

# **USDA FARM PROGRAM ELIGIBILITY AND APPEALS: PITFALLS AND POINTERS**

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## **FARM PROGRAM ELIGIBILITY**

The federal government provides assistance to producers of agricultural commodities through a wide array of conservation, commodity, disaster assistance, and price support programs. Although each particular program establishes particular eligibility rules based upon the subject matter of the program, several rules of general application apply to these programs. Some of these rules address payment eligibility while other rules impose payment limitations.

Among others, payment eligibility rules include the actively engaged in farming rule, rules for non-family joint operations, the cash rent tenant rule, adjusted gross income provisions, and foreign person rules. Among the payment limitation rules are direct attribution rules, common attribution rules, substantive change rules, and inheritance provisions. It must be pointed out that although I have described these rules as rules of “general” applicability, none of these rules apply to all programs. These are simply common rules outside of the eligibility rules of the specific programs that apply only to those programs as designated by law or regulation. For example, the actively engaged in farming rule and the cash rent tenant rule apply only to conservation reserve program contracts approved before October 1, 2008, and the commodity programs while the adjusted gross income provisions apply to all conservation programs, all commodity programs, all disaster assistance programs, and some but not all of the price support programs. (Handbook 6-PL, ¶ 34A.)

The authority for administering these common payment eligibility and payment limitation rules is derived from sections 1001–1001D of the Food Security Act of 1985 as amended, which is codified at 7 U.S.C. §§1308–1308-3. The regulations governing these provisions are found at 7 C.F.R. Part 1400. The agency of the U.S. Department of Agriculture administering these common payment eligibility and payment limitation rules is the Farm Service Agency (FSA). Because these payment eligibility and payment limitation rules must necessarily be applied by FSA employees and farmer committees in hundreds of county and state FSA offices across the country, the FSA publishes additional administrative guidance in the form of a handbook to be distributed to state and county offices. The handbook contains the FSA’s current interpretation of the statutes and regulations governing payment eligibility and payment limitations. As such, the contents of the handbook do not have the force of law because the handbook has not been subject to the regulatory comment and hearing process. Nevertheless, the handbook represents an important source for practitioners by providing the current interpretation of the FSA in more detailed explanation and in examples not found in the regulations.

The current farm program eligibility handbook is Handbook 6-PL, *Payment Limitation, Payment Eligibility, and Average Adjusted Gross Income*. Handbook 6-PL was originally published on September 28, 2020, and was most recently updated on October 28, 2020. Handbook 6-PL can be found online at the following link: [https://www.fsa.usda.gov/Internet/FSA\\_File/6-pl\\_r00\\_a02.pdf](https://www.fsa.usda.gov/Internet/FSA_File/6-pl_r00_a02.pdf). A table of FSA handbooks available online can be found at the following link: <https://www.fsa.usda.gov/programs-and-services/laws-and-regulations/handbooks/index>.

### **Actively Engaged in Farming**

In my practice I am regularly assisting farmers in establishing or maintaining their eligibility for benefits in the annual programs for covered commodities—the Agricultural Risk Coverage (ARC) program and the Price Loss Coverage (PLC) program. To be considered eligible to receive farm program payments under these commodity programs, a person or entity must be “actively engaged in farming” in the farming operation. Actively engaged in farming is a four-part test. A person or entity is actively engaged in farming if:

1. The person or entity makes a significant contribution of capital, equipment, or land, or a combination of capital, equipment, and land to the farming operation;
2. The person or entity makes a significant contribution of active personal labor or active personal management, or a combination of active personal labor and active personal management, to the farming operation;
3. The person’s or entity’s share of the profits or losses from the farming operation is commensurate with the person’s or entity’s contributions to the operation; and
4. The person’s or entity’s contributions to the farming operation are at risk. (7 C.F.R. §1400.201(b).)

A person or entity makes a significant contribution of capital, equipment, or land if the person provides at least 50% of the person’s or entity’s commensurate share of (1) the total value of the capital, (2) the total rental value of the equipment, or (3) the total rental value of the land necessary to conduct the farming operation during the crop year. If making a significant contribution of a combination of capital, equipment, and land, the person or entity must provide a contribution with a total value equal to at least 30% of the person’s or entity’s commensurate share of the total cost of the farming operation for the crop year. (7 C.F.R. §1400.3.) To qualify as a significant contribution, the capital, equipment, or land must be owned or, with respect to equipment or land, leased by the person or entity making the contribution. If the contributed capital, land, or equipment is acquired as a result of a loan, the loan must not be made to, guaranteed, co-signed, or secured by any other person or entity that has an interest in the farming operation. (7 C.F.R. §§1400.202(c), 1400.203(b), 1400.204(d), 1400.205(e), and 1400.206(b).) A person or entity has an interest in the farming operation if the person or entity, either directly or indirectly as a partner of a general

partnership, is an owner, lessor, or lessee of land in the farming operation, or has an interest in the agricultural products, commodities, or livestock produced by the farming operation. (7 C.F.R. §1400.3.) The FSA handbook provides an exception to this financing rule if the other persons or entities that have an interest in the farming operation making, guaranteeing, co-signing, or securing the loan are all of the members of the joint operation or all of the shareholders of the legal entity to which the loan is made. (Handbook 6-PL, ¶¶ 144E, 145D, and 146D.)

