

The Government Changes the Rules Mid-Game

An Explanation of the Credit Provisions of the FAIR Act

Part One — Direct Loan and Primary Loan Servicing Program Changes

by Randi Ilyse Roth

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I. Introduction

The Credit Title of the new Federal Agricultural Improvement and Reform Act¹—called the “FAIR” Act—changes the law in many ways that are bad for family farmers. Progressive farm groups around the country have been working since the law’s passage to persuade Congress and the United States Department of Agriculture (USDA) to fix some of the worst provisions. Some of those efforts have been successful, but most of the provisions to which farmers object are still in effect.

This article will first give brief descriptions of some of the most important parts of the FAIR Act Credit Title and will then explain how those changes fit into the context of the credit programs. That way, readers who want just a quick checklist of changes can simply scan the first part of the article, and readers who want a detailed explanation can read the whole thing.

Some of the FAIR Act changes took effect immediately upon enactment of the bill: on April 4, 1996. Others of the changes took effect 90 days after enactment of the bill: on about July 3, 1996.² As we discuss the important changes in the detailed sections of this article, we will note whether the provision being discussed became effective on April 4 or 90 days after April 4.

This article only explains the FAIR Act changes to the Farm Service Agency’s (FSA’s) major direct loan-making programs³ and to primary loan servicing. Changes to the

¹ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127 (Apr. 4, 1996), 100 Stat. 888-1197.

² It was unclear from the Act how USDA would count the days. Also, although the 90 days have already passed as this article is being written, we have not yet confirmed that all of USDA—or even all of FSA—has counted in the same way. Therefore, we will continue to refer to the time when those provisions became effective as “90 days after enactment” or “90 days after April 4, 1996” rather than as a specific date.

³ This article will cover the operating loan program (OL) and the farm ownership program (FO). The emergency loan program (EM) changes will be addressed in a later issue of this newsletter.

guaranteed loan program will be addressed in a later edition *Farmers' Legal Action Report*. Changes to the preservation loan servicing programs and to the rules for treatment of inventory property are explained in "The Government Changes the Rules Mid-Game, An Explanation of the Credit Provisions of the FAIR Act: Part Two—Preservation Loan Servicing Program and Inventory Property Changes," *Farmers' Legal Action Report*, Vol. 11, No. 1 (1996).

As this article is being written, the regulations that will implement most of the credit provisions of the FAIR Act have not yet been published. Therefore, our interpretations are based solely on the statute, the Conference Report that accompanies the statute, and the Farm Credit Notices (FCs) that are published by FSA.

II. Checklist of Important Changes

A. Loan Making

Some of the most important changes in the loan-making programs include:

1. *Funding*. The FAIR Act established the funding levels for the FSA credit programs for the next seven years. There is not a lot of money in these programs, and much of what is there is targeted to beginning farmers.
 - The direct FO program is scheduled to have \$85 million per year nationwide. Seventy percent of that is for "qualified beginning farmers and ranchers."⁴
 - The direct OL program is scheduled to have \$500 million per year nationwide. Twenty-five to 35 percent of that is for "qualified beginning farmers and ranchers."⁵
2. *Prohibition on Refinancing*. Before passage of the FAIR Act, FSA loans could be used to refinance existing indebtedness. The FAIR Act now generally prohibits the use of OL⁶ and FO⁷ loans for refinancing (with some exceptions). The details are explained below in Section III.B.1 on page 7 for FO loans and in Section IV.B.2 on page 10 for OL loans.
3. *Preferences*. The FAIR Act restated a set of preferences for the making of FO loans.⁸
4. *New Financing Arrangements*. The FAIR Act created several new kinds of financing arrangements, including a line of credit option for operating loans⁹

⁴ FAIR Act, § 641. (Sixty percent of that 70 percent is for "down payment" loans. See the description in Section III.A.4 on page 7.)

⁵ FAIR Act, § 641. (In fiscal years 1996 through 1998, 25 percent will be reserved for qualified beginning farmers; in fiscal year 1999, 30 percent shall be reserved; and for each of the fiscal years 2000 through 2002, 35 percent shall be reserved.)

⁶ FAIR Act, § 612, effective 90 days after April 4, 1996.

⁷ FAIR Act, § 602, effective April 4, 1996.

⁸ FAIR Act, § 602(a), effective April 4, 1996.

⁹ FAIR Act, § 614, effective April 4, 1996.

and a special joint financing program for farm ownership loans.¹⁰ These offer special advantages not found in the regular OL and FO programs.

5. *Hazard Insurance.* The FAIR Act created a new requirement that hazard insurance be made a condition of receiving an OL¹¹ or FO¹² loan. These provisions will not be implemented until the Secretary of Agriculture makes certain determinations.
6. *Debt Forgiveness.* The FAIR Act created a new concept of “debt forgiveness”—but it is not a benefit; it is a penalty. Many farmers who have received “debt forgiveness” in the past are now *ineligible* for farm ownership and operating loans.¹³ There are some exceptions.

The basic definition of “debt forgiveness” is:¹⁴

Reduce or terminate a direct or guaranteed loan resulting in a loss to the Secretary by write-down,¹⁵ write-off,¹⁶ debt settlement, payment of a loss claim on a guaranteed loan, or a discharge in bankruptcy.¹⁷

FSA interprets the definition differently, though, depending on whether the farmer is trying to get a new loan or primary loan servicing. (The details are explained below in Section III.B.5 (Rule #2) on page 8 for FO loans and in section IV.B.7 (Rule #3) on page 13 for OL loans.)

7. *Other New Eligibility Limits.* The FAIR Act created other eligibility limits on both OL and FO loans, including a ban on the making of operating loans to delinquent borrowers.¹⁸

¹⁰ FAIR Act, § 604, effective April 4, 1996.

¹¹ FAIR Act, § 612(a), effective 90 days after April 4, 1996.

¹² FAIR Act, § 602, effective April 4, 1996.

¹³ FAIR Act, § 648(b), effective April 4, 1996.

¹⁴ FAIR Act, § 640(2). The exact language is:

“(12) Debt Forgiveness.—

“(A) In General.—Except as provided in subparagraph (B), the term ‘debt forgiveness’ means reducing or terminating a farmer program loan made or guaranteed under this title, in a manner that results in a loss to the Secretary, through—

“(i) writing down or writing off a loan under section 353;

“(ii) compromising, adjusting, reducing, or charging-off a debt or claim under section 331;

“(iii) paying a loss on a guaranteed loan under section 357; or

“(iv) discharging a debt as a result of bankruptcy.

