■ a. Revise the first sentence of paragraph (b); and
■ b. Revise the introductory text of paragraph (c).

The revisions read as follows:

§ 226.11 Program payments for centers.

* * * * *

(b) Each child care institution or outside-school-hours care institution must report each month to the State agency the total number of meals, by type (breakfast, lunch, supper, and snack), served to children, except that such reports must be made for a for-profit center only for calendar months during which not less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. * * *

(c) Each State agency must base reimbursement to each child care institution or outside-school-hours institution on the number of meals, by type (breakfast, lunch, supper, and snack), served to children multiplied by the assigned rates of reimbursement, except that reimbursement must be payable to for-profit child care centers or for-profit outside-school-hours care centers only for calendar month during which at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. Each State agency must base reimbursement to each adult day care institution on the number of meals, by type, served to adult participants multiplied by the assigned rates of reimbursement, except that reimbursement must be payable to for-profit adult day care centers only for calendar months during which at least 25 percent of the enrolled adult participants were beneficiaries of title XIX, title XX, or a combination of titles XIX and XX. In computing reimbursement, the State agency must either:

* * * * *

■ 8. In § 226.15, revise paragraph (a) to read as follows:

§ 226.15 Institution provisions.

(a) *Tax exempt status.* Except for for-profit centers and sponsoring organizations of such centers, institutions must be public, or have tax exempt status under the Internal Revenue Code of 1986.

* * * * *

■ 9. In § 226.17:
■ a. Remove the words ''proprietary title XX'' in paragraph (b)(2) and add in their place the words ''for-profit''; and
■ b. Revise the second sentence of paragraph (b)(4).

The revision reads as follows:

§ 226.17 Child care center provisions.

* * * * *

(b) * * *

(4) * * * For-profit child care centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. * * *

* * * * *

■ 10. In § 226.19:
■ a. In paragraph (b)(2), remove the words ''proprietary title XX'' and add in their place the words ''for-profit''; and
■ b. Revise the second and third sentences in paragraph (b)(5).

The revision reads as follows:

§ 226.19 Outside-school-hours care center provisions.

* * * * *

(b) * * *

(5) * * * Reimbursement may not be claimed for more than two meals and one snack provided daily to each child or for meals served to children at any one time in excess of authorized capacity. For-profit centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries.

* * * * *

Dated: July 20, 2005.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 05–14811 Filed 7–26–05; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 780

RIN 0560–AG88

Appeal Procedures

AGENCY: Farm Service Agency, USDA.

ACTION: Interim final rule.

SUMMARY: The Farm Service Agency (FSA) is amending the regulations for informal agency appeals to make conforming and clarifying changes regarding FSA procedures.

DATES: *Effective Date:* This rule is effective August 26, 2005. Written comments via letter, facsimile, or Internet are invited from interested individuals and organizations and must be received on or before September 26, 2005, in order to be assured of consideration.

ADDRESSES: FSA invites interested persons to submit comments on this interim final rule. Comments may be submitted by any of the following methods:

E-Mail: Send comments to *Tal_Day@wdc.usda.gov*. Include ''Part 780'' in the subject line of the message.

- Fax: Submit comments by facsimile transmission to: 202/690–3003.
- Mail: Send comments to: H. Talmage Day, Appeals and Litigation Staff, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., AG STOP 0570, Washington, DC 20250–0570.
- Hand Delivery or Courier: Deliver comments to: H. Talmage Day, Appeals and Litigation Staff, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 6722–S, Washington, DC 20250–0570.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: H. Talmage Day at the above address or 202/690–3297.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has determined this rule is not significant for the purposes of Executive Order 12866; therefore, this rule has not been reviewed by OMB.

Paperwork Reduction Act of 1995

This rule does not constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12612

It has been determined under section 6(a) of Executive Order 12612, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601, FSA has determined that there will not be a significant economic impact on a substantial number of small entities. From experience, relatively few program decisions result in any form of appeal proceeding provided for in this rule. This rule codifies and clarifies existing procedures and deadlines applicable in agency informal appeals, but will not make fewer individuals eligible for any FSA program, nor will it increase the costs of compliance with program regulations for any participant. Similarly, this rule does not change any substantive provisions of the programs covered by this rule or limit options otherwise available to participants in covered programs. Accordingly, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605 (b), the Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

These regulations are not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, on Civil Justice Reform. The provisions of this rule are not retroactive. The provisions of this rule preempt State and local laws to the extent such State and local laws are inconsistent. Generally, all administrative appeal provisions, including those published at 7 CFR part 11, must be exhausted before any action for judicial review may be brought in connection with the matters that are the subject of this rule.

Environmental Evaluation

The environmental impacts of this rule have been considered consistent with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508, and the FSA regulations for compliance with NEPA, 7 CFR parts 799 and 1940, subpart G. FSA completed an environmental evaluation and concluded the rule requires no further environmental review. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement. A copy of the environmental evaluation is available for inspection and review upon request.

Background and Purpose

On December 29, 1995, the Office of the Secretary published an interim final rule (60 FR 67298–67319) to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Reorganization Act), Pub. L. 103–354, 7 U.S.C. 6995, setting forth interim procedures for appeals of adverse decisions by USDA agency officials to the National Appeals Division (NAD). The interim final rule also included conforming changes to regulations governing agency informal appeals, including 7 CFR part 780.

