

Chapter 7

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## Chapter 7

# Farm Service Agency (FSA) Emergency (EM) Loans

## I. Introduction

The Farm Service Agency (FSA)—formerly the Farmers Home Administration (FmHA)—provides relief for farmer disaster victims in the form of low interest loans, called Emergency (EM) loans.<sup>1</sup> EM loans are intended to enable farmers to return to their normal farming operations as soon as possible after a disaster.

## II. EM Loan Program Significantly Altered in Recent Years

FSA's administration of the EM loan program is governed by federal statutes and by official regulations published in the Code of Federal Regulations (CFR).

### A. Significant Program Changes Adopted in 2002

In the 1990s, Congress passed laws making some significant changes to the EM loan program.<sup>2</sup> On January 8, 2002, FSA issued a rule implementing those statutory provisions and making other dramatic changes to the program.<sup>3</sup> The rule that took effect in 2002 was significantly shorter, and simplified many of the required calculations and determinations. In the 2002 rule, FSA also moved the EM loan program regulations to a new section of the CFR, Part 764 of Title 7.<sup>4</sup>

In addition to the changed regulations, in 2002 FSA also issued a handbook setting out EM loan program requirements for state and county offices to use when handling EM loan applications.<sup>5</sup>

## **B. Additional EM Loan Program Changes Made in 2007 as a Result of FSA Streamlining of Direct Farm Loan Programs**

On November 8, 2007, FSA issued a rule making comprehensive changes to its direct farm loan programs.<sup>6</sup> The rule changed and reorganized all of the general direct loan requirements, including requirements that apply to EM loans. FSA also revised the EM Loan Handbook to incorporate these changes.

The rule and the new handbook took effect on January 1, 2008.

This chapter explains the EM loan program requirements under the current statute, rule, and handbook provisions. See earlier editions of this book for EM loan requirements in effect before 2008.<sup>7</sup>

Farmers can request a copy of the EM Loan Handbook, called "Direct Loan Making," 3-FLP, from their local FSA offices or obtain a copy from FSA's website at [www.fsa.usda.gov/Internet/FSA\\_File/3-flp-r1.pdf](http://www.fsa.usda.gov/Internet/FSA_File/3-flp-r1.pdf). Part 4 of the handbook lists the general requirements for all direct loan programs; these also apply to EM loans. Specific requirements for EM loans are set out in Part 9 of the handbook.

## **III. EM Loan Deadlines**

An EM loan application must be received by FSA no later than eight months after the date a disaster is officially declared or designated.<sup>8</sup> This declaration or designation date may vary from county to county.

The EM Loan Handbook states that if a county has been designated or named as a disaster county more than once for the same disaster, farmers will have eight months from the most recent designation to submit an EM loan application.<sup>9</sup>

## IV. Eligibility for EM Loans

EM loans are available to farmers who meet the eligibility rules even if they have not borrowed from FSA—or FmHA—in the past. To be eligible for an EM loan, farmers must meet all of the following requirements.<sup>10</sup>

### EM Loan Eligibility Criteria

To qualify for an EM loan, the farmer must:

- A. Operate a family farm in a disaster area.
- B. Be an established farmer and intend to continue farming.
- C. Have sufficient managerial ability.
- D. Have an acceptable credit history.
- E. Be unable to get credit elsewhere.
- F. Agree to meet borrower training requirements.
- G. Have received only limited FSA debt forgiveness in the past.
- H. Have no property subject to a federal judgment lien.
- I. Have no drug convictions in the past five crop years.
- J. Have no federal crop insurance violations.
- K. Agree to repay duplicative assistance from other federal sources.
- L. Possess legal capacity.
- M. Meet citizenship requirements.
- N. Have suffered a qualifying loss.

### A. Operate a Family Farm in a Disaster Area

EM loans are only available to a borrower who operates a family farm in a disaster area.<sup>11</sup>

#### 1. Owner-Operator or Tenant-Operator

An EM loan borrower must be the operator of the farm affected by the disaster.<sup>12</sup> If the loan proceeds are going to be used for repair or replacement of real estate, the borrower also must either be the owner of the farming operation or have a lease on the real estate meeting certain requirements. These requirements are: (1) the lease must go beyond the loan repayment term, (2) the

lease must provide that FSA will receive prior notice of lease termination during the term of the loan, and (3) the landlord must give FSA a mortgage on the real estate as security for the loan.<sup>13</sup>

The EM Loan Handbook states that, in addition to being the farm operator, the borrower must have an ownership interest in any chattel that will be the basis for a loss claim.<sup>14</sup>

## **2. Family Farm**

An EM loan borrower's operation must qualify as a family farm.<sup>15</sup> The FSA definition of family farm has four parts. First, the farm must produce enough agricultural commodities for sale to be recognized in the community as a farm rather than a rural residence.<sup>16</sup> The EM Loan Handbook states that the farm operation must "provide a significant financial return."<sup>17</sup> Second, the farm must be managed by the farmer.<sup>18</sup> The EM Loan Handbook elaborates on this point, stating that all of the day-to-day management and operational decisions should be made by members of the farm family and that if consultants, advisors, and similar experts are used, someone in the farm family must remain the decision maker.<sup>19</sup> Third, the farmer and his or her family must provide a substantial part of the farm's labor requirements.<sup>20</sup> The farm may use a reasonable amount of temporary labor for seasonal peak periods or intermittent labor-intensive activities and still qualify as a family farm, so long as any full-time hired labor is only supplementing family labor.<sup>21</sup> The EM Loan Handbook states that, in most instances, the family should provide most of the day-to-day labor, with exceptions recognized for high-value, labor-intensive crops.<sup>22</sup>

The EM Loan Handbook adds a fourth factor that FSA will consider when determining whether a farmer satisfies the family farm requirement: credit needs.<sup>23</sup> Noting that the FSA loan limits established by Congress generally ensure that the loans are made to family farm operations, the handbook states that if FSA farm loans are a small portion of the farmer's total credit requirements,

this may indicate that the farm is larger than family-size or that credit would be available from another source.<sup>24</sup>

EM loans are not available for losses to non-eligible enterprises.<sup>25</sup> FSA defines non-eligible enterprises as enterprises that: (1) raise exotic animals or their products; (2) raise non-farm animals (for example, animals ordinarily used as pets); (3) market goods or services that are not produced by the farming operation; or (4) process or market farm products, the majority of which were not produced by the farming operation.<sup>26</sup>

### **3. In a Disaster Area**

EM loans are only available for losses to a farming operation located in a disaster area.<sup>27</sup> For EM loan purposes, a “disaster area” is any county declared or designated a disaster and eligible for EM loan assistance, along with all counties bordering the declared or designated county.<sup>28</sup> This means that to be eligible for an EM loan, a farmer must operate in a county that is a declared or designated disaster county or any county that borders a disaster county.

In 2002, Congress authorized FSA to make EM loans available to producers suffering losses due to quarantines imposed by the Secretary of Agriculture under specified laws.<sup>29</sup> Although the regulatory definition of “disaster area” has not been changed to reflect this authority for making EM loans for losses from a quarantine, it seems that FSA will interpret the requirements to read “disaster area” as “quarantine area” when appropriate.<sup>30</sup>

## **B. Established Family Farmer Intending to Continue Farming**

EM loan borrowers must be established farmers who intend to continue farming.

### **1. Established Farmer**

The borrower must be an established farmer.<sup>31</sup> The EM loan regulations define “established farmer” as a farmer who operates

a farm and meets the following three requirements: (1) was actively participating in the operation and management of the farm at the time of the disaster;<sup>32</sup> (2) spends a substantial portion of time carrying out the farming operation; and (3) planted the crops or produced the livestock on the farm.<sup>33</sup> If the borrower is a business entity, in addition to meeting these three requirements, it must be primarily engaged in farming, and more than 50 percent of its gross income from all sources must be from the farming operation, based on a projected cash flow.<sup>34</sup>

The regulations and EM Loan Handbook list certain types of operations that cannot be considered established farmers for EM loan purposes. These ineligible operations are: (1) an entity whose members are other corporations, partnerships, joint operations, cooperatives, limited liability companies, or trusts; (2) integrated livestock, poultry, or fish processors operating through contracts or other arrangements with farmers; and (3) any farming operation that employs a full-time farm manager.<sup>35</sup>

Although integrated processors are not eligible for EM loans, a grower under contract with an integrated processor may be considered an established farmer for EM loan purposes so long as the grower does not employ an outside full-time manager or management service.<sup>36</sup> EM loans made to such a grower will be based on the grower's share in the agricultural production, as provided for in the contract with the processor.<sup>37</sup>

## **2. Intend to Continue Farming**

EM loan borrowers must demonstrate the intent to continue the farming operation after the disaster.<sup>38</sup> Farmers who temporarily stopped farming because of the disaster should be able to satisfy this eligibility requirement if they intend to resume farming.

## **C. Managerial Ability**

In order to be eligible for an EM loan, a farmer must have sufficient managerial ability to ensure reasonable prospects of repaying the

loan, as determined by FSA. Managerial ability must be demonstrated by education, on-the-job training, or farming experience covering at least one entire production cycle in the previous five years.<sup>39</sup>

According to the EM Loan Handbook, a farmer whose managerial experience is based on his or her farming experience must demonstrate that he or she has carried out the farm operation according to standard farming practices in the area.<sup>40</sup> Examples given in the handbook of failures to follow standard farming practices include: (1) planting crops that are not typically grown in the area due to climate conditions, (2) late planting unrelated to disaster, (3) poor tillage practices, (4) poor breeding practices, and (5) lack of good recordkeeping.<sup>41</sup> Based on these examples, any farmer whose operation is appropriate for the growing conditions and who has practiced good husbandry and good recordkeeping should not have difficulty satisfying this requirement, even if the operation is not typical for the area.

#### **D. Acceptable Credit History**

A farmer must demonstrate an acceptable credit history to be eligible for any FSA direct farm loan, including an EM loan.<sup>42</sup> The regulations state that FSA will use a farmer's prior record of debt repayment to evaluate the farmer's credit history.<sup>43</sup>

##### **1. Truthful Credit Information and History of Fulfilling Credit Obligations**

Part of the credit history consideration is whether the farmer has dealt in good faith with FSA in the past, including providing current, complete, and truthful information in the EM loan application and in all past dealings with FSA.<sup>44</sup> Good faith also includes satisfying all written agreements with FSA. The regulations state that if a farmer fails to satisfy written agreements with FSA because of circumstances beyond the farmer's control, the farmer will still be considered to have acted in good faith.<sup>45</sup>

Farmers will be found not creditworthy if they deliberately falsify information,<sup>46</sup> intentionally omit information relevant to the loan decision, or do not make every reasonable effort to meet the terms and conditions of the proposed loan.<sup>47</sup> FSA will also examine whether the farmer has fulfilled his or her obligations to other parties, including other federal agencies.<sup>48</sup> A history of failures to repay debts when the ability to repay was within the farmer's control will generally be considered an unacceptable credit history.<sup>49</sup>

## **2. Certain Credit Problems Are Not Necessarily Unacceptable**

General FSA regulations applicable to all FSA direct farm loan programs state that certain problems in making past payments do not automatically indicate an unacceptable credit history.<sup>50</sup>

### **a. More Than Three Years Ago**

Foreclosures, judgments, or delinquent payments that occurred more than 36 months before the EM loan application is filed do not constitute an unacceptable credit history if no similar situations have occurred recently.<sup>51</sup>

### **b. Resolved Through FSA Loan Servicing**

Delinquencies on FSA debt that have been resolved through loan servicing do not mean that the farmer has an unacceptable credit history.<sup>52</sup>

### **c. Isolated Incidents**

Isolated incidents of delinquent payments that do not represent a general pattern of unsatisfactory or slow payment do not mean that the farmer has an unacceptable credit history.<sup>53</sup>

**d. Lack of Credit History**

According to FSA regulations, a lack of credit history is not automatically unacceptable.<sup>54</sup>

**e. Circumstances Beyond the Farmer's Control**

A recent foreclosure, judgment, bankruptcy, or delinquent payment does not mean the farmer has an unacceptable credit history if the circumstances causing it were temporary and beyond the farmer's control.<sup>55</sup> The FSA direct loan regulations in effect before January 1, 2008, set out examples of circumstances beyond a farmer's control, including loss of a job, delay or reduction in government benefits, other loss of income, and increased living expenses due to illness or death.<sup>56</sup> Although the 2007 rule removed this language from the loan program regulations, these should still be considered valid examples of what circumstances may be considered beyond a farmer's control, since FSA did not indicate that their removal would result in any substantive changes to the credit history requirements for direct farm loan programs.

**f. Justifiable Dispute About Goods or Services**

A recent foreclosure, judgment, bankruptcy, or delinquent payment does not mean the farmer has an unacceptable credit history if the farmer refused to make full payment due to defective goods or services or based on another justifiable dispute relating to the goods or services purchased.<sup>57</sup>

**E. Unable to Get Credit Elsewhere**

EM loan borrowers must be unable to get sufficient credit elsewhere at reasonable rates and terms.<sup>58</sup> The EM loan regulations implemented in 2002 reduced the amount of documentation that farmers are required to provide to demonstrate that they are unable to obtain credit elsewhere. According to FSA, the documentation requirements under the prior regulations were stricter than required by statute.<sup>59</sup>

Even if the required documentation is provided, FSA reserves the right in all cases to contact lenders in the area and make an independent determination of the farmer's ability to obtain credit elsewhere.<sup>60</sup>

**1. Application to Borrow \$300,000 or More: Two Written Denials**

If the farmer is requesting a loan of \$300,000 or more, the EM loan regulations require the farmer to provide written loan denials from two commercial lending institutions located near the farmer.<sup>61</sup> The reason for the denial must be specified.<sup>62</sup> The EM Loan Handbook states that one of the denials must be from the farmer's normal lender, and both denials must be from lenders who typically make farm loans.<sup>63</sup>

**2. Application to Borrow Less Than \$300,000: One Written Denial**

If the application is for less than \$300,000, the EM loan regulations require the farmer to provide a written loan denial from one commercial lending institution located near the farmer.<sup>64</sup> The reason for the denial must be specified.<sup>65</sup> The EM Loan Handbook states that the farmer must contact his or her normal lender unless that lender has already denied a request to continue with the farmer or extend additional credit with or without a guarantee.<sup>66</sup> In that case, the farmer may contact another lender that makes agricultural loans.<sup>67</sup>

**3. Waiver Possible for Applications to Borrow \$100,000 or Less**

For loans of \$100,000 or less, FSA may waive the requirement for a written denial of credit if certain conditions are met.<sup>68</sup> In order for the waiver to be available, FSA must conclude that obtaining the written denial would pose an undue burden on the farmer, the farmer must certify that credit is not available elsewhere, and FSA must conclude that credit from other lenders is not likely to be available based on the farmer's circumstances.<sup>69</sup>

According to the EM Loan Handbook, a waiver of the credit denial requirement will only be granted after the FSA loan approval official has reviewed the farmer's financial statement, credit report, and other financial information and has determined that these clearly indicate that other credit would not be available.<sup>70</sup> The loan approval official must compare the credit standards of local agricultural lenders to the farmer's financial condition and must document how the farmer fails to meet those standards.

The EM Loan Handbook emphasizes that a farmer's ability to obtain credit for the farming operation through credit cards, finance companies, or other "sub-prime" lenders does not constitute failure of the no-credit-elsewhere test, unless the rates and terms for that credit are similar to the rates and terms offered by other agricultural lenders in the community on loans for farm purposes.<sup>71</sup>

#### **F. Borrower Training**

The farmer must agree to meet FSA borrower training requirements.<sup>72</sup> A waiver of training requirements may be granted in some cases.<sup>73</sup> If the farmer previously received FSA assistance that was conditioned on attending borrower training, the farmer will be ineligible for an EM loan until the earlier borrower training requirement is satisfied.<sup>74</sup> Depending on how long it has been since the earlier assistance was received, the farmer must either be enrolled in and attending an approved borrower training course or have satisfactorily completed a course.

#### **G. Only Limited Debt Forgiveness**

The farmer must not have received debt forgiveness from USDA on more than one occasion on or before April 4, 1996, and not at all after April 4, 1996.<sup>75</sup> Debt forgiveness, for this purpose, includes a write-down, write-off, or debt settlement of a debt to FSA or a loss paid by FSA on a guaranteed loan.<sup>76</sup>

If the farmer caused FSA a loss by receiving debt forgiveness on more than one occasion on or before April 4, 1996, or on any occasion after that date, the farmer could become eligible for an EM loan by repaying FSA's loss and curing the debt forgiveness.<sup>77</sup> In such cases, FSA may still consider the debt forgiveness in reviewing the farmer's credit history.<sup>78</sup>

#### **H. No Outstanding Federal Judgment Liens**

The farmer's property must not be subject to an outstanding federal judgment lien, though United States Tax Court liens are permitted.<sup>79</sup>

#### **I. No Recent Drug Convictions**

The farmer and anyone else who will sign the loan agreement must not have been convicted under federal or state law of planting, cultivating, growing, producing, harvesting, or storing a controlled substance during the current crop year or the previous four crop years.<sup>80</sup> Additionally, applicants must not have been convicted of possessing or selling a controlled substance.<sup>81</sup> The farmer will be required to self-certify on the EM loan application form that these eligibility requirements are satisfied.<sup>82</sup>

#### **J. No Federal Crop Insurance Violations**

Applicants who have willfully and intentionally provided false or inaccurate information to USDA or a crop insurance company with respect to a federal crop insurance policy or plan are not eligible to receive EM loan funds.<sup>83</sup> If the borrower is a business entity, all of its members must satisfy this requirement. The farmer will be required to self-certify on the EM loan application form that this eligibility requirement is satisfied.<sup>84</sup>

#### **K. Agree to Repay Duplicative Federal Assistance**

The farmer must agree that if disaster assistance in addition to the EM loan is received from another federal agency for the same losses, the duplicative benefits will be repaid to the agency that provided them.<sup>85</sup>

The EM Loan Handbook states that, if at the time the EM loan is processed the farmer expects to receive additional disaster benefits, but the amount of those benefits is not known, the farmer must assign those benefits to FSA.<sup>86</sup> FSA's comments accompanying the 2002 EM loan rule state that FSA will use federal debt collection procedures to recover any duplicative assistance that it provides.<sup>87</sup>

The EM Loan Handbook also states that benefits from programs enacted after an EM loan is approved will not affect the EM loan amount.<sup>88</sup> The use of the word "enacted" suggests that this exception applies only to benefits from programs that are not authorized by Congress until after the EM loan approval.