“(B) Loan Restructuring.—The term ‘debt forgiveness’ does not include consolidation, rescheduling, reamortization, or deferral.”

¹⁵ Note that if payment on a shared appreciation agreement enabled the Secretary to recoup all prior losses, arguably the write-down did not result in a *net* “loss to the Secretary.”

¹⁶ Note that if the payment on a recapture agreement enabled the Secretary to recoup all prior losses, arguably the write-off did not result in a *net* “loss to the Secretary.”

¹⁷ Note that a bankruptcy in which FSA/FmHA debt was not discharged does not result “in a loss to the Secretary.”

¹⁸ FAIR Act, § 648(b), effective April 4, 1996.

8. *The Budget Act*. As explained above, the FAIR Act made it much more difficult for farmers to qualify for certain types of loans. Shortly after the FAIR Act was passed, Congress received a great deal of pressure from farmers who figured out that the Act would eliminate their operating and emergency loans for the 1996 growing season. Congress responded by suspending the FAIR Act changes to the operating and emergency loan rules *for 1996 only*. The details are explained in Section IV.B.1 on page 10.

B. Primary Loan Servicing

Some of the most important changes in the primary loan servicing program include:

1. *Net Recovery Value Buyout Eliminated*. The net recovery value buyout program was eliminated by the FAIR Act. It was replaced by a current market value buyout program.¹⁹
2. *Debt Forgiveness*. The debt forgiveness concept created by the FAIR Act (see explanation above) also applies to some aspects of primary loan servicing.²⁰ FSA interprets the definition of debt forgiveness differently for primary loan servicing than for loan making. The details are explained in Section V.B.2 on page 17.
3. *Cash Flow Changes*. The FAIR Act changed the formula that FSA will use to measure farmers' cash flow for the purpose of determining primary loan servicing eligibility.²¹ The margin is increased from 105 percent to 110 percent, and the margin will be applied to virtually all of the borrower's expenses rather than just to debt service obligations.
4. *Good Faith Definition Changed*. Now it is easier for the government to show that a farmer acted in bad faith. See the details in section V.B.4 on page 18.

III. Making Farm Ownership Loans: The Details

This section will first explain the basics of FSA's direct farm ownership (FO) loan program and will then explain the FAIR Act changes in more detail.

A. The Basics

This section explains the basic provisions of the direct FO loan program.

1. Objective

The objective of the farm ownership loan program is to provide credit and management assistance to eligible farmers and ranchers to become owners-operators of family-sized farms or to continue such operations when credit is not available elsewhere.²²

¹⁹ FAIR Act, § 645(1), effective 90 days after April 4, 1996.

²⁰ FAIR Act, § 648(b), effective April 4, 1996.

²¹ FAIR Act, § 645(1), effective 90 days after April 4, 1996.

²² 7 C.F.R. § 1943.2.

2. Limits

The total amount of outstanding direct farm ownership (FO), soil and water (SW), and recreation loan (RL) principal balance (including the proposed new loan) must be the lesser of \$200,000 or the market value of security.²³

3. Terms

The maximum *pay back period* on an FO loan is 40 years.²⁴ The regular *interest rate* as of November 1, 1996, is 7.5 percent; the limited resource interest rate is 5 percent. The *security requirement* for an FO loan is the lesser of 150 percent of the value of the loan or all of the real estate owned by the applicant.²⁵

4. The Beginning Farmer FO Program

FSA has a special “beginning farmer” FO program.²⁶ This is also sometimes referred to as the “down payment loan” program. Under this program, the farmer must provide at least a 10 percent down payment, and a direct FO may be made to provide up to another 30 percent of the purchase price or appraised value, whichever is lower. The main benefits to the farmer are that the interest rate for the FO is only 4 percent, and the security requirement for the FO is limited to the property being acquired with the FO loan. (Other FSA security requirements—such as the 150 percent rule described above—do not apply.)

To be eligible for this program, an applicant must meet FSA’s “beginning farmer” definition.²⁷ Other eligibility rules include:

- Credit (from FSA and other creditors) must account for no more than 90 percent of cost (lesser of purchase price or appraised value);
- The farm must cost no more than \$250,000 (lesser of purchase price or appraised value); and
- The other creditors’ loans must be amortized for at least 30 years, and there must be no balloon within 10 years.

An FO loan under this program will be amortized over ten years or less, to be paid in equal annual installments.

²³ 7 C.F.R. § 1943.17.

²⁴ 7 C.F.R. § 1943.18(a).

²⁵ 7 C.F.R. § 1943.19. (Under some circumstances, some chattel property will be taken as additional security.)

²⁶ 7 U.S.C. § 1935; 7 C.F.R. § 1943.14.

²⁷ 7 U.S.C. § 1991(a)(11), as amended by § 640(1) of the FAIR Act; 7 C.F.R. § 1943.4. Some major points in the definition include: has not operated a farm or ranch, or has operated a farm or ranch for not more than ten years; materially and substantially participates in the operation of the farm or ranch and provides substantial day-to-day labor and management of the farm or ranch; agrees to participate in loan assessment, borrower training, and financial management programs as required by USDA; does not own land or owns land the aggregate acreage of which does not exceed 25 percent of the median acreage of the farms or ranches in the county where the applicant’s operations are located [this criterion does not apply to operating loans]; available resources of the applicant and spouse are not sufficient to enable applicant to continue farming on a viable scale.

5. Eligibility and Approval

The basic eligibility criteria that apply to both FO and operating loans (OLs) are described in this section. Special, additional rules for each type of program are described in Section III.B.5 on page 8 for FO loans and in Section IV.B.7 on page 13 for OL loans.

The FSA county committee makes decisions about an applicant's *eligibility*. There are nine basic eligibility criteria for all direct FO and OL loans.²⁸ The applicant must:

- Be a citizen or lawful alien;
- Possess legal capacity;
- Have sufficient applicable education and/or on-the-job training (one year within the past five years) that indicates the managerial ability necessary to ensure reasonable prospects of success;
- Be unable to get sufficient credit elsewhere at reasonable rates and terms;
- Be the owner/operator²⁹ of a not larger than family-sized farm after the loan is closed;³⁰
- Be at least the age of majority;³¹
- Have an adequate credit history;
- Be creditworthy³² (it is important to know that FSA regulations contain a long list of factors that FSA *cannot* use to assert that the borrower is not creditworthy³³); and
- Must not have an outstanding recorded judgment against him or her by the United States in a federal court other than the United States Tax Court.³⁴ (Agency loan or grant funds may not be used to satisfy the judgment.)