NAD published its final rule in the **Federal Register** on June 23, 1999 (64 FR 33367–33378). At that time, the Secretary expressly noted that the final rule for NAD did not contain rules for agency appeal procedures and that those rules would be published separately by the respective agencies.

Section 275 of the Reorganization Act provided for the Secretary to maintain the FSA informal appeals process that preceded the 1994 legislation. The rules in 7 CFR part 780 do that. This rule amends FSA informal appeal regulations to make clarifying changes and improvements to those rules to ensure better administration and conformity to existing laws.

The rule specifically reflects changes and additions to the current interim rule to document in regulations existing policies governing reconsideration of adverse decisions as a feature of the informal appeals process and policies governing mediation as an alternative dispute resolution technique in the informal appeals process. This rule also establishes a procedure for administrative review by State Executive Directors of local adverse determinations that certain issues are not appealable and makes other conforming changes required by other legislation, including limitations on judicial review of State Executive Director decisions on equitable relief as provided for in Section 1613 of the Farm Security and Rural Investment Act of 2002 (2002 Act), Pub. L. 107–171, 7 U.S.C. 7996. The changes and additions are incorporated in a general edit and reorganization of part 780 as set out in this rule. While this rule is exempt from the requirement for publication for prior public notice and comment because it is a rule of agency procedure and practice, the Agency will accept public comments for 60 days after publication of this rule.

As a general matter, the goal of FSA's informal appeals process is to maximize opportunity for resolution within FSA of disputes with participants that result from adverse program decisions. FSA's aim and expectation is that disputes with participants regarding adverse decisions can, for the most part, be resolved through further reviews within FSA. It is FSA's experience that only the most difficult disputes proceed to further appeals before NAD.

Dispute Resolution Procedures

FSA's informal appeals process provides a range of alternative procedures for dispute resolution. Program disputes in FSA vary significantly in complexity, sums at stake, and feasibility of resolution through discovery of additional alternatives or additional information. The availability of alternative procedures is, therefore, central to FSA's goal to achieve just, speedy, and inexpensive determinations in program disputes. As defined in the regulations (7 CFR 780.2), participants with rights in the appeals process include any individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of FSA to which the regulations in this part apply is directly affected by a decision of FSA. The term may include anyone meeting this definition regardless of whether the participant in a particular proceeding is an appellant, an interested party, or a third party respondent. The term does not include individuals or entities whose disputes arise under the programs excluded in the definition of ''participant'' set out in the NAD rules of procedure found in 7 CFR part 11.

The regulations provide for the following dispute resolution procedures in the agency informal appeals process consistent with current practice:

Reconsideration: subsequent consideration by the same level decision maker or reviewing authority. Reconsideration affords a means to clarify Agency determinations and

consider additional facts. Any decision on reconsideration will constitute a new decision for purposes of running of the time limitations for any subsequent appeal within FSA or to NAD.

County Committee and State Committee appeals: subsequent consideration by a county or State committee established under Section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)). The decision of an employee of a county committee must be taken before the county committee before any other appeal procedure is available, either within FSA's informal appeals process or through appeal to NAD.

Alternative dispute resolution (ADR) procedures: This rule incorporates specific guidelines for mediation of program disputes that have to date been operative as generally applicable agency policy. Part 785 of 7 CFR provides for certification of and grants to State mediation programs that meet requirements of that part. When a certified mediation program is operating in a State, mediation is made available through that program. Mediation in a State without a certified mediation program is made available by the State FSA office. A request for mediation in a State without a certified mediation program must be submitted to the State Executive Director. If a participant makes a request for some other form of ADR, FSA will consider the request in good faith.

The regulations continue to provide for reservations of authority to permit representatives of FSA and the Commodity Credit Corporation (CCC) to correct errors in data entered on program contracts, loan agreements and other program documents and the results of the computations or calculations made pursuant to the contract or the agreement. Likewise, nothing in the regulations precludes the Secretary, Administrator, Executive Vice President of CCC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by FSA, its State or county committees, or CCC.

The decisions of the Administrator and Deputy Administrators are outside FSA's appeals process and, therefore, are not decisions subject to mediation, reconsideration, or further appeal within FSA. Although such decisions are final for purposes of appeal to NAD, in exceptional cases the Administrator or a Deputy Administrator may exercise discretion to reconsider or to refer a matter to mediation. Any decision on reconsideration or appeal within FSA will constitute a new decision for purposes of running of the time limitation for any subsequent appeal to NAD.

Adverse Program Decisions

Section 274 of the 1994 Reorganization Act, 7 U.S.C. 6994, Notice and Opportunity for Hearing, requires FSA to provide written notice of an adverse decision and notice of appeal rights no later than 10 working days after the decision is made. Accordingly, this rule provides that FSA will endeavor to mail or personally deliver written notice of a decision to a participant no later than 10 working days after FSA renders a decision.

Appealable and Non-Appealable Decisions

Not all decisions that affect program participants afford them the option for reconsideration, mediation, or appeal. Decisions made pursuant to statutory provisions or implementing regulations that are not dependent upon a unique set of facts are generally not appealable. For example, the determination whether a participant is a beginning farmer for purposes of sales of farmland that has been taken into inventory by FSA is not appealable because appeal is barred by 7 U.S.C. 1985. In general, any decision based on a program provision or program policy, or on a statutory or regulatory requirement that is applicable to all similarly situated participants is not appealable under these rules. Issues of fact regarding the applicability of a general rule, however, may be appealable. A letter transmitting an FSA decision that is determined not to be appealable will, as a general rule, set forth the facts on which the decision was based and will document that those facts are not in dispute.