#### **L. Possess Legal Capacity**

The farmer and anyone who will sign the loan agreement must possess the legal capacity to qualify for the loan.<sup>89</sup> This means that the person must be of legal age, possess the mental capacity, and have the authority to enter into a legally binding agreement.<sup>90</sup>

#### **M. Meet Citizenship Requirements**

The farmer and anyone who will sign the loan agreement must be a citizen of the United States, a non-citizen national, or a qualified alien under federal immigration laws.<sup>91</sup>

#### **N. Suffer a Qualifying Loss**

To be eligible for an EM loan, a farmer must have suffered a qualifying loss.<sup>92</sup> There are two different types of qualifying losses: physical losses and production losses. Farmers can qualify for an EM loan on the basis of either type of loss, or both.

##### **1. Physical Losses**

Farmers whose property, including livestock, was damaged by a disaster may qualify for an EM loan due to physical losses.<sup>93</sup> There is no minimum amount of physical loss required for eligibility.

**a. Types of Property Eligible for Physical Loss Assistance**

Physical loss is defined for EM loan purposes as verifiable damage to or destruction of property.<sup>94</sup> Damage to or destruction of annual growing crops is specifically excluded from eligibility as a physical loss for EM loan purposes and must instead qualify as a production loss, discussed next.<sup>95</sup> Types of physical property that can count as the basis for a physical loss loan include the following.<sup>96</sup>

***(i) Property Essential to the Farm Operation***

Disaster-related damage to real estate or chattel that is essential to the farming operation is a qualifying physical loss for EM loan purposes.<sup>97</sup> Property is essential to the farming operation if it would be needed after the disaster for the farmer to be able to continue operating the farm as it was operated immediately prior to the disaster.<sup>98</sup>

Depending on the circumstances, this could include a dwelling, land and farm buildings, machinery, equipment, tools, and supplies needed for the farm. FSA will make the determination whether property is essential to the farmer's operation.<sup>99</sup>

***(ii) Essential Household Items***

Disaster-related damage to the farmer's household items that must be repaired or replaced is a qualifying physical loss for EM loan purposes.<sup>100</sup> The items must be essential to maintain viable living quarters for the farmer's household.<sup>101</sup> Examples of essential household items from the prior EM loan rule include: a stove, refrigerator, furnace, couch, chairs, tables, beds, lamps, and clothing.<sup>102</sup> Damage to luxury items, such as jewelry, furs, antiques, and paintings, is not a qualifying loss for EM loan purposes.<sup>103</sup>

Damage to essential household items is an eligible physical loss only for individual farmers.<sup>104</sup> Farming operations conducted as business entities cannot receive EM loans for losses to essential household items.

*(iii) Livestock*

Before February 2002, disaster losses affecting livestock could qualify as production losses or physical losses, depending on the type of loss experienced.<sup>105</sup> Under the current EM loan regulations, all disaster-related livestock losses are treated as physical losses for EM loan purposes.<sup>106</sup> This includes both losses to breeding stock and losses to livestock that would otherwise have generated normal production income. FSA explained the change in policy for livestock losses by saying that it would make it easier for livestock producers to qualify for EM loans because they would not have to experience a minimum 30 percent loss, as is required for EM loans based on production losses.<sup>107</sup> FSA's comments accompanying the final 2002 EM loan regulations stated that livestock losses rarely qualified as production losses under the prior regulations.<sup>108</sup>

Even though all livestock losses are now treated as physical losses, there are still some different rules for different types of livestock losses. For example, as discussed in the next section of this chapter, EM loans for many types of livestock losses can be used to cover family living and farm operating expenses, but EM loans made for loss of breeding stock cannot be used for these purposes.<sup>109</sup> These loans can only be used to replace the lost breeding stock.

The EM Loan Handbook emphasizes that farmers cannot qualify for EM loans based on losses of livestock raised under production contracts where the integrator retains

ownership in the livestock and the farmer has no ownership interest.<sup>110</sup> Farmers who raise livestock under such contracts would be eligible for EM loans for losses to livestock, commodities, and chattel that they do own.

*(iv) Harvested and Stored Crops*

Disaster-related damage to harvested and stored crops is a qualifying physical loss for EM loan purposes.<sup>111</sup>

*(v) Perennials That Produce an Agricultural Commodity*

The current EM loan regulations include as a qualifying physical loss the costs to restore perennials that produce an agricultural commodity to the stage of development the damaged perennials had obtained prior to the disaster.<sup>112</sup> The EM Loan Handbook specifies that losses to fruit, nut bearing, or income producing trees and plants which result in their destruction or major damage will be treated as physical losses.<sup>113</sup>

However, the EM Loan Handbook states that FSA will not make EM loans available for perennial restoration unless the perennials can be completely rehabilitated or reestablished within five years.<sup>114</sup> The handbook also requires the farmer to show the trees or plants will produce income for more than five years.

The EM Loan Handbook additionally emphasizes that farmers who wish to use EM loan funds to rehabilitate or reestablish perennials must meet additional eligibility requirements. Specifically, farmers must: (1) be the owner-operator of a citrus grove, orchard, or commercial woodlot, (2) provide FSA with a feasible plan for each year until the operation has been brought back to full production, and (3) verify that income from other farming enterprises or dependable off-farm income is sufficient to meet family living and farm operating expenses not

related to the rehabilitation or reestablishment being financed with the EM loan funds.<sup>115</sup>

**b. Hazard Insurance Requirements**

Most physical property damaged in a disaster must have been covered by hazard insurance at the time of the disaster to qualify as a physical loss for EM loan purposes.<sup>116</sup> In general, the level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less.<sup>117</sup> If the tax value or cost-depreciated value of the property is very low, the level of coverage required will also be quite low.

For EM loan purposes, hazard insurance is defined as “insurance covering fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workers compensation, or any similar insurance that is available and needed to protect the Agency security, or that is required by law.”<sup>118</sup>

***(i) Real Estate: Hazard Insurance Required***

In general, real estate damaged by a disaster must have been covered by general hazard insurance at the time of the disaster in order to qualify for EM loan assistance.<sup>119</sup>

***(ii) Chattel: Hazard Insurance Required if Available and Cost-Effective***

Chattel property damaged by a disaster must have been covered by general hazard insurance at the time of the disaster if such insurance was readily available and its benefits justified its cost.<sup>120</sup>

***(iii) Livestock: Hazard Insurance Not Required***

The prior EM loan regulations explicitly stated that the hazard insurance requirement did not apply to livestock.<sup>121</sup> The current regulations do not retain this explicit exemption, though it does appear in the EM Loan Handbook.<sup>122</sup> Thus, the policy of exempting livestock from the hazard insurance requirements should continue to apply under the current regulations.

***(iv) Exception Authority for Chicken Houses: Farmer Must Have Attempted to Obtain Hazard Insurance***

The EM loan regulations allow FSA to make EM loans to poultry farmers to cover the cost of rebuilding lost chicken houses, even if the buildings were not covered by hazard insurance, provided the farmer meets four requirements.<sup>123</sup> First, the farmer must show that prior to the disaster, he or she applied for hazard insurance, but could not obtain it. Second, the farmer must use the loan funds to rebuild the chicken house according to industry standards in effect on the date the farmer applied for the loan. Third, the farmer must obtain hazard insurance for the full market value of the rebuilt chicken house for the term of the loan. And fourth, the farmer must meet all other EM loan requirements.<sup>124</sup>

**2. Production Losses**

Disaster-related damage affecting agricultural production other than livestock is eligible for EM loan assistance as a production loss if it has caused at least a 30 percent loss for at least one crop.<sup>125</sup> If this threshold requirement is met, all of the farmer's disaster-related crop losses will be totaled to determine the level of EM loan assistance available, even losses to crops that did not experience a 30 percent loss.

Eligible production losses can be a lower per-acre yield, a reduction in crop quality, or losses to native pasture and rangeland.<sup>126</sup>

**a. Threshold Requirement: 30 Percent Production Loss in One Crop Enterprise**

To qualify as a production loss for EM loan purposes, the disaster must have reduced by at least 30 percent the production of any single non-livestock crop that is a basic part of the farming operation.<sup>127</sup> A crop is considered a “basic part of the farming operation” if it normally generates enough income to be considered essential to the success of the operation.<sup>128</sup>

To determine whether a farmer’s production loss qualifies for EM loan assistance, the loss for each individual crop enterprise must be measured, as explained in the next section of this chapter. Generally speaking, the disaster year production is compared to the farmer’s normal production for each commodity. If the disaster year production is at least 30 percent less than normal production for any single commodity, the farmer qualifies for an EM loan based on production losses.<sup>129</sup>

Prior EM loan regulations gave specific examples of what could be considered a single crop enterprise for EM loan qualification purposes.<sup>130</sup> For example, each separate cash crop (wheat, corn, soybeans, and so forth) was considered a single enterprise, and a 30 percent loss in any one of those enterprises would qualify the farmer for an EM loan.<sup>131</sup> Each individual feed crop—such as alfalfa, or corn grown for livestock consumption—was also considered a separate enterprise if livestock production was a basic part of the farmer’s operation.<sup>132</sup> As a result, one farmer could have had two separate enterprises of corn—one a cash crop and one for livestock feed.<sup>133</sup> These examples were not retained in the

regulations that took effect in 2002. The current regulations also fail to specify how crop enterprises will be identified when determining production loss eligibility for EM loans. It is likely that FSA is continuing to use the prior policy.

**b. Available for Losses to All Agricultural Commodities Other Than Livestock**

The definition of “production loss” in the EM loan regulations only mentions annual growing crops.<sup>134</sup> However, another section of the regulations states that EM loans for production losses may be used to address disaster losses “associated with production of agricultural commodities (except the losses associated with the loss of livestock).”<sup>135</sup> When the EM loan regulations are viewed as a whole, it seems that FSA does intend for production loss loans to be available for all non-livestock commodities. “Agricultural commodity” is defined in the EM loan regulations to include grains, cotton, oilseeds, dry beans, tobacco, peanuts, sugar beets, sugar cane, fruit, vegetables, forage, tree farming, nursery crops, nuts, aquacultural species, and other plant or animal production as determined by FSA.<sup>136</sup>

The EM Loan Handbook emphasizes that losses of commodities grown under production contracts—where the integrator retains ownership in the commodity and the farmer has no ownership interest—do not qualify for EM loan assistance.<sup>137</sup> Farmers growing commodities under such contracts would be eligible for EM loans for losses to other commodities that they do own.

## **V. Calculating EM Loan Benefits**

In general, EM loan benefits are limited to the value of the farmer’s physical and production losses.<sup>138</sup> Therefore, establishing the value of those losses is a critical part of the EM loan application process. FSA

regulations also set certain limitations on EM loan benefits that may reduce the amount of a farmer's loan.

### **A. Measuring Physical Losses**

Farmers are eligible for EM loan assistance for their total eligible physical losses caused by the disaster.<sup>139</sup> The maximum amount of EM loan assistance a farmer may receive for physical losses is determined by the total allowable costs for disaster-damaged property and the total value of livestock losses.<sup>140</sup> The eligible physical losses are calculated in the following way.<sup>141</sup>

#### **1. Calculate Allowable Costs to Replace or Repair Damaged Property**

EM loan assistance for physical losses is based on "allowable costs" to replace or repair damaged property.<sup>142</sup> Allowable costs are defined for EM loan purposes as replacement and repair costs that are supported by "acceptable" documentation.<sup>143</sup>

Documentation that can be used to establish allowable costs includes, but is not limited to, written estimates, invoices, and bills.<sup>144</sup>

##### **a. Cost of Replacing or Repairing Damaged Real Estate**

The allowable costs needed to replace or repair damaged farm real estate, including farm buildings, are included in the total physical loss amount.<sup>145</sup> As discussed earlier, to be included as an eligible loss, the damaged real estate must have been covered by hazard insurance at the time of the disaster.<sup>146</sup>

The EM Loan Handbook states that the amount needed for repair or replacement of essential buildings and structures must be supported by written estimates from the supplier or contractor who will provide the services.<sup>147</sup> The handbook also states that EM loan funds may be used to pay for hired labor and purchased materials only. Labor, machinery, equipment,

and materials contributed by the farmer cannot be included in the cost of repair or replacement.<sup>148</sup>

**b. Cost of Replacing or Repairing Damaged Chattel**

Eligible physical losses for EM loan purposes also include the amount of allowable costs needed to replace or repair damaged farm chattel property.<sup>149</sup> As with real estate, damaged chattel must have been covered by hazard insurance at the time of the disaster to be included as an eligible physical loss, if such insurance was available and economically feasible.<sup>150</sup> The value of any labor, machinery, equipment, or materials contributed by the farmer to repair or replace his or her own damaged property will not be included as allowable costs.<sup>151</sup>

**c. Cost of Essential Household Contents—Up to \$20,000**

If the farmer is applying for EM loan assistance as an individual and not as a business entity, the allowable costs needed to repair or replace essential household contents will be included in the total physical loss.<sup>152</sup> A farmer cannot receive more than \$20,000 in EM loan assistance for this purpose.<sup>153</sup> As discussed earlier in this chapter, the prior regulations gave examples of essential household contents, including furniture, clothing, major kitchen appliances, and similar items.<sup>154</sup> Although these examples were not retained in the current regulations, it is likely FSA will continue its policy of treating these items as essential household contents.

**2. Add Value of Livestock Losses**

The replacement value of disaster-related livestock losses is included in eligible physical losses for EM loan assistance.<sup>155</sup>

**a. Value of Losses to Livestock and Livestock Products Set by FSA**

The EM loan regulations state that the value of livestock and livestock product losses will be established by FSA.<sup>156</sup> The EM Loan Handbook states that the value of livestock lost or destroyed as a result of the disaster will be the replacement cost less any salvage value received for the damaged livestock.<sup>157</sup>

The handbook states that the value of lost livestock products—such as calves, pigs, lambs, eggs, milk, and wool—will be established by FSA using prices published in FSA’s state-specific price list for all commercially grown commodities.<sup>158</sup> Examples given in the EM Loan Handbook show that for livestock production losses, FSA will compare the disaster year production to the farmer’s average production for the previous three years to determine the extent of disaster losses.<sup>159</sup>

According to the EM Loan Handbook, farmers who purchase and finish feeder livestock will qualify for a physical loss in the amount of the value of the lost livestock, as determined from FSA’s state-specific commodity price list, minus the purchase price of the feeder livestock.<sup>160</sup>

**b. Written Documentation Required to Establish Pre-Disaster Livestock Value**

Farmers who seek EM loan assistance for disaster losses to livestock must have written documentation of their livestock inventory and records of livestock product sales.<sup>161</sup> The documentation and records must be sufficient to allow FSA to value the livestock and livestock products just prior to the disaster.<sup>162</sup>

**Livestock Loss<sup>163</sup>**

**Example # 1**

A farmer lost 50 bred cows in a flood. The farmer's average normal calving rate over the past three years is 90 percent. The FSA price in the farmer's state for calves weighing 300–500 pounds is \$275. The cost to replace each bred cow is \$1,000.

The farmer's physical loss is calculated as follows:

Number of cows times normal calving rate equals lost production.

$$50 \text{ cows} \times .90 \text{ (90 percent)} = 45 \text{ calves}$$

Lost production times normal price equals lost production income.

$$45 \text{ calves} \times \$275 \text{ per calf} = \$12,375$$

Number of cows times replacement cost per cow equals replacement cost.

$$50 \text{ cows} \times \$1,000 \text{ per cow} = \$50,000$$

Lost production income plus replacement cost equals total physical loss for livestock.

$$\$12,375 + \$50,000 = \$62,375$$

**Livestock Loss<sup>164</sup>**

**Example # 2**

A farmer lost 20 dairy cows in a storm. The farmer's average milk production over the previous three years was 18,000 lbs. per cow or 1,500 lbs. per cow per month. The FSA price in the farmer's state for milk is \$12.25 per cwt. The cost to replace the cows is \$1,200 per cow. The farmer was unable to replace the cows for three months.