²⁸ The first five criteria are from 7 C.F.R. § 1943.12 (FO loans) and 7 C.F.R. § 1941.12 (OLs).

²⁹ For operating loans, it is permissible to be a tenant/operator. 7 C.F.R. § 1941.12(a)(7).

³⁰ See FC-68 for newest "family farmer" definition.

³¹ The next two criteria are from 7 C.F.R. § 1910.5.

³² 7 C.F.R. § 1910.5(c). Also see AN 3199 and AN 3148.

³³ The factors that FSA may not use to support an assertion that the borrower is not creditworthy include: (a) foreclosure, judgment, or delinquent payments that occurred more than 36 months before application if there are no recent similar situations; (b) delinquencies that have been resolved through loan servicing; (c) isolated incidents of delinquent payments that do not represent a general pattern of unsatisfactory or slow payment; (d) no credit history cannot be used as bad credit history; (e) recent bankruptcy, foreclosure, judgment, or delinquent payments if the circumstances causing the situation were of a temporary nature and beyond the borrower's control or the borrower refused to pay because of a justifiable dispute about goods or services; (f) nonpayment due to circumstances beyond the borrower's control; (g) the fact that an applicant or borrower filed bankruptcy can never be used as an indication of not being creditworthy (however, recent regulations provide that the circumstances causing the nonpayment of debt—i.e., whether nonpayment was beyond the applicant's or borrower's control—may be considered) [61 Fed. Reg. 35922 (July 9, 1996) (to be codified at 7 C.F.R. § 1910.5(c)(5))]; and (h) debt settlement (with some exceptions). The old rule which said that prior debt restructuring cannot be a factor in determinations of creditworthiness [old 7 U.S.C. § 2001(k)] was eliminated by § 645(2) of the FAIR Act.

³⁴ 61 Fed. Reg. 35921 (July 9, 1996) (to be codified at 7 C.F.R. § 1910.4(h)(2)).

The Agricultural Credit Manager makes decisions about an applicant's *approval*. The two basic approval criteria are:

- That the applicant has sufficient repayment ability; and
- That the applicant has sufficient security for the loan.

B. What's Changed

This section explains the major parts of the FO loan program that were changed by the FAIR Act.

1. Purposes

The FAIR Act rewrote the list of permitted purposes for FO loans.³⁵ The program now has a long list of permitted purposes that focuses on: purchasing or enlarging a farm, constructing and/or improving facilities, providing land and water development, and promoting conservation.³⁶

The major change is that the FAIR Act *eliminated* certain purposes that used to be permitted. They include: refinancing debt, recreational uses, financing certain non-farm enterprises, and certain types of pollution control.³⁷ This rule became effective April 4, 1996.

2. Preferences

The FAIR Act restated a set of preferences that existed under the old law³⁸ but did not get much attention under the old law.³⁹

Now, in making a direct FO loan, preference shall be given to a person who:

- Has a dependent family;
- To the extent practicable, is able to make an initial down-payment on the farm or ranch; or
- Is an owner of livestock or farm or ranch equipment that is necessary to successfully carry out farming or ranching operations.

This rule became effective on April 4, 1996.

³⁵ The old purpose list was at 7 U.S.C. § 1923.

³⁶ FAIR Act, § 602(a). Loans may be used for: acquiring or enlarging a farm or ranch; making capital improvements to a farm or ranch; paying loan closing costs related to acquiring, enlarging, or improving a farm or ranch; or paying for activities to promote soil and water conservation and protection on a farm or ranch as described at section 304 (reference is to 7 U.S.C. § 1924 as amended by § 603 of the FAIR Act describing establishment of certain conservation and sustainable agriculture practices).

³⁷ These purposes appeared in the *old* purpose section (7 U.S.C. § 1923) and are missing from the *new* purpose section. The report that accompanied the FAIR Act comments on the drafters' intentions in eliminating these formerly permitted uses. H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 409, reprinted in 1996 USSCAN 774-75.

³⁸ See 7 U.S.C. § 1923(a).

³⁹ FAIR Act, § 602(a).

3. Hazard Insurance

The FAIR Act provides that hazard insurance must be made a condition of receiving an FO loan.⁴⁰ The Act says that within 180 days after April 4, 1996, the Secretary must determine how much hazard insurance to require for FO loans. Once that determination is made, FSA will be prohibited from making FO loans unless the farmer has or agrees to get hazard insurance on any real property to be acquired or improved with the loan. This rule became effective April 4, 1996.

4. Joint Financing Program

The FAIR Act created a new “joint financing program” for FO loans.⁴¹ It provides that if the direct FO is part of a joint financing arrangement and FSA is providing less than 50 percent of the total financing, a special interest rate can be set (but it must be at least 4 percent). This rule became effective April 4, 1996.

5. Eligibility

The FAIR Act creates two special eligibility rules for FO loans.⁴² These two rules apply *in addition to* the general eligibility rules described above.

Rule #1: Time Limits. The first FAIR Act rule provides that the applicant must have operated a farm or ranch for at least three years *and* must either (a) be a qualified beginning farmer or rancher; or⁴³ (b) fall within a complicated set of guidelines that describe when and for how many years the applicant may have had FO loans in the past.⁴⁴ This rule became effective 90 days after April 4, 1996.

Rule #2: Never Had Debt Forgiveness. The second FAIR Act rule provides that FSA may not make a direct FO loan to a borrower who has received debt forgiveness on any direct or guaranteed loan.⁴⁵ The definition of debt forgiveness is:⁴⁶

⁴⁰ FAIR Act, § 602(a) and (b).

⁴¹ FAIR Act, § 604.

⁴² It is unclear at this time whether these will ultimately be eligibility rules or approval rules.

⁴³ This “or” is implied by the statutory construction.

⁴⁴ FAIR Act, § 601. The Act provides that the applicant must have operated a farm or ranch for at least three years *and*:

- a) Must be a qualified beginning farmer or rancher;
- b) Has not received a previous direct FO; *or*
- c) Has not received a direct FO more than ten years before the date the new loan would be made;
- d) BUT—if the applicant has a direct FO as of April 4, 1996, then:
 - 1) If, as of April 4, 1996, the applicant has had a direct FO outstanding for less than five years, USDA will not make a direct FO to the applicant after April 4, 2006;
 - 2) If, as of April 4, 1996, the applicant has had a direct FO outstanding for five years or more, USDA will not make a direct FO to the applicant after April 4, 2001.

There is an exception for youth loans.

⁴⁵ FAIR Act, § 648(b).

⁴⁶ FAIR Act, § 640(2). The exact language is in footnote 14 above.