Similarly, decisions of FSA State Executive Directors or others on equitable relief made under the regulations implementing Section 1613 of the 2002 Act are discretionary decisions that do not afford participants any rights of appeal within FSA or any right to judicial review. However, the underlying program decisions are appealable within FSA; and the final agency program decision under the applicable regulations and any denial of equitable relief under other authority, generally, is appealable to NAD.

In addition, requirements and conditions of participation that are designated by law to be developed by agencies other than FSA are not appealable through the procedures in this rule except as may involve the Department's Natural Resources Conservation Service under some circumstances as addressed in the rule. Examples of such requirements or conditions include flood plain determinations, archaeological and historic area preservation requirements, and designations of areas that have been determined to be inhabited by endangered species. As an additional safeguard in the agency appeals process, this rule provides an additional option to allow a participant to seek an administrative review by the State Executive Director when a program decision has been determined not to be appealable. It is in the interest of participants and FSA that program disputes be resolved by persons with expertise in agency programs whenever feasible. This provision for administrative review by the State Executive Director will afford participants another opportunity to avail themselves of FSA's informal appeals process. This option is in addition to a participant's right to seek an appealability review by the NAD Director in accordance with 7 CFR part 11.

Implementation of Final Decisions in Appeals

As a general matter, a decision in an FSA informal appeal will be implemented within 30 days after the period for appeal of the decision has run, *i.e.*, 30 days after the agency decision becomes a final decision of USDA. Implementation is understood to require that the next step to be taken in the matter will be initiated by the agency within the required period, but not necessarily completed. Additional time may be required, for example, to obtain updated financial or other information relating to eligibility or feasibility, to obtain a new appraisal, or to reassess any wetland features on a tract of farmland. This policy is consistent with implementation of final decisions in NAD appeals under 7 CFR 11.12.

Decisions can only be implemented to the extent otherwise allowed by law. For example, how the decision in an appeal may be implemented will sometimes depend upon the availability of funds. If funds are not available, a decision may not cause a payment to be issued immediately to a participant, notwithstanding a successful appeal. In such circumstances, the appeal is effective to resolve issues of a participant's compliance with the appealed program requirements. In an instance where Congress later appropriates additional funding for assistance under the subject program, or in future programs establishing the same

requirement, provided a participant's circumstances remain unchanged, FSA may effect payment.

Mediation

Mediation is a technique that can assist FSA, program participants and applicants, and other interested parties in resolving issues arising in FSA adverse decisions. As defined in § 780.2, mediation means a technique for resolution of disputes in which a mediator assists disputing parties in voluntarily reaching mutually agreeable settlement of issues within the laws, regulations, and the agency's generally applicable program policies and procedures, but in which the mediator has no authoritative decision making power.

Similarly, a mediator is defined to mean a neutral individual who functions specifically to aid the parties in a dispute during a mediation process. The regulations also set out a minimum requirement for mediator qualification that mediators must satisfy to be eligible to mediate an adverse decision in a State without a certified mediation program. The requirement incorporates, where applicable, the qualification requirements established in the law of the State where the adverse decision would be mediated, if the State has established mediator qualification requirements in statutory law or regulations, and otherwise prescribes a minimum requirement. These definitions are consistent with definitions in the FSA Certified State Mediation Program regulations at 7 CFR part 785. The rule also explains as a requirement of impartiality that a mediator may not have served as an advocate or representative for any party in the mediation and may not so serve thereafter in a proceeding related to the mediated dispute.

In States with certified mediation programs, the mediation process may encompass a number of activities in addition to intake and scheduling of mediations to prepare participants for mediation. A certified State's mediation process may involve, for example, iterative rounds of financial counseling assistance to participants in efforts to develop a feasible plan for a farming operation before any session or sessions with a mediator. Nothing in this rule operates to limit the scope of a mediation process or the number of sessions that may be involved in the single mediation of an adverse decision, including the issues of fact material to an adverse decision.

When mediation is available in the informal appeals process, FSA's adverse decision letters will advise participants how to exercise that option. In States with a mediation program certified under 7 CFR part 785, adverse decision letters will provide guidance on how the participant may contact the certified mediation program to request mediation. In States without a certified mediation program, adverse decision letters will instruct participants to direct requests for mediation to the State Executive Director when mediation is an available option. If a qualified mediator is available and accepted by the participant, FSA will notify third parties and interested parties of the mediation. If no qualified mediator is available, FSA will not participate in mediation, but will attend any meeting of creditors requested by a participant to the extent that it may be required under part 1951, subpart S, of this title or any successor regulation.