The farmer's physical loss is calculated as follows:

Number of cows times normal milk production per cow times number of months before cows could be replaced equals lost production.

$$20 \text{ cows} \times 1,500 \text{ lbs. per cow per month} \times 3 \text{ months} = 90,000 \text{ lbs. or } 900 \text{ cwt.}$$

Lost production times normal price equals lost production income.

$$900 \text{ cwt.} \times \$12.25 \text{ per cwt.} = \$11,025$$

Number of cows times replacement cost per cow equals replacement cost.

$$20 \text{ cows} \times \$1,200 \text{ per cow} = \$24,000$$

Lost production income plus replacement cost equals total physical loss for livestock.

$$\$11,025 + \$24,000 = \$35,025$$

**3. Add Costs of Restoring Perennials**

Total physical losses for EM loan purposes also include the allowable costs of restoring perennials that produce an agricultural commodity to the stage of development the perennials were at when the disaster occurred.<sup>165</sup>

#### **4. Subtract Disaster Compensation or Insurance**

When calculating a farmer's total eligible physical losses for EM loan assistance, FSA will subtract any disaster-related compensation or insurance payments that the farmer has received or will receive for the damaged property.<sup>166</sup> In a slight change from previous policy, the EM loan regulations seem to require subtracting other disaster-related compensation only when that compensation is specifically for the property that suffered the qualifying loss.

The EM Loan Handbook states that any salvage value received for damaged property will also be deducted from the qualifying physical loss amount.<sup>167</sup>

### **B. Measuring Production Losses**

Before February 2002, the maximum EM loan amount for production losses was limited to 80 percent of the farmer's total actual production loss.<sup>168</sup> The 2002 EM loan regulations removed this limitation. Since then, the regulations have allowed farmers to qualify for EM loans for the full amount of their eligible production losses.<sup>169</sup>

Before February 2002, the EM loan regulations also included complex formulas for calculating whether a farmer's production losses qualified for assistance.<sup>170</sup> In comments accompanying a 2000 proposal to change these formulas, FSA stated that these calculations consumed "substantial amounts of time for FSA and the applicant" when determining eligibility and the loan level.<sup>171</sup> The EM loan regulations now use much less complicated calculations.

#### **1. Determine Normal Yield for Each Enterprise**

The first step in calculating the farmer's production loss is to establish the farmer's normal yield for each crop.<sup>172</sup> This step was substantially changed beginning with the 2002 EM loan rule.<sup>173</sup> When figuring the normal year's production, the farmer must use

production record sources for each crop in the following order of priority.

**a. Farmer's APH Yields**

Under the current regulations, the preferred normal production yield for EM loan purposes will be the farmer's actual production history (APH) yield for the year in which the disaster occurred.<sup>174</sup> The farmer's APH yield is the yield used to determine federal crop insurance coverage or coverage under FSA's Noninsured Crop Disaster Assistance Program (NAP) and is an average of historical yields using four to ten years of the farmer's actual production records.<sup>175</sup>

**b. Farmer's Actual Reliable Farm Records**

If the farmer does not have an approved APH yield for the crop for the disaster year, the normal production yield will be based on the farmer's actual production records for the previous three years.<sup>176</sup>

**c. FSA Farm Program Proven Yields**

If the farmer does not have adequate production records available for any or all of the previous three years, the normal production yield for any missing year will be based on the farmer's proven yields used to calculate farm program payments for that year.<sup>177</sup>

**d. County or State Average Yields**

The EM loan regulations state that if proven yields for farm program payments are not available for any or all of the previous three years, the normal production yield for any missing year will be the county average production yield for the crop for that year.<sup>178</sup> These yields are listed in FSA's "state supplement."

According to the EM Loan Handbook, if county average yields are not available, the normal production yield for any missing year will be the state average production yield for the crop.<sup>179</sup> These yields are also listed in FSA's "state supplement."

## **2. Calculate Actual Losses for Each Crop**

Actual losses for each crop are calculated for EM loan purposes in terms of lost crop value. Actual loss figures serve two important purposes. First, they are used to establish that the farmer experienced at least a 30 percent loss for at least one crop. As discussed earlier, this establishes that the farmer qualifies for an EM loan.<sup>180</sup> Second, actual loss figures determine the total amount of production losses for all crops. This becomes part of the formula that determines the farmer's EM loan amount. These calculations take into account the fact that disaster can affect the quality as well as the quantity of crop production.

### **a. Production Losses Generally**

In general, the following steps are taken to calculate lost production value for each crop.

#### ***(i) Subtract Disaster Yield from Normal Yield***

The farmer's disaster year yield for the crop is first subtracted from the normal production yield.<sup>181</sup>

#### ***(ii) Multiply Yield Loss by Acreage Devoted to the Crop***

The per acre yield loss is then multiplied by the number of acres in the operation devoted to that crop in the disaster year, in order to calculate the volume of lost production.<sup>182</sup>

*(iii) Multiply Lost Crop Volume by Market Price*

The volume of lost production is then multiplied by the market price for the crop, as determined by FSA, to determine the value of the lost production. This is the actual loss amount for the crop.<sup>183</sup>

**b. Quality Loss Calculations**

If the disaster reduced the quality of a farmer's production, FSA will account for this by adjusting the farmer's actual disaster yield downward.<sup>184</sup> In other words, quality losses are converted into quantity losses. This is done by comparing the average market price for a farmer's normal production grade with the average price for the grade of the disaster year production.<sup>185</sup> The farmer's disaster yield is then reduced by the same proportion to produce a quality-adjusted disaster year yield.<sup>186</sup> This quality-adjusted disaster year yield is then used in the production loss calculation set out above.

**Production Loss Example: Quality Loss Calculation<sup>187</sup>**

A farmer normally produces apples for fresh market sale. Because of a disaster, the farmer's apples must be sold for processor, peeler, or juice apples. The average price for fresh market apples is \$258 per ton. The farmer receives \$60 per ton for the processor apples.

The farmer's quality adjustment is calculated as follows:

Price per unit received in the disaster year divided by normal market price per unit equals a quality loss factor:

$$\$60 \text{ per ton} \div \$258 \text{ per ton} = .23 \text{ (or 23 percent)}$$

The farmer's actual disaster year yield will be multiplied by the quality loss factor (in this case, 23 percent) to determine the quality adjusted disaster year yield.

**c. Native Pasture and Rangeland Loss Calculations**

Production losses for damage to native pastures, rangeland, and grazing permit lands are based on the lost feed capacity for the farmer's livestock. In making this calculation, FSA first determines the average per head cost of feed purchased in the three years prior to the disaster year.<sup>188</sup> This is compared to the farmer's average per head cost of feed in the disaster year.<sup>189</sup> For the losses to qualify for an EM loan, the disaster year feed cost per head must be at least 30 percent greater than the average pre-disaster feed cost per head.<sup>190</sup> If the 30 percent threshold is satisfied, the farmer will be eligible for an EM loan, and the losses will be determined by multiplying the number of head of livestock by the difference in feed costs between the disaster year and the pre-disaster average.<sup>191</sup>

**Production Loss Example: Feed Loss Calculation<sup>192</sup>**

A farmer provides reliable records to show that the cost for feed purchases in the previous three years was \$210 per head. The average feed cost in the disaster year was \$300 per head.

The farmer's production loss is calculated as follows:

Cost per unit in the disaster year divided by normal cost per unit equals the loss factor:

$$\$300 \text{ per head} \div \$210 \text{ per head} = 1.43 \text{ (or 43 percent higher costs)}$$

Because the disaster year cost is more than 30 percent greater than the normal cost, the feed loss qualifies for an EM loan.

Cost per unit in the disaster year minus normal cost per unit equals production loss per head:

$$\$300 \text{ per head} - \$210 \text{ per head} = \$90 \text{ per head}$$

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This amount is multiplied by the number of head the farmer had during the disaster year to equal the farmer's total production loss.

If the farmer had 100 head of cattle, the total production loss would be:

$$\$90 \text{ per head} \times 100 \text{ head} = \$9,000$$

#### **d. Prevented Planting**

Prevented planting coverage under the new EM loan regulations is somewhat unclear. The prior EM loan regulations specifically mentioned and set out calculations for valuing prevented planting losses.<sup>193</sup> While the EM Loan Handbook seems to anticipate that prevented planting will be treated as a production loss—with the farmer having a zero yield for the disaster year—coverage is not made explicit.<sup>194</sup> If such coverage is available, the farmer will likely be required to demonstrate that preparations had been made for planting.

#### **e. Substitute Crops**

According to the EM Loan Handbook, if a substitute crop is planted and harvested in place of a crop that was destroyed or could not be planted, the loss on the first crop will not be a qualifying production loss for EM loan purposes.<sup>195</sup> If, however, the substitute crop is damaged or destroyed by disaster, that loss may qualify for EM loan assistance.

### **3. Total Up Production Losses for All Enterprises**

The actual loss amounts for all crops are totaled to determine the amount of EM loan assistance the farmer qualifies for.<sup>196</sup> Once the farmer has established production loss eligibility, all production losses from every enterprise—even those that are not a basic part

of the operation and those that did not suffer a 30 percent loss—are counted toward the total production loss.<sup>197</sup>

#### **4. Subtract Disaster Compensation or Insurance**

The value of lost crop production is reduced by any disaster-related compensation or insurance indemnities received or expected for the crop loss.<sup>198</sup> This then reduces the amount of EM loan assistance available for the farmer's production loss.

Other financial assistance received by the farmer for the disaster losses should not affect the value of production loss when determining whether the farmer has suffered a qualifying loss.<sup>199</sup> It does affect the farmer's total losses and, therefore, the amount of EM loan funds that will be available.

Examples given in the EM Loan Handbook of possible disaster-related compensation include: crop insurance payments, Noninsured Crop Disaster Assistance Program (NAP) payments, payments from other FSA disaster programs, and Federal Emergency Management Agency (FEMA) disaster assistance.<sup>200</sup> The handbook emphasizes that only compensation received specifically for the production losses that are the basis of the EM loan will be deducted from the qualifying loan amount.<sup>201</sup> Any compensation received for other losses will not be deducted.

#### **5. No Deduction of Expenses Not Incurred**

Under prior EM loan regulations, the amount of the farmer's production losses was reduced to reflect any expenses that the farmer did not incur because a crop could not be planted or harvested.<sup>202</sup> Since 2002, the regulations have not required these deductions from the total value of production losses.

### **C. Maximum EM Loan Eligibility**

Several different considerations limit the amount of EM loans. As discussed above, a farmer cannot borrow more than the actual value

of his or her production losses and physical losses.<sup>203</sup> The following limits also apply.

**1. Amount Necessary to Restore Farming Operation**

An EM loan may not be larger than the amount of credit necessary to restore the family farming operation to its pre-disaster condition.<sup>204</sup>

**2. Total EM Loan Indebtedness: \$500,000**

No individual or business entity may have more than \$500,000 in outstanding principal debt for all EM loans combined.<sup>205</sup> This limit applies to anyone who signs the promissory note for the loan.<sup>206</sup>

**3. Essential Household Items: \$20,000**

If an EM loan for physical losses includes losses to essential household items, no more than \$20,000 will be included in the loan amount for repairing or replacing those items.<sup>207</sup> As discussed earlier, losses to essential household items are eligible physical losses only for individual farmers and not for business entities.<sup>208</sup>

**VI. Putting EM Loans to Work**

FSA regulations restrict the use of EM loan funds.<sup>209</sup> Permitted uses depend in part on the type of qualifying loss—whether physical or production.

**A. Loan Purposes for Physical Losses**

Permitted uses of EM loans for physical losses are different depending on the type of property affected by the disaster.<sup>210</sup>

**1. Physical Losses Affecting Essential Real Estate**

EM loan funds may be used to address disaster-related damage to or destruction of essential real estate.<sup>211</sup> As discussed earlier in the

eligibility section, if the loan proceeds are going to be used for repair or replacement of real estate, the borrower must either be the owner of the farming operation or have a lease on the real estate meeting certain requirements.<sup>212</sup> Permitted uses of loan funds for such losses include the following.

**a. Acquire or Enlarge the Farm**

EM loan funds for damage to essential real estate may be used to acquire or enlarge the disaster-afflicted farm.<sup>213</sup>

According to the EM Loan Handbook, real estate may only be purchased with EM loan funds if the following conditions are met: (1) some or all of the farm's existing land was destroyed or rendered unusable for agricultural purposes; (2) the parcel being purchased is comparable in size and use to the damaged parcel; (3) the farmer owned the damaged parcel; (4) the salvage value of the damaged parcel minus any liens will be applied to the EM loan debt once the damaged parcel is sold; and (5) FSA will obtain a lien on all farm real estate that is determined to be unusable.<sup>214</sup>

**b. Build, Buy or Improve Essential Buildings or Other Structures**

EM loan funds for physical losses to real estate may be used to build, buy or improve buildings or other structures that are essential to the ongoing viability of the farming operation.<sup>215</sup>

The buildings or structures must conform to industry standards and must meet the needs of the operation and the intended uses of the structures.<sup>216</sup>

Additional requirements apply if the farmer is leasing the property being built, bought, or improved with the EM loan funds. Specifically, the farmer's lease must ensure that the farmer will have use of the improvement over its useful life, or that the farmer will receive compensation for the remaining economic life of the improvement when the lease is

terminated.<sup>217</sup> The regulations do not describe how the economic life of improvements will be measured.

**c. Replace or Develop Land or Water Resources or Conservation Measures**

EM loan funds for physical losses to real estate may be used to pay for activities that promote soil and water conservation and protection on the farm.<sup>218</sup> The prior regulations specified that EM loan funds could be used to pay costs associated with developing land and water resources for conservation or to replace the farm's land or water resources that could not be restored.<sup>219</sup> The current regulations do not retain these specific descriptions. However, given that FSA has not announced any policy changes in this area, it is reasonable to expect that FSA will continue to allow EM loan funds for physical losses to real estate to be used for the types of soil and water conservation activities described in the prior regulations.

According to the EM Loan Handbook, EM loan funds may be used for these conservation, development, and resource replacement measures only if existing measures were damaged or destroyed during the disaster, or if the measures are needed as part of a conservation plan on purchased land.<sup>220</sup> The handbook also states that FSA Emergency Conservation Program (ECP) funding for these measures will be considered in conjunction with EM loan funds when available.<sup>221</sup> ECP is discussed in detail in Chapter 5 of this book.

**d. Establish a New Farm Site Outside Flood or Mudslide Area**

An EM loan for physical losses to real estate may be used to establish a new site for farm dwellings and service buildings in order to relocate outside of a flood or mudslide prone area.<sup>222</sup>

**e. Replace Liquidated Land**

An EM loan for physical losses to real estate may be used to replace land from the farm that was sold or conveyed as a direct result of the disaster if the land is necessary for the farming operation to be effective.<sup>223</sup>

**f. Pay Closing Costs**

EM loan funds for physical losses to real estate may be used to pay loan closing costs related to repairing or replacing real estate for the farm.<sup>224</sup> Under the prior regulations, EM loan funds could only be used to pay loan closing costs if the farmer could not pay the costs from other sources.<sup>225</sup> The current regulations do not retain this limitation.

**2. Physical Losses Affecting Essential Chattel Property**

EM loan funds may also be used to remedy disaster-related damage to or destruction of chattel property that is essential to the farming operation.<sup>226</sup> Permitted uses of loan funds for such losses include the following.

**a. Purchase Livestock, Equipment, and Other Necessary Chattel**

EM loan funds for physical losses to chattel may be used to purchase essential chattel for the farming operation, including livestock, farm equipment, quotas and bases, and cooperative stock for credit, production, processing, or marketing purposes.<sup>227</sup>

FSA's comments accompanying the final 2002 EM loan regulations stated that loan funds for loss of breeding stock could only be used to replace those livestock.<sup>228</sup> Similarly, the EM Loan Handbook states that loan funds for loss of harvested and stored crops that were intended for livestock feed rather than sale may only be used to replace those feed crops.<sup>229</sup>

According to the EM Loan Handbook, only loan funds for physical losses to normal income security—such as livestock products and harvested and stored crops held for sale—may be used to purchase quotas and cooperative stock.<sup>230</sup>

**b. Repair or Replace Essential Household Contents**

EM loan funds for physical losses to chattel may be used to repair or replace essential household contents that were damaged or destroyed by the disaster.<sup>231</sup> Household contents are the essential items necessary to maintain viable living quarters.<sup>232</sup>

**c. Restore Damaged Agricultural Perennials**

An EM loan for physical losses to chattel may be used to restore perennials that produce an agricultural commodity (such as fruit or nut trees) to the stage of development that the damaged perennials were at before the disaster.<sup>233</sup>

**d. Pay Reasonable Costs for Obtaining the Loan**

Farmers may use funds from an EM loan for physical losses to chattel to pay customary costs related to planning, obtaining, and closing a loan if the farmer cannot pay the costs from other sources.<sup>234</sup> Examples given in the regulation of such customary costs include fees for legal, architectural, and other technical services. Fees for agricultural management consultation and preparation of FSA loan forms may not be paid for with EM loan funds.<sup>235</sup>

**e. Livestock Producers and Farmers With Losses to Stored Crops: Pay Essential Living and Operating Expenses**

Funds from an EM loan for physical losses to livestock that is not breeding stock may be used to pay essential farm operating and family living expenses.<sup>236</sup> EM loan funds for physical losses to harvested crops that were stored for sale may also be used for this purpose.<sup>237</sup>

The EM loan regulations define the term “essential family living and farm operating expenses” as those that are “basic, crucial or indispensable.”<sup>238</sup> FSA will determine if an expense qualifies as an essential family living or farm operating expense after considering: (1) the specific borrower’s operation, (2) what is typical for that type of operation in the area where the operation is located, and (3) what is an efficient method of production considering the borrower’s resources.<sup>239</sup>

Examples of essential expenses included in the regulations are expenses needed for: household operating expenses; food; clothing; medical care; shelter; schooling; religious expenses; transportation; hired labor; machinery, farm building, and fence repair; interest on loans and credit or purchase agreements; rent on equipment, land, and buildings; feed; seed; fertilizer; pesticides and herbicides; spray materials and other farm supplies; livestock expenses, including medical supplies, artificial insemination, and veterinarian bills; machinery hire; fuel and oil; taxes; water charges; insurance, including personal, property, and crop insurance; auto and truck expenses; and utility payments.<sup>240</sup> Other types of expenses not listed as examples in the regulations may also be considered essential family and farm operating expenses.<sup>241</sup>

FSA explains the distinction between the use of EM loan funds for breeding stock losses and funds for market animal losses by stating that breeding stock is an essential part of a farming operation, and therefore funds for breeding stock losses can only be used to replace the breeding stock.<sup>242</sup>

Market animals are considered to generate normal production income, and therefore loan funds for their loss can be used to pay living and operating expenses.<sup>243</sup>

The EM Loan Handbook gives the following example for determining what amount of EM loan funds due to livestock

losses would be available for farm operating and family living expenses: A producer suffers a loss of 100 brood cows and 90 of their calves. The calves would have been sold this year to produce farm income to pay expenses. The EM loan funds resulting from the loss of the calves may be used for family living and farm operating expenses, and other operating purposes, but the EM loan funds from the loss of the brood cows may only be used to purchase suitable replacements.<sup>244</sup>

**f. Refinance Debt**

EM loan funds for physical losses to chattel may be used to refinance debt.<sup>245</sup> Existing FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times and the refinancing is necessary due to a designated or declared disaster.<sup>246</sup>

The EM Loan Handbook sets out the following restrictions on refinancing non-FSA debt with EM loan physical loss funds.<sup>247</sup> First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the EM loan funds must be for loss of normal income security, such as livestock products and crops that were harvested and stored for sale. Third, the farmer must be unable to develop a feasible plan without the refinancing. Fourth, the farmer must not have the resources—such as cash, stored crops, and bank accounts—to cure any delinquency on the debt. Fifth, the creditor to be refinanced must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.<sup>248</sup> And sixth, using EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the debt must be insufficient to result in a feasible plan.