Reduce or terminate a direct or guaranteed loan resulting in a loss to the Secretary by write-down,⁴⁷ write-off,⁴⁸ debt settlement, payment of a loss claim on a guaranteed loan, or a discharge in bankruptcy.⁴⁹

This rule became effective April 4, 1996.

C. The Table

To make it easier for the reader to keep track of the FO loan eligibility criteria, we have included a table that summarizes them. You can find it at the end of this article (Table 1). The table indicates what the eligibility criteria were before the FAIR Act was passed, what they were as of April 4, 1996, and what they are as of 90 days after April 4, 1996.

IV. Making Operating Loans: The Details

This section will first explain the basics of FSA's direct operating loan (OL) program and will then explain the FAIR Act changes in more detail.

A. The Basics

This section explains the basic provisions of the direct OL loan program.

1. Objective

The objective of the operating loan program is to provide credit and management assistance to eligible farmers and ranchers to become operators of family-sized farms or to continue such operations when credit is not available elsewhere.⁵⁰

2. Limits

Balance. The total amount of outstanding direct OL principal balance (including the proposed new loan) must be less than \$200,000.⁵¹

Time Limits. In addition to the balance limit, there are time limits that apply to OL loans under the pre-FAIR Act rules.⁵² It is unclear whether they will be eliminated

⁴⁷ Note that if payment on a shared appreciation agreement enabled the Secretary to recoup all prior losses, arguably the write-down did not result in a *net* "loss to the Secretary."

⁴⁸ Note that if the payment on a recapture agreement enabled the Secretary to recoup all prior losses, arguably the write-off did not result in a *net* "loss to the Secretary."

⁴⁹ Note that a bankruptcy in which FSA debt was not discharged does not result in a loss to the Secretary.

⁵⁰ 7 C.F.R. § 1941.2.

⁵¹ 7 C.F.R. § 1941.17(b).

⁵² See 7 C.F.R. § 1941.17(a). Section 611 of the FAIR Act may be interpreted to modify or perhaps nullify these provisions. The current regulations are complicated and should be read in full. In summary, they provide that an OL will not be approved if: (1) the applicant received direct OL loan(s) after October 28, 1992, and the sum of all years in which the applicant had direct OLs is more than ten; (2) the applicant received direct and/or guaranteed OL loan(s) after October 28, 1992, and the sum of all years in which any of those loans were outstanding is more than 15; (3) as of October 28, 1992, the applicant had one or more direct OL loans outstanding during each of the last five calendar years AND has had direct and/or guaranteed OL(s) made after October 28, 1992, that have been outstanding for a sum of more than five calendar years since that date; or (4) as of October 28, 1992, the borrower had one or more guaranteed OL loans outstanding during each of the last ten calendar years AND has had direct and/or guaranteed OL loan(s) made after October 28, 1992, that have been outstanding for a sum of more than five calendar years since that date.

by the time limits that will be imposed by the FAIR Act. (See explanation in section IV.B.7 (Rule #1) on page 13.)

3. Terms

The maximum *pay-back period* on an OL loan is seven years.⁵³ If the loan is for annual operating purposes, the first installment must generally be paid within 18 months. The regular *interest rate* as of November 1, 1996, is 7.0 percent; the limited resource interest rate is 5 percent. The *security requirement* for an OL loan is 150 percent of the value of the loan.⁵⁴

4. Eligibility

The explanation of basic pre-FAIR Act eligibility criteria for FO loans applies to OL loans as well.⁵⁵ See the discussion on page 7. The FAIR Act changes to OL eligibility criteria are described in Section IV.B.7 on page 13.

B. What's Changed

1. The Budget Act

As explained above, the FAIR Act made it much more difficult for farmers to qualify for certain types of loans. Shortly after the FAIR Act was passed, Congress passed a budget act⁵⁶ which said that the FAIR Act changes do not apply to *operating* loan (or emergency loan⁵⁷) applicants who meet certain criteria.

The budget act says⁵⁸ that the FAIR Act changes to the operating loan rules do not apply to applicants who:

- Submitted their OL application prior to April 5, 1996; and
- Were less than 90 days delinquent⁵⁹ on April 4, 1996.

2. Purposes

The operating loan program is available for many listed purposes.⁶⁰ They generally focus on:

- Purchasing farm machinery and equipment, livestock, poultry, animals, tools, etc.;
- Annual operating expenses;

⁵³ 7 C.F.R. § 1941.18(b).

⁵⁴ 7 C.F.R. § 1941.19.

⁵⁵ Note that the fifth criterion is different for operating loans. See footnote accompanying that text.

⁵⁶ Congressional Record, April 25, 1996, at H3925.

⁵⁷ An article in a future edition of this newsletter will describe the FAIR Act changes to the emergency loan program.

⁵⁸ The exact language is: "Sec. 2002. Notwithstanding any other provision of law, the Secretary of Agriculture is hereby authorized to make or guarantee an operating loan under Subtitle B or an emergency loan under Subtitle C of the Consolidated Farm and Rural Development Act (7 U.S.C. 1922, *et seq.*), as in effect prior to April 4, 1996, to a loan applicant who was less than 90 days delinquent on April 4, 1996, if the loan applicant had submitted an application for the loan prior to April 5, 1996."

⁵⁹ Ninety days delinquent means 120 days past due. See FC-43.

⁶⁰ 7 U.S.C. § 1942 as amended by § 612 of the FAIR Act.

- Borrower training; and
- Family living expenses.

The major change created by the FAIR Act is a limitation on the use of OL loans to refinance existing debt.⁶¹ Now OL loans can be used to refinance existing debt only if the applicant had operating loan refinancing no more than four times in the past and:

- The applicant is a direct loan borrower at the time of refinancing and the applicant has suffered a qualifying loss because of a declared/ designated natural disaster; *or*
- The applicant is refinancing a debt obtained from a creditor *other than* USDA.

This provision became effective 90 days after April 4, 1996.

3. Beginning Farmer OL Program Eliminated

The Special Beginning Farmer or Rancher operating loan program is eliminated.⁶² This provision was effective on April 4, 1996.

4. Hazard Insurance

The FAIR Act provides that hazard insurance must be made a condition of receiving an OL loan.⁶³ The Act says that within 180 days after April 4, 1996, the Secretary must determine how much hazard insurance to require for OL loans. Once that determination is made, FSA will be prohibited from making OL loans unless the farmer has or agrees to get hazard insurance on any property to be acquired. This rule became effective 90 days after April 4, 1996.

