

# Rules and Regulations

## PREAMBLE TO NAD FINAL RULE

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### DEPARTMENT OF AGRICULTURE

#### Office of the Secretary

#### 7 CFR Parts 1 and 11

#### National Appeals Division Rules of Procedure

**AGENCY:** National Appeals Division, Office of the Secretary, USDA.

**ACTION:** **Final rule.**

**SUMMARY:** On December 29, 1995, the National Appeals Division (NAD) in the Office of the Secretary published an interim final rule to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, by setting forth procedures for program participant appeals of adverse decisions by United States Department of Agriculture (USDA) agency officials to NAD. The deadline for receipt of comments was March 28, 1996. Nineteen timely public comments were received in response to the interim final rulemaking.

The Secretary now issues a final rule for the rules of procedure of NAD and for the technical change regarding authentication of NAD records by the NAD Director. The interim final rulemaking document also included conforming changes to the former appeal rules of USDA agencies whose adverse decisions are now subject to NAD review. This final rulemaking document does not contain final rules for the conforming changes. Those final rules will be issued by the respective agencies at a later date.

**DATES:** *Effective Date:* This final rule is effective July 23, 1999.

*Applicability Date:* This rule applies to all agency adverse decisions issued after July 23, 1999, all agency adverse decisions on which timely NAD appeals have not yet been taken, and pending NAD appeals.

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**SUPPLEMENTARY INFORMATION:**

**Classification**

This final rule has been reviewed under E.O. 12866, and it has been determined that it is not a "significant regulatory action" rule because it will not have an annual effect on the economy of \$100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, of State, local, or tribal governments or communities. This final rule will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in E.O. 12866.

**Regulatory Flexibility Act**

USDA certifies that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96-534, as amended (5 U.S.C. 601 *et seq.*).

**Paperwork Reduction Act**

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, 44 U.S.C., chapter 35, do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action taken by an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

**Background and Purpose**

On December 27, 1994 (see 59 FR 66517), the Secretary of Agriculture noticed that the NAD was established pursuant to Title II, Subtitle H of the Federal Crop Insurance Reform and Department of Agriculture

Reorganization Act of 1994, Pub. L. No. 103-354, 7 U.S.C. 6991 *et seq.* ("the Reorganization Act"). NAD was assigned responsibility for all administrative appeals formerly handled by the National Appeals Division of the former Agriculture Stabilization and Conservation Service (ASCS) and by the National Appeals Staff of the former Farmers Home Administration (FmHA), appeals arising from decisions of the former Rural Development Administration (RDA) and the former Soil Conservation Service (SCS), appeals arising from decisions of the successor agencies to the foregoing agencies established by the Secretary, appeals arising from decisions of the Commodity Credit Corporation (CCC) and the Federal Crop Insurance Corporation (FCIC), and such other administrative appeals arising from decisions of agencies and offices of USDA as may in the future be assigned by the Secretary.

This final rule sets for the jurisdiction of the NAD, and the procedures appellants and agencies must follow upon appeal of adverse decisions by covered USDA program "participants" as defined in detail in 7 CFR part 11.

**Response to Comments and Changes to Interim Final Rule**

Nineteen comments were received by March 28, 1996 in response to the request for comments on the interim final NAD rule. In response to these comments, minor changes have been made to the interim final rule. Additionally, a few other changes to the interim final rule have been made to reflect subsequent Congressional and USDA action established in the Risk Management Agency and to clarify some aspects of the rule as a result of the application of the interim final rule since it was promulgated.

The following explanation is given for those sections of the interim final rule that have been changed. Responses to comments not addressed in the explanation of changes follow.

*Effective Date*

The provisions of the interim final rule applicable to NAD Director review (7 CFR 11.9) were made effective retroactively to October 20, 1994, the date on which the Secretary established NAD. The purpose of the retroactive application of that section was to provide an administrative mechanism

for reconsideration of Director reviews during the transition from the old to the new appeals system where appellants had not received notice or copies or agency requests for review of hearing officer decisions. At this point, USDA has determined that any difficulties with prior decisions should have been resolved. In order to remove any ambiguity regarding the finality of Director review decisions, USDA accordingly is not making § 11.9 of this final rule retroactive.