The EM Loan Handbook also states that, although EM loan funds may not be used to refinance a real estate debt, EM loan funds may be used to pay past due or currently due payments

on real estate debts as part of the farmer's operating expenses.<sup>249</sup>

The EM Loan Handbook also sets out additional restrictions on refinancing FSA direct and guaranteed loans with EM loan physical loss funds.<sup>250</sup> First, only FSA loans made for authorized Operating (OL) loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, using EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the FSA debt must be insufficient to result in a feasible plan. Fourth, for FSA direct loans, loan servicing or set aside must be insufficient to result in a feasible plan.<sup>251</sup> And fifth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, the EM Loan Handbook emphasizes that FSA employees have no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.<sup>252</sup> Farmers cannot rely on being able to use an EM loan to repay any specific debt or advance until the loan application has been processed and approved.

## **B. Loan Purposes for Production Losses**

As discussed earlier, losses in annual production of agricultural commodities other than livestock can qualify for EM loans as production losses.<sup>253</sup> Permitted uses of loan funds for such losses include the following.

### **1. Pay Annual Operating Expenses**

EM loans for production losses may be used to pay annual operating expenses for the farm.<sup>254</sup> The regulations give specific examples of eligible expenses—feed, seed, fertilizer, pesticides,

farm supplies, and cash rent—but state that other operating expenses are also eligible.<sup>255</sup> The EM Loan Handbook states that annual operating expenses also include the purchase of livestock used for normal operating income, including poultry and aquatic organisms.<sup>256</sup>

## **2. Pay Essential Family Living Expenses**

EM loans for production losses may be used to pay the farmer's essential family living expenses.<sup>257</sup> The regulations give examples of essential family living expenses—the expenses of providing food, clothing, education, and shelter—but state that other types of expenses may also be considered as family living expenses.<sup>258</sup>

## **3. Pay Training Costs**

Funds from an EM loan for production losses may be used to pay the costs of any training that is required or recommended by FSA.<sup>259</sup>

## **4. Pay Costs to Reorganize Farm to Improve Profitability**

Funds from an EM loan for production losses may be used to pay the costs of reorganizing the family farm to improve its profitability.<sup>260</sup> Bankruptcy expenses are not considered eligible costs for this purpose.<sup>261</sup>

The EM Loan Handbook states that reorganizing a farm means changing enterprises, production practices, marketing methods, or other parts of the farm business to promote recovery from the disaster and reduce the potential impact of future disasters.<sup>262</sup> The handbook further states that EM loan funds cannot be used to finance expansion of an existing farm enterprise, unless it is clearly shown that the expansion will promote recovery from the disaster and reduce the potential impact of future disasters.<sup>263</sup>

The handbook gives the following examples of acceptable uses of EM loan funds for this purpose: (1) purchase equipment to convert from conventional to no-till production, (2) change from

stocker to cow/calf production, (3) shift from row crop to vegetable production, (4) purchase grain drying and storage equipment, and (5) purchase shares in processing and marketing cooperatives.<sup>264</sup> FSA emphasizes in the handbook, however, that these are only examples of acceptable purposes, and “any similar operational changes are acceptable as long as a realistic farm plan indicates the changes will improve the financial viability of the farm.”<sup>265</sup>

## **5. Replace Working Capital**

Since 2002, the EM loan regulations have allowed loan funds for production losses to be used to replace lost “working capital.”<sup>266</sup> Working capital is defined as the “cash available to conduct normal daily operations including, but not limited to, paying for feed, seed, fertilizer, pesticides, farm supplies, cooperative stock, and cash rent.”<sup>267</sup>

## **6. Refinance Debt**

EM loans for production losses may be used to refinance farm-related debt for the purpose of improving farm profitability.<sup>268</sup> FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times and the refinancing is necessary due to a designated or declared disaster.<sup>269</sup>

The EM Loan Handbook sets out the following restrictions on refinancing non-FSA debt with EM loan production loss funds.<sup>270</sup> First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the farmer must be unable to develop a feasible plan without the refinancing. Third, the farmer must not have the resources—such as cash, stored crops, and bank accounts—to cure any delinquency on the debt. Fourth, the creditor to be refinanced must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.<sup>271</sup> And fifth, using EM loan funds to pay only the

farmer's delinquency and/or the current year's payment(s) on the debt must be insufficient to result in a feasible plan.

Although EM loan funds may not be used to refinance a real estate debt, the EM Loan Handbook states that EM loan funds may be used to pay past due or currently due payments on real estate debts as part of the farmer's operating expenses.<sup>272</sup>

The EM Loan Handbook also sets out additional restrictions on refinancing FSA direct and guaranteed loans with EM loan production loss funds.<sup>273</sup> First, only FSA loans made for authorized Operating (OL) loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, using EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the FSA debt must be insufficient to result in a feasible plan. Fourth, for FSA direct loans, loan servicing or set aside must be insufficient to result in a feasible plan.<sup>274</sup> And fifth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, the EM Loan Handbook emphasizes that FSA employees have no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.<sup>275</sup> Farmers cannot rely on being able to use an EM loan to repay any specific debt or advance until the loan application has been processed and approved.

## **7. Pay Costs to Meet Safety Standards**

EM loans for production losses may be used to pay the costs of complying with federal or state standards for occupational health and safety if the farmer can show that complying with the

standards or facing penalties of non-compliance would cause substantial economic injury.<sup>276</sup>

## **8. Purchase Livestock, Equipment, Quotas, and Cooperative Stock**

The EM Loan Handbook adds an eighth, separate approved use of EM loan funds for production losses.<sup>277</sup> The handbook states that production loss loan funds may be used to purchase livestock, equipment, quotas, and cooperative stock for credit, production, processing, and marketing purposes.<sup>278</sup>

### **C. Other Limits on the Use of EM Loans**

The following restrictions also limit the use of EM loan funds.

#### **1. Highly Erodible Land and Wetlands**

EM loan funds may not be used for any purpose that contributes to excessive erosion of highly erodible land or to the conversion of wetlands.<sup>279</sup> Additionally, EM loan funds may not be used to drain, dredge, fill, level, or otherwise alter a wetland.<sup>280</sup>

#### **2. Activities That Impair Water Flow, Circulation, or Reach**

EM loan funds may not be used for activities that would impair or impede the flow, circulation, or reach of water.<sup>281</sup> Activities related to maintaining previously converted wetlands may be allowed.

#### **3. Construction Standards**

Any construction financed through EM loan funds must comply with applicable building standards established by federal, state, and local authorities.<sup>282</sup> It must also meet industry standards for the intended use of the building.<sup>283</sup> Construction financed through an EM loan must also meet FSA requirements for construction planning and monitoring.<sup>284</sup>

#### **4. Support of a Non-Eligible Enterprise**

EM loan funds cannot be used to support a non-eligible enterprise.<sup>285</sup> This remains true even if the non-eligible enterprise contributes to the farm. As described earlier in this chapter, non-eligible enterprises are those that produce exotic or non-farm animals or their products; market non-farm goods or provide non-farm services; or process or market products that were not produced by the farming operation.<sup>286</sup>

#### **5. Credit Cards and Other Consumer Debt**

EM loan funds may not be used to refinance consumer debt, such as automobile loans.<sup>287</sup> Credit card debt may only be refinanced with EM loan funds if the debt can be attributed directly to the farming operation.<sup>288</sup>

### **VII. EM Loan Interest Rates, Terms, and Security Requirements**

The EM loan regulations set out specific terms for EM loans.

#### **A. Interest Rates**

As of May 1, 2008, the annual interest rate for EM loans was 3.75 percent.<sup>289</sup> This rate is subject to change.<sup>290</sup>

#### **B. Repayment Terms**

The EM loan regulations set out maximum repayment periods and minimum payment requirements.<sup>291</sup>

##### **1. Repayment Periods**

Repayment periods for EM loans depend upon the type of loss, the farmer's repayment ability, and the useful life of the farmer's loan security.<sup>292</sup>

**a. EM Loans for Physical Losses to Real Estate**

The repayment period for EM loan funds for losses to real estate will be based on FSA's assessment of the farmer's repayment ability and the useful life of the security.<sup>293</sup> The repayment period for such EM loans can never be longer than 40 years.<sup>294</sup> The EM Loan Handbook states that the repayment period for such loans will be the minimum period of time allowed by the farmer's ability to repay the loan, considered in five-year increments.<sup>295</sup>

**b. EM Loans for Production Losses and Physical Losses to Chattel**

For production losses and physical losses to chattel, including livestock, the EM loan repayment period can generally be no longer than seven years.<sup>296</sup> Exceptions can be made by FSA if "necessary to improve the repayment ability" and the farmer is able to also pledge real estate security.<sup>297</sup> In such cases, the repayment period for these loans could be extended up to a maximum of 20 years from the date of the loan.<sup>298</sup> The EM Loan Handbook states that if payment within seven years is not feasible, a ten-year term will be considered and then consecutively longer intervals in two-year increments until a feasible plan is developed or the term is extended to 20 years.<sup>299</sup>

**c. EM Loans for Operating Expenses**

If a farmer receives an EM loan to pay annual operating expenses, that loan must generally be repaid within 12 months.<sup>300</sup> The repayment period may be extended an additional six months (for a total of 18 months) if necessary to accommodate the farmer's production cycle.<sup>301</sup> The EM Loan Handbook states that payment on annual operating loans must be scheduled for the time when the farm plan shows that income will be available to make the payment.<sup>302</sup>

This limitation does not apply to expenses associated with reestablishing perennials.<sup>303</sup> These expenses presumably fall under the seven-year repayment limit discussed above.

## **2. At Least One Payment Per Year**

The regulations require that EM loans be scheduled for at least one payment every year.<sup>304</sup> The EM Loan Handbook states that the minimum annual payment must be at least the amount of interest accrued on the principal loan balance at the time the payment is scheduled to be made.<sup>305</sup>

The EM Loan Handbook also states that if unequal or interest-only installments are scheduled, the farmer must be able to show that he or she will have the resources available to pay the loan in full by the final maturity date.<sup>306</sup>

## **3. Balloon Payments Prohibited**

The EM Loan Handbook states that balloon installments are prohibited in EM loan repayment schedules.<sup>307</sup> The handbook defines a balloon installment as resulting when scheduled payments are so low that the final installment is greater than twice the amount of a regularly amortized installment.<sup>308</sup>

## **C. Repayment Ability**

Before an EM loan application will be approved, the farmer must submit a feasible plan that demonstrates his or her ability to repay the loan and satisfy all other credit needs and obligations that the farmer is responsible for.<sup>309</sup>

The current regulations define a “feasible plan” as a cash flow budget or a farm operating plan that shows the farmer has sufficient “cash inflow” to pay all “cash outflow.”<sup>310</sup> Cash inflow includes anticipated farm income, nonfarm income, all loan advances, cash on hand, and may also include other sources of anticipated cash inflow.<sup>311</sup> Cash outflow includes all farm and nonfarm debt that will be incurred during the period covered by the budget.<sup>312</sup> If the loan request is for

only one production cycle, a feasible plan is only required for one production cycle. If the loan request is for more than one production cycle, the plan must reflect a typical cycle.<sup>313</sup>

The EM Loan Handbook states that if the farmer's plan is dependent on the availability of additional credit, the farmer must show that the additional credit has been approved.<sup>314</sup>

The prior regulations contained a more specific definition of "feasible plan." Previously, the regulations specified that the plan had to be based on the farmer's actual production and expense records, realistic price projections, and reliable off-farm income. The regulations also required that the plan show the farmer's expected income would be at least sufficient to allow the farmer to cover all operating expenses, taxes, and debt payments, including either living expenses for the family of an individual farmer or a wage for the operator of a farm business entity. It is likely that FSA will continue to apply these same considerations when determining if a farmer has a feasible plan.

#### **D. Security for EM Loans**

Each EM loan must be secured by the farmer's assets.<sup>315</sup> Although the security requirements in the current EM loan regulations are somewhat less burdensome for farmers than the requirements in the prior regulations, they are substantial.

##### **1. Minimum Security Requirements**

The EM loan regulations set out minimum security requirements for EM loans.<sup>316</sup> An EM loan will not be approved unless the farmer can satisfy these minimum requirements.

###### **a. "Adequate Security"—Collateral Value Equals Loan Amount**

Generally, FSA requires that the farmer secure loans with assets having a security value that is at least equal to the EM loan amount.<sup>317</sup> FSA refers to this as "adequate security."<sup>318</sup> In determining whether a farmer has provided adequate

security, FSA will only count the value of the farmer's equity interest in the property being pledged.<sup>319</sup>

**b. Property Made Available or Improved With EM Loan Funds Must Be Pledged**

FSA will generally expect the farmer to provide a security interest in any property that is purchased, refinanced, produced, or otherwise affected by the farmer's use of the EM loan funds. If an EM loan is made for real estate losses, the loan must be secured, at a minimum, by the real estate that is being purchased, repaired, replaced, or improved with the loan funds.<sup>320</sup> If an EM loan is made for chattel or production losses, the loan must be secured, at a minimum, by the chattel that is being purchased or produced with the loan funds.<sup>321</sup>

**c. Other Collateral Taken If Required Property Not Sufficient to Provide Adequate Security**

If the value of the real estate and chattel security that is required for an EM loan is not enough to provide adequate security for the loan, FSA will take a security interest in other property.<sup>322</sup> When there are several alternatives available that meet FSA's security requirements, FSA will choose which property it wants to take a security interest in.<sup>323</sup> In making this choice, the agency may honor the farmer's preference with respect to which property it takes as security, provided that doing so does not compromise the quality and value of the agency's security position.<sup>324</sup>

***(i) Non-Ownership Interests in Property***

The EM loan regulations state that a farmer's interest in property that is not owned by the farmer can be given as security for an EM loan and will be considered when determining whether the farmer has pledged adequate security.<sup>325</sup> Examples given in the regulations of possible non-ownership interests include leases that provide a

mortgageable value, water rights, easements, mineral rights, and royalties.<sup>326</sup>

*(ii) Third-Party Pledge of Security*

If needed to provide adequate security for an EM loan, FSA will take a pledge of security from someone other than the farmer or farm entity seeking the loan.<sup>327</sup>

*(iii) Securities, Insurance, and Other Intangible Property*

Under the prior regulations, FSA would take a security interest in patents, copyrights, insurance policies, stocks, other securities, or cooperative memberships owned by the farmer if needed to provide adequate security for an EM loan, that is, security worth at least 100 percent of the loan amount.<sup>328</sup> This provision is not retained in the current regulations. However, FSA did not announce a policy change in this area, and the current regulations mention stocks as an example of the type of asset FSA will take a security interest in.<sup>329</sup> Thus, it is likely that FSA will continue to take a security interest in intangible property.

*(iv) Residence Located Apart From Real Estate Collateral*

If it is necessary to provide adequate or additional security for an EM loan, FSA will take a security interest in a farmer's residence and related real estate that is located on a separate parcel of land from the farm.<sup>330</sup>

**d. When Adequate Security Is Not Available—Repayment Ability as Loan Security**

FSA is prohibited by statute from rejecting an EM loan application because of inadequate security if FSA is "reasonably certain" that the farmer can repay the loan.<sup>331</sup> FSA has adopted policies allowing an EM loan to be approved if the farmer's plan showed that the loan would be paid in full by the end of the loan, even if the total value of all available

collateral was not enough to provide adequate security.<sup>332</sup> The new EM loan regulations continue this policy, but impose stricter eligibility requirements.<sup>333</sup>

Under the new EM loan regulations, an EM loan application may be approved—even if the value of all available collateral does not equal the loan amount—if several conditions are met.