This rule provides that FSA is obligated to participate in good faith in mediation under the auspices of a State-certified mediation program when applicable. In that regard, the rule provides that FSA will endeavor to:

- Designate a person to represent FSA in the mediation;
- Define the FSA representative's authority to bind FSA to agreements reached in the mediation;
- Instruct FSA's representative to ensure that any agreement reached during, or as a result of, the mediation is consistent with the statutory and regulatory provisions and generally applicable program policies and is mutually agreed to in writing by all affected parties;
- Authorize FSA's representative to assist in identifying and exploring additional options that may resolve the dispute;
- Assist as necessary in making pertinent records available for review and discussion during the mediation;
- Direct FSA's representative in the mediation to forward any written agreement proposed in mediation to the appropriate FSA official for approval; and
- Timely consider dispute resolution proposals requiring actions or approvals under broader authority than is vested in the representative in the mediation.

The foregoing specifications reflect a difference between the function of mediation in private disputes and public program disputes that FSA believes is essential for understanding the role and potential of mediation as a means for resolving agency program disputes. In contrast to private disputes, the ultimate issue in mediation of an agency program dispute is usually whether one or more parties to the mediation meets, or can meet, program requirements that are set forth in regulations. Parties mediating a regulatory program dispute are not free to make their own law, and mediation of these disputes should not be perceived as a means to obtain a result not otherwise obtainable under statute, regulations, or generally applicable agency policy and program procedure. Hence, while mediation, unlike some other forms of ADR, emphasizes assistance to parties in developing alternatives, the alternatives developed in mediation of an FSA program dispute must be feasible and consistent with statutory and regulatory requirements and FSA's generally applicable interpretations of them. Within these constraints, FSA believes that mediation of program disputes can produce benefits when the mediation reveals additional relevant facts and new points of view. Examples of activities that may productively occur during an FSA program mediation include identifying alternative means for a participant to comply with regulatory requirements, exploring alternative mitigation strategies when a wetland has been converted, or considering possible changes in a farming operation or additional resources that may be made available to meet the farming operation's financial requirements. In addition, when other private parties are involved, for example, other creditors, the mediation may assist in identifying potential flexibility in the positions of these private parties as in a purely private mediation. In other cases, the mediation may simply clarify the basis for a decision.

The features distinguishing mediation of a regulatory program dispute are reasons that FSA believes that attendance at a mediation of a representative with final authority to bind FSA is not essential to effective mediation of agency program disputes. In addition, such a procedure would be impractical in many situations. For example, it would be unworkable to have county and/or State committees attend mediation sessions. As a matter of sound management policy, FSA will consistently endeavor to ensure that the representative designated for FSA in any mediation is a person with appropriate knowledge of the legal parameters implicated in the program dispute.

This rule does not establish guidelines for mediations that may occur in advance of any decision that is appealable under this rule. As a general matter, FSA believes that mediation is most likely to be productive when an adverse decision has been issued that presents clear issues to challenge and

resolve. Also, the early stages in FSA decision-making when an issue may be defined for mediation ensure that mediation is available in the agency informal appeals process at a very early stage. As an example, under existing farm loan regulations, participants have a means to obtain decisions at an early stage of difficulty. FSA loan servicing regulations afford borrowers a means to be considered for relief as financially distressed borrowers before a delinquency has occurred. Similarly, participants seeking new farm loans or refinancing may likewise obtain decisions on eligibility without submitting a complete loan application. Also, it is in participants' interests that their requests for loans be submitted before outstanding loans have gone delinquent.

In farm commodity and marketing assistance and conservation programs, mediation in advance of any adverse decision is much more rarely likely to be productive. In the Conservation Reserve Program, for example, the regulatory requirements that will determine eligibility for a future sign-up cannot be anticipated until guidelines are published. Similarly, in commodity assistance programs, while general criteria of eligibility tend to persist in successively authorized assistance programs, the exact conditions under which assistance will be made available frequently depend on details of enacted legislation that cannot be accurately projected before legislation is signed. Notwithstanding, in certain limited cases, where it is clear that only one issue will be in dispute and some resolution seems clearly feasible, e.g., because of potential flexibility in positions of third parties, mediation may be considered by FSA to expedite progress toward a favorable resolution of the initial administrative request. If mediation occurs in advance of an adverse decision, mediation on that issue will not again be offered to a participant as an option in the informal appeals process.

This rule is consistent with 7 CFR 11.5(c)(2) of the NAD Rules of Procedure, which states that a participant may request mediation or any other method of alternative dispute resolution at any time prior to a NAD hearing. If a participant lodges such a request after having filed an appeal with NAD, provided such a request is lodged within 30 days of the date the participant receives the adverse decision, FSA will participate in such a mediation in good faith provided the decision under appeal is not a decision by an official in FSA's national office and the matter has not been mediated.

Consistent with the Administrative Dispute Resolution Act, 5 U.S.C. 574, and the regulations in this part, mediations will be handled with a concern for confidentiality. During the course of a mediation, it is anticipated that FSA's representative may need to communicate with other agency officials. Such communications are not inconsistent with the requirement that mediations be confidential. Restrictions on confidentiality may vary with the circumstances in a particular mediation. As a general matter, participants will not require other parties' consents to disclose information in a mediation to agents furnishing confidential services to a participant, *e.g.*, attorneys, accountants, or other agents bound to furnish services under a duty of confidentiality. A participant may, in any event, obtain other parties' consent to contemplated disclosures.

List of Subjects in 7 CFR Part 780

Administrative practice and procedure, Agricultural commodities, Agriculture, Farmers, Federal aid programs, Loan programs, Price support programs, Soil conservation, Wetlands.

■ For the reasons stated in the preamble, FSA revises 7 CFR part 780 to read as follows:

PART 780—APPEAL REGULATIONS

Sec.