A person makes a significant contribution of active personal labor if the person provides the lesser of 1,000 hours of labor per calendar year or 50% of the total hours that would be necessary to conduct a farming operation comparable in size to such person's commensurate share in the farming operation. Except for a general partnership or joint operation in which at least one owner is not a family member, a person makes a significant contribution of active personal management if the person provides management activities that are "critical to the profitability of the farming operation," which management is performed in one or more of the categories of capital, labor, agronomics, and marketing. If neither of the foregoing contributions has been made, a person will make a significant contribution of a combination of active personal labor and active personal management if the person provides labor and management activities which, when made together, result in a "critical impact on the profitability of the farming operation" in an amount at least equal to either the significant contribution of active personal labor or active personal management as set forth above. (7 C.F.R. §1400.3.) Furthermore, for a partner of a general partnership or a member of a joint operation, to qualify as a significant contribution, the labor or management must not be provided for compensation in the form of a salary or guaranteed payment. The only compensation that can be provided is the commensurate share of the profit or loss of the farming operation. (7 C.F.R. §1400.201(d)(4); Handbook 6-PL, ¶¶147-48.) In addition, for a joint operation or a legal entity the contribution of labor or management must be made by all of the partners, stockholders, or members. If any partner, stockholder, or member fails to contribute the required labor or management, the program payments otherwise payable to the joint operation or legal entity will be reduced by an amount commensurate with the ownership share held by that partner, stockholder, or member. (7 C.F.R. §§1400.203(a)(1)(ii) and 1400.204(b).)

**How can the farming operation's financing arrangements adversely affect farm program eligibility?**

### **Cash Rent Tenant Rule**

To establish or maintain eligibility in the ARC and the PLC programs, farmers who are cash renting land must satisfy an additional eligibility requirement to receive payments with respect to the cash-rented land. For those farmers who, like many of my clients, cash rent all of the land they farm, this additional eligibility requirement applies to their entire farming operation.

In the case of cash-rented land, the owners or partners of a farming operation must make a significant contribution to the farming operation of either (1) active personal labor, or (2) a combination of a significant contribution of active personal management and a significant contribution of equipment. As with the requirement to be actively engaged in farming, for a joint operation or a legal entity, if the contribution of labor or management is not made by all of the partners, stockholders, or members, the program payments otherwise payable to the joint operation or legal entity will be reduced by an amount commensurate with the ownership share held by that partner, stockholder, or member. (7 C.F.R. §§1400.214(a), (d), and (e).)

In the situations for which a significant contribution of equipment is required to satisfy the cash rent tenant rule, additional restrictions are imposed that are not necessary for achieving a significant contribution of equipment to satisfy the actively engaged in farming eligibility requirement. If the equipment is leased from a landlord owning land farmed in the farming operation, the lease must reflect the fair market value of the equipment leased with a payment schedule considered reasonable and customary for the area. If the equipment is leased from the same person or legal entity that is providing hired labor to the farming operation, then the contracts for the lease of the equipment and for the hired labor must be two separate contracts. And in both situations, the tenant must exercise complete control over the leased equipment, including exclusive access and use by the tenant, during the entire crop year. (7 C.F.R. §§1400.214(b) and (c).)

### **How can certain equipment leasing arrangements adversely affect program eligibility?**

#### **Limited Liability Companies**

Payment limitations are imposed per person or legal entity. (7 C.F.R. §1400.1(f).) A person is an individual “natural person” and does not include a legal entity. A legal entity is an entity created under federal or state law that owns land or owns or produces an agricultural commodity, product, or livestock. (7 C.F.R. §1400.3.) Therefore, payments for a particular program to an individual or to an entity cannot exceed the dollar limitation set forth in the regulations. (7 C.F.R. §1400.1(f).) However, the regulations provide a separate definition for one type of entity – a joint operation. A joint operation is a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization. (7 C.F.R. §1400.3.)