***(i) Security Interests Have Been Given in All Personal and Business Assets***

As a condition of being able to rely on repayment ability as collateral for an EM loan, the farmer must pledge all available personal and business property as security for the loan.<sup>334</sup> All personal and business assets must be pledged both by an individual farmer who seeks to use repayment ability as collateral for an EM loan and by all of the members, stockholders, partners, and joint operators of a farm business entity that seeks to do so.<sup>335</sup>

***(ii) Lack of Security Caused by Disaster***

To be able to rely on repayment ability as collateral for an EM loan, the farmer's lack of adequate security must be due to the disaster.<sup>336</sup>

***(iii) Farmer Has a Feasible Plan That Shows Repayment Ability Under Normal Operation***

FSA must believe that the farmer's approved plan, discussed above, provides "reasonable assurance" that the farmer will be able to repay the loan and all other obligations.<sup>337</sup> This repayment ability must be based on the farmer's ongoing operation, must reflect the farmer's production and income history, and must not include special, one-time income sources or expenses.<sup>338</sup>

*(iv) Farmer's Plan Addresses Pricing Risks*

The farmer's approved plan must also address pricing risks applicable to the operation.<sup>339</sup> The regulations state that acceptable ways to address pricing risks include marketing contracts, hedging, options, revenue protection mechanisms, and a marketing plan or "similar risk management practices."<sup>340</sup>

*(v) Positive Net Cash Flow in Three of Past Five Years*

To be able to use repayment ability as collateral for an EM loan, the farmer must have had a positive net cash farm income in at least three of the previous five years.<sup>341</sup> The EM Loan Handbook states that the farmer's annual cash flow will be determined from the farmer's tax records for the five years immediately preceding the disaster year.<sup>342</sup>

According to the EM Loan Handbook, if the farmer has been in operation for fewer than five years, there must have been a positive net farm cash income in at least half of the years of operation.<sup>343</sup>

*(vi) USDA Program Payments Assigned to FSA*

Farmers who use repayment ability as collateral for an EM loan must give FSA an assignment of any payments to be received under USDA programs, including FSA farm programs.<sup>344</sup>

**2. Additional Security Requirements**

Once a farmer is able to pledge enough collateral to meet the minimum "adequate security" requirements, FSA will seek collateral that can further secure the EM loan.<sup>345</sup>

**a. “Additional Security” – Collateral Value Equals 150 Percent of Loan Amount**

FSA will require security valued at up to 150 percent of the amount of the loan if it is available.<sup>346</sup> This is referred to as “additional security.”<sup>347</sup> An EM loan will not be denied if the farmer is unable to provide this additional security. FSA will not take additional security in cases where adequate security—equal to 100 percent of the loan amount—is available and further liens would prevent the farmer from obtaining credit from other sources.<sup>348</sup> However, if additional collateral is available and the farmer refuses to pledge it, FSA may deny or cancel the EM loan.<sup>349</sup> FSA will generally want to have collateral up to the full “additional security” amount.

***(i) Assets of Farm Entity Owners Must Be Pledged If Needed***

According to the EM Loan Handbook, the personal assets of individual owners of a farm business entity will be taken as security for an EM loan made to the entity when the value of the entity’s assets is not enough to satisfy the additional security requirement.<sup>350</sup>

***(ii) Assets That Will Not Be Taken as Additional Security***

The EM loan regulations set out certain categories of property that FSA will not require the farmer to offer as collateral to satisfy the additional security requirement.<sup>351</sup>

***(a) Real Estate with Liability or Impaired Value Concerns***

FSA will not take a security interest in real estate that is subject to environmental problems or costs that could impair its value or expose FSA to potential liability.<sup>352</sup>

***(b) Valid Lien Not Available***

FSA will not take a security interest in property if it is not possible to obtain a valid lien.<sup>353</sup>

***(c) Residence Located Apart From Real Estate Collateral***

As mentioned above, if other available security provides 150 percent or more of the loan balance, FSA will not require the farmer to pledge his or her residence and related real estate as security if it is located on a separate parcel of land from the farm.<sup>354</sup>

***(d) Assets Used for Farming or Essential Living Expenses***

If the adequate security requirement has been satisfied, FSA will not require the farmer to pledge subsistence livestock, cash, working capital accounts used for the farming operation, retirement accounts, personal vehicles necessary for family living, household contents, and small tools and equipment such as hand tools and lawn mowers.<sup>355</sup>

**b. Non-Essential Assets Valued Over \$5,000 Must Be Pledged as Security**

If the farmer has non-essential assets that cannot be converted to cash (to decrease the farmer's credit needs) and those assets have an individual or total value of more than \$5,000, FSA will take a security interest in the assets.<sup>356</sup> This is true even if the adequate security and additional security requirements have been met.<sup>357</sup> According to the EM Loan Handbook, the nonessential assets must be pledged in addition to any other security requirements, and they will not be counted when determining whether the farmer has provided security up to 150 percent of the loan amount.<sup>358</sup>

Non-essential assets are defined as assets: (1) in which the farmer has an ownership interest, (2) that do not contribute income to pay essential family living expenses or to maintain the farming operation, and (3) that are not exempt from creditor judgment or bankruptcy actions.<sup>359</sup> Examples of non-essential assets might include recreational vehicles or vacation property.

The EM Loan Handbook states that the requirement to pledge all non-essential assets with a total value of more than \$5,000 also applies to all of the individual members of a farm business entity that is seeking an EM loan.<sup>360</sup>

### **3. Indian Trust Land as EM Loan Security**

FSA may take a lien on Indian trust lands as security for an EM loan if the applicant requests the Bureau of Indian Affairs (BIA) to furnish title status reports and the BIA provides those reports and approves the lien.<sup>361</sup>

### **4. FSA's Required Lien Positions**

The EM loan regulations set out required lien positions that must be available to FSA in security property.<sup>362</sup>

#### **a. Required Lien Position for Real Estate Security**

If the farmer gives real estate as security for an EM loan and a first lien is available, FSA must take the first lien on the property.<sup>363</sup> If the first lien is not available, FSA can take a junior lien on real estate security when the following conditions are met: (1) the prior lien(s) will not jeopardize FSA's interest or the farmer's ability to repay the EM loan, (2) all prior lienholders agree to notify FSA of any acceleration or foreclosure, (3) the farmer agrees to get written permission from FSA before increasing an existing lien, and (4) the farmer has equity in the property.<sup>364</sup>

**b. Requirements for Real Estate Security Under a Purchase Contract**

If the farmer is pledging real estate that is held under a recorded purchase contract, the following conditions must be met for the property to be accepted as security: (1) the farmer must provide a security interest in the real estate; (2) the farmer and the seller must agree in writing that any insurance proceeds for real estate losses will be used only to repair or replace damaged real estate essential to the farming operation, make other essential real estate improvements, or pay any prior lien, including the purchase agreement; (3) the purchase agreement must provide the farmer with the right to possess, control, and use the property, and entitle the farmer to take title to the property upon fulfilling the contract; (4) the purchase contract must not be subject to summary cancellation on default and must not contain any provisions that jeopardize FSA's security position or the farmer's ability to repay the loan; (5) the seller must agree in writing not to sell or transfer the seller's interest without FSA's written consent, not to take out any additional liens against the property, to notify FSA of any breach by the farmer and to give FSA the option to resolve any breach before taking action against the farmer's interest in the property, and to consent to FSA making the loan and taking a security interest in the farmer's interest under the purchase agreement; and (6) the agreement must provide that if FSA acquires the farmer's interest in the property, it will not have assumed the farmer's obligations under the agreement.<sup>365</sup>

**c. Required Lien Position for Chattel Security**

FSA must get a first lien on any chattel that is being acquired or produced with the EM loan funds.<sup>366</sup> In any case, FSA's lien position must be equal to or higher than the lien position held by any creditor being refinanced with the loan funds.<sup>367</sup>

## **5. Same Collateral for Two Loans Possible**

The same collateral may be used to secure two or more FSA loans made to the same borrower.<sup>368</sup> For example, a junior lien on property serving as collateral for an FSA Farm Ownership (FO) loan could be acceptable security for an EM loan.

## **6. Establishing the Value of Security Property**

In determining whether a farmer has sufficient security for an EM loan, how property is valued can be very important. The EM loan regulations set out how real estate and chattel property will be valued for this purpose, defining “security value” to be the market value of the property on the date of loan closing, minus any prior liens.<sup>369</sup> The regulations define market value to be the amount that an informed and willing buyer would pay to an informed and willing seller in a completely voluntary sale.<sup>370</sup>

### **a. Security Value of Real Estate**

The value of real estate security for EM loans usually must be established through a real estate appraisal by FSA that conforms to the Uniform Standards of Professional Appraisal Practice and FSA’s own appraisal requirements.<sup>371</sup>

If certain requirements are met, FSA State Executive Directors may waive the real estate appraisal requirement for farmers who are receiving only an EM loan.<sup>372</sup> First, specific conditions under which an appraisal may be waived must be established, and the waiver must be available to all farmers meeting those conditions. Second, the estimated security value must be established by someone other than the loan approval official. Third, procedures must be established to allow the farmer to dispute the estimated security value and have an appraisal completed.

**b. Security Value of Livestock and Equipment**

The value of livestock and equipment is determined by FSA according to FSA appraisal requirements.<sup>373</sup>

**c. Security Value of Annual Commodity Production**

Under the current EM loan regulations, the security value of a farmer's annual crop production is presumed to be 100 percent of the amount loaned for annual family living and farm operating expenses.<sup>374</sup>

**d. Security Value of Property Damaged by the Disaster**

The value of disaster-damaged farm assets that are pledged as collateral for an EM loan will be the value of those assets as established for the day before the disaster occurred.<sup>375</sup>

**7. Title Requirements for Real Estate Security**

If real estate is given as security for an EM loan and the loan amount is more than \$25,000, FSA must obtain title clearance on the property.<sup>376</sup> If real estate is given as security for an EM loan and the loan amount is \$25,000 or less, FSA must receive a certification of ownership.<sup>377</sup> The certification of ownership can be an affidavit signed by the farmer that names the record owner of the real estate and lists the balances due on all known debts against the property. If the FSA official responsible for approving the loan is uncertain about the record owner or the debts against the real estate security, a title search will be required.<sup>378</sup>

**E. Insurance Requirements**

The EM loan regulations impose requirements for certain insurance coverage depending on the type of loan security.<sup>379</sup> In general, the farmer must obtain insurance at least equal to the EM loan principal amount or the value of the security at loan closing, whichever is less.<sup>380</sup>

## **1. Crop Insurance**

Farmers who receive EM loan funds will often be required to carry crop insurance.<sup>381</sup> Crop insurance is discussed in detail in Chapter 3 of this book.

### **a. Obtain Crop Insurance or Waive Emergency Crop Loss Assistance**

All farmers who get an EM loan must either: (1) obtain crop insurance coverage, if it is available, for each crop that is a basic part of the farming operation for the year in which the loan is sought; or (2) waive future eligibility for emergency crop loss assistance in connection with any uninsured crops.<sup>382</sup> The crop insurance must be at least the catastrophic risk protection (CAT) level of coverage.<sup>383</sup>

Regarding perennial crops, the EM Loan Handbook states that the farmer will be required to obtain crop insurance on all perennial crops for all subsequent crop years in which the loan is outstanding.<sup>384</sup>

### **b. If Growing Crops Are EM Loan Security—Crop Insurance Required If Available**

Farmers are required to obtain crop insurance on any growing crop that is part of the “adequate security” for an EM loan.<sup>385</sup> The option of signing a waiver of eligibility for disaster payments and retaining loan eligibility is not available for any such crop if crop insurance is available.

### **c. If Crop Insurance Carried—Proceeds Must Be Assigned to FSA**

EM loan borrowers must execute an assignment of their crop insurance indemnities to FSA.<sup>386</sup>

## **2. Hazard Insurance**

In addition to crop insurance, discussed above, the EM loan regulations require that all security for an EM loan must be covered by hazard insurance if the insurance is readily available and the insurance premiums do not exceed the benefits to be obtained through the insurance.<sup>387</sup> As mentioned earlier, hazard insurance is defined for EM loan purposes as “insurance covering fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workers compensation, or any similar insurance that is available and needed to protect the Agency.”<sup>388</sup>

As discussed earlier in this chapter, the EM loan regulations include authority for special hazard insurance requirements when EM loan funds will be used to replace chicken houses.<sup>389</sup> Under this authority, poultry farmers who obtain EM loans to rebuild chicken houses must obtain hazard insurance on any new chicken house for its full market value for the term of the loan.<sup>390</sup>

## **3. Flood or Mudslide Insurance**

Federal law restricts the use of loan funds, including EM loan funds, on farms in flood or mudslide prone areas and requires flood or mudslide insurance for any loan security.<sup>391</sup> The EM loan regulations state that flood or mudslide insurance must be obtained for any real estate security located in flood or mudslide prone areas.<sup>392</sup>

## **4. FSA Must Be Listed as Beneficiary of Insurance Policies**

FSA must be named as the loss payee for any insurance indemnity payment under a policy required by the EM loan regulations and as a beneficiary of any mortgagee loss payable claim.<sup>393</sup>

## **F. Fees**

The farmer will be responsible for paying all filing, recording, notary, lien search, and any other fees necessary to process and close an EM loan.<sup>394</sup> These fees may be paid for out of the EM loan funds.

## **G. Loan Application Requirements**

In addition to a completed application form, all EM loan applications must generally include all of the following.<sup>395</sup>

- A written description of the farmer's farm training and experience, including, in the case of an entity, the farm training and experience of each entity member who will be involved in managing or operating the farm.
- The last three years of farm financial records, including tax returns, and farm production records (unless the applicant has been farming less than three years).
- Documentation that the applicant and each member of an entity applicant, cannot obtain sufficient credit elsewhere at reasonable rates and terms.
- Documentation showing compliance with FSA's environmental regulations.
- Verification of all non-farm income.
- Current financial statements and the current farm operating plan, including a projected cash flow budget reflecting production, income, expenses, and the loan repayment plan.
- A legal description of the farm property owned or to be acquired and any leases, contracts, options, and other agreements that affect the property.
- Payment to FSA for ordering a credit report concerning the farmer.

- Verification of all debts.
- A statement of loss or damage sustained from the disaster.

The regulations also permit FSA to request additional information from the farmer if needed to evaluate the application.<sup>396</sup>

Additional application requirements apply to entity applicants. Under these requirements, entity applicants must submit a list of entity members, including the address, citizenship, occupation, and amount of their shares or stock in the entity for each member. They must also provide FSA with a personal financial statement from each entity member and from the entity itself.<sup>397</sup>

Loan applications must be submitted in the name of the actual operator of the farm. In those cases where two or more applicants apply jointly for a loan, FSA will consider the application to be from an entity applicant and the application requirements for entity applicants must be met.<sup>398</sup>

## **H. Loan Application Processing**

The FSA loan regulations state that FSA will notify farmers in writing that their complete loan applications have been received.<sup>399</sup> Within 60 calendar days of receiving the farmer's application, FSA must give the farmer written notification of its decision approving or denying the loan application.<sup>400</sup> If the farmer's application is approved, loan funds will be made available to the farmer within 15 calendar days after loan approval, unless the farmer agrees to a longer period.<sup>401</sup>

If the application received by FSA is incomplete, FSA must notify the farmer in writing within ten days of the missing information.<sup>402</sup> The farmer will have 20 calendar days from the date of the notice to provide the missing information. If this deadline is not met, FSA will inform the farmer in writing that the application will be withdrawn if the missing information is not provided within ten calendar days of the second notice.<sup>403</sup>

## **I. EM Loan Denials**

A farmer must be notified in writing of an EM loan denial.<sup>404</sup> The denial notice must: (1) set out clear, specific reasons for the denial; (2) give citations of regulations and handbook sections that were not satisfied in the farmer's application; (3) set out the farmer's rights to appeal the denial (as discussed below); and (4) include USDA's statement of nondiscrimination and equal credit opportunity.<sup>405</sup>

## **VIII. Mediation and Appeals of EM Loan Decisions**

A farmer may seek mediation of a dispute with FSA related to an EM loan if the mediation program in the state where the farmer resides has been certified by USDA to hear agricultural credit disputes.<sup>406</sup> Farmers may also ask FSA to reconsider EM loan adverse decisions.<sup>407</sup>

Farmers may also appeal any adverse decision made by FSA about an EM loan.<sup>408</sup> An adverse decision may include, among other things, a determination that a farmer is not eligible for an EM loan, failure to process a loan application, or approval of a smaller loan amount than the farmer requested.<sup>409</sup>

EM loan appeals are handled by USDA's National Appeals Division (NAD).<sup>410</sup> NAD regulations set out a formal appeals process with important deadlines and other requirements. For example, farmers must file their appeals with NAD within 30 days after they first receive notice of the adverse decision.<sup>411</sup>

## **IX. EM Loan Interaction With Other Government Programs**

### **A. EM Loans and Small Business Administration (SBA) Loans**

It is possible to borrow from both the FSA EM loan program and the Small Business Administration (SBA) disaster loan programs. Since SBA does not make agricultural loans, SBA eligibility likely will be for physical damage or loss to the farmer's dwelling and its contents. As discussed in this chapter, EM loans are also available for damage to a

farmer's dwelling and household contents. SBA and FSA insist that there be no duplication in these loans. These programs might be coordinated in cases when the farm is operated as a business entity and, therefore, EM loan funds are not available to replace essential household contents, or when the farmer's dwelling is located apart from the farm property. The farmer and his or her family might then be able to apply for an SBA disaster loan to cover the household losses. See Chapter 9 of this book for a discussion of SBA disaster loans.