780.1 General.
780.2 Definitions.
780.3 Reservations of authority.
780.4 Applicability.
780.5 Decisions that are not appealable.
780.6 Appeal procedures available when a decision is appealable.
780.7 Reconsideration.
780.8 County committee appeals.
780.9 Mediation.
780.10 State committee appeals.
780.11 Appeals of NRCS determinations.
780.12 Appeals of penalties assessed under the Agricultural Foreign Investment Disclosure Act of 1978.
780.13 Verbatim transcripts.
780.14 [Reserved]
780.15 Time limitations.
780.16 Implementation of final agency decisions.
780.17 Judicial review.

Authority: 5 U.S.C. 301 and 574; 7 U.S.C. 6995; 15 U.S.C. 714b and 714c; 16 U.S.C. 590h.

§ 780.1 General.

This part sets forth rules applicable to appealability reviews, reconsiderations, appeals and alternative dispute resolution procedures comprising in aggregate the informal appeals process of FSA. FSA will apply these rules to facilitate and expedite participants' submissions and FSA reviews of documentary and other evidence material to resolution of disputes arising under agency program regulations.

§ 780.2 Definitions.

For purposes of this part:

1994 Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103–354).

Adverse decision means a program decision by an employee, officer, or committee of FSA that is adverse to the participant. The term includes any denial of program participation, benefits, written agreements, eligibility, etc., that results in a participant receiving less funds than the participant believes should have been paid or not receiving a program benefit to which the participant believes the participant was entitled.

Agency means FSA and its county and State committees and their personnel, CCC, NRCS, and any other agency or office of the Department which the Secretary may designate, or any successor agency.

Agency record means all documents and materials maintained by FSA that are related to the adverse decision under review that are compiled and reviewed by the decision-maker or that are compiled in the record provided to the next level reviewing authority.

Appeal means a written request by a participant asking the next level reviewing authority within FSA to review a decision. However, depending on the context, the term may also refer to a request for review by NAD.

Appealability review means review of a decision-maker's determination that a decision is not appealable under this part. That decision is, however, subject to review according to § 780.5 or 7 CFR part 11 to determine whether the decision involves a factual dispute that is appealable or is, instead, an attempt to challenge generally applicable program policies, provisions, regulations, or statutes that were not appealable.

Appellant means any participant who appeals or requests reconsideration or mediation of an adverse decision in accordance with this part or 7 CFR part 11.

Authorized representative means a person who has obtained a Privacy Act waiver and is authorized in writing by a participant to act for the participant in a reconsideration, mediation, or appeal.

CCC means the Commodity Credit Corporation, a wholly owned Government corporation within USDA.

Certified State means, in connection with mediation, a State with a mediation program, approved by the

Secretary, that meets the requirements of 7 CFR part 785.

Confidential mediation means a mediation process in which neither the mediator nor parties participating in mediation will disclose to any person oral or written communications provided to the mediator in confidence, except as allowed by 5 U.S.C. 574 or 7 CFR part 785.

County committee means an FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

Determination of NRCS means a decision by NRCS made pursuant to Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*), as amended.

FSA means the Farm Service Agency, an agency within USDA.

Final decision means a program decision rendered by an employee or officer of FSA pursuant to delegated authority, or by the county or State committee upon written request of a participant. A decision that is otherwise final shall remain final unless the decision is timely appealed to the State committee or NAD. A decision of FSA made by personnel subordinate to the county committee is considered ''final'' for the purpose of appeal to NAD only after that decision has been appealed to the county committee under the provisions of this part.

Hearing means an informal proceeding on an appeal to afford a participant opportunity to present testimony, documentary evidence, or both to show why an adverse decision is in error and why the adverse decision should be reversed or modified.

Implement means the taking of action by FSA, NRCS, or CCC that is necessary to effectuate fully and promptly a final decision.

Mediation means a technique for resolution of disputes in which a mediator assists disputing parties in voluntarily reaching mutually agreeable settlement of issues within the laws, regulations, and the agency's generally applicable program policies and procedures, but in which the mediator has no authoritative decision making power.

Mediator means a neutral individual who functions specifically to aid the parties in a dispute during a mediation process.

NAD means the USDA National Appeals Division established pursuant to the 1994 Act.

NAD rules means the NAD rules of procedure published at 7 CFR part 11, implementing title II, subtitle H of the 1994 Act.

Non-certified State means a State that is not approved to participate in the certified mediation program under 7 CFR part 785, or any successor regulation.

NRCS means the Natural Resources Conservation Service of USDA.

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of FSA to which the regulations in this part apply is affected by a decision of FSA. The term includes anyone meeting this definition regardless of whether, in the particular proceeding, the participant is an appellant or a third party respondent. The term does not include individuals or entities whose claim(s) arise under the programs excluded in the definition of ''participant'' published at 7 CFR 11.1.

Qualified mediator means a mediator who meets the training requirements established by State law in the State in which mediation services will be provided or, where a State has no law prescribing mediator qualifications, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by USDA, by an accredited college or university, or by one of the following organizations: State Bar of a qualifying State, a State mediation association, a State approved mediation program, or a society of dispute resolution professionals.

Reconsideration means a subsequent consideration of a program decision by the same level of decision-maker or reviewing authority.