5. Private Reserve

The FAIR Act creates a “private reserve” for OL loans.⁶⁴ This allows USDA to reserve a portion of any OL and place it in an unsupervised bank account that may be used at the discretion of the borrower for the basic family needs of the borrower and the immediate family.

The size of the reserve shall not exceed the least of:

- Ten percent of the loan; or
- \$5,000; or
- The amount needed to provide for the basic family needs of the borrower and his or her immediate family for three calendar months.

This provision became effective 90 days after April 4, 1996.

⁶¹ FAIR Act, § 612(a). There are other changes as well. For example, use of OL loans for recreational purposes, for financing certain enterprises to supplement farm income, and for certain types of pollution control systems is now prohibited.

⁶² FAIR Act, § 616.

⁶³ FAIR Act, § 612(a).

⁶⁴ FAIR Act, § 612(a).

6. Line of Credit Program

The FAIR Act created a new operating loan program, called line-of-credit loans.⁶⁵ This program allows a farmer to apply for a five-year revolving line of operating credit.

Historically, one of the biggest problems with FSA operating loans has been that FSA runs out of money before funding many of the applications. This program could help to solve that problem for the farmers who get the lines of credit: although the statute does not give much detail, it seems that those farmers' operating money should be locked in for the five-year period.

The statute gives details about three aspects of the line-of-credit program.

Eligibility for Future Loans. First, it says that for purposes of determining eligibility for operating loans, each year in which the farmer takes an advance or draws on the line of credit will count as one year of having an operating loan. (See Section IV.A.2 on page 9 on operating loan time limits and Section IV.B.7 on page 13 on FAIR Act operating loan eligibility rules.)

Effect of Delinquency. Second, it says that if a borrower fails to pay an installment on the line-of-credit loan on schedule, the borrower may not draw on the line of credit *unless*:

- The borrower's failure to pay on schedule was due to unusual conditions that the borrower could not control; and
- The borrower will reduce the line of credit balance to the scheduled level at the end of the production cycle or at the end of the marketing of the borrower's agricultural products.

Which Agricultural Commodities May Be Produced. Third, it says that a line-of-credit loan may be used to finance the production or marketing of an agricultural commodity that:

- Is eligible for a price support program of USDA; or
- Was eligible for a price support program of USDA on April 3, 1996.

The statute is silent about whether the loans may be used to finance the production of other commodities as well.

This program became effective April 4, 1996.

⁶⁵ FAIR Act, § 614.

7. Eligibility

The FAIR Act creates three special eligibility rules for OL loans.⁶⁶ These three rules apply *in addition to* the general eligibility rules described above.

Rule #1: Time Limits. The first FAIR Act rule provides that FSA may make a direct operating loan only to a farmer or rancher who:⁶⁷

- Is a qualified beginning farmer or rancher who has not operated a farm or ranch or who has operated a farm or ranch for not more than five years;⁶⁸
- Has not received a previous direct operating loan; or
- Has received a previous direct operating loan during six or fewer years.
- The additional “transition rule” says that if, as of April 4, 1996, a farmer has received a direct OL during each of four or more previous years, the borrower shall be eligible to receive a direct OL during three additional years after April 4, 1996. The Conference Report says: “It is the intent of the Managers that direct farm operating loans be made available to farmers and ranchers for a maximum of 7 years. These years may be consecutive, nonconsecutive, or a combination of consecutive and nonconsecutive.”⁶⁹

There is an exception for youth loans.

This rule became effective 90 days after April 4, 1996.

Rule #2: Cannot be delinquent. The second FAIR Act rule provides that FSA may not make a direct OL to a borrower who is delinquent on any direct or guaranteed loan.⁷⁰

This rule became effective April 4, 1996.

Rule #3: Never had debt forgiveness (with an exception). The third FAIR Act rule provides that FSA may not make a direct OL to a borrower who has

⁶⁶ It is unclear at this time whether these will ultimately be eligibility rules or approval rules.

⁶⁷ FAIR Act, § 611.

⁶⁸ It is unclear whether a farmer can meet the requirements of the second clause, “or who has operated a farm or ranch for not more than 5 years,” without being a “qualified beginning farmer or rancher.” In the larger context, it seems that one must be able to qualify without being a “qualified beginning farmer or rancher” because only a portion of the OL funding is designated for beginning farmers and ranchers.

Additionally, in the statute there is no “and” or “or” after this clause. However, the conference report says that there should be an “or” after this clause. H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 410, reprinted in 1996 USCCAN 776.

⁶⁹ H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 410, reprinted in 1996 USCCAN 776.

⁷⁰ FAIR Act, § 648(b).

received debt forgiveness on a direct or guaranteed loan.⁷¹ The definition of debt forgiveness is explained in Section III.B.5 (Rule #2) on page 8.

There is an *exception* to this rule, though, for OL loans. It says that FSA may make an OL loan for paying annual farm or ranch operating expenses of a borrower who was restructured with a primary loan servicing write-down.

This rule became effective April 4, 1996.

C. The Table

To make it easier for the reader to keep track of the OL loan eligibility criteria, we have included a table that summarizes them. You can find it at end of this article (Table 2). The table indicates what the eligibility criteria were before the FAIR Act was passed; what they were as of April 4, 1996; and what they are as of 90 days after April 4, 1996. The table is additionally complicated by adding in the effects of the Budget Act (see discussion in Section IV.B.1 on page 10).

V. Primary Loan Servicing: The Details

This section will first explain the basics of FSA's primary loan servicing program for direct loans and will then explain the FAIR Act changes in more detail.

A. The Basics

This section explains the basic structure of the primary loan servicing program for direct loans.

1. Concept of Restructuring

Sometimes a farmer becomes unable to make payments on his or her loan as scheduled. When faced with that situation, most lenders will consider whether they should *foreclose* on the loan or *restructure* the loan. Restructuring means somehow changing the payment schedule so that it is within the farmer's means. Restructuring can include changing the timing of payments, changing the interest rate on the loan, or even reducing the total amount that the farmer owes. Sometimes restructuring allows a lender to collect more than the lender would collect in a foreclosure.

"Primary loan servicing" is FSA's term for its restructuring programs. One of FSA's long-standing goals has been to keep family farmers on their farms:⁷² the FSA primary loan servicing programs have helped FSA to achieve that goal.

⁷¹ FAIR Act, § 648(b).

⁷² 7 U.S.C.A. § 1921 is followed by a note that says: "Pub. L. 95-334, Title I, § 126, Aug. 4, 1978, 92 Stat. 429, provided that . . . the Secretary of Agriculture should ensure that . . . a high priority is placed on keeping existing farm operations operating."