As mentioned earlier, EM loans are not available for "non-eligible enterprises." These enterprises should be eligible for assistance under SBA disaster business loan programs.

### **B. EM Loans and Other FSA Loans**

Farmers may receive other FSA loans—such as Operating (OL) loans or Farm Ownership (FO) loans—along with EM loans. In addition, farmers who are not eligible for an EM loan may still be eligible for other FSA loans.

### **C. EM Loans, Crop Insurance, and Noninsured Crop Disaster Assistance (NAP)**

Farmers are permitted to receive both catastrophic crop insurance (CAT) coverage or Noninsured Crop Disaster Assistance Program (NAP) benefits as well as an EM loan for the same disaster losses. However, CAT or NAP benefits received for a qualifying production loss will result in a one-to-one reduction in the qualifying EM loan amount.<sup>412</sup>

## **X. Discrimination Is Illegal**

FSA is prohibited by the Equal Credit Opportunity Act (ECOA) from discriminating against any EM loan applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the applicant's receipt of income from any public

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assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes the ECOA.<sup>413</sup> In addition to these prohibited bases for discrimination, general USDA regulations also prohibit discrimination in any program administered by USDA on the basis of familial status, sexual orientation, disability, or because all or part of an individual's income is derived from any public assistance program.<sup>414</sup>

## Chapter 7 Notes

- <sup>1</sup> EM loans are authorized by 7 U.S.C. §§ 1961-1970.
- <sup>2</sup> See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (Apr. 4, 1996) (1996 FAIR Act); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998) (1999 Appropriations Act). See also earlier editions of this book discussing specific statutory changes.
- <sup>3</sup> 67 Fed. Reg. 791 (2002) (codified at 7 C.F.R. pt. 764) (as corrected by 67 Fed. Reg. 7941 (2002)). The final rule was based on changes proposed in September 2000. 65 Fed. Reg. 54,973 (2000).
- <sup>4</sup> Before the 2002 rule was issued, the EM loan regulations were located in Title 7, Part 1945 of the CFR.
- <sup>5</sup> The handbook, called "Direct Loan Making," 3-FLP, was originally issued on February 8, 2002. A revised handbook was issued on December 31, 2007.
- <sup>6</sup> 72 Fed. Reg. 63,242 (2007) (codified in scattered sections of Title 7 of the CFR) (as corrected by 72 Fed. Reg. 74,153 (2007)).
- <sup>7</sup> To obtain earlier editions of this book, contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, MN 55101; or by electronic mail at [lawyers@flaginc.org](mailto:lawyers@flaginc.org).
- <sup>8</sup> 7 U.S.C. § 1961(a); 7 C.F.R. § 764.352(g) (2008).
- <sup>9</sup> EM Loan Handbook, page 9-12, para. 232.H (Dec. 31, 2007).
- <sup>10</sup> Under the current EM loan regulations, delinquency on other FSA loans is no longer a bar to eligibility. 7 C.F.R. § 764.101(f) (2008). Prior EM loan regulations had made it an eligibility requirement that the farmer not be delinquent on any other direct or guaranteed FSA loan. See 7 C.F.R. § 1945.162(a) (2002). This requirement was only in the regulations and was not required by statute.
- <sup>11</sup> A family farm that changes ownership structure between the time the disaster occurs and the EM loan closing will still be eligible for the EM loan if the following conditions are met: (1) the new applicant, including all owners, meets all applicable EM loan eligibility requirements; and (2) the new individual applicant (or all owners of a new entity applicant) had an

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- ownership interest in the farming operation at the time of the disaster. 7 C.F.R. § 764.352(j) (2008). The amount of an EM loan after a change in ownership structure will be based on the percentage of the disaster-afflicted farming operation that was transferred to the new applicant. 7 C.F.R. § 764.352(j)(3) (2008). In no case will any new EM loan amounts equal more, in total, than would have been authorized for the original farming operation.
- <sup>12</sup> 7 C.F.R. § 764.352(c) (2008). If the borrower is a business entity, its members must not be business entities. 7 C.F.R. § 764.101(l) (2008). In addition, if the owners of a majority interest in the entity are related by blood or marriage, at least one of the related owners must be the operator of a family farm. 7 C.F.R. § 764.101(k)(2)(i) (2008). If the borrower is a business entity and the majority interest holders are not related by blood or marriage, all of the majority interest holders must be operators of a family farm. 7 C.F.R. § 764.101(k)(2)(ii) (2008). Additionally, if the borrower is a business entity, the entity must be authorized to operate and own the farm under the state laws applying to farm ownership in the state where the farm is located. 7 C.F.R. § 764.352(c)(3)(ii) (2008).
- <sup>13</sup> 7 C.F.R. § 764.352(c)(1)(ii) (2008).
- <sup>14</sup> EM Loan Handbook, page 9-9, para. 232.D (Dec. 31, 2007).
- <sup>15</sup> 7 C.F.R. § 764.101(k) (2008). If the borrower is a business entity that has an operator interest in any other farming operation, that other farming operation must not exceed the requirements of a family farm. 7 C.F.R. § 764.101(k)(4) (2008). The EM Loan Handbook contains additional details about the family farm definition for FSA's direct loan programs, including a list of factors that FSA will consider in determining if a borrower's farming operation meets the family farm requirement. EM Loan Handbook, page 4-17, para. 71.B (Dec. 31, 2007).
- <sup>16</sup> 7 C.F.R. § 761.2, "Family farm (1)" (2008).
- <sup>17</sup> EM Loan Handbook, page 4-17, para. 71.B (December 31, 2007).
- <sup>18</sup> 7 C.F.R. § 761.2, "Family farm (2)" (2008). If the borrower is a business entity, the farm must be managed by the members of the entity who are responsible for operating the farm. 7 C.F.R. § 761.2, "Family farm (2)(i)(B)" (2008).
- <sup>19</sup> EM Loan Handbook, page 4-17, para. 71.B (Dec. 31, 2007).

- <sup>20</sup> 7 C.F.R. § 761.2, “Family farm (2)(ii)” (2008). If the borrower is a business entity, a substantial part of the farm’s labor requirements must be provided by the members of the entity responsible for operating the farm. 7 C.F.R. § 761.2, “Family farm (2)(ii)(B)” (2008).
- <sup>21</sup> 7 C.F.R. § 761.2 “Family farm (3), (4)” (2008).
- <sup>22</sup> EM Loan Handbook, page 4-17, para. 71.B (December 31, 2007).
- <sup>23</sup> EM Loan Handbook, page 4-17, para. 71.B (December 31, 2007).
- <sup>24</sup> EM Loan Handbook, page 4-17, para. 71.B (December 31, 2007).
- <sup>25</sup> 7 C.F.R. §§ 764.352(a), 764.101(k), 761.2, “Family farm,” “Non-eligible enterprise” (2008).
- <sup>26</sup> 7 C.F.R. § 761.2, “Non-eligible enterprise” (2008).
- <sup>27</sup> 7 C.F.R. § 764.351 (2008); EM Loan Handbook, page 9-12, para. 232.H (Dec. 31, 2007). This requirement was a separate item in determining a farmer’s eligibility for EM loans under prior program regulations. See 7 C.F.R. § 1945.162(e) (2002). Under the current rules, the requirement that the farmer’s operation be in a disaster area is a component of whether the farmer suffered a type of loss for which EM loans may be used, discussed in more detail later in the chapter. The requirement continues to be listed separately here to ensure that readers familiar with earlier editions of this book are not confused about its continuing applicability.
- <sup>28</sup> 7 C.F.R. § 761.2, “Disaster area” (2008).
- <sup>29</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 5201, 116 Stat. 344 (May 13, 2002). Applicable laws include the Plant Protection Act and the federal animal quarantine laws. For a complete list of these laws, see 21 U.S.C. § 136a(f)(1). Although this new authority was incorporated into the EM loan program regulations in February 2003, neither the regulations nor the EM Loan Handbook specify how quarantine-related eligibility will be determined nor how eligible losses will be calculated. 68 Fed. Reg. 7693, 7695-96 (2003) (codified at 7 C.F.R. § 761.2, “Disaster,” “Quarantine” (2008)).
- <sup>30</sup> Although the definition of “disaster area” was not changed, “disaster” is defined for EM loan purposes to include quarantine. 7 C.F.R. § 761.2, “Disaster” (2008).
- <sup>31</sup> 7 C.F.R. § 764.352(b) (2008).

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- <sup>32</sup> The regulations state that active participation includes exercising control over the farming operation, making decisions regarding the operation, and establishing the direction of the operation. 7 C.F.R. § 761.2, “Established farmer (1)” (2008).
- <sup>33</sup> 7 C.F.R. § 761.2, “Established farmer (1)-(3)” (2008). If the farm is operated by a business entity, the entity owners as a group must satisfy the established farmer requirements.
- <sup>34</sup> 7 C.F.R. § 761.2, “Established farmer (4)” (2008). The farming operation’s cash flow for this purpose must be for either the next crop year or the next 12-month period, as “mutually determined” between FSA and the borrower. The EM Loan Handbook states that FSA will impose additional, state-specific requirements in cases of direct loans to trusts. EM Loan Handbook, page 4-19, para. 72.E (Dec. 31, 2007).
- <sup>35</sup> 7 C.F.R. § 761.2, “Established farmer (5),” “Entity” (2008). The EM Loan Handbook also states that estates cannot be considered established farmers. EM Loan Handbook, page 9-8, para. 232.C (Dec. 31, 2007).
- <sup>36</sup> 7 C.F.R. § 761.2, “Established farmer (5)(ii)” (2008).
- <sup>37</sup> 7 C.F.R. § 761.2, “Established farmer (5)(ii)” (2008).
- <sup>38</sup> 7 C.F.R. § 764.352(d) (2008).
- <sup>39</sup> 7 C.F.R. § 764.101(i) (2008).
- <sup>40</sup> EM Loan Handbook, page 4-14, para. 69.A (Dec. 31, 2007).
- <sup>41</sup> EM Loan Handbook, page 4-14, para. 69.A (Dec. 31, 2007).
- <sup>42</sup> 7 C.F.R. § 764.101(d) (2008).
- <sup>43</sup> 7 C.F.R. § 764.101(d) (2008).
- <sup>44</sup> 7 C.F.R. §§ 764.101(d)(1), 761.2 “Good faith” (2008).
- <sup>45</sup> 7 C.F.R. § 761.2 “Good faith” (2008). When determining the issue of “good faith,” FSA will only consider fraud, waste, or conversion actions if those actions are substantiated by a written legal opinion issued by the Office of the General Counsel. 7 C.F.R. § 761.2 “Good faith” (2008); see also 72 Fed. Reg. 63,242, 63,247 (2007) (prefatory comments to final rule).
- <sup>46</sup> The handbook states that farmers who provide false information to FSA will be referred to USDA’s Office of Inspector General and may be subject to

- criminal prosecution. EM Loan Handbook, page 4-5, para. 65.A (Dec. 31, 2007).
- <sup>47</sup> 7 C.F.R. §§ 761.2 “Good faith,” 764.101(d) (2008). The EM Loan Handbook states that a farmer will be determined uncreditworthy if he or she has not made every reasonable effort to meet the conditions and terms of any previous FSA loan. EM Loan Handbook, page 4-5, para. 65.A (Dec. 31, 2007).
- <sup>48</sup> 7 C.F.R. § 764.101(d)(1) (2008). With respect to lenders other than FSA, a farmer may be deemed uncreditworthy if he or she does not make a reasonable effort to resolve delinquencies with those lenders. EM Loan Handbook, page 4-5, para. 65.A (Dec. 31, 2007).
- <sup>49</sup> 7 C.F.R. § 764.101(d)(3) (2008).
- <sup>50</sup> 7 C.F.R. § 764.101(d)(3) (2008).
- <sup>51</sup> 7 C.F.R. § 764.101(d)(3)(i) (2008).
- <sup>52</sup> 7 C.F.R. § 764.101(d)(3)(i) (2008). This applies to delinquencies that are resolved through FSA’s loan servicing programs available under 7 C.F.R. part 766. 7 C.F.R. § 764.101(d)(3)(i) (2008).
- <sup>53</sup> 7 C.F.R. § 764.101(d)(3)(ii) (2008).
- <sup>54</sup> 7 C.F.R. § 764.101(d)(3)(iii) (2008).
- <sup>55</sup> 7 C.F.R. § 764.101(d)(3)(iv) (2008).
- <sup>56</sup> See 7 C.F.R. § 1910.(c)(4)(i) (2007).
- <sup>57</sup> 7 C.F.R. § 764.101(d)(3)(iv) (2008).
- <sup>58</sup> 7 C.F.R. §§ 764.101(e), 764.352(e) (2008). If the EM loan is for a farm business entity, all individuals, members, stockholders, partners, and joint operators must meet this eligibility requirement. EM Loan Handbook, page 9-11, para. 232.F (Dec. 31, 2007).
- <sup>59</sup> 65 Fed. Reg. 54,973, 54,974 (2000) (prefatory comments to proposed rule). The 2002 rule, on the other hand, is said to be “consistent with the minimum requirements of the Act” while giving FSA “maximum flexibility.” 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- <sup>60</sup> 7 C.F.R. § 764.352(e) (2008). In comments accompanying the 2002 rule, FSA stated that this provision allows it to “contact other commercial lending institutions within reasonable proximity of the applicant and make an independent determination of the applicant’s ability to obtain credit

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elsewhere” and to “investigate cases where the applicant’s net worth or other circumstances indicate that credit may be available elsewhere without increasing the applicant’s burden in obtaining additional written declinations of credit.” 67 Fed. Reg. 791, 794 (2002) (prefatory comments to final rule).

- 61 7 C.F.R. § 764.352(e)(1) (2008).
- 62 7 C.F.R. § 764.352(e) (2008).
- 63 EM Loan Handbook, page 9-10, para. 232.F (Dec. 31, 2007).
- 64 7 C.F.R. § 764.352(e)(2) (2008).
- 65 7 C.F.R. § 764.352(e) (2008).
- 66 EM Loan Handbook, page 9-10, para. 232.F (Dec. 31, 2007).
- 67 EM Loan Handbook, page 9-10, para. 232.F (Dec. 31, 2007).
- 68 7 C.F.R. § 764.352(e)(3) (2008).
- 69 7 C.F.R. § 764.352(e)(3) (2008).
- 70 EM Loan Handbook, page 9-11, para. 232.F (Dec. 31, 2007).
- 71 EM Loan Handbook, page 9-11, para. 232.F (Dec. 31, 2007).
- 72 7 C.F.R. § 764.101(j) (2008). The training requirements are set out in 7 C.F.R. §§ 764.452 and 764.454 (2008).
- 73 7 C.F.R. § 764.453 (2008).
- 74 7 C.F.R. § 764.454(a)(4) (2008).
- 75 7 C.F.R. § 764.352(f) (2008).
- 76 7 C.F.R. § 761.2, “Debt forgiveness” (2008). Debt forgiveness does not include debt reduction through a conservation contract; a writedown provided as part of the resolution of a discrimination complaint against FSA; prior debt forgiveness that has been repaid; or consolidation, rescheduling, reamortization, or deferral of a loan. The regulations define conservation contracts to include contracts under which the borrower agrees to set aside land “for conservation, recreation or wildlife purposes” in exchange for reduction of a direct loan debt. Writedowns reduce the borrower’s debt to an amount that FSA determines is collectible based on the value of the security provided to FSA and the borrower’s ability to pay. 7 C.F.R. § 761.2, “Conservation contract,” “Debt writedown” (2008).

- 77 7 C.F.R. §§ 761.2, "Debt forgiveness," 764.101(d) (2008); EM Loan Handbook, page 9-12, para. 232.G (Dec. 31, 2007).
- 78 7 C.F.R. § 764.101(d)(2) (2008).
- 79 7 C.F.R. § 764.101(g) (2008).
- 80 7 C.F.R. §§ 764.101(a), 718.6(b) (2008). Controlled substances for this purpose are defined in 21 U.S.C. § 812. See 7 C.F.R. § 761.2, "Controlled substance" (2008). If the EM loan application is from a farm business entity, this requirement applies to all individuals, members, stockholders, partners, and joint operators in the entity. EM Loan Handbook, page 4-18, para. 72.B (Dec. 31, 2007).
- 81 7 C.F.R. § 718.6(b)(2) (2008); EM Loan Handbook, page 4-2, para. 62.B (Dec. 31, 2007). If an applicant has been convicted of possessing or distributing a controlled substance, a court will determine whether the applicant is eligible to participate in the EM loan program. If the court determines the applicant is ineligible, the court will also determine the period of ineligibility.
- 82 EM Loan Handbook, page 4-2, para. 62.B (Dec. 31, 2007).
- 83 7 C.F.R. § 764.101(h) (2008); EM Loan Handbook, page 4-12, para. 68.A (Dec. 31, 2007). The rule governing crop insurance violations is located at 7 C.F.R. § 718.11 (2008).
- 84 EM Loan Handbook, page 4-12, para. 68.A (Dec. 31, 2007).
- 85 42 U.S.C. § 5155(b)(1); 7 C.F.R. § 764.352(k) (2008).
- 86 EM Loan Handbook, page 9-14, para. 232.K (Dec. 31, 2007).
- 87 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 88 EM Loan Handbook, page 9-14, para. 232.K (Dec. 31, 2007).
- 89 7 C.F.R. § 764.101(b) (2008). The borrower must legally be able to sign a loan contract.
- 90 EM Loan Handbook, page 4-3, para. 63.A (Dec. 31, 2007). If the borrower is a business entity, all members, stockholders, partners, and joint operators must satisfy this requirement.
- 91 7 C.F.R. § 764.101(c) (2008). If the borrower is a business entity, the individuals who own the majority interest in the entity must be citizens, non-citizen nationals, or qualified aliens. Non-citizen nationals and qualified

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aliens will be required to provide appropriate documentation of their immigration status. EM Loan Handbook, page 4-4, para. 64.A (Dec. 31, 2007).