Reviewing authority means a person or committee assigned the responsibility of making a decision on reconsideration or an appeal filed by a participant in accordance with this part.

State committee means an FSA State committee established in accordance with Section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)) including, where appropriate, the Director of the Caribbean Area FSA office for Puerto Rico and the Virgin Islands.

State Conservationist means the NRCS official in charge of NRCS operations within a State, as set forth in part 600 of this title.

State Executive Director means the executive director of an FSA State office with administrative responsibility for a FSA State office as established under the Reorganization Act.

USDA means the U.S. Department of Agriculture.

Verbatim transcript means an official, written record of proceedings in an appeal hearing or reconsideration of an adverse decision appealable under this part.

§ 780.3 Reservations of authority.

(a) Representatives of FSA and CCC may correct all errors in data entered on program contracts, loan agreements, and other program documents and the results of the computations or calculations made pursuant to the contract or agreement. FSA and CCC will furnish appropriate notice of such corrections when corrections are deemed necessary.

(b) Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by a subordinate employee of FSA or its county and State committees, or CCC.

§ 780.4 Applicability.

(a)(1) Except as provided in other regulations, this part applies to decisions made under programs and by agencies, as set forth herein:

(i) Decisions in programs administered by FSA to make, guarantee or service farm loans set forth in chapters VII and XVIII of this title relating to farm loan programs;

(ii) Decisions in those domestic programs administered by FSA on behalf of CCC through State and county committees, or itself, which are generally set forth in chapters VII and XIV of this title, or in part VII relating to conservation or commodities;

(iii) Appeals from adverse decisions, including technical determinations, made by NRCS under title XII of the Food Security Act of 1985, as amended;

(iv) Penalties assessed by FSA under the Agricultural Foreign Investment Disclosure Act of 1978, 5 U.S.C. 501 *et seq.*;

(v) Decisions on equitable relief made by a State Executive Director or State Conservationist pursuant to section 1613 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107–171; and

(vi) Other programs to which this part is made applicable by specific program regulations or notices in the **Federal Register**.

(2) The procedures contained in this part may not be used to seek review of statutes or regulations issued under

Federal law or review of FSA's generally applicable interpretations of such laws and regulations.

(3) For covered programs, this part is applicable to any decision made by an employee of FSA or of its State and county committees, CCC, the personnel of FSA, or CCC, and by the officials of NRCS to the extent otherwise provided in this part, and as otherwise may be provided in individual program requirements or by the Secretary.

(b) With respect to matters identified in paragraph (a) of this section, participants may request appealability review, reconsideration, mediation, or appeal under the provisions of this part, of decisions made with respect to:

(1) Denial of participation in a program;

(2) Compliance with program requirements;

(3) Issuance of payments or other program benefits to a participant in a program; and

(4) Determinations under Title XII of the Food Security Act of 1985, as amended, made by NRCS.

(c) Only a participant directly affected by a decision may seek administrative review under § 780.5(c).

§ 780.5 Decisions that are not appealable.

(a) Decisions that are not appealable under this part shall include the following:

(1) Any general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants;

(2) Mathematical formulas established under a statute or program regulation and decisions based solely on the application of those formulas;

(3) Decisions made pursuant to statutory provisions that expressly make agency decisions final or their implementing regulations;

(4) Decisions on equitable relief made by a State Executive Director or State Conservationist pursuant to Section 1613 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107–171;

(5) Decisions of other Federal or State agencies;

(6) Requirements and conditions designated by law to be developed by agencies other than FSA.

(7) Disapprovals or denials because of a lack of funding.

(8) Decisions made by the Administrator or a Deputy Administrator.

(b) A participant directly affected by an adverse decision that is determined not to be subject to appeal under this part may request an appealability review of the determination by the State Executive Director of the State from which the underlying decision arose in accordance with § 780.15.

(c) Decisions that FSA renders under this part may be reviewed by NAD under part 11 of this title to the extent otherwise allowed by NAD under its rules and procedures. An appealability determination of the State Executive Director in an administrative review is considered by FSA to be a new decision.

§ 780.6 Appeal procedures available when a decision is appealable.

(a) For covered programs administered by FSA for CCC, the following procedures are available:

(1) Appeal to the county committee of decisions of county committee subordinates;

(2) Reconsideration by the county committee;

(3) Appeal to the State committee;

(4) Reconsideration by the State committee;

(5) Appeal to NAD;

(6) Mediation under guidelines specified in § 780.9.

(b) For decisions in agricultural credit programs administered by FSA, the following procedures are available:

(1) Reconsideration under § 780.7;

(2) Mediation under § 780.9;

(3) Appeal to NAD.

(c) For programs and regulatory requirements under Title XII of the Food Security Act of 1985, as amended, to the extent not covered by paragraph (a) of this section, the following procedures are available:

(1) Appeal to the county committee;

(2) Appeal to the State committee;

(3) Mediation under § 780.9;

(4) Appeal to NAD.

§ 780.7 Reconsideration.

(a) A request for reconsideration under this part must be submitted in writing by a participant or by a participant's authorized representative and addressed to the FSA decision maker as may be instructed in the adverse decision notification.

(b) A participant's right to request reconsideration is waived if, before requesting reconsideration, a participant:

(1) Has requested and begun mediation of the adverse decision;

(2) Has appealed the adverse decision to a higher reviewing authority in FSA; or

(3) Has appealed to NAD.