2. Primary Loan Servicing Tools

FSA has six basic primary loan servicing tools:

- *Reamortization*:⁷³ Changes the payment plan on a loan secured by real estate.
- *Rescheduling*:⁷⁴ Changes the payment plan on a loan secured by chattel property.
- *Consolidation*:⁷⁵ Combines two or more loans.
- *Deferral*:⁷⁶ Allows a borrower to make no payments or partial payments for up to five years.
- *Limited Resource Interest Rate*:⁷⁷ Allows some borrowers to lower their interest rates.
- *Write-down*:⁷⁸ Reduces the amount of debt that the borrower owes.

The write-down program is the most powerful tool. FSA determines a farmer's eligibility for a write-down in part by comparing:

- The amount of money FSA would get in a foreclosure (the "net recovery value") with
- The amount of money FSA would get if the loan were restructured to allow the farmer to pay the most that he or she could afford ("the value of the restructured loan").

FSA uses a computer program called DALR\$—the Debt and Loan Restructuring System—to perform these calculations. If DALR\$ shows that it is at least as economical for FSA to restructure as to foreclose, and if the farmer meets the other eligibility criteria, FSA offers restructuring to the farmer.

Before the FAIR Act was passed, farmers who applied for a write-down and were rejected for certain reasons were offered a *net recovery value buyout*. This offer invited them to buy out their loans for a cash payment of the net recovery value. Farmers who got net recovery value buyouts were asked to sign *recapture agreements*. These agreements set up penalties for farmers to pay FSA if they sold or conveyed the land within certain time periods in certain situations.

Farmers who accept restructuring offers are required to sign a *shared appreciation agreement*. This agreement says that if the land increases in value within certain

⁷³ 7 C.F.R. § 1951.909(e)(2).

⁷⁴ 7 C.F.R. § 1951.909(e)(1).

⁷⁵ 7 C.F.R. § 1951.909(e)(1).

⁷⁶ 7 C.F.R. § 1951.909(e)(3).

⁷⁷ 7 C.F.R. § 1951.909(e)(1)(xii) for OL loans; 7 C.F.R. § 1951.909(e)(2)(viii) for FO loans.

⁷⁸ 7 C.F.R. § 1951.909(e)(4).

time limits, the farmer owes FSA a payment equal to the value of a certain portion of the appreciation.

3. Concept of Notice

FSA is not allowed to accelerate a borrower's account or bring foreclosure actions until *after* FSA has given the borrower notice of his or her rights under the loan servicing programs and has given the borrower a chance to apply and be considered for the programs and to appeal any determination of ineligibility for the programs.⁷⁹

4. Eligibility

There are four basic eligibility criteria for all of primary loan servicing and an additional three criteria that apply to debt write-down only.

The general primary loan servicing eligibility criteria are:

- **Feasible plan.**⁸⁰ The borrower's application must show that he or she has enough money to pay for family living expenses, farm operating expenses, and taxes; that he or she has enough money to service all debts (after the loan servicing); and that it is more economical for FSA to restructure than to foreclose.
- **Good faith.** The borrower must have acted in what is called "good faith." Good faith has a very technical definition.⁸¹ If a borrower is accused of bad faith (or lack of good faith), he or she should carefully check the definition to see if FSA's accusation actually constitutes bad faith.
- **Delinquent for reasons beyond control.**⁸² The borrower must have become delinquent for reasons beyond his or her control.
- **Training requirements.**⁸³ Unless the borrower is completing a buyout,⁸⁴ the borrower must agree to meet FSA's borrower training requirements.

⁷⁹ 7 U.S.C. § 2001(g).

⁸⁰ 7 U.S.C. § 1951.906 and 7 C.F.R. § 1951.909(d).

⁸¹ 7 C.F.R. §§ 1951.906 and 61 Fed. Reg. 35929 (July 9, 1996) (to be codified at 7 C.F.R. § 1951.906). (See Section V.B.4 on page 20 for an explanation of how this definition has changed.) The definition includes the following points: (1) a borrower is considered to have acted in good faith if the borrower has "demonstrated 'honesty' and 'sincerity' in carrying out the agreements set forth on the . . . 1962-1 form and other written agreements made with [FSA]"; (2) findings of a lack of good faith will be based on violations within the borrower's control—these actions will demonstrate the borrower's intent to violate written agreements with FSA; (3) any allegations of fraud, waste, or conversion must be substantiated by a written legal opinion by the Office of General Counsel when such allegations are used to deny a servicing request; and (4) a borrower will not be considered to lack good faith if the "sole basis for such determination was the disposition of normal income security . . . prior to October 14, 1988, without [FSA's] . . . consent and the borrower demonstrates that the proceeds were used to pay essential family living and farm operating expenses that [FSA] . . . could have approved according to § 1962.17. . . ."

⁸² 7 C.F.R. § 1951.909(c)(1).

⁸³ 7 C.F.R. § 1951.909(c)(5).

⁸⁴ A net recovery value buyout under the old law or a current market value buyout under the new law.

The three additional criteria for debt write-down are:

- *No prior debt forgiveness.* Under the FAIR Act, FSA may not provide to a borrower debt forgiveness on a direct loan if the borrower has received debt forgiveness on another direct loan.⁸⁵ See the explanation of the special definition of debt forgiveness for loan servicing purposes in Section V.B.2 on page 17.
- *Total lifetime limit of \$300,000.* Each borrower has a total lifetime limit of \$300,000 in write-downs and write-offs.⁸⁶
- *Lien on all available assets.* If FSA grants a debt write-down to a borrower, as a condition of the write-down FSA will take a lien on all of the borrower's available assets.⁸⁷

B. What's Changed

1. Net Recovery Value Buyout Eliminated

The FAIR Act eliminated the net recovery value buyout program and replaced it with a current market value buyout program.⁸⁸ This change will also eliminate recapture agreements.⁸⁹ These provisions became effective 90 days after April 4, 1996.

2. Debt Forgiveness

As mentioned above, the FAIR Act makes farmers who have received debt forgiveness on a direct loan in the past ineligible for future debt forgiveness on other direct loans. The statutory definition of debt forgiveness is explained in Section II.A ("debt forgiveness") on page 2.

It is important to know that, as an administrative matter, for *loan servicing purposes* FSA is clear about debt forgiveness including write-down or write-off but is unclear about whether other types of debt forgiveness listed in the statute will be counted.⁹⁰ Other types of prior debt forgiveness on direct loans—such as debt settlements and bankruptcies—will be referred to the FSA national office for

⁸⁵ FAIR Act, § 648(b). The statute's use of the word "another" leaves open the question of whether a farmer can receive debt forgiveness if he or she has received past debt forgiveness on the *same* loan. However, another rule provides that a borrower has a "lifetime limit" of either one write-down or one buyout. 7 C.F.R. § 1951.909(e)(4)(ii). There are some exceptions for older applications (submitted before November 28, 1990) and older loans (notes dated on or before January 6, 1988).