- 92 7 C.F.R. § 764.351 (2008).
- 93 7 C.F.R. § 764.351(a) (2008).
- 94 7 C.F.R. § 761.2, “Physical loss” (2008).
- 95 7 C.F.R. § 761.2, “Physical loss” (2008).
- 96 7 C.F.R. §§ 764.351(a), 764.352(i) (2008).
- 97 7 C.F.R. §§ 764.351(a), 764.352(i) (2008).
- 98 7 C.F.R. § 761.2, “Chattel or real estate essential to the operation” (2008).
- 99 7 C.F.R. § 761.2, “Chattel or real estate essential to the operation” (2008).
- 100 7 C.F.R. §§ 764.351(a)(2)(iii), 764.352(i) (2008).
- 101 7 C.F.R. § 761.2, “Household contents” (2008).
- 102 See 7 C.F.R. § 764.2, “Household contents” (2007). Although not specifically included in the new rule, these examples are most likely still things FSA would consider essential household items.
- 103 7 C.F.R. § 761.2, “Household contents” (2008).
- 104 7 C.F.R. § 764.353(d)(5) (2008).
- 105 See 7 C.F.R. §§ 1945.163(a)(1)(iv), 1945.163(b)(6)(i) (2002).
- 106 This change arose from the EM loan regulations implemented in 2002, and continues under the current regulations. 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule); 7 C.F.R. § 764.351 (2008).
- 107 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 108 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 109 7 C.F.R. § 764.351(a)(2)(v) (2008).
- 110 EM Loan Handbook, page 9-9, para. 232.D (Dec. 31, 2007).
- 111 7 C.F.R. §§ 764.351(a)(2)(v), 764.352(i) (2008).
- 112 7 C.F.R. §§ 764.351(a)(2)(iv), 764.352(i) (2008).
- 113 EM Loan Handbook, Exhibit 21 (Dec. 31, 2007).
- 114 EM Loan Handbook, Exhibit 21 (Dec. 31, 2007).
- 115 EM Loan Handbook, Exhibit 21 (Dec. 31, 2007).

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- 116 7 C.F.R. § 764.353(e) (2008). This requirement was created by the 1996 FAIR Act. 1996 FAIR Act § 621 (codified at 7 U.S.C. § 1961(b)).
- 117 7 C.F.R. § 764.353(e) (2008).
- 118 7 C.F.R. § 761.2, "Hazard insurance" (2008).
- 119 7 C.F.R. § 764.353(e)(1) (2008).
- 120 7 C.F.R. § 764.353(e)(1) (2008).
- 121 See 7 C.F.R. § 764.4(b)(4) (2007).
- 122 EM Loan Handbook, page 9-15, para. 232.L (Dec. 31, 2007). The current regulations seem to incorporate the policy that no hazard insurance is required for livestock because they categorize livestock separately from property covered by hazard insurance for purposes of physical loss calculations. 7 C.F.R. § 764.353(d) (2008). Thus, when the EM loan regulations are viewed as a whole, it seems FSA does intend to maintain the hazard insurance exemption for livestock.
- 123 7 C.F.R. § 764.353(e)(2) (2008).
- 124 7 C.F.R. § 764.353(e)(2) (2008).
- 125 7 C.F.R. § 764.352(h) (2008).
- 126 See EM Loan Handbook, pages 9-18 through 9-21, paras. 234.B-F (Dec. 31, 2007).
- 127 7 C.F.R. § 764.352(h) (2008).
- 128 7 C.F.R. § 761.2, "Basic part of an applicant's total farming operation" (2008). Although the regulatory definition provides that both crop and livestock enterprises could be considered "basic parts" of a farming operation, only crop enterprises can qualify as production losses for EM loans.
- 129 7 C.F.R. § 764.352(h) (2008).
- 130 See 7 C.F.R. § 1945.154(a), "Farming enterprise (1)" (2002).
- 131 See 7 C.F.R. § 1945.154(a), "Farming enterprise (1)(i)" (2002).
- 132 See 7 C.F.R. § 1945.154(a), "Farming enterprise (1)(v)" (2002).
- 133 See 7 C.F.R. § 1945.154(a), "Farming enterprise (1)" (2002).
- 134 7 C.F.R. § 761.2, "Production loss" (2008).
- 135 7 C.F.R. § 764.351(b) (2008).

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- 136 7 C.F.R. § 761.2, “Agricultural commodity” (2008). “Aquaculture” is defined as “the husbandry of any aquatic organisms (including fish, mollusks, crustaceans or other invertebrates, amphibians, reptiles, or aquatic plants) raised in a controlled or selected environment of which the applicant has exclusive rights to use.” 7 C.F.R. § 761.2, “Aquaculture” (2008).
- 137 EM Loan Handbook, page 9-9, para. 232.D (Dec. 31, 2007).
- 138 7 C.F.R. § 764.353(b) (2008).
- 139 7 C.F.R. § 764.353(b)(2) (2008).
- 140 7 C.F.R. § 764.353(d) (2008).
- 141 7 C.F.R. § 764.353(d) (2008).
- 142 7 C.F.R. § 764.353(d)(1) (2008).
- 143 7 C.F.R. § 761.2, “Allowable costs” (2008).
- 144 7 C.F.R. § 761.2, “Allowable costs” (2008).
- 145 7 C.F.R. § 764.353(d)(2) (2008).
- 146 7 C.F.R. § 764.353(d)(2) (2008). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.353(e)(1) (2008).
- 147 EM Loan Handbook, page 9-1, para. 231.A (Dec. 31, 2007).
- 148 EM Loan Handbook, page 9-1, para. 231.A (Dec 31, 2007).
- 149 7 C.F.R. § 764.353(d)(1) (2008).
- 150 7 C.F.R. § 764.353(d)(1), (e)(1) (2008). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.353(e)(1) (2008).
- 151 7 C.F.R. § 764.353(d)(1) (2008).
- 152 7 C.F.R. § 764.353(d)(5) (2008).
- 153 7 C.F.R. § 764.353(d)(5) (2008).
- 154 See 7 C.F.R. § 764.2, “Household contents” (2007).
- 155 7 C.F.R. § 764.353(d)(3) (2008).
- 156 7 C.F.R. § 764.353(d)(3)(ii) (2008).
- 157 EM Loan Handbook, page 9-22, para. 234.G (Dec. 31, 2007).
- 158 EM Loan Handbook, page 9-22, para. 234.G (Dec. 31, 2007).

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- <sup>159</sup> EM Loan Handbook, page 9-23, para. 234.H (Dec. 31, 2007).
- <sup>160</sup> EM Loan Handbook, page 9-22, para. 234.G (Dec. 31, 2007).
- <sup>161</sup> 7 C.F.R. § 764.353(d)(3) (2008).
- <sup>162</sup> 7 C.F.R. § 764.353(d)(3) (2008).
- <sup>163</sup> EM Loan Handbook, page 9-23, para. 234.H (Dec. 31, 2007). The handbook emphasizes that the loan funds for the lost cows can only be used to replace cows; the lost calves and lost milk production are considered loss of normal income, and EM loan funds for these losses can be used for any authorized production loss loan purpose.
- <sup>164</sup> EM Loan Handbook, page 9-23, para. 234.H (Dec. 31, 2007).
- <sup>165</sup> 7 C.F.R. § 764.353(d)(4) (2008).
- <sup>166</sup> 7 C.F.R. § 764.353(d)(6) (2008).
- <sup>167</sup> EM Loan Handbook, page 9-22, para. 234.G (Dec. 31, 2007).
- <sup>168</sup> See 7 C.F.R. § 1945.163(a)(2)(x) (2002).
- <sup>169</sup> 7 C.F.R. § 764.353(b)(3) (2008).
- <sup>170</sup> See 7 C.F.R. § 1945.163 (2002).
- <sup>171</sup> 65 Fed. Reg. 54,973, 54,974 (2000) (prefatory comments to proposed rule).
- <sup>172</sup> 7 C.F.R. § 764.353(c)(1) (2008).
- <sup>173</sup> Under the EM loan regulations in effect before February 2002, normal yield was based on the farmer's best four years out of the previous five. See 7 C.F.R. § 1945.163(a)(1) (2002).
- <sup>174</sup> 7 C.F.R. § 761.2, "Normal production yield" (2008).
- <sup>175</sup> 7 C.F.R. § 761.2, "Normal production yield (1)" (2008). APH yield calculations for crop insurance purposes are set out in 7 C.F.R. part 400, subpart G (2008). APH yield calculations for NAP purposes are set out in 7 C.F.R. part 1437, subpart B (2008).
- <sup>176</sup> 7 C.F.R. § 761.2, "Normal production yield (2)" (2008).
- <sup>177</sup> 7 C.F.R. § 761.2, "Normal production yield (2)" (2008); EM Loan Handbook, page 9-18, para. 234.B (Dec. 31, 2007). The EM Loan Handbook emphasizes that these proven yields are the farmer's actual production yields and not the established yields set by the county committee. EM Loan Handbook, page 9-18, para. 234.B (Dec. 31, 2007).

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- <sup>178</sup> 7 C.F.R. § 761. 2, “Normal production yield (3)” (2008).
- <sup>179</sup> EM Loan Handbook, page 9-18, para. 234.B (Dec. 31, 2007).
- <sup>180</sup> 7 C.F.R. § 764.352(h) (2008).
- <sup>181</sup> 7 C.F.R. § 764.353(c)(1) (2008).
- <sup>182</sup> 7 C.F.R. § 764. 353(c)(2) (2008).
- <sup>183</sup> 7 C.F.R. § 764.353(c)(3) (2008). The EM Loan Handbook states that, in December of each year, FSA will issue a state supplement for each state setting out unit prices for all commodities produced commercially in the state. EM Loan Handbook, page 9-19, para. 234.C (Dec. 31, 2007). The prices in these supplements are used to determine EM loan amounts for production losses for the next calendar year.
- <sup>184</sup> The quality loss adjustment is not included in the current EM loan regulations, although it was an explicit provision of the prior rules. See 7 C.F.R. § 1945.163(a)(2)(iii) (2002). Under the current regulations, the quality loss adjustment is set out in the program handbook. See EM Loan Handbook, page 9-20, para. 234.D (Dec. 31, 2007).
- <sup>185</sup> EM Loan Handbook, page 9-20, para. 234.D (Dec. 31, 2007).
- <sup>186</sup> EM Loan Handbook, page 9-21, para. 234.F (Dec. 31, 2007).
- <sup>187</sup> EM Loan Handbook, page 9-21, para. 234.F (Dec. 31, 2007).
- <sup>188</sup> EM Loan Handbook, page 9-20, para. 234.E (Dec. 31, 2007).
- <sup>189</sup> EM Loan Handbook, page 9-20, para. 234.E (Dec. 31, 2007).
- <sup>190</sup> EM Loan Handbook, page 9-20, para. 234.E (Dec. 31, 2007).
- <sup>191</sup> EM Loan Handbook, page 9-20, para. 234.E (Dec. 31, 2007).
- <sup>192</sup> EM Loan Handbook, page 9-20, para. 234.F (Dec. 31, 2007).
- <sup>193</sup> See 7 C.F.R. § 1945.163(a)(2)(xii) (2002).
- <sup>194</sup> EM Loan Handbook, page 9-13, para. 232.I (Dec. 31, 2007).
- <sup>195</sup> EM Loan Handbook, page 9-13, para. 232.I (Dec. 31, 2007).
- <sup>196</sup> 7 C.F.R. § 764.353(b)(3) (2008).
- <sup>197</sup> 7 C.F.R. § 764.353(b)(3) (2008).
- <sup>198</sup> 7 C.F.R. § 764.353(c)(4) (2008).

- <sup>199</sup> This was made explicit in comments to a prior EM loan regulation change. See 59 Fed. Reg. 16,771, 16,771-72 (1994) (prefatory comments to final rule). This approach seems to be continued, given the absence of any discussion of a policy change and the separate regulatory provisions for the 30 percent eligibility threshold and the total production loss calculation.
- <sup>200</sup> EM Loan Handbook, page 9-20, para.234.C (Dec. 31, 2007).
- <sup>201</sup> EM Loan Handbook, page 9-13, para. 232.I (Dec. 31, 2007).
- <sup>202</sup> See 7 C.F.R. § 1945.163(a)(2)(v), (xii), (xiv) (2002).
- <sup>203</sup> 7 C.F.R. § 764.353 (2008).
- <sup>204</sup> 7 C.F.R. § 764.353 (2008).
- <sup>205</sup> 7 C.F.R. § 761.8(a)(5) (2008). Until March 1997, a farmer could borrow up to \$500,000 per disaster. See 62 Fed. Reg. 9351, 9353 (1997) (prefatory comments to interim rule).
- <sup>206</sup> 7 C.F.R. § 761.8(a) (2008).
- <sup>207</sup> 7 C.F.R. § 764.353(d)(5) (2008).
- <sup>208</sup> 7 C.F.R. § 764.353(d)(5) (2008).
- <sup>209</sup> 7 C.F.R. § 764.351 (2008).
- <sup>210</sup> 7 C.F.R. § 764.351(a) (2008).
- <sup>211</sup> 7 C.F.R. § 764.351(a) (2008).
- <sup>212</sup> 7 C.F.R. § 764.352(c) (2008).
- <sup>213</sup> 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(a) (2008).
- <sup>214</sup> EM Loan Handbook, page 9-1, para. 231.A (Dec. 31, 2007).
- <sup>215</sup> 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(b) (2008).
- <sup>216</sup> 7 C.F.R. §§ 764.102(e), 761.10 (2008); EM Loan Handbook, page 7-2, para. 131.C (Dec. 31, 2007).
- <sup>217</sup> 7 C.F.R. § 764.151(b) (2008). The EM Loan Handbook additionally requires that if the leased property is on Indian tribal lands, trusts properties, or Hawaiian homelands, the farmer's leasehold must show an ownership interest as specified by a state supplement. EM Loan Handbook, page 7-2, para. 131.C (Dec. 31, 2007).
- <sup>218</sup> 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(b) (2008).
- <sup>219</sup> See 7 C.F.R. § 764.3(a)(1)(v) (2007).

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- 220 EM Loan Handbook, page 9-1, para. 231.A (Dec. 31, 2007).
- 221 EM Loan Handbook, page 9-1, para. 231.A (Dec. 31, 2007).
- 222 7 C.F.R. § 764.351(a)(1)(ii) (2008).
- 223 7 C.F.R. § 764.351(a)(1)(iii) (2008).
- 224 7 C.F.R. §§ 764.151(d), 764.351(a) (2008).
- 225 See 7 C.F.R. § 764.3(a)(1)(iv) (2007).
- 226 7 C.F.R. § 764.351(a)(2) (2008).
- 227 7 C.F.R. § 764.351(a)(2)(i) (2008).
- 228 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 229 EM Loan Handbook, page 9-2, para. 231.B (Dec. 31, 2007).
- 230 EM Loan Handbook, page 9-2, para. 231.B (Dec. 31, 2007).
- 231 7 C.F.R. § 764.351(a)(2)(iii) (2008).
- 232 7 C.F.R. § 761.2, “Household contents” (2008).
- 233 7 C.F.R. § 764.351(a)(2)(iv) (2008).
- 234 7 C.F.R. § 764.351(a)(2)(ii) (2008).
- 235 7 C.F.R. § 764.351(a)(2)(ii) (2008).
- 236 7 C.F.R. § 764.351(a)(2)(v) (2008).
- 237 7 C.F.R. § 764.351(a)(2)(v) (2008).
- 238 7 C.F.R. § 761.2, “Essential family living and farm operating expenses” (2008).
- 239 7 C.F.R. § 761.2, “Essential family living and farm operating expenses” (2008).
- 240 7 C.F.R. § 761.2, “Essential family living and farm operating expenses” (2008).
- 241 7 C.F.R. § 761.2, “Essential family living and farm operating expenses” (2008).
- 242 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 243 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 244 EM Loan Handbook, page 9-3, para. 231.B (Dec. 31, 2007).
- 245 7 C.F.R. § 764.351(a)(2)(vi) (2008).
- 246 7 C.F.R. § 764.351(a)(2)(vi) (2008).
- 247 EM Loan Handbook, page 9-3, para. 231.B (Dec. 31, 2007).