The critical difference between a joint operation and other legal entities for farm program payment purposes is the level of the organization at which payment limitations are applied. Whether a business entity (other than a joint operation), a trust, or an estate, the payment limitation is imposed at the entity level. (7 C.F.R. §§1400.204, 1400.205, and 1400.206.) For joint operations, such as general partnerships and joint ventures, the payment limitation is applied at the partner or member level. (7 C.F.R. §1400.203.) The key distinction is, as stated in the regulatory definition of a joint operation, the joint and several liability of all of the members for the obligations of the organization. If the entity affords liability protection to some or all of its members, then the payment limitation is

applied at the entity level and the entity is eligible for payments not exceeding one limitation. If, on the other hand, the entity affords no liability protection to its members, then such joint operation may receive payments for each of its members to the extent such members are otherwise eligible. Essentially, a general partnership is the only form of business organization that permits a single farming operation to receive farm program payments in excess of a single payment limitation. All other business organizations, including limited partnerships, limited liability partnerships, limited liability companies, and corporations, are limited to one payment limitation each.

### **Watch out for farming operations conducted as limited liability companies!**

#### **Non-Family Members**

As noted in the discussion on actively engaged in farming above, a person makes a significant contribution of active personal management if the person provides management activities that are “critical to the profitability of the farming operation.” Many family farming operations involve members of the family in a general partnership and maintain the eligibility of some or all of the partners by such partners contributing active personal management as described in the preceding sentence. This can be particularly important to maintain the eligibility of partners who are no longer physically able to perform labor in the farming operation or whose circumstances prevent them from meeting the minimum hours requirement for a significant contribution of labor. However, qualifying multiple members of a joint operation as being actively engaged in farming through a significant contribution of active personal management is only permitted for farming partnerships in which all of the partners or the owners of partners are family members. For payment limitation and payment eligibility purposes, federal law defines a family member to be a person to whom another member in the farming operation is related as lineal ancestor, lineal descendant, sibling, first cousin, niece, nephew, spouse, or otherwise by marriage. (7 U.S.C. §1308(a)(2).)

Significant restrictions are imposed upon the ability of more than one partner or owner of a partner to maintain payment eligibility in a joint operation in which at least one partner or owner of a partner is not a family member as defined above (a non-family operation). Normally, a non-family operation is limited to only one person maintaining eligibility through a significant contribution of active personal management. One additional person may maintain eligibility with a significant contribution of management if the farming operation is either large or complex. Two additional persons, for a maximum of three managers, can be eligible through a significant contribution of management if the farming operation is **both** large and complex. A large farming operation is an operation that (1) produces and markets crops on 2,500 acres or more of cropland, (2) produces honey with more than 10,000 hives, or (3) produces wool with more than 3,500 ewes. A farming operation will be deemed complex only if approved by the FSA State Committee with the concurrence of the FSA Deputy Administrator for Farm Programs in Washington. In no case may more than three persons in the same non-family operation maintain farm program eligibility through a significant contribution of management. (7 C.F.R. §1400.602.)

Even if a non-family operation is large or can establish itself as complex, more stringent requirements are imposed to be considered to be making a significant contribution of active personal management, such that each manager must perform at least 25% of the total management hours required for the farming operation annually or at least 500 hours of management for the farming operation annually. Detailed records must be maintained to establish the management performed by each partner seeking to qualify by making a significant contribution of management and by each other individual providing management to the farming operation. (7 C.F.R. §§1400.601(b) and 1400.603.) Frankly, these requirements are so onerous that among my clients all non-family farming operations are limiting themselves to no more than one person making a significant contribution of management or have divided themselves into smaller operations with all of the members of each such operation being family members.

### **How can the death of a spouse or the divorce of a married couple adversely affect farm program eligibility?**

#### **Substantive Change**

To prevent the proliferation of eligible persons in farming operations, there is a system of rules requiring that any change in a farming operation that would increase the number of persons subject to payment limitations must be bona fide and substantive. The addition of a family member to a farming operation, if bona fide, is always a substantive change. Therefore, the substantive change rules principally impact non-family operations. Substantive changes that permit an increase in the number of persons to which payment limitations apply include:

1. The addition of land used for agricultural production not previously involved in the farming operation of at least 20% or more in the total land previously involved in the farming operation. Normally, the addition of such amount of land will be considered a substantive change for the increase of only one person or legal entity to the farming operation.

2. A change in ownership by sale or gift of equipment from a person or legal entity previously engaged in a farming operation to a person or legal entity that has not been involved in the farming operation. The amount of the equipment transferred must be commensurate with the new person's share of the farming operation, the sale or gift of equipment must be based on the equipment's fair market value, the former owner must have no direct or indirect control over the equipment, the transaction must not be financed by the former owner, and preference cannot be given to the former owner to repurchase the equipment at a later date.

3. A change in ownership by sale or gift of land or livestock from a person or legal entity previously engaged in a farming operation to a person or legal entity that has not been involved in the farming operation. The amount of the land or livestock transferred must be commensurate with the new person's share of the farming operation, the sale or gift of land or livestock must be based on the land or livestock's fair market value, the former owner must have no direct or indirect control

over the land or livestock, the transaction must not be financed by the former owner, and preference cannot be given to the former owner to repurchase the land or livestock at a later date. (7 C.F.R. §1400.104.)

