan debt when that loan was secured by real estate and that real estate increases in value. Also, the act of collecting shared appreciation.

*Related by blood or marriage.* Individuals who are connected to one another as husband, wife, parent, child, brother, or sister.

*Relative.* An individual or spouse and anyone having the following relationship to either: parent, son, daughter, sibling, stepparent, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, uncle, aunt, nephew, niece, grandparent, granddaughter, grandson, and the spouses of the foregoing.

*Rescheduling.* To rewrite the rates and terms of a single note or line of credit agreement.

*Restructuring.* Changing terms of a debt through either a rescheduling, deferral, or writedown or a combination thereof.

*Security.* Property of any kind subject to a real or personal property lien. Any reference to "collateral" or "security property" shall be considered a reference to the term "security."

*Shared appreciation agreement.* An agreement between a guaranteed lender and borrower that requires a borrower that has received a write down on a guaranteed loan secured by real estate to repay the lender some or all of the writedown received, based on a percentage of any increase in the value

of that real estate at some future date, if certain conditions exist.

*State.* The major political subdivision of the United States and the organization of program delivery for the Agency.

*Subordination.* A document executed by a lender to relinquish their priority of lien in favor of another lender that provides the other lender with a priority right to collect a debt of a specific dollar amount from the sale of the same collateral.

*Subsequent loans.* Any loans processed by the Agency after an initial loan has been made to the same borrower.

*Transfer and assumption.* The conveyance by a debtor to an assuming party of the assets, collateral, and liabilities of the loan in return for the assuming party's binding promise to pay the debt outstanding.

*Typical plan.* A projected income and expense statement listing all anticipated cash flows for a typical 12-month production cycle; including all farm and nonfarm income and all expenses (including debt service) to be incurred by the borrower during such period.

*Unaccounted for security.* Items, as indicated on the lender's loan application, request for guarantee, or any interim agreements provided to the Agency, that are security for the guaranteed loan that were misplaced, stolen, sold, or otherwise missing, where replacement security was not obtained or the proceeds from their sale have not been applied to the loan.

*United States.* The United States itself, each of the several States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

*Veteran.* Any person who served in the military, naval, or air service during any war as defined in section 101(12) of title 38, United States Code.

[64 FR 7378, Feb. 12, 1999, as amended at 66 FR 7567, Jan. 24, 2001; 68 FR 7695, Feb. 18, 2003; 69 FR 5262, Feb. 4, 2004; 70 FR 56107, Sept. 26, 2005]

#### § 762.103 Full faith and credit.

(a) *Fraud and misrepresentation.* The loan guarantee constitutes an obligation supported by the full faith and

credit of the United States. The Agency may contest the guarantee only in cases of fraud or misrepresentation by a lender or holder, in which:

(1) The lender or holder had actual knowledge of the fraud or misrepresentation at the time it became the lender or holder, or

(2) The lender or holder participated in or condoned the fraud or misrepresentation.

(b) *Lender violations.* The loan guarantee cannot be enforced by the lender, regardless of when the Agency discovers the violation, to the extent that the loss is a result of:

(1) Violation of usury laws;

(2) Negligent servicing;

(3) Failure to obtain the required security; or,

(4) Failure to use loan funds for purposes specifically approved by the Agency.

(c) *Enforcement by holder.* The guarantee and right to require purchase will be directly enforceable by the holder even if:

(1) The loan guarantee is contestable based on the lender's fraud or misrepresentation; or

(2) The loan note guarantee is unenforceable by the lender based on a lender violation.

#### § 762.104 Appeals.

(a) The loan applicant or borrower and lender must jointly execute the written request for review of an alleged adverse decision made by the Agency. However, in cases where the Agency has denied or reduced the amount of the final loss payment, the decision may be appealed by the lender only.

(b) A decision made by the lender adverse to the borrower is not a decision by the Agency, whether or not concurred in by the Agency, and may not be appealed.

(c) The lender or Agency may request updated information from the borrower to implement an appeal decision.

(d) Appeals will be handled in accordance with parts 11 and 780 of this title.

#### § 762.105 Eligibility and substitution of lenders.

(a) *General.* To participate in FSA guaranteed farm loan programs, a lender must meet the eligibility criteria in