⁸⁶ 7 C.F.R. § 1951.909(e)(4)(v). There are some exceptions for applications submitted before November 28, 1990. Also, write-downs received through bankruptcy, debt settlement, and conservation easements do not count towards this limit. 7 C.F.R. § 1951.909(e)(4)(vi).

⁸⁷ 7 C.F.R. §§ 1951.909(e)(4)(xi) and 1951.910(b).

⁸⁸ FAIR Act, § 645(1).

⁸⁹ § 645 of the FAIR Act eliminated the statutory authority for recapture agreements.

⁹⁰ FC-37 at 4 defines debt forgiveness for loan servicing purposes as "Reducing or terminating a direct CONACT loan in a manner that results in a loss through write-down or write-off under FmHA Instruction 1951-S. . . . National Office referral is required for cases in which a borrower who has received previous debt forgiveness under any authority except FmHA Instruction 1951-S is now being considered for additional debt forgiveness." FC-37 at 4.

review. The statute itself makes it clear that prior actions on *guaranteed* loans have no bearing on an applicant's eligibility for *direct* loan debt forgiveness.⁹¹

This provision became effective April 4, 1996.

3. Cash Flow Rules

The FAIR Act changed the cash flow rules that FSA must use to determine whether a borrower is eligible for debt write-down.⁹² Prior to the FAIR Act, FSA would grant a write-down based on a cash flow plan that included up to 105 percent of the amount of money the borrower needed for debt service.⁹³ Now FSA may grant a write-down based on a cash flow plan that includes up to 110 percent of the borrower's debt service, family living expenses, and farm operating expenses.⁹⁴

This provision became effective 90 days after April 4, 1996.

4. Good Faith Changes

Under the old rules, there were five different criteria that the government was required to meet in order to establish that a borrower was in "bad faith." A set of regulations that was issued on July 9, 1996, eliminated one of those criteria, which makes it easier for the government to establish bad faith.⁹⁵

C. The Table

To make it easier for the reader to keep track of primary loan servicing changes, we have included a table that summarizes them. You can find it at the end of this article (Table 3). The table indicates some of the major ways in which the primary loan servicing programs changed in the Agricultural Credit Act,⁹⁶ the FACT Act,⁹⁷ the first 90 days of the FAIR Act, and as of 90 days after enactment of the FAIR Act.

⁹¹ FAIR Act, § 648(b).

⁹² These cash flow rules may be interpreted to apply to all primary loan servicing decisions—not just debt write-down decisions. See 7 U.S.C. § 2001 and FAIR Act, § 645(1).

⁹³ 7 U.S.C. § 2001(c)(3)(C), prior to amendment by § 645(1) of the FAIR Act.

⁹⁴ FAIR Act, § 645(1). The new language reads: "For the purpose of assessing . . . the ability of a borrower to meet debt obligations and continue farming operations, the Secretary shall assume that the borrower needs up to 110 percent of the amount indicated for payment of farm operating expenses, debt service obligations, and family living expenses." FSA has changed its DALR\$ program to take this amendment into consideration. According to FC-67, if the DALR\$ program finds that using the 110 percent figure the borrower could cash flow a restructured loan with a write-down and that using a 101 to 109 percent figure he or she could cash flow a restructured loan without a write-down, the borrower will be given the option of choosing restructuring with or without a write-down.

⁹⁵ The four remaining criteria are explained in footnote 81 above. Prior to July 9, 1996, there was an additional, fifth criteria which provided that all lack of good faith determinations must be adequately documented in the case file. It is significant that that criterion was eliminated.

⁹⁶ Agricultural Credit Act of 1987, Pub. L. No. 100-233.

⁹⁷ Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624.

VI. Conclusion

The changes in FSA's direct loan and primary loan servicing programs brought about by the FAIR Act will make these programs unavailable to many family farmers who would have received them in the past. Progressive farm organizations are continuing their work to convince Congress and the Administration to fix some of the most restrictive provisions of the Act.

Other articles in this series explain the changes made to the preservation loan servicing programs, inventory property procedures, and emergency and guaranteed loan programs.

Table 1 — Loan-Making Eligibility Criteria: Direct FOs

<p>Law as of April 3, 1996</p>	<p>Law as of April 4, 1996</p>	<p>Law as of July 2, 1996</p>
<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness 	<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness • Never had “debt forgiveness” 	<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness • Never had “debt forgiveness” • Meets FAIR Act rule about experience and previous FO history • No outstanding recorded judgment by the United States (July 9, 1996, rule of change)

Table 2 — Loan-Making Eligibility Criteria: Direct OLs

<p>Application Date and Delinquency Status</p>	<p>APPLIED before April 5, 1996 AND Less than 90 days delinquent on April 4, 1996</p>	<p>APPLIED April 15, 1996, or later OR APPLIED before April 5, 1996, and was 90 or more days delinquent on April 4, 1996</p>	<p>APPLIED April 5, 1996, or later OR APPLIED before April 5, 1996, and was 90 or more days delinquent on April 4, 1996</p>
<p>The Column Contains the Law That Applies During This Period</p>	<p>N/A</p>	<p>From April 4, 1996, through about July 1, 1996</p>	<p>From about July 2, 1996, into the future</p>
<p>Eligibility Criteria</p>	<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness 	<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness • Never had “debt forgiveness” EXCEPT if forgiveness was write-down, can get annual loan for annual operating expenses 	<ul style="list-style-type: none"> • Citizen or lawful alien • Legal capacity • Sufficient applicable education and/or on-the-job training • Unable to get credit elsewhere • Owner/operator of not larger than family-sized farm • Age • Credit history • Creditworthiness • Never had “debt forgiveness” EXCEPT if forgiveness was write-down, can get annual loan for annual operating expenses • Cannot be delinquent on any direct or guaranteed loan • Meets FAIR Act rule about experience and previous OL history • No outstanding recorded judgment by the United States (July 9, 1996, rule of change)

Table 3 — Primary Loan Servicing

Italicized entries are changed by newer laws.