(c) Provided a participant has not waived the right to request reconsideration, FSA will consider a request for reconsideration of an adverse decision under these rules except when a request concerns a determination of NRCS appealable under the procedures in § 780.11, the decision has been mediated, the decision has previously been reconsidered, or the decision-maker is the Administrator, Deputy Administrator, or other FSA official outside FSA's informal appeals process.

(d) A request for reconsideration will be deemed withdrawn if a participant requests mediation or appeals to a higher reviewing authority within FSA or requests an appeal by NAD before a request for reconsideration has been acted upon.

(e) The Federal Rules of Evidence do not apply to reconsiderations. Proceedings may be confined to presentations of evidence to material facts, and evidence or questions that are irrelevant, unduly repetitious, or otherwise inappropriate may be excluded.

(f) The official decision on reconsideration will be the decision letter that is issued following disposition of the reconsideration request.

(g) A decision on reconsideration is a new decision that restarts applicable time limitations periods under § 780.15 and part 11 of this title.

§ 780.8 County committee appeals.

(a) A request for appeal to a county committee concerning a decision of a subordinate of the county committee must be submitted by a participant or by a participant's authorized representative in writing and must be addressed to the office in which the subordinate is employed.

(b) The Federal Rules of Evidence do not apply to appeals to a county committee. However, a county committee may confine presentations of evidence to material facts and may exclude evidence or questions that are irrelevant, unduly repetitious, or otherwise inappropriate.

(c) The official county committee decision on an appeal will be the decision letter that is issued following disposition of the appeal.

(d) Deliberations shall be in confidence except to the extent that a county committee may request the assistance of county committee or FSA employees during deliberations.

§ 780.9 Mediation.

(a) Any request for mediation must be submitted after issuance of an adverse decision but before any hearing in an appeal of the adverse decision to NAD.

(b) An adverse decision and any particular issues of fact material to an adverse decision may be mediated only once:

(1) If resolution of an adverse decision is not achieved in mediation, a participant may exercise any remaining appeal rights under this part or appeal to NAD in accordance with part 11 of this title and NAD procedures.

(2) If an adverse decision is modified as a result of mediation, a participant may exercise any remaining appeal rights as to the modified decision under this part or appeal to NAD, unless such appeal rights have been waived pursuant to agreement in the mediation.

(c) Any agreement reached during, or as a result of, the mediation process shall conform to the statutory and regulatory provisions governing the program and FSA's generally applicable interpretation of those statutes and regulatory provisions.

(d) FSA will participate in mediation in good faith and to do so will take steps that include the following:

(1) Designating a representative in the mediation;

(2) Instructing the representative that any agreement reached during, or as a result of, the mediation process must conform to the statutes, regulations, and FSA's generally applicable interpretations of statutes and regulations governing the program;

(3) Assisting as necessary in making pertinent records available for review and discussion during the mediation; and

(4) Directing the representative to forward any written agreement proposed in mediation to the appropriate FSA official for approval.

(e) Mediations will be treated in a confidential manner consistent with the purposes of the mediation.

(f) For requests for mediation in a Certified State, if the factual issues implicated in an adverse decision have not previously been mediated, notice to a participant of an adverse decision will include notice of the opportunity for mediation, including a mailing address and facsimile number, if available, that the participant may use to submit a written request for mediation.

(1) If the participant desires mediation, the participant must request mediation in writing by contacting the certified mediation program or such other contact as may be designated by FSA in an adverse decision letter. The request for mediation must include a copy of the adverse decision to be mediated.

(2) Participants in mediation may be required to pay fees established by the mediation program.

(3) A listing of certified State mediation programs and means for contact may be found on the FSA Web site at *http://www.udsa.gov/fsa/dispute-mediation.htm.*

(g) For requests for mediation in a Non-certified State, if the factual issues implicated in an adverse decision have not previously been mediated, notice to a participant of an adverse decision will, as appropriate, include notice of the opportunity for mediation, including the mailing address of the State Executive Director and a facsimile number, if available, that the participant may use to submit a written request for mediation.

(1) It is the duty of the participant to contact the State Executive Director in writing to request mediation. The request for mediation must include a copy of the adverse decision to be mediated.

(2) If resources are available for mediation, the State Executive Director will select a qualified mediator and provide written notice to the participant that mediation is available and the fees that the participant will incur for mediation.

(3) If the participant accepts such mediation, FSA may give notice of the mediation to interested parties and third parties whose interests are known to FSA.

(h) Mediation will be considered to be at an end on that date set out in writing by the mediator or mediation program, as applicable, or when the participant receives written notice from the State Executive Director that the State Executive Director believes the mediation is at an impasse, whichever is earlier.

(i) To provide for mediator impartiality:

(1) No person shall be designated as mediator in an adverse program dispute who has previously served as an advocate or representative for any party in the mediation.

(2) As a condition of retention to mediate in an adverse program dispute under this part, the mediator shall agree not to serve thereafter as an advocate or representative for a participant or party in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a mediation participant before an administrative appeals entity of USDA, or any other Federal Government department.

§ 780.10 State committee appeals.

(a) A request for appeal to the State committee from a decision of a county committee must be submitted by a participant or by a participant's authorized representative in writing and addressed to the State Executive Director.