#### Section 11.1 Definitions

**Agency.** Section 194 of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, amended the Reorganization Act by adding a new section 226A (7 U.S.C. 6933) authorizing the Secretary to establish an Office of Risk Management to supervise the Federal Crop Insurance Corporation (FCIC) and other crop insurance-related programs. The Secretary implemented this provision with Secretary's Memorandum 1010-2 issued on May 3, 1996, which established the Risk Management Agency (RMA). Since the RMA has taken over FCIC supervisory functions formerly assigned to the Farm Service Agency (FSA), USDA has added RMA to the definition of "agency" in this final rule.

Given that the Reorganization Act was enacted more than four years ago, USDA has deleted obsolete references to the former Agricultural Stabilization and Conservation Service (ASCS), Farmers Home Administration (FmHA), and Soil Conservation Service (SCS) from the definition of "agency." However, to ensure any matters that may arise from those former agencies remain within the jurisdiction of NAD, appropriate reference has been made to include a "predecessor" of a named agency within the definition of "agency."

USDA has deleted the Rural Development Agency (RDA) from the definition of "agency" as that agency no longer exists.

In many States and at the national office level, decisions relating to programs of the Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RUS) may be issued under the auspices of "Rural Development." Accordingly, USDA adds Rural Development (RD) to the definition of "agency" to avoid any confusion as to whether such decisions are subject to appeal to NAD.

**Participant.** For USDA response to comments and amendments regarding the participation of parties in NAD proceedings other than the agency and

the appellant, see the preamble text below addressing new § 11.15 of the rule.

USDA also amends this section to clarify that participants in proceedings before State Tobacco Marketing Quota Review Committees ("Tobacco Committees) under section 361, *et seq.*, of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1361, *et seq.*) are excluded from the definition of "participant" in § 11.1. In creating the NAD, Congress repealed several statutory appeal processes in section 273 of the Reorganization Act, but did not repeal these statutory appeal and judicial review provisions for decisions of the Tobacco Committees. Accordingly, in order to construe the statutes harmoniously, USDA concludes Congress did not intend for NAD review to supersede the specific statutory review process for decisions of the Tobacco Committees, and amends the NAD rule to give effect to this interpretation.

#### Section 11.4 Inapplicability of Other Laws and Regulations

Three comments were received from the same commenter concerning the applicability of the provisions of the Administrative Procedure Act (APA) regarding formal adjudicative proceedings (5 U.S.C. 554-57, 3105) and the Equal Access to Justice Act (EAJA) (5 U.S.C. 504) to NAD proceedings. The commenter suggests that 5 U.S.C. 559 requires that the formal adjudication provisions of the APA apply to NAD proceedings, and therefore, by its terms, EAJA also applies to NAD proceedings.

For the reasons set forth in the preamble to the interim final rule, it is the position of USDA that Congress did not intend for either the APA or the EAJA to apply to NAD proceedings. This is the same position that USDA took with respect to the applicability of the APA and EAJA when it was addressed in the regulations applicable to appeals before the former Farmers Home Administration National Appeals Staff. See 53 FR 26401 (July 12, 1988).

In *Lane v. U.S. Dept. of Agriculture*, 120 F.3d 106 (8th Cir. 1997), the court disagreed with the USDA position regarding the applicability of the APA and EAJA, holding that 5 U.S.C. 559 required application of both Acts to NAD proceedings. Consequently, USDA will apply the holding in *Lane* to NAD appeals which arise within the 8th Circuit. For adverse decisions arising outside of the 8th Circuit, USDA will continue to assert the inapplicability of NAD and EAJA, and NAD will not process EAJA applications filed in such appeals.

By definition, USDA EAJA regulations at 7 CFR part 1, subpart J, apply to any adjudication that USDA is required to conduct under the formal adjudication provisions of the APA. 7 CFR 1.183(a)(1)(i). Accordingly, EAJA applications on 8th Circuit NAD appeals have been processed by USDA in accordance with the USDA EAJA regulations at 7 CFR part 1, subpart J, and will continue to be processed in accordance with those regulations with one change.

Under EAJA, it is the agency, not the adjudicative officer, that is the final agency decisionmaker on an administrative EAJA application. 5 U.S.C. 504(a)(3). A NAD Hearing Officer clearly falls within the definition of "adjudicative officer" under the USDA EAJA regulations (7 CFR 1.180(b)); however, the Secretary has delegated to the Judicial Officer (with the exception of covered proceedings arising before the Board of Contract Appeals) his authority to review decisions of adjudicative officers as the final agency decisionmaker under EAJA (7 CFR 1.189). Concurrently with the promulgation of this final rule, the Secretary by separate memorandum will reassign, from the Judicial Officer to the NAD Director, his authority to make final agency determinations under EAJA for initial EAJA determinations rendered by NAD Hearing Officers. This delegation will apply prospectively to initial EAJA determinations issued by NAD Hearing Officers after the date the memorandum is signed.

As the holding of the 8th Circuit in *Lane* makes apparent, the right of a NAD appellant under EAJA to recover attorneys fees incurred in NAD proceedings will not rise or fall on the basis of whether or not USDA promulgates a regulation accepting or denying the applicability of the APA and EAJA. Further, as a result of *Lane*, the statement in the interim final rule regarding the inapplicability of the APA and EAJA no longer has universal application.

Accordingly, USDA has determined to remove any references to the APA or EAJA from the final rule in order to eliminate the issue of rulemaking from what is a pure matter of statutory construction involving the relationship of the Reorganization Act, the APA, and EAJA. The removal of references to the APA and EAJA, however, does not mean that USDA now finds the APA and EAJA applicable to NAD proceedings. As indicated above, USDA will continue to assert that the APA and EAJA do not apply to NAD appeals except where required by judicial ruling.

### *Section 11.5 Informal Review of Adverse Decisions*

Section 11.5(a) of the interim final rule provides that a participant first must seek county or area committee review of any adverse decision issued at the field service office level by an officer or employee of FSA, or any employee of such county or area committee. In the context of the USDA reorganization with the combination of the former Farmers Home Administration and the Agricultural Stabilization and Conservation Service into FSA, confusion has surrounded this provision with respect to its applicability to the former FmHA farm credit programs. As a result of reorganization, very few farm credit decisions would come within the scope of this requirement in any case. Accordingly, to clarify the scope of the provision, language has been added excepting farm credit programs from its coverage. Any inconsistency with the interim final rule at 7 CFR part 780 will be corrected when that rule is finalized but in the meantime NAD will apply these rules in determining the acceptability of an appeal to NAD of a farm credit decision by FSA.

### *Section 11.6 Director Review of Agency Determinations of Appealability and Right of Participants to Division Hearing*

Paragraph (a)(1) of § 11.6 is amended to correct an omission in the interim final rule that led to a discrepancy between the statement in the preamble to that rule and the text of that rule. The preamble of the interim final rule provided that a request for Director review of an agency determination that a decision is not appealable must be personally signed by the participant, just as the case with a participant request for a hearing and request for Director review of a Hearing Officer determination. However, the language of section 11.6(a)(1) did not expressly state that such requests must be personally signed. Section 11.6(a)(1) now makes clear that the participant must personally sign the request for Director review of an agency determination of non-appealability.

Further, with respect to the need for personal signature for certain actions, USDA clarifies that the reasonable interpretation of this requirement is vested in the NAD Hearing Officers or Director in individual cases. While it is not a statutory jurisdictional prerequisite for perfecting a timely appeal, it is reasonable to expect that authorized representatives seeking to file appeals before NAD would check the rules of the forum for filing

requirements. Even though the requirement is expressed using the term "personally," it also is reasonable to interpret that term as applying to a responsible officer or employee of an entity where the definition of "participant" in § 11.1 encompasses an "entity" as well as an "individual."