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- 248 Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.
- 249 EM Loan Handbook, page 9-4, para. 231.B (Dec. 31, 2007).
- 250 EM Loan Handbook, page 9-4, para. 231.B (Dec. 31, 2007).
- 251 This refers to loan servicing under 7 C.F.R. part 766, subpart C, and set aside under 7 C.F.R. part 766, subpart B (2008).
- 252 EM Loan Handbook, page 9-3, para. 231.B (Dec. 31, 2007).
- 253 7 C.F.R. § 764.351(b) (2008).
- 254 7 C.F.R. § 764.351(b)(2) (2008).
- 255 7 C.F.R. § 764.351(b)(2) (2008).
- 256 EM Loan Handbook, page 9-5, para. 231.C (Dec. 31, 2007).
- 257 7 C.F.R. § 764.351(b)(5) (2008).
- 258 7 C.F.R. § 761.2, "Essential family living and farm operating expenses," "Family living expenses" (2008).
- 259 7 C.F.R. § 764.351(b)(4) (2008).
- 260 7 C.F.R. § 764.351(b)(1) (2008).
- 261 7 C.F.R. § 764.351(b)(4) (2008).
- 262 EM Loan Handbook, page 9-5, para. 231.C (Dec. 31, 2007).
- 263 EM Loan Handbook, page 9-5, para. 231.C (Dec. 31, 2007).
- 264 EM Loan Handbook, page 9-5, para. 231.C (Dec. 31, 2007).
- 265 EM Loan Handbook, page 9-5, para. 231.C (Dec. 31, 2007).
- 266 7 C.F.R. § 764.351(b)(7) (2008).
- 267 7 C.F.R. § 761.2, "Working capital" (2008).
- 268 7 C.F.R. § 764.351(b)(6) (2008).
- 269 7 C.F.R. § 764.351(b)(6) (2008).
- 270 EM Loan Handbook, page 9-6, para. 231.C (Dec. 31, 2007).
- 271 Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.
- 272 EM Loan Handbook, page 9-6, para. 231.C (Dec. 31, 2007).
- 273 EM Loan Handbook, page 9-7, para. 231.C (Dec. 31, 2007).

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- <sup>274</sup> This refers to loan servicing under 7 C.F.R. part 766, subpart C, and set aside under 7 C.F.R. part 766, subpart B (2008).
- <sup>275</sup> EM Loan Handbook, page 9-7, para. 231.C (Dec. 31, 2007).
- <sup>276</sup> 7 C.F.R. § 764.351(b)(3) (2008).
- <sup>277</sup> EM Loan Handbook, page 9-7, para. 231.C (Dec. 31, 2007).
- <sup>278</sup> EM Loan Handbook, page 9-7, para. 231.C (Dec. 31, 2007).
- <sup>279</sup> 7 C.F.R. § 764.102(d)(1) (2008).
- <sup>280</sup> 7 C.F.R. § 764.102(d)(2) (2008).
- <sup>281</sup> 7 C.F.R. § 764.102(d)(3) (2008).
- <sup>282</sup> 7 C.F.R. §§ 764.102(e), 761.10(d)(2), (3) (2008).
- <sup>283</sup> 7 C.F.R. § 761.10(d)(1) (2008).
- <sup>284</sup> 7 C.F.R. § 764.102(e) (2008). These requirements are set out at 7 C.F.R. § 761.10 (2008).
- <sup>285</sup> 7 C.F.R. § 764.102(f) (2008).
- <sup>286</sup> 7 C.F.R. § 761.2 “Non-eligible enterprise” (2008).
- <sup>287</sup> 7 C.F.R. § 764.353(f) (2008).
- <sup>288</sup> 7 C.F.R. § 764.353(f) (2008).
- <sup>289</sup> FSA Handbook “General Program Administration,” 1-FLP (Rev. 1), Exhibit 17 (April 21, 2008). The rate is listed under “Actual Loss” Emergency Loans.
- <sup>290</sup> If the loan rate does change, the farmer is entitled to have the rate which is in effect upon loan approval or loan closing, whichever is lower. 7 C.F.R. § 764.354(a)(2) (2008).
- <sup>291</sup> 7 C.F.R. § 764.354(b) (2008).
- <sup>292</sup> 7 C.F.R. § 764.354(b)(1) (2008).
- <sup>293</sup> 7 C.F.R. § 764.354(b)(5) (2008).
- <sup>294</sup> 7 C.F.R. § 764.354(b)(5) (2008).
- <sup>295</sup> EM Loan Handbook, page 9-26, para. 235.F (Dec. 31, 2007).
- <sup>296</sup> 7 C.F.R. § 764.354(b)(4) (2008). This category includes, but is not limited to, property with an expected life of one to seven years.
- <sup>297</sup> 7 C.F.R. § 764.354(b)(4) (2008).

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- <sup>298</sup> 7 C.F.R. § 764.354(b)(4) (2008).
- <sup>299</sup> EM Loan Handbook, page 9-25, para. 235.E (Dec. 31, 2007).
- <sup>300</sup> 7 C.F.R. § 764.354(b)(3) (2008).
- <sup>301</sup> 7 C.F.R. § 764.354(b)(3) (2008).
- <sup>302</sup> EM Loan Handbook, page 9-24, para. 235.D (Dec. 31, 2007).
- <sup>303</sup> 7 C.F.R. § 764.354(b)(3) (2008).
- <sup>304</sup> 7 C.F.R. § 764.354(b)(2) (2008).
- <sup>305</sup> EM Loan Handbook, page 9-24, para. 235.C (Dec. 31, 2007).
- <sup>306</sup> EM Loan Handbook, page 9-24, para. 235.C (Dec. 31, 2007).
- <sup>307</sup> EM Loan Handbook, pages 9-25 and 9-26, paras. 235.E and 235.F (Dec. 31, 2007).
- <sup>308</sup> EM Loan Handbook, pages 9-25 and 9-26, paras. 235.E and 235.F (Dec. 31, 2007).
- <sup>309</sup> 7 C.F.R. § 764.401(a)(1) (2008).
- <sup>310</sup> 7 C.F.R. § 761.2, "Feasible plan" (2008).
- <sup>311</sup> 7 C.F.R. § 761.2, "Feasible plan," "Cash flow budget" (2008); 72 Fed. Reg. 63,242, 63,246 (2007) (prefatory comments to final rule).
- <sup>312</sup> 7 C.F.R. § 761.2, "Feasible plan," "Cash flow budget" (2008).
- <sup>313</sup> 7 C.F.R. § 761.2, "Feasible plan" (2008).
- <sup>314</sup> EM Loan Handbook, Exhibit 2 (Dec. 31, 2007).
- <sup>315</sup> 7 C.F.R. § 764.355(a), (b) (2008).
- <sup>316</sup> 7 C.F.R. §§ 764.355(a), (b), 764.103(b) (2008).
- <sup>317</sup> 7 C.F.R. §§ 764.103(b), 761.2, "Adequate security" (2008).
- <sup>318</sup> 7 C.F.R. §§ 764.103(b), 761.2, "Adequate security," (2008).
- <sup>319</sup> 7 C.F.R. § 761.2, "Security value" (2008).
- <sup>320</sup> 7 C.F.R. §§ 764.355(a), 764.155(b) (2008).
- <sup>321</sup> 7 C.F.R. §§ 764.355(b), 764.255(b)(1) (2008).
- <sup>322</sup> 7 C.F.R. § 764.103(b) (2008).
- <sup>323</sup> 7 C.F.R. § 764.103(d) (2008).

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- <sup>324</sup> 69 Fed. Reg. 6,056, 6,061 (2004) (prefatory comments to proposed rule). In its comments accompanying the final rule, FSA stated that its choice of security cannot be appealed. 72 Fed. Reg. 63,242, 63,257 (prefatory comments to final rule). However, USDA's National Appeals Division (NAD) has the final say in what decisions can be appealed. 7 C.F.R. § 11.6 (2008). Applicants who wish to dispute FSA's choice of security may seek a determination of appealability directly from NAD.
- <sup>325</sup> 7 C.F.R. § 764.103(b)(2) (2008).
- <sup>326</sup> 7 C.F.R. § 764.103(b)(2) (2008).
- <sup>327</sup> 7 C.F.R. § 764.103(b)(1) (2008).
- <sup>328</sup> See 7 C.F.R. § 764.8(g)(2)(ii) (2007).
- <sup>329</sup> 7 C.F.R. § 764.103(e) (2008).
- <sup>330</sup> 7 C.F.R. § 764.106(d) (2008). FSA will not take a security interest in separate residential property unless, after taking prior liens into consideration, the equity value of other security property—real estate, crops, and chattel—is less than 150 percent of the unpaid loan balance. EM Loan Handbook, page 5-12, para. 94.E (Dec. 31, 2007).
- <sup>331</sup> 7 U.S.C. § 1964(d)(2)(A).
- <sup>332</sup> See FSA Notice FLP-88, "Statutory and Administrative Changes to Emergency (EM) Loan Processing Regulations," 3.B (Oct. 18, 1999) (expired Oct. 1, 2000).
- <sup>333</sup> 7 C.F.R. § 764.355(c) (2008).
- <sup>334</sup> 7 C.F.R. § 764.355(c)(1) (2008). Property that presents liability concerns for FSA or for which no valid lien is available is excluded from this requirement.
- <sup>335</sup> EM Loan Handbook, page 9-28, para. 236.B (Dec. 31, 2007).
- <sup>336</sup> 7 C.F.R. § 764.355(c) (2008).
- <sup>337</sup> 7 C.F.R. § 764.355(c) (2008).
- <sup>338</sup> 7 C.F.R. §§ 764.355(c)(2), 761.2 "Feasible plan" (2008).
- <sup>339</sup> 7 C.F.R. § 764.355(c)(2) (2008).
- <sup>340</sup> 7 C.F.R. § 764.355(c)(2) (2008).
- <sup>341</sup> 7 C.F.R. § 764.355(c)(3) (2008).

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- 342 EM Loan Handbook, page 9-28, para. 236.B (Dec. 31,2007). Net farm income will be determined by subtracting all cash farm expenses from all farm income reported on the farmer's federal income tax return. Depreciation shown on Schedule F of a federal income tax return will not be included as an expense.
- 343 EM Loan Handbook, page 9-28, para. 236.B (Dec. 31,2007).
- 344 7 C.F.R. § 764.355(c)(4) (2008).
- 345 7 C.F.R. § 764.103(c) (2008).
- 346 7 C.F.R. § 764.103(c) (2008).
- 347 7 C.F.R. §§ 761.2, "Additional security," 764.103(c) (2008).
- 348 7 C.F.R. § 764.106(a) (2008).
- 349 7 U.S.C. § 1964(d)(2)(B).
- 350 EM Loan Handbook, page 9-28, para. 236.B (Dec. 31,2007).
- 351 7 C.F.R. § 764.106 (2008).
- 352 7 C.F.R. § 764.106(b) (2008).
- 353 7 C.F.R. § 764.106(c) (2008).
- 354 7 C.F.R. § 764.106(d)(1) (2008).
- 355 7 C.F.R. § 764.106(e) (2008).
- 356 7 C.F.R. § 764.103(e) (2008). If the total value of all the farmer's nonessential assets is \$5,000 or less, FSA will not require a lien. FSA will likely value non-essential assets according to their market value rather than replacement value or cost.
- 357 7 C.F.R. § 764.103(e) (2008).
- 358 EM Loan Handbook, page 5-3, para. 91.E (Dec. 31, 2007).
- 359 7 C.F.R. § 761.2, "Non-essential asset" (2008).
- 360 EM Loan Handbook, page 5-3, para. 91.E (Dec. 31, 2007).
- 361 7 C.F.R. § 764.104(c) (2008).
- 362 7 C.F.R. § 764.104 (2008).
- 363 7 C.F.R. § 764.104(a) (2008).
- 364 7 C.F.R. § 764.104(a) (2008).
- 365 7 C.F.R. § 764.104(b) (2008).

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- 366 7 C.F.R. §§ 764.355(b), 764.255(b) (2008).
- 367 7 C.F.R. § 764.255 (b)(2) (2008).
- 368 7 C.F.R. §§ 764.104(d), 764.105 (2008).
- 369 7 C.F.R. § 761.2, “Security value” (2008).
- 370 7 C.F.R. § 761.2, “Market value” (2008).
- 371 7 C.F.R. §§ 764.107(a), 761.7(b) (2008). The appraisal may be performed by a designated FSA appraiser or by a private appraiser on contract with FSA. FSA appraisal requirements can be found at 7 C.F.R. § 761.7.
- 372 EM Loan Handbook, page 9-30, para. 238.A (Dec. 31, 2007).
- 373 7 C.F.R. § 764.107(a)(2) (2008). FSA appraisal requirements can be found at 7 C.F.R. § 761.7 (2008).
- 374 7 C.F.R. § 764.107(b)(1) (2008).
- 375 7 U.S.C. § 1964(d)(1); 7 C.F.R. § 764.356(b) (2008).
- 376 7 C.F.R. § 764.355(d) (2008).
- 377 7 C.F.R. § 764.355(e) (2008).
- 378 7 C.F.R. § 764.355(e) (2008).
- 379 7 C.F.R. § 764.108 (2008).
- 380 7 C.F.R. § 764.108 (2008).
- 381 7 C.F.R. § 764.108 (2008).
- 382 7 C.F.R. § 764.108(d) (2008). EM loans are not considered emergency crop loss assistance for this purpose. 7 C.F.R. § 762.123(a)(2)(ii) (2008). See also, FSA Notice FC-39, “Federal Agriculture Improvement and Reform Act (1996 Farm Bill) Provisions Affecting Requirement for CAT Coverage,” Exhibit 1 (FSA 570), “Waiver of Eligibility for Emergency Assistance” (Apr. 11, 1996).
- 383 7 C.F.R. § 764.108(d) (2008).
- 384 EM Loan Handbook, page 6-3, para. 112.C (Dec 31, 2007).
- 385 7 C.F.R. § 764.108(c) (2008).
- 386 7 C.F.R. § 764.108(c), (d) (2008).
- 387 7 C.F.R. § 764.108(a) (2008). “Readily available” means that the insurance is sold by agents in the farmer’s normal trade area.
- 388 7 C.F.R. § 761.2, “Hazard insurance” (2008).

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- 389 7 C.F.R. § 764.353(e)(2) (2008).
- 390 7 C.F.R. § 764.353(e)(2)(iii) (2008).
- 391 42 U.S.C. § 4012a. Through the National Flood Insurance Program, the Federal Emergency Management Agency (FEMA) designates special flood or mudslide prone areas and oversees the offering of flood insurance in communities where it is required. 44 C.F.R. pt. 59 (2008).
- 392 7 C.F.R. § 764.108(b) (2008).
- 393 7 C.F.R. § 764.108 (2008).
- 394 7 C.F.R. § 764.402(b) (2008).
- 395 7 C.F.R. § 764.51(b) (2008).
- 396 7 C.F.R. § 764.51(b) (2008). If the applicant has already submitted any of the required information to FSA and the information remains current, the farmer does not need to resubmit the information with his or her EM loan application. 7 C.F.R. § 764.51(e) (2008).
- 397 7 C.F.R. § 764.51(b)(2) (2008).
- 398 7 C.F.R. § 764.51(a) (2008).
- 399 7 C.F.R. § 764.53(b) (2008).
- 400 7 C.F.R. § 764.53(c) (2008).
- 401 7 C.F.R. § 764.402(e) (2008); EM Loan Handbook, page 10-7, para. 262.D (Dec. 31, 2007).
- 402 7 C.F.R. § 764.52(a) (2008).
- 403 7 C.F.R. § 764.52(b) (2008).
- 404 7 C.F.R. § 764.52(c) (2008); EM Loan Handbook, page 10-15, para. 266.B (Dec. 31, 2007).
- 405 EM Loan Handbook, page 10-15, para. 266.B (Dec. 31, 2007).
- 406 7 C.F.R. §§ 780.6, 780.9 (2008).
- 407 7 C.F.R. § 780.4(a)(1)(i) (2008).
- 408 7 U.S.C. § 6996(a).
- 409 7 C.F.R. § 780.4(d) (2008). An “adverse decision” is defined as  
“a program decision by an employee, officer, or committee of FSA that is adverse to the participant. The term includes any denial of program

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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.”

7 C.F.R. § 780.2, “Adverse decision” (2008).

The term also includes

“a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations.”

7 C.F.R. § 11.1, “Adverse decision” (2008).

<sup>410</sup> 7 C.F.R. pt. 11 (2008). FSA regulations related to NAD appeals are set out at 7 C.F.R. pt. 780 (2008).

<sup>411</sup> 7 C.F.R. § 11.6(a)(1) (2008). For a detailed discussion of NAD procedures, see *USDA’s National Appeals Division Practice and Procedures* by FLAG attorney Karen Krub, available at [www.flaginc.org/pubs/arts/NADarticle\\_NatAgLawCtr2003.pdf](http://www.flaginc.org/pubs/arts/NADarticle_NatAgLawCtr2003.pdf), or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, MN 55101; or by electronic mail at [lawyers@flaginc.org](mailto:lawyers@flaginc.org).

<sup>412</sup> See EM Loan Handbook, page 9-20, para. 234.C (Dec. 31, 2007). At one time FSA required farmers to choose between receiving CAT or NAP benefits and obtaining an EM loan for the production losses. See FSA Notice FC-207, “Multiple Benefits on Emergency (EM) Loans” (Aug. 19, 1998) (rescinded by FSA Notice FLP-10, “Statutory Changes Because of FY 1999 Appropriations Legislation” (Dec. 4, 1998) (expired Oct. 1, 1999)). FSA Notice FLP-10 was superseded by FSA Notice FLP-88, “Statutory and Administrative Changes to Emergency (EM) Loan Processing Regulations,” 3.A (Oct. 18, 1999) (expired Oct. 1, 2000). The 1999 Appropriations Act changed the law governing CAT insurance coverage and NAP to specifically allow farmers to receive both the available benefits from CAT or NAP and an EM loan for the same crop disaster. 1999 Appropriations Act, Title VIII, § 803 (amending 7 U.S.C. §§ 1508(n), 7333(i)(3)).

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<sup>413</sup> 15 U.S.C. § 1691(a).

<sup>414</sup> 7 C.F.R. § 15d.2(a) (2008).