

behind the drafting of these rules was to ensure that they were written as broadly and flexibly as possible so that they do not need to be amended each time an agency amends its substantive program regulations.

Ex parte communication. One commenter suggested this definition needed to include post-hearing requests for Director review and requests regarding the appealability of adverse decisions. The definition here was changed to include an oral or written communication "to any officer or employee of the Division." As explained below, further changes were made regarding *ex parte* communications to ensure that the prohibition on such communications covered all NAD proceedings and employees.

Implement. Three comments were received suggesting changes to this definition. In combination with § 11.11 of the rule, USDA feels that this language reflects the statutory definition and need not be changed.

Participant. One commenter suggested that, rather than defining "participant" by listing programs and statutes under which an individual may not bring an appeal before NAD, a separate list of non-appealable decisions should be added to the regulation. This approach was considered, as was listing the programs from which adverse decisions could be appealed to NAD, but the statutory language did not support these approaches. "Adverse decision" is defined too broadly in the statute to limit by regulation. Further, nonappealability of decisions is limited only to matters of general applicability under section 272(d) of the Act. Conversely, Congress explicitly gave the Secretary authority to define "participant" (sec. 271(9)) and therefore the approach reflected in the rule was chosen.

Seven substantive comments were made regarding the definition of "participant" in the proposed rule. Two commenters suggested that the definition should be expanded to include the requirement that, for certain guaranteed loan programs of the former Farmers Home Administration (FmHA), both the applicant/borrower and the lender should be required to appeal jointly. Since any decision to deny a guaranteed loan would affect both the applicant/borrower and the lender, USDA agrees that both parties must appeal any such adverse decision and the rule has been revised to reflect this requirement. However, only the lender will be able to appeal the denial or reduction of a final loss payment to that lender.

One commenter expressed concern that the language "right to participate in" did not clearly include an applicant. Therefore, USDA has added "who has applied for" to the definition.

One commenter suggested that the wording of the definition technically could exclude someone from appealing to NAD if, for example, they had filed a tort claim against USDA. As a "participant" in a tort claim, they would not be included as a "participant" for purposes of a NAD appeal. To clarify that this is not the case, USDA has amended the introductory phrase before the list of programs to read: "The term does not include persons whose claim(s) arise under:".

Finally, three comments were received from representatives of reinsured companies, that is, crop insurance companies whose insurance contracts with producers are reinsured by the FCIC. The reinsured companies objected to the language including participants affected by decisions of reinsured companies in the definition of "participants." As originally proposed, the language would have allowed participants to appeal reinsured company decisions to NAD.

The reinsured companies objected to this language on several grounds. First, they noted that while FCIC was included in the definition of "agency" in section 271(1) of the Act, reinsured companies were not. Thus, the proposed rule attempted to include private companies as government agencies contrary to the language of the Act. Second, the reinsured companies argued that promulgation of this language by USDA in the final rule would breach the terms of the Standard Reinsurance Agreements between USDA and the reinsured companies, as well as alter the legal terms of reinsured company policies with thousands of insureds. Third, the number of policy decisions made by reinsured companies that would be open to appeal to NAD under the proposed language would overwhelm NAD with thousands of appeals. Finally, the reinsured companies argued that the intent of the Act in including FCIC in the definition of "agency" was to provide appeal rights for participants in crop insurance programs for a narrow range of decisions still committed to FCIC after crop insurance reform, i.e., decisions regarding yield and coverage that are based on FCIC actuarial data or decisions where an individual is found ineligible to participate in the Federal crop insurance program.

In response to these comments, USDA has dropped decisions of reinsured companies as decisions that participants

may appeal under this part. The exclusion of disputes between reinsured companies and FCIC from the definition of participant in the final rule also means that all disputes between reinsured companies and FCIC likewise are excluded from the jurisdiction of NAD. Contract disputes between reinsured companies and FCIC will be appealable to the USDA Board of Contract Appeals as provided in its rules. Non-contract related decisions of FCIC that are adverse to reinsured companies may be settled with the agency or by resort to legal action in a court of competent jurisdiction.

Additional definitions. Two commenters suggested that a definition for "mediation" be added. The use of mediation or other forms of alternative dispute resolution (ADR) by program participants is a matter of choice for the participants themselves. Since the type of mediation or ADR used by a participant and the agency is not a jurisdictional issue for purposes of determining whether an appeal is properly before NAD, NAD has no control over whatever means the participant and agency employ. Accordingly, USDA has declined to attempt to define mediation or ADR for purposes of this part.

§ 11.2 General statement.

No comments were received in response to this section. USDA has made two changes to this section upon further review. First, language has been added to reflect the statutory provision that NAD, although independent, is subject to the general supervision and policy direction of the Secretary. Second, a statement has been added to make clear that exhaustion of the procedures for Hearing Officer review of an adverse decision under this part is required before a program participant may seek judicial review of an adverse decision. This additional language does not deprive participants of their right to seek review under any judicial exceptions to required exhaustion of administrative procedures.

§ 11.3 Applicability.

Six commenters generally contended that the NAD appeal procedures should apply to appeals arising after October 13, 1994, and not October 20, 1994 as specified in the proposed rule. The commenters' rationale for the October 13 date is that the Act was effective as of that date. One commenter also discussed the legal ability of the Department to make the rule effective retroactively.

USDA has decided to delete the effective date subsection from this