### *Section 11.8 Division Hearings*

Section 11.8(b)(6) is ambiguous with respect to the options of a NAD hearing officer when a party fails to show up at a hearing. Section 11.8(b)(6)(i)(B) states that if the hearing officer elects to cancel the hearing, he can accept evidence into the record from any party present and then issue a determination, whereas § 11.8(b)(6)(ii) suggests that the hearing officer must allow the absent party an opportunity to respond to any such evidence admitted prior to rendering a determination. USDA has modified the language of § 11.8(b)(6)(i)(B) to make the acceptance of evidence clearly subject to § 11.8(b)(6)(ii) prior to issuing a determination.

### *Section 11.9 Director Review of Determinations of Hearing Officers*

The word "Associate" in § 11.9(d)(3) is changed to "Assistant" to reflect the current organization of NAD.

### *Section 11.15 Participation of Third Parties and Interested Parties in Division Proceedings*

Several commenters, either reinsurance companies or organizations commenting on behalf of reinsurance companies, requested that reinsurance companies be notified of and allowed to participate in NAD proceedings on participant appeals of FCIC decisions where the outcome of the NAD proceeding would affect policies held by reinsurance companies. For example, if FCIC declares an insured ineligible for crop insurance, a reinsurance company may cancel a previously existing policy as a result of that decision; however, if the insured then successfully appeals to NAD and the FCIC decision is overturned, the reinsurance company now will have a policy on its books that it had thought removed and it may not have received any notice of the NAD appeal or decision.

One commenter also objected to the change from the proposed rule in the interim final rule that required a bank holding a guaranteed loan to jointly appeal with the borrower any adverse decision. The commenter argued that the borrower was the individual directly affected and thus should be able to appeal an adverse decision related to a guaranteed loan independently from the lender.

In addition to the concerns raised by these commenters, NAD also has experienced difficulties in the appeal process where the interests of parties other than the appellant and the agency are involved.

Accordingly, a new § 11.15 has been added to the rule to provide procedures for handling these types of situations involving the interests of other parties in a NAD appeal.

The new § 11.15 recognizes that there are two types of situations where parties other than the appellant or the agency may be interested in participating in NAD proceedings. In the first situation, a NAD proceeding may in fact result in the adjudication of the rights of a third party, e.g., an appeal of a tenant involving a payment shared with a landlord, an appeal by one recipient of a share of a payment shared by multiple parties, or an appeal by one heir of an estate. In the second situation, there may be an interested party that desires to receive notice of and perhaps participate in an appeal because of the derivative impact the appeal determination will have on that party, e.g., guaranteed lenders and reinsurance companies.

These two different types of situations require separate procedures. Thus, in the first type where the actual rights of a third party are being adjudicated, USDA has termed such a party a "third party" and provided a new § 11.15(a) to provide for the participation of a "third party." After an appellant files an appeal, if the agency, appellant, or NAD itself identifies a third party whose rights will be adjudicated in an appeal, NAD will issue a notice of the appeal to the third party and provide such party with an opportunity to participate fully as a party in the NAD proceeding. Participation will include the right to seek Director review of the determination of the Hearing Officer. USDA believes the participation of a third party under § 11.15 also gives the third party the right to seek judicial review of the final NAD determination. If the third party receiving notice declines to participate, he will be bound by the final NAD determination as if he had participated. The intent of this provision is to include all parties in the initial NAD appeal and prevent a secondary appeal by a third party who did not receive notice of the appeal, but who is adversely affected by the agency implementation of the NAD determination of appeal, and who thus would then be entitled to an appeal of his own that could lead to a contradictory result.

For example, the agency determines a recipient sharing in a payment with two

other parties is entitled to 25% of the payment, and the recipient appeals. NAD determines that the agency decision was erroneous, and the agency implements by according the appellant 50% of the payment. The first NAD determination would not be binding as to the other two recipients, thus giving rise to secondary appeals, unless the other two recipients had notice and opportunity to participate in the first appeal.