	Agricultural Credit Act	FACT Act¹	FAIR Act: During First 90 Days	FAIR Act: After First 90 Days
Dates in Effect	January 6, 1988 – November 27, 1990	November 28, 1990 – April 4, 1996	April, 4, 1996 – About July 1, 1996	About ² July 2, 1996, into the future
A. What Is It?				
1. Reamortization		<ul style="list-style-type: none"> • Capitalize all accrued interest • Protective advances added to principal 		If farmer applies for reamortization without applying for § 1951-S servicing, must pay a portion of interest due. § 648(a) of FAIR Act.
2. Rescheduling		<ul style="list-style-type: none"> • Capitalize all accrued interest • Protective advances added to principal 		If farmer applies for reamortization without applying for § 1951-S servicing, must pay a portion of interest due. § 648(a) of FAIR Act.
3. Consolidation		<ul style="list-style-type: none"> • Capitalize all accrued interest • Protective advances added to principal 		
4. Limited Resource Interest Rate				
5. Deferral				
6. Write-Down	<ul style="list-style-type: none"> • <i>Unlimited number</i> • <i>Unlimited amount</i> 	<ul style="list-style-type: none"> • One write-down • \$300,000 lifetime limit (principal and interest) 	<ul style="list-style-type: none"> • No prior “debt forgiveness” (administrative definition³) 	<ul style="list-style-type: none"> • No prior “debt forgiveness” (administrative definition⁴)

¹ This column of the chart explains the FACT Act as it applied to applications filed on or after November 28, 1990. Some of the provisions of the FACT Act did not apply to applications filed before that date. See FACT Act training materials or call FLAG.

² The statutory language says that these provisions become effective 90 days after the date of enactment of the act. The date of enactment was April 4, 1996. We do not know exactly how USDA will count days and whether April 4 will be included in the count.

³ The *statutory* definition of debt forgiveness is “reducing or terminating a farmer program loan made or guaranteed under this title, in a manner that results in a loss to the Secretary, through—(i) writing down or writing off a loan under section 353 [FSA debt restructuring]; (ii) compromising, adjusting, reducing, or charging-off a debt or claim under section 331 [debt settlement]; (iii) paying a loss on a guaranteed loan under section 357; or (iv) discharging a debt as a result of bankruptcy.” FAIR Act, § 640(2)(A). The *administrative* definition of debt forgiveness, for purposes of loan *servicing* only, is “reducing or terminating a direct CONACT loan in a manner that results in a loss through write-down or write-off under FmHA Instruction 1951-S . . . National Office referral is required for cases in which a borrower who has received debt forgiveness under any authority except FmHA Instruction 1951-S is now being considered for additional debt forgiveness.” FC-37 at 4.

⁴ See previous footnote.

Italicized entries are changed by newer laws.

	Agricultural Credit Act	FACT Act¹	FAIR Act: During First 90 Days	FAIR Act: After First 90 Days
B. Eligibility Criteria				
1. Delinquent for Reasons Beyond Control				
2. Good Faith	<ul style="list-style-type: none"> • <i>Definition</i> • <i>OGC opinions</i> 	<ul style="list-style-type: none"> • Definition changes: better 		
3. Feasible Plan <ul style="list-style-type: none"> • Enough \$ to pay FL, FO, and taxes • Service all debts • More economical to restructure: NRV compared to PRESENT VALUE OF RESTRUCTURED LOAN • Liquidation of NEAs 	<ul style="list-style-type: none"> • <i>Net recovery value based on collateral only</i> • <i>No requirement</i> 	<ul style="list-style-type: none"> • Net recovery value based on collateral plus certain NEAs • Must liquidate or borrow against NEAs, or else FmHA will add value of assets into NRV calculation 		
C. Pledge Additional Assets as Condition for Write-Down	<ul style="list-style-type: none"> • <i>No requirement</i> 	<ul style="list-style-type: none"> • Required—almost all assets 		
D. Shared Appreciation	<ol style="list-style-type: none"> 1. Length of Agreement—Triggers at earliest of <ul style="list-style-type: none"> • PIF • Stop farming • Convey • Ten years 2. Amount to Pay: <ul style="list-style-type: none"> • Years 1-4: 75% • Years 5-10: 50% 	Change in arrangements for paying at end		

Italicized entries are changed by newer laws.

	Agricultural Credit Act	FACT Act¹	FAIR Act: During First 90 Days	FAIR Act: After First 90 Days
E. Net Recovery Value Buyout				
1. Eligibility Criteria	<ul style="list-style-type: none"> • Flunk cash flow 	<ul style="list-style-type: none"> • New good faith requirement (with exceptions) 		
2. Basis of Calculation	<ul style="list-style-type: none"> • <i>Actual collateral only</i> 	<ul style="list-style-type: none"> • <i>Plus NRV of NEAs</i> 		<ul style="list-style-type: none"> • Now it is a CURRENT MARKET VALUE BUYOUT
3. Days to Cash Out	<ul style="list-style-type: none"> • 45 	<ul style="list-style-type: none"> • 90⁵ 		
4. Limit on Amount of Debt Forgiveness	<ul style="list-style-type: none"> • <i>No limit</i> 	<ul style="list-style-type: none"> • \$300,000 limit 		
5. Recapture Agreement	<ul style="list-style-type: none"> • <i>Penalty = FMV at time of buyout minus NRV buyout price</i> • <i>Penalty triggers if sell at profit without two years</i> 	<ul style="list-style-type: none"> • <i>Penalty = FMV at time of sale/conveyance minus NRV buyout price</i> • <i>Penalty triggers if sell or convey within 10 years (with exceptions)</i> 		<ul style="list-style-type: none"> • RECAPTURE AGREEMENT WILL BE ELIMINATED⁶
F. Cash Flow				
1. Based on Records	<ul style="list-style-type: none"> • <i>Disaster years discarded</i> • <i>No income tax records required</i> 	<ul style="list-style-type: none"> • Need two disaster years to discard any • Income tax records required 		
2. Cash Flow Margin	<ul style="list-style-type: none"> • 100% 	<ul style="list-style-type: none"> • 105% of debt service 		<ul style="list-style-type: none"> • 110%⁷ of farm operating, debt service, and family living

⁵ The language is “pays (or obtains third-party financing to pay) . . . an amount equal to the current market value.” § 645 of the FAIR Act.

⁶ This conclusion comes from the committee report (at page 111 in the version in these notebooks), not from the language of the statute itself.

⁷ Note that the old language that limited the margin’s application to debt service is eliminated. The new language reads: “For the purpose of assessing . . . the ability of a borrower to meet debt obligations and continue farming operations, the Secretary shall assume that the borrower needs up to 110 percent of the amount indicated for payment of farm operating expenses, debt service obligations, and family living expenses.” § 645(1) of the FAIR Act.