Whether there is an increase in the number of persons to which payment limitations would apply is measured between the current year's farming operation and the prior year's farming operation. (Handbook 6-PL, ¶ 125B.) The substantive change rules apply only if there is an overall increase in the number of persons, both within the farming operation and outside the farming operation, subject to payment limitations. Therefore, if a member of a farming operation retires and ceases farming and is replaced by a new person who has not farmed before, the substantive change rules do not apply. On the other hand, if a person departs a farming operation but continues to farm separately and such person is replaced by a new person in the original farming operation, the substantive change rules do apply. (Handbook 6-PL, ¶ 126B.) Therefore, the continuity of the number of persons within a farming operation from year to year can be very important to avoid the application of the substantive change rules.

**How can the unexpected departure of a member of a farming operation affect farm program eligibility?**

## FARM PROGRAM APPEALS

The U.S. Department of Agriculture provides a system of appeals by which farmers and the FSA can resolve disputes regarding farm program eligibility. This system begins with an informal appeals process within the FSA itself and continues with more formal administrative appeals to the National Appeals Division (NAD), an independent agency within the office of the Secretary of Agriculture. Mediation may be requested, but only once, at any stage in the appeal process prior to a hearing before NAD. (7 C.F.R. §780.9.)

The regulations governing the informal appeals process within the FSA can be found at 7 C.F.R. Part 780. The regulations governing appeals to NAD can be found at 7 C.F.R. Part 11. The current FSA appeals handbook is Handbook 1-APP (Revision 2), *Program Appeals, Mediation, and Litigation*. Handbook 1-APP was originally published on June 3, 2008, and was most recently updated on September 12, 2016. Handbook 1-APP can be found online at the following link: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-app\\_r02\\_a15.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf).

Depending upon the level within the FSA at which an adverse determination has been made, the following procedures are available:

1. Appeal to the FSA county committee of decisions made by county office personnel;
2. Reconsideration by the FSA county committee;

3. Appeal to the FSA state committee; and
4. Reconsideration by the FSA state committee. (7 C.F.R. §780.6(a).)

A farmer can choose to begin the appeal process at the lowest available level or begin at any higher level. (Handbook 1-APP, ¶ 13.)

If a farmer is not satisfied with a determination obtained through the FSA informal appeals process, after receiving the final adverse determination from the FSA state committee or at any other point in the appeals process after at least receiving a determination from the county committee, the farmer may appeal the most recent determination to NAD. (7 C.F.R. §780.6(a)(5).)

In the FSA informal appeals process and the administrative appeal procedures before NAD, there are three points that I suggest practitioners keep in mind.

**Keep in mind the 30-day appeal deadline.** A request for reconsideration, mediation, or appeal must be submitted in writing no later than 30 calendar days from the date a participant **receives** written notice of the decision. (7 C.F.R. §§780.15(c) and 11.6(b)(1).) Many times the attorney will not be consulted about an adverse determination until many days after the determination was issued. The first thing an attorney should do when consulted about an adverse determination is to obtain a copy of the determination letter to determine the date it was issued and, if possible, to figure out the date the determination letter was received. The date upon which an adverse determination is deemed received by the farmer 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. (7 C.F.R. §780.15(e)(2).) Therefore, an appeal or request for reconsideration based upon an adverse determination letter sent by regular mail should be timely if it is filed within 37 days after the date of the determination letter.

**Use of mediation.** My experience is that mediation is not effective in resolving issues during the informal appeals process. For determinations appealable to the FSA state committee, the FSA personnel attending the mediation have not had the authority to reach any conclusions on behalf of the state committee. I have not been able to achieve any resolution or narrowing of the issues in the mediations in which I have been involved. Nevertheless, mediation can be valuable if more time is needed to gather information about the case and particularly to obtain more information from the FSA itself. Remember that mediation merely tolls the 30-day period for filing an appeal within the FSA; it does not restart the appeal clock. Accordingly, if mediation is unsuccessful in resolving all issues, you will have only the balance of the days remaining within the appeal period to file an appeal. (Handbook 1-APP, ¶ 14E.)



**The farmer must personally sign a request for appeal to NAD.** Within the FSA informal appeals process, a request for reconsideration or appeal may be signed either by the farmer or by the farmer’s authorized representative. (7 C.F.R. §§780.7(a), 780.8(a), and 780.10(a).) To the contrary, an appeal of an adverse decision to NAD must be “personally signed by the participant.” (7 C.F.R. §11.6(b)(2).) Be sure your farmer client is available to sign the request for appeal to NAD in time to meet the filing deadline.

3-25500-3.417