In the second type of situation, new § 11.15(b) provides for the participation of guaranteed lenders and crop reinsurers as "interested parties" in an appeal where the actual rights of such interested parties under a USDA program are not being adjudicated (i.e., the appeal would not lead to an agency implementation decision that would give rise to NAD appeal rights for them), but such parties would be impacted by the outcome. Interested parties are not entitled under this new provision to request Director review of a hearing officer determination. It also is the position of USDA that such participation of an "interested party" does not give rise to a right by such "interested party" to judicial review of the final NAD determination.

In light of these changes, USDA is striking the requirement in the definition of "participant" in § 11.1 of the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers.

With respect to the comments suggesting that reinsurers should be notified of NAD appeals taken by insureds, that topic should be addressed in agency rules and not the rules pertaining to NAD itself. NAD does not have the resources, capability, or function to carry out that mission.

#### *Other Comments*

As indicated above, the other CFR sections amended by the interim final rule and that are not a part of this final rule will be issued as final rules at a later date. Comments received on those rules are not addressed below except to the extent that they are related to a provision of 7 CFR part 11. Comments related to other parts of the interim final rule, or other agency rules (such as those for mediation), will be referred to the appropriate parties for further consideration.

#### *Crop Insurance Issues*

One commenter expressed concern that the revision of 7 CFR part 400, subpart J, in the interim final rule eliminated the rights of appeal previously contained in 7 CFR 400.92. The commenter questioned whether the

more general language of the interim final rule provided for appeal rights coextensive to those in 7 CFR 400.92.

Except with respect to the provision for notification to the reinsurance company in 7 CFR 400.92(f), USDA believes that the specified rights of appeal outlined in 7 CFR 400.92 are covered by the NAD appeal regulations contained in this final rule. Further, the notification issue has been dealt with partially in this final rule by providing reinsurance companies the right to participate in NAD appeals as detailed above.

One reinsurance commenter also expressed the view that if allowed to participate in a NAD appeal it also should be allowed to request Director review of a hearing officer's decision. The comment reflected a concern that the agency would not timely request Director review of a hearing officer's decision and thus leave the reinsurer at risk. USDA does not adopt this recommendation because only program participants receiving adverse decisions from an agency have a statutory right to appeal under the NAD statute; since a reinsurer is not the recipient of the adverse decision, it may not be a NAD appellant able to request hearings and Director review. However, as interested parties, USDA is allowing reinsurers to participate in the hearing and Director review process.

One commenter on behalf of crop insurers suggested that the interim final rule be revised to allow reinsurance companies to appeal to NAD where a matter would not be subject to appeal to the Agriculture Board of Contract Appeals (AGBCA). The NAD process was established as a forum primarily for producer appeals, not as a forum for contractual and quasi-contractual matters. USDA at this time does not perceive a gap between a reinsurance company's right of appeal to the AGBCA and the availability of participant appeals to NAD by recipients of FCIC or RMA adverse decisions; therefore, a safety provision in this NAD final rule to cover appeals not taken by the AGBCA is neither required nor appropriate.

#### *Mediation*

Several commenters addressed issues regarding mediation. The mediation process between participants and agencies is not the subject of this final rule. Mediation is relevant to this rule only with respect to the determination of when a participant's right to appeal to NAD begins to toll. Comments regarding the length of time agencies allow for mediation to be requested and the length of time they permit for

mediation to continue therefore are outside the scope of this rule and are not addressed herein.

Section 11.5(c)(1) of the interim final rule provides that a participant request for mediation or alternative dispute resolution (ADR) stops the running of the 30-day period after an adverse decision in which a participant may appeal that decision. Once mediation or ADR has concluded, this provision provides that the participant then has the remaining balance of the 30 days to appeal. Finding this process prone to confusion, four commenters suggested that the termination of mediation without settlement should in some way be construed as a new adverse decision with a full 30 days to seek NAD review of the decision. This suggestion does not comport with the concept of mediation. First of all, the mediator is not an agency decisionmaker and the results of the mediator's work is not therefore an agency decision. Second, mediation does not result in decisions; it results either in a mutually acceptable solution to all parties or a termination of the mediation with no resolution of the dispute. The NAD statute does not provide for a new 30-day period for a NAD appeal to begin at the conclusion of the mediation process.

One of the commenters, however, suggested that agencies issue a new adverse decision at the conclusion of mediation, with a notice of appeal rights. This adverse decision would replace the initial adverse determination and start the 30-day clock running anew for a NAD appeal. Such a mandate on USDA program agencies is beyond the scope of this final rule.

Three commenters suggested that § 11.5 of the rule provide that agencies notify participants of the balance of time remaining for appeal at the conclusion of mediation. Two commenters suggested that it would be inappropriate for the mediator to perform this task for reasons of liability and impartiality.

USDA agrees that it would be inappropriate to require the mediator to provide such notice; however, USDA does not adopt the suggestion that agencies should be required to give such notice. Agency notices to participants of appeal rights are beyond the scope of this final rule.

One commenter suggested that participants be billed for their share of the costs of medication. That subject is beyond the scope of this final rule.

#### *Required Informal Agency Review*

One commenter suggested that the required informal review by a county or area committee as a prerequisite to a NAD appeal, as set forth in § 11.5(a),

should be dropped because it results in additional costs and delays for participants. USDA declines to remove this provision.

#### Notification of Appeal Rights for Adverse Decisions Determined Non-Appealable

One commenter suggested that agencies be required to provide participants with notice of appeal rights to NAD under § 11.6(a) of agency determinations that an adverse decision is not appealable. USDA agrees that information on such appeal rights should be given by agencies when a decision is issued with a statement that it is not appealable. As with other notice requirements, however, USDA does not mandate this requirement on agencies in this final rule.

#### "Reasonably Should Have Known"

One commenter objected to the requirement in § 11.6(b)(1) that a participant must request an appeal within 30 days after "the participant reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations". The commenter suggested that the agency should have specified timeframes to respond to participant requests, application, or inquiries; that participants should be notified of agency deadlines so that they can monitor them and know when to appeal; and that, alternatively, that if an agency fails to respond by deadlines, participant requests or applications should be automatically approved.

The purpose of the above-quoted phrase in § 11.6(b)(1) is to bring finality to agency decisions and programs by requiring appellants to appeal within 30 days of an agency missing a deadline specified in published agency regulations. Participants are deemed to have knowledge of published laws and regulations. If a regulation states that the agency will act on a given application in 60 days, a participant may not rest on his or her rights for a year before appealing to NAD because the agency never acted on the applications. Requiring an agency to specify timeframes for all actions in regulations, or to notify participants of such timeframes, is beyond the scope of this rule and the mission of NAD. Finally, USDA by general rule cannot establish automatic award of applications for failure to act on them where contrary to statute or principles of sovereign immunity.

#### "Adverse Decision"

Two commenters suggested that § 11.8(b) should be revised to allow

participants 30 days to appeal upon receiving a *written* decision from the agency including: a clear statement of the adverse decision, a citation of the regulatory basis for the adverse decision, a notification of appeal rights, notification of the proper agency from which to appeal the adverse decision, notification of the proper reviewing officer to whom the appeal must be sent, and notification of mediation rights. One of the commenters further suggested that the definition of "adverse decision" be changed to "adverse final decision" so that preliminary adverse letters to participants—which a given agency may not regard as starting the 30-day clock—will not start the 30-day clock until the adverse decision is made officially by the agency.

These suggestions by the commenters appear to reflect several concerns. First, one commenter takes issue with our view, stated in the preamble to the interim final rule, that the requirement for notice of an agency adverse decision in § 274 of the Reorganization Act is not a prerequisite for NAD jurisdiction. Placing the requirement for a written decision in § 11.8(b)(1), as suggested, implicitly would provide that notice and allow the participant a fair amount of time to develop his or her appeal. Second, there is a concern that agencies will seek to trigger the 30-day clock with oral decisions that participants will not understand as triggering their appeal rights. Third, agencies often do not view some actions as the adverse decisions for which appeal rights run and thus participants may prematurely appeal. Fourth, the suggested required content for an adverse decision is needed for the written determinations so that participants understand all their rights and clearly understand what the adverse decision is and the basis therefor.

USDA declines to adopt these suggestions for several reasons. While well-intentioned, these suggestions would be a triumph of form over substance spawning unnecessary litigation over who got what notice when. First and foremost, USDA interprets the statute to provide a clear intent on the part of Congress to afford participants the right to appeal *de facto* decisions rendered by an agency failure to act. The definition of "adverse decision" in section 271(1) of the Reorganization Act expressly includes "the failure of an agency to issue a decision or otherwise act on the request or right of the participant." To require a written decision from the agency before a participant may appeal essentially stops a participant's ability

to appeal agency inaction, contrary to Congressional intent.

Second, if an administrative decision adversely affects a participant, it is an adverse decision subject to appeal under the statute regardless of whether the agency has sent out the formal letter with formal appeal rights. Each agency subject to NAD jurisdiction handles decisions in various ways and to attempt to specify that only "final" adverse decisions will count does not provide for an efficient NAD appeals process. (This, of course, does not mean that an agency may not recall and re-issue an earlier decision, in which case the 30-day clock begins to run anew).

Finally, with respect to the fairness of the appeal by providing the basis therefore, USDA sees no intent on the part of Congress to allow agencies to hold up the processing of appeals by failing to provide the basis for the decision. Section 11.8(c)(ii) in fact is written to require the agency to provide NAD with a copy of the adverse decision and a written explanation, including regulatory and statutory citation, once an appeal is filed in the event the participant was unable to get that information beforehand. If the agency does not furnish the information at that point, it merely runs the danger of losing the appeal for lack of information. At least, however, the participant has gotten his appeal before NAD whereas requiring the agency to provide that information to the participant before he or she may appeal to NAD effectively would prevent the participant from even filing an appeal.

#### Copies of Agency Record

Two commenters suggested changes to §§ 11.8(a) and 11.8(b)(1) to require agencies to notify an appellant of the appellant's right to an agency record after the appellant has filed an appeal, to require the agency to provide the hearing officer with a copy of the agency file to be placed automatically in the record, to require the agency to provide a copy of the agency record upon request, and to provide specific procedures for how an appellant could obtain the agency record. One commenter also suggested adding language to § 11.8(c)(5)(ii) to require the agency to present similar information, as well as additional information on the basis of the decision, at the hearing itself.

USDA declines to adopt these comments. They are either already covered specifically in the cited sections of the rule or else are covered within the language of the rule in a way that allows flexibility for agency and NAD response. Appellants are placed on notice of their

right to request and receive copies of the agency record by this final rule itself and a further requirement for agencies to provide such notice is beyond the scope of this rule. Further, requiring the agency to present such information at the hearing runs contrary to the statutory requirement that the appellant must prove the agency decision erroneous. This places the burden of going forward in the appeal on the appellant. If the agency fails to provide an adequate response to the appellant by failing to provide information, it runs the risk of losing the appeal.

#### Notice of Director Review

Section 11.9(b) requires the Director to notify all parties of receipt of a request for Director review and section 11.9(c) requires a party to submit responses to a request for Director review within 5 business days of receiving a copy of the request for Director review.

One commenter suggested clarifying how the Director is to provide notification under § 11.9(b), and suggested inserting the word "their" in § 11.9(c) presumably to distinguish the running of the 5 business days from the receipt of the Director review itself by the Division from the 5 business days from receipt of a copy by the other parties. USDA declines to adopt either of these comments. The method of notification should remain within the discretion of the Director and § 11.9(c) is clear without further amendment.

#### Basis for Determinations

Three commenters suggested removal or revision of the phrase "and with the generally applicable interpretations of such laws and regulations" in § 11.10(b) to reflect that generally applicable interpretations of laws and regulations should not be the sole basis for agency adverse decisions. These commenters were concerned that § 11.10(b) is inconsistent with the principle that adverse decisions must be based on regulations promulgated in accordance with notice-and-comment rulemaking procedures. For the reasons set forth in explanation of § 11.10(b) in the preamble to the interim final rule, USDA finds this language appropriate and declines to remove it as requested in the comments. Further, USDA notes that inclusion of this language does not reflect an intent to bind NAD to arbitrary interpretations of statutes or regulations by agency officials. Any unpublished, generally applicable interpretations of laws and regulations may be relied upon only to the extent permitted by the APA and interpretations thereof by relevant

caselaw. NAD is bound to decide appeals in accordance with law; therefore, if an interpretation is not permissible under the APA, then NAD cannot rely upon that interpretation to sustain an agency decision.

#### Reconsideration

One commenter suggested that appellants be given 15 days, instead of 10 days, to request the Director to reconsider his determination under § 11.11. USDA declines to change this provision.

Section 11.11 was added to the interim final rule to reflect the inherent authority of a decisionmaker under general principles of law to review his or her decisions to correct errors. These are errors (such as citation to the wrong dates, wrong amounts, wrong regulations, or wrong statutes), not changes of interpretations or opinions, and as such should be quickly detectable upon reading the determination and reviewing the record. A request for reconsideration under this provision should not require a great deal of time for research, and rarely should require additional time for gathering information and evidence since this is not another step in the appeal process.

#### Implementation

One commenter suggested that § 11.12(a) was vague about how implementation would occur, thus allowing agencies to obstruct the implementation process. The commenter suggested amending § 11.12(a) to incorporate the implementation language from the old National Appeals Staff rules of procedure (7 CFR 1900.59(d) (1-1-95)) that provided that implementation meant the taking of the next step by the agency that would be required by agency regulations if no adverse action had occurred.

USDA indicated in the preamble to the interim final rule its position that implementation meant taking the next step. However, that interpretation of implementation comes from the farm credit appeals system that is now under the auspices of NAD. NAD also reviews decisions related to farm programs, disaster assistance, soil and water conservation programs, and crop insurance. Given the variety of programs now covered by NAD that were not subject to the "next step" rule, USDA declines to adopt any express guidance regarding implementation at this time until experience with a unified appeals process provides a clear picture of what uniform implementation rule would work for all agencies under the jurisdiction of NAD.

#### Discrimination Complaints

One commenter suggested that NAD develop a process for consolidating program appeals with related civil rights complaints. USDA declines to adopt this suggestion. The rights and remedies available to NAD appellants under USDA statutes and regulations are much different than those available to individuals asserting discrimination claims against USDA under civil rights laws of governmentwide applicability. USDA already has a separate administrative process for review of discrimination complaints. NAD does not have the ability or capacity to undertake consolidated civil rights appeals that exceed the scope of the purpose for which it was established.

#### List of Subjects

##### 7 CFR Part 1

Administrative practice and procedure, Agriculture, Reporting and recordkeeping requirements.

##### 7 CFR Part 11

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Guaranteed loans, Insured loans, Loan programs, Price support programs, Soil conservation.

For the reasons set out in the preamble, Title 7 of the Code of Federal Regulations is amended as set forth below.

#### PART 1—ADMINISTRATIVE REGULATIONS

1. The authority citation for part 1 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 552. Appendix A also issued under 7 U.S.C. 2244; 31 U.S.C. 9701, and 7 CFR 2.75(a)(6)(xiii).

2. Section 1.20 is revised to read as follows:

##### § 1.20 Authentication.

When a request is received for an authenticated copy of a document which the agency determines to make available to the requesting party, the agency shall cause a correct copy to be prepared and sent to the Office of the General Counsel which shall certify the same and cause the seal of the Department to be affixed, except that the Hearing Clerk in the Office of Administrative Law Judges may authenticate copies of documents in the records of the Hearing Clerk and that the Director of the National Appeals Division may authenticate copies of documents in the records of the National Appeals Division.