(b) A participant's right to appeal a decision to a State committee is waived if a participant has appealed the adverse decision to NAD before requesting an appeal to the State Committee.

(c) If a participant requests mediation or requests an appeal to NAD before a request for an appeal to the State Committee has been acted upon, the appeal to the State Committee will be deemed withdrawn.

(d) The Federal Rules of Evidence do not apply in appeals to a State committee. Notwithstanding, a State committee may confine presentations of evidence to material facts and exclude evidence or questions as irrelevant, unduly repetitious, or otherwise inappropriate.

(e) The official record of a State committee decision on an appeal will be the decision letter that is issued following disposition of the appeal.

(f) Deliberations shall be in confidence except to the extent that a State committee may request the assistance of FSA employees during deliberations.

§ 780.11 Appeals of NRCS determinations.

(a) Notwithstanding any other provision of this part, a determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as amended, including a wetland determination, may be appealed to the county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal and believes that the challenge to the NRCS determination is not frivolous, the county committee shall refer the case with its findings on other issues to the NRCS State Conservationist to review the determination, or may make such a referral in advance of resolving other issues.

(c) A decision of the county committee not to refer the case with its findings to the NRCS State Conservationist may be appealed to the State Committee.

(d) The county or State committee decision must incorporate, and be based upon, the results of the NRCS State Conservationist's review and subsequent determination.

§ 780.12 Appeals of penalties assessed under the Agricultural Foreign Investment Disclosure Act of 1978.

(a) Requests for appeals of penalties assessed under the Agricultural Foreign Investment Disclosure Act of 1978 must be addressed to: Administrator, Farm Service Agency, Stop 0572, 1400 Independence Avenue, SW., Washington, DC 20250–0572.

(b) Decisions in appeals under this section are not subject to

reconsideration and are administratively final.

§ 780.13 Verbatim transcripts.

(a) Appellants and their representatives are precluded from making any electronic recording of any portion of a hearing or other proceeding conducted in accordance with this part. Appellants interested in obtaining an official recording of a hearing or other proceeding may request a verbatim transcript in accordance with paragraph (b) of this section.

(b) Any party to an appeal or request for reconsideration under this part may request that a verbatim transcript be made of the hearing proceedings and that such transcript be made the official record of the hearing. The party requesting a verbatim transcript shall pay for the transcription service, provide a copy of the transcript to FSA free of charge, and allow any other party in the proceeding desiring to purchase a copy of the transcript to order it from the transcription service.

§ 780.14 [Reserved]

§ 780.15 Time limitations.

(a) To the extent practicable, no later than 10 business days after an agency decision maker renders an adverse decision that affects a participant, FSA will provide the participant written notice of the adverse decision and available appeal rights.

(b) A participant requesting an appealability review by the State Executive Director of an agency decision made at the county, area, district or State level that is otherwise determined by FSA not to be appealable must submit a written request for an appealability review to the State Executive Director that is received no later than 30 calendar days from the date a participant receives written notice of the decision.

(c) A participant requesting reconsideration, mediation or appeal must submit a written request as instructed in the notice of decision that is received no later than 30 calendar days from the date a participant receives written notice of the decision.

(d) Notwithstanding the time limits in paragraphs (b) and (c) of this section, a request for an appealability review, reconsideration, or appeal may be accepted if, in the judgment of the reviewing authority with whom such request is filed, exceptional circumstances warrant such action. A participant does not have the right to see an exception under this paragraph. FSA's refusal to accept an untimely request is not appealable.

(e) Decisions appealable under this part are final unless review options available under this part or part 11 are timely exercised.

(1) Whenever the final date for any requirement of this part falls on a Saturday, Sunday, Federal holiday, or other day on which the pertinent FSA office is not open for the transaction of business during normal working hours, the time for submission of a request will be extended to the close of business on the next working day.

(2) The date when an adverse decision or other notice pursuant to these rules is deemed received is the earlier of physical delivery by hand, by facsimile with electronic confirmation of receipt, actual stamped record of receipt on a transmitted document, or 7 calendar days following deposit for delivery by regular mail.

§ 780.16 Implementation of final agency decisions.

To the extent practicable, no later than 30 calendar days after an agency decision becomes a final administrative decision of USDA, FSA will implement the decision.

§ 780.17 Judicial review.

(a) Decisions of the Administrator in appeals under this part from Agriculture Foreign Investment Disclosure Act penalties are administratively final decisions of USDA.

(b) The decision of a State Executive Director or State Conservationist on equitable relief made under § 718.307 of this title is administratively final and also not subject to judicial review.

Signed at Washington, DC, on July 7, 2005.

James R. Little,

Administrator, Farm Service Agency.

[FR Doc. 05–14767 Filed 7–26–05; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Docket No. FV05–981–2 FR]

Almonds Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the Almond Board of California (Board) for the 2005–06 and subsequent crop years from $0.025 to $0.030 per pound of almonds received. Of the $0.030 per pound assessment, 60 percent (or $0.018 per pound) will be available as credit-back for handlers who conduct their own promotional activities. The Board locally administers the marketing order which regulates the handling of almonds grown in California. Authorization to assess almond handlers enables the Board to incur expenses that are reasonable and necessary to administer the program. The crop year begins August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: July 28, 2005.

FOR FURTHER INFORMATION CONTACT: California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California almond handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable almonds beginning August 1, 